PERSPECTIVES ON COMMON PROPERTY REGIMES IN ETHIOPIA: A CRITICAL REFLECTION ON COMMUNAL LAND HOLDING RIGHTS IN BORANA OROMO PASTORALISTS CONTEXT

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INTRODUCTION

Perspectives on common property regime have been popularized when Hardin wrote on the "Tragedy of the Commons". Hardin's conception of common property analyzed how the uses of pasture "Commons" end up in tragedy due to its susceptibility to over-exploitation. In many parts of the world, Hardin's theory, among other things "has been extremely powerful in analyzing and explaining over-exploitation in forests, overgrazing, abuses of public lands, population problems, ground water depletion, and other problems of resource misallocation."[1] In order to avoid such tragedy, Hardin has offered the introduction of either private or public property regime as alternative possible solution. However, subsequent writers criticized Hardin's work for his failure to distinguish open access from regime of managed common property resources. Different scholars have argued that the theory in which the supposed tragedy results really applies only to open access resources which of course Hardin himself has acknowledged that it should have been "Tragedy of the Open Access Commons."[2] Conceptually,

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[1] Glenn G. Stevenson, Common Property Economics: A General Theory and Land Use Applications (Cambridge University Press, 1991), p.8

[2] Michael D. Kaplowitz (ed), Property Rights, Economics, and the Environment (Michigan State University, 2000), p. 65

Schlager and Ostrom have also observed that whilst private and state property rights are clearly understood, many people even prominent scholars conceive open access resource and common property regime with confusion.[3]

Today, the misconception on common property regime, by and large, is unfolded due to multifaceted studies conducted on community based property regimes that helped eminent economists to revise Hardin's theory of resource use in common property regime.[4] Yet, the assertions embedded in the same theory that common property regime such as communal grazing land causes inappropriate land use and administration has not gone away. Though Hardin's theory becomes old-fashioned, governments still justify their intervention in communal property regime under the guise of such obsolete theory. For African countries including Ethiopia, the theory rather becomes a gospel from which they derive the force of scientific validity for policy and legal intervention in dismantling pastoralists' communal land holding rights.[5]

This article offers a case, the pastoral commons of Borana Oromo in Ethiopia, where common property regime is proved to be efficient in the management and use of communal land including its natural resources. The article generally aims to trigger legal debates by critically reflecting on the adequacy of the legal regimes regarding communal land holding rights in pastoralist area of Ethiopia by juxtaposing the perspectives on common

[3] Even scholars, who are meticulous theorists and observers of behavior related to natural resource systems, use the terms "open access" and "common property systems" interchangeably. See Edella Schlager and Elinor Ostrom, Property Rights Regime and Natural Resources: A Conceptual Analysis, Land Economics (1992), Vol. 68, No. 2, p. 249 (at footnote)

[4] Behnke, R. H. (1985), *Open Range Management and Property Rights in Pastoral Africa: A Case Study of Spontaneous Range Enclosures in South Darfur, Sudan* (London).<http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5267.pdf> (Accessed on February 4, 2013)

[5] See Policy Framework For Pastoralism In Africa, infra note at 83, pp. 14-15

property regime. Regretablely, however, the article will not deal with all aspects of communal land holding in different parts of Ethiopia. But, quite logically, it is necessary to justify why the article opted to treat communal land holding regime in Borana pastoralists' context. The first basic reason is related with the existence of multifaceted researches conducted on Borana pastoralists' area that clearly show the nature of communal land holding system and the magnitude of state intervention in such regime. It is not an exaggeration to say that the Borana Oromo pastoralists' area represents the most extensively studied ecological area in Ethiopian landscape. The second reason is that Borana Oromo pastoralists, as argued later on, could be a model for indigenous community based resource management that if properly harnessed would be used as cooperative mechanisms to address resource dissipation in rural area. The third reason is that the Borana Oromo cradleland represents a home for Oromo cultural heritage – such as the Oromo *gadaa* democracy, and the Oromo worldview intertwined in customary land rights. This area represents not only a "cattle corridor" but also a "cultural corridor" that call for serious attention. Therefore, this area has more to unfold the multifaceted aspects of common property regime in Ethiopia and deserves critical evaluation.

Against this backdrop, the article labours to address three related questions regarding communal land regime in Ethiopia. Firstly, what contending theoretical perspectives on common property regime could be consulted in order to critically assess the current policy and legislative intervention in the communal land holding regime? Secondly, does the existing legal framework adequately address the need and specificities of pastoralists' "historic and customary" communal land holding rights? Thirdly, what implication(s) could be drawn from both existing legal regimes regarding the administration and use of resources compared to the customary communal land

administration and land use system in light of the Borana Oromo pastoralists? In order to address these questions and other related issues, section one briefly describes different types of property regimes in an attempt to distinguish common property regime from other property regimes and resource uses. It then describes theoretical perspectives on common property regime. Section two examines communal property regime in Borana Oromo pastoralists' context. This section shows how land and its natural resource, as a community based property regime has been conceived in the historical past and its present overriding relevance to Borana pastoralist communities in particular and the Oromo people in general. Section three critically reflects on Ethiopia's policy path and legal frameworks on customary communal property regime. Section four draws conclusion based on the implications of the evaluation made thus far and the way forward at last.

1. COMMON PROPERTY REGIME: DISENTANGLING THE CONFUSION

The use of land including its natural resources based on the institutions of common property has been recognized since the economic pre-history.[6] Particularly, the role of communal property system in resource management among indigenous peoples is gaining wide support from ecologists, political scientists and human rights scholars. But, the conception of common property is misunderstood by different scholars including modern day economists.[7] Therefore, it is important to brief on some semantic confusion and the theoretical assumptions that emanates from it.

[6] Ciriacy-Wantrup and Richard C. Bishop, "Common Property" as a Concept in Natural Resources Policy, Natural Resources Journal (1975), Vol. 15, p. 713.
[7] ibid.

1.1. OF STATE, PUBLIC, AND COMMON PROPERTY REGIMES

In the literature, the concept of common property is often confused with the concept of public property regime since the later term is often associated with the collective nature of property rights. Public property is used to describe collective property in which state on behalf of the public is responsible for controlling the property.[8] In other words, the right to ownership of public property is vested in a responsible public agency. According to this conception, although rights of use may be available for the public, the title does not rest with the public. Hence, in such property system, the problem of allocation is solved by social, economic and political principles based on collective interest of the society.[9] Some argue that this situation makes public property a particularly good vehicle for protecting or serving public interests since ownership is detached from the usual self-serving interests associated with private property.[10] It is also argued that public property scheme appears to reduce collective property of the public to a special form of private property, with the State casting the role of an owner.[11]

On the other hand, public property regime is criticized as it does not generate a specific normative meaning if one takes the structure of ownership compared to private property. Similar to private property, public authority typically may enjoy rights such as possessions, management and use to the exclusion of the others be it individuals, groups or the general public. Such kind of understanding is also reflected in Demsetz's definition of "state ownership of property" that implies a situation in which "the state may

[8] Richard Barnes, Property Rights and Natural Resources (Hart Publishing, 2009) p. 154
[9] Enrico C., The Elgar Companion to the Economics of Property Rights (USA: Edward Elgar, 2004), p. 50
[10] Richard Barnes, at supra note 8
[11] ibid.

exclude anyone from the use of a right as long as a state follows accepted political procedure for determining who may not use state-owned property."[12] So, public property may refer to state property in which state makes distinction between individuals who may or may not use such collective property.

As noted above, it could be argued that "although public property is structured in the same way as private property ownership with rights such as excluding others, is clear that the title is vested in a public agency responsible for controlling the property in the interest of the public."[13] Yet, an important issue is whether public agency that holds the property clearly established use and access rules to ensure that such property is used to promote social, economic and cultural objectives of the public. Hence, the basic feature of public property lies not in the structure of ownership but in the way in which interest in the property is held.

Another term often related and used to describe common property regime is "communal ownership of property". Once again, Demsetz defines "communal ownership of property" as "the right which can be exercised by all members of the community [in which] the community denies to the state or to individual citizens the right to interfere with any person's right of community owned rights."[14] In this regard, "the right to till and hunt the land and the right to walk a city sidewalk" are considered as the two classic examples of communally owned property provided by Demsetz. As we shall see later on, if the definition is related to communal property regime with defined user group capable of excluding others outside such community, one can say that communal property ownership refers to common property

[12] H. Demsetz, Toward a Theory of Property Rights, American Economic Review (1967) Vol. 57, p. 347
[13] Richard Barnes, at supra note 8, p. 155
[14] ibid.

regime. But whether the classical examples given by Demsetz really refer to common property regime is doubtful. The above classical examples clearly refer to both open access and public property regimes.[15] Firstly, the right of the community to till and to hunt the land free of interference either from the state or individuals signifies open access resources. Secondly, the right to walk a city sidewalk as a communally owned property right, however, signifies the situation of "public goods" in which all members of the community enjoy the rights without any rivalry effect of such resource use without interference from the state or any individual. So, Demsetz's communal property ownership is not clear as to whether it is construed to refer to common property regime or open access resources. As we shall note below, the contemporary conception of common property regime as distinguished from open access resource implies a "group property" where a well-defined set of user/s has access and control rights over the resource.[16]

[15] For instance, David Feeny et al, define communal property as "the resource held by an identifiable community of interdependent users. These users exclude outsiders while regulating use by members of the local community. Within the community, rights to the resource are unlikely to be either exclusive or transferable; they are often rights of equal access and use." See David Feeny et al, infra note 58, p. 4. Others also use the phrase "comprehensive communal property" to refer "a system in which no individual maintains an exclusive right to use pastoral re-sources; there are specific criteria that define who can and cannot become a member of the community of resource users; members of the group having usufructuary rights can expect to use the resources in the future, implying security of tenure; the community has developed a set of rules that guide how pastoral resources are to be used; and, there is a way of imposing sanctions on those who fail to adhere to these rules, which constitutes an enforcement mechanism." See Susan Charnley, Pastoralism and Property Rights: The Evolution of Communal Property on the Usangu Plains, Tanzania, African Economic History (1997) No. 25, p. 99

[16] Mark Giordano, The Geography of the Commons: The Role of Scale and Space, Annals of the Association of American Geographers (2003), Vol. 93, No. 2 p. 367

1.2.OF COMMON PROPERTY REGIME AND OF OPEN ACCESS RESOURCE

The literature relating to what signify common property regime won greater attention after Hardin's influential article on "The Tragedy of the Commons." Hardin's understanding of the word "common property" in his "classic description of pasture commons, illustrates a common property regime that has been applied to "any natural resource used in common which is susceptible to overexploitation.[17] Subsequent writers such as Ciriacy-Wantrup and Bishop criticized Hardin for his failure to distinguish the concept of open access and that of common property.[18] According to these writers unlike open access resource, "common property is not "everybody's property."[19] The concept of common property implies that potential resource users who are not members of a group of co-equal owners are excluded.[20] This insight has proven to be very useful in distinguishing common property from open access resources, and has played an important part in challenging the impacts of Hardin's influential article which is about the "tragedy of open access commons" and not any "tragedy of the commons."[21] But, what are the salient features of common property regime that distinguishes it from open access resource?

According to Stevenson's "synoptic definition," the term common property is defined as "a form of resource management in which a well-delineated group of competing users participates in extraction or use of a jointly held,

[17] G. Hardin, The Tragedy of Commons, Science (1968), Vol. 162,
[18] Ciriacy-Wantrup and Bishop at supra note 6, p.715
[19] ibid. see also Gordon, H. Scott, The Economic Theory of a Common Property Resource: The Fishery, of Political Economy (1954) Journal Vol.62, No. 128
[20] Ciriacy-Wantrup and Bishop at supra note 6. See also Bryan E. Burke, Hardin Revisited: A Critical Look at Perception and the Logic of the Commons, Human Ecology (2001) Vol. 29, No. 4, pp. 449-476
[21] Owen J. Lynch, Promoting Legal Recognition of Community-Based Property Rights, Including the Commons: Some Theoretical Considerations (Bloomington, USA: Indiana University,1999), p. 18

fugitive resource according to explicitly or implicitly understood rules about who may take how much of the resource."[22] Common property performs this task says Stevenson, "within the framework of group control, even as private property accomplishes them under individual control."[23] The number of users is limited, each user understands how much of the resource he or she may extract, and decisions about resource allocation are made by some group process.[24] Similarly, Ciriacy-Wantrup and Bishop defined the term common property to refer to "a distribution of property rights in resources in which a number of owners are co-equal in their rights to use the resource."[25] As per these writers, such rights "are not lost through non-use (…) but, it does not mean that the co-equal owners are necessarily equal with respect to the quantities (or other specification) of the resource each uses over a period of time.[26] They argue that, resources in such property regime are subject to the rights of common use and not to a specific use right held by several owners.[27] Like Stevenson, both of these writers argue that the concept of common property "implies that potential resource users who are not members of a group of co-equal owners are excluded."[28]

On the other hand, "open access resource" is defined as a "depletable, fugitive resource that are open to extraction by anyone, whose extraction is rivalry and whose exploitation leads to negative externalities for other users of the resource."[29] In other words, open access resources are susceptible to over-exploitation depletable since such resources are subject to use by any person who has the capability and desire to enter into extraction of it without

[22] Stevenson, supra note 1, at p. 46
[23] ibid.
[24] ibid. p. 19
[25] Ciriacy-Wantrup and Bishop, supra note 6, p. 715
[26] ibid.
[27] ibid
[28] ibid
[29] Stevenson, supra note 1, p. 8

any exclusion. In this context, open access resources could be tagged as "everybody's property" as it represents "nobody's property".[30] Therefore, the major departure between common property and open access resource depends on the concept of what implies property in the resource in certain users.[31]

Property implies rights and duties for both participants and non-participants in resource extraction; the absence of rights and duties means that the institution of property does not exist.[32] In this sense, "vesting property rights" means defining who may participate in resource extraction and to what degree, and designating who makes the management decisions regarding the resource. Hallowell and Becker used the concept of property rights to further show how they exist in common property but not in an open access situation.[33] According to these writers, "rights and duties are relationships between persons and property rights are specifically relationships between persons regarding use of a thing."[34] Hence, the existence and observance of these rights, duties, and other relationships distinguishes property from non-property, as well as one type of property from another.[35]

One of the most fundamental ownership rights is the right to possess, which involves the right to exclusive physical control or the right to exclude others from the use or benefits of a thing.[36] In this sense, possession is important in the comparison between open access and common property, because

[30] Ciriacy-Wantrup and Bishop, at supra note 6, p. 713
[31] ibid
[32] Stevenson at supra note 1, p. 63
[33] Hallowell, and A. Irving, The Nature and Function of Property as a Social Institution, Journal of Legal and Political Sociology (1943) Vol.1, No. 3-4, p.115
[34] ibid.
[35] ibid
[36] Becker, Lawrence C., Property Rights: Philosophic Foundations (Boston: Routledge and Kegan Paul, 1977), p.19

resources under open access are not possessed, whereas they are possessed under common property."[37] The right to possession implies the positive right of holding the object and the negative right of excluding others from its possession, even if the object is not yet held. [38] This shows that in open access resources, neither the right to exclude another from extracting the resource and nor the security of possessing either particular physical units or a certain amount of the resource is present. Thus, unlike common property regime in which at least possessory rights rests in the defined communal user of resources, there is no possession in the situations of open access resources.[39] In the above context, describing open access resources *(res nullius)* as common property *(res communes)* is a self-defeating.[40]

1.3. THEORETICAL PERSPECTIVES ON COMMON PROPERTY REGIME

As previously noted, Hardin's "Tragedy of the Commons" is the story that has been much debated since its publication, but the terrain it covers is not new. [41] Aristotle, writing in the Fourth Century BC, remarked that "*what is common to the greatest number gets the least amount of care."* [42] As some argue, while there is little of philosophical interest in Hardin's theory, it has had tremendous policy implications in analyzing and explaining over-exploitation in forests, overgrazing, abuse of public lands, population problems, ground water depletion, and other problems of resource misallocation which becomes one of the most important gospels of

[37] ibid, p. 21
[38] ibid.
[39] ibid.
[40] Ciriacy-Wantrup and Bishop at supra note 6, p.715
[41] "The distribution of care and the Tragedy of the Commons – Hardin's Misappropriation of Aristotle," See at <http://commoning.wordpress.com/2011/01/03/the-distribution-of-care-and-the-tragedy-of-the-commons hardins-misappropriation-of-aristotle/> (accessed on April 22, 2013)
[42] Aristotle, The Politics, trans and intro by TA Sinclair, revised and represented by TJ Saunders (Harmondsworth, Penguin, 1992) p. 1262

privatization in the early stages of neoliberalism.[43] As previously noted, the theoretical perspectives on common property regime are, by and large, the product of Hardin's misunderstanding of common property regime which ultimately resulted in conceptual ambiguities.

In general, three broad approaches emerge from the literature on the institutional arrangements to avert the tragedy of the commons which would have otherwise been the tragedy of the open access resources. The first approach, the property rights economics, holds the view that the problem of over-exploitation and degradation in commons can be resolved only by creating and enforcing private property rights.[44] The second approach advocates the change of common property to state property regime in which a public agency with a clearly defined ownership rights regulates such commons by devising rules.[45] The third approach holds the view that decentralized collective management of common property regime by their users could be an appropriate system for avoiding the tragedy of the commons."[46] According to this last approach, "in practice every society has its own means and adaptations to deal with natural environment – its own "cultural capital" and local level systems of resource management, which are based on the knowledge and experience of the resource users themselves."[47] The last approach gave birth to the justification of common property regime

[43] Stevenson, supra note 1, at p. 38

[44] Demsetz, supra note 12. See also McCay, B.J. and Acheson, J.M., The Question of the Commons: The Culture and Ecology of Communal Resource (University of Arizona Press, 1987) p. 33

[45] Hardin, supra note 17

[46] Berkes, Fikrest (ed.), Common Property Resources: Ecology and Community-Based Sustainable Development (London, Belhaven Press, 1989) p.2. See also Wade, R., The Management of Common Property Resources: Collective Action as an Alternative to Privatization or State regulation, Cambridge Journal of Economics (1987), Vol. 11 No. 2, Jodha. N. S., Common Property Resources and Rural Poor in Dry Regions of India, Economic and Political Weekly (1986), Vol. 21 No. 27, p. 170. See also Chopra, et al., People's Participation and Common Property Resources, Economic and Political Weekly (1989), No. 24, p. 189

[47] Berkes, and Folke, C., Investing in Cultural Capital for the Sustainable use of Natural Capital, In: "Investing in National Capital: The Ecological Economics Approach to Sustainability," A.M. Janson et al. (ed), (Washington, D.C. Island Press, 1994)

in resource management by rebutting the assumptions of the former two approaches. Let us investigate arguments for and against each approach as follows.

To begin with, the first approach contends that "a well-defined structure of property rights induces efficiency in the use of resources."[48] The early thinking of property rights economics claim that "private property regime is the most efficient means of allocating resources and that it provides an incentive for the productive use of resources."[49] Proponents of this approach hold the view that "common property regime is inefficient and will lead to the degradation of a resource as it becomes difficult to internalize externalities."[50] They propose that the cure for such resource use problem is "the introduction of private property rights that help some externalities to disappear as the costs of negative externalities should be borne by those who cause them."[51]

According to Angelsen, externalities are bound to occur where "a consumer's welfare or a producer's production is affected by variables whose values are chosen by others, without particular attention to the effects on the other actors' welfare or production."[52] For property rights economists, externalities in common property regime are borne by parties who did not create them and hence any cost-benefit analysis will be incomplete as it cannot be properly accounted for.[53] In other words, it is only when the full package of rights (use, management, transfer and income rights) is vested in a single person that efficient outcomes are achieved. However, as noted

[48] Richard Barnes, supra note 8, at p. 41
[49] ibid.
[50] ibid.
[51] Demsetz, supra note 12 at p. 354. see also Carlisle Ford Runge, Common Proprty Externalities: Isolation, Assurance, and Resource Depltion in Traditional Grazing Context (1981) American Journal of Agricultural Economics, p. 596
[52] Cited in Stevenson, supra note 1
[53] ibid.

before, the conception of property rights in the context of common property regime is created due to the confusion of equating it with open access resource. Scholars such as Scott Gordon,[54] Demsetz's and Hardin's subsequent works are often criticized for creating conceptual and theoretical confusion that relates to common property regime. To repeat once again, Demsetz's definition of "communal ownership"[55] confused open access situation with common property regime despite his use of the terms "rights" and "ownership" which as we noted cannot exist in an open access regime. His assumption based on such confusion becomes clear when he goes on to speak of "everyone's" having the right to use the resource, a failure "to concentrate the cost" of extraction on the user, and the consequent overuse of the resource.[56]

Another group of economists however, recognized the defects in property rights theory and have tried to revise the conception on common property regime by refuting claims that private property is better at protecting resources than common property regimes. Hence, "the revisionists approach" has emerged with a view to revise Hardin's and the property rights paradigm."[57] Acheson tried to list flawed basic axiomatic assumptions of Hardin's model in a bid to show the problems of the theorization. Accordingly, the flaw include: that common property means the absence of property rights; that everywhere there is a level of technical capacity to over-exploit resources; that there is a general inability to craft effective local institutions for resource management; and finally that only private property

[54] See H. Scott Gordon, The Economic Theory of a Common Property Resource: The Fishery, Journal of Political Economy (1954), Vol.62, pp.124-142
[55] Demsetz, at supra note 12, p. 354
[56] Stevenson, at supra note 1, p. 59
[57] ibid.

or government intervention represents a viable solution to resource management.[58]

The second approach like the first one contends that common property regime is inefficient in the use and management of resources and hence offers a policy advice to keep such property under the custody of state as a public property to which rights to entry and use could be efficiently allocated.[59] So, this approach implies that resource degradation was inevitable unless common property was converted to government regulation of uses and users in which the state should claim ownership rights by establishing legal and institutional frameworks.[60] Yet, this approach is criticized for the incapacity of the state to effectively and adequately control all natural resources that lies in its territorial sovereignty.[61] According to Richard Barnes, *de jure* state/public property regime in its practice becomes a *de facto* open access in two situations.[62] First, despite the existence of ownership right by the state or public a condition of *de facto* open access could be created because of conscious political decisions to guarantee all members of society access right to such state/public property resources.[63] Second, there exist conditions in which state/public property regime remains open-access because the entity assigned formal ownership of the resource cannot effectively exclude individuals or groups of individuals from such

[58] Ibid.
[59] David Feeny et al., The Tragedy of the Commons: Twenty-Two Years Later, Human Ecology (1990), Vol. 18, No. 1, p. 2
[60] State property, or state governance, rights to the resource are vested exclusively in government which in turn makes decisions concerning access to the resource and the level and nature of exploitation. ibid.
[61] Richard Barnes, supra note 8 at p.2
[62] ibid., See also Ostrom, at infra note 71 p. 337. "… the national governments lacked monetary resources and personnel to monitor the use of these resources effectively. Thus, resources that had been under a de facto common property regime enforced by local users were converted to a de jure government-property regime, but reverted to a de facto open-access regime."
[63] ibid

resource use.[64] Richard Barnes holds the view that "states nationalize resources absent the financial or institutional capacity to regulate it".[65] Thus, these two scenarios will eventually result in the degradation of the state/public property through overuse, and therefore brings no real difference from the resource use in open access.[66] In the context of Ethiopia, Elias N. Stebek "raises the issue whether natural resources that are legally declared as government-owned are in fact open-access regimes as long as there is no effective control against the withdrawal of the resources by persons who have no right to do so."[67] Elias noted that "lack or inadequacy of efficient and effective control in these attributes of property rights leads to *de facto* open access and resource dissipation."[68]

The final approach provides pragmatic evidence to the study of common property regime and contends that property rights economics "does not account for the persistence of a number of communal arrangements, and that it conflates common property with the situations of open-access.[69] According to this approach, overuse of resources is not caused by the breakdown of common property but includes situations where there are no property rights, hence no effective management of resources ("open-access").[70] Ostrom states that "communal groups have established some means of governing themselves in relationship to a resource."[71] Hence, according to Ostrom, the fact that a certain property right is collective or communal does not

[64] ibid
[65] Ibid., See also D Curtis, Beyond Government: Organizations for Common Benefit (London, Macmillan, 1991), p. 24
[66] Richard Barnes, supra note 8, at p. 2
[67] Elias N. Stebek, Conceptual Foundations of Property Rights: Rethinking Defacto Rural Open Access to Common-pool Resources in Ethiopia, Mizan Law Review (2011), Vol. 5, No.1, p. 30
[68] ibid. p. 38
[69] see McCay and Acheson, at supra note 44
[70] Stevenson, at supra note 1, p. 81
[71] E. Ostrom (1999), Private and Common Property Rights (Encyclopedia of Law and Economics, 2000), p. 339

necessarily lead to the conclusion that it is not well-defined since full members of communal groups have the "right to sell their access, use, exclusion and management rights to others, subject in many systems to the approval of the other members of the group."[72]

In nutshell, the approaches taken may influence the role of individuals, community and states in addressing problems associated with management and utilizations of land and its resources. In a resource regime in which property rights are adequately defined, the right holders are successful in the efficient use and management of the resource by excluding others who do not have right to the resource in question be it private property or common property.[73] Conversely, a resource regime in which there are no property rights or property rights are not adequately defined is susceptible to the problem of resource misallocation.[74]

2. COMMUNAL LAND HOLDING SYSTEM IN BORANA OROMO PASTORALISTS AREA

A proper understanding of the customary rules governing communal land holding rights and the use of the resources on it is indispensable to unravel the way one perceives about common property regime in the pastoralist context. This section tries to describe and reflect on the Oromo conception of common property in general. It then evaluates how Borana pastoralists and

[72] ibid. Though Ostrom's principles of common property resources provides for the rights of communal groups to have the right to sell their access, Ciriacy-Wantrup et al., however noted that the concept of common property could also be employed in situation where there exists "the right to use the resources, but not to transfer. Heirs of a common owner become co-owners themselves only through their membership in the group (tribe, village, etc.)." See Ciriacy-Wantrup, et al., at supra note p. 714 at foot note.

[73] Irwin B., Managing Forests as Common Property: Collaborative Forest Management in Ethiopia, in Zenebework Taddesse (eds., 2000), p. 119

[74] Bromley, D. W., Environment and Economy: Property Rights and Public Policy (United Kingdom: Oxford University Press, 1991), p. 22

scholars view the social, cultural, economic and political dynamics of communal land holding system.

2.1.THE OROMO CONCEPTION OF COMMON PROPERTY RIGHTS: A BRIEF INTRODUCTION

The philosophical conception of property among Oromo people recognizes that *Waaqaa* (Oromo God) has already given us natural resources to properly subdue for our use.[75] This idea conforms to the Biblical conception in which the Book of Genesis tells us that God gave the earth to man for the support and comfort of his well being. Similarly, prominent political philosophers like Hugo Grotius, Thomas Hobbes and John Locke also confirmed the creation of "common goods" by Almighty God for the good of human race.[76]

Historically, early Oromo ancestors practiced pastoralism in which communal land is important to successfully yield productivity of livestock herding.[77] However, after the great expansion, "the traditional pastoral economy became integrated to a greater or a lesser extents with agriculture".[78] As M. Hassen noted, an account from the Gibe states in present day Jimma and its surrounding demonstrated that "agriculture was more highly developed than in others as a result of long contact with traders and others from Shoa and the East coast".[79] It could be said that presently, the majority of Oromo groups adopted mixed agirculture where land cultivation and herding is practiced side by side. Hence, in dominantly

[75] Dirribi Demissie B., Oromo Wisdom in Black Civilization (Finfinne: Finfinnee Printing and Publishing S.C, Ethiopia, 2011), pp. 113-114

[76] Rebecca P. Judge, Restoring the Commons: Toward a New Interpretation of Locke's Theory of Property, Land Economics (2002), Vol. 78, No. 3, p.332

[77] Mohammed Hassen, Oromo of the Ethiopia: A History of 1570-1860 (Trenton, N.J.: Red Sea Press, 1994), p. 22. See also Manoel de Almeida (1993) "The [Oromo] from the History of High Ethiopia or Abassia, History of The [Oromo] of Ethiopia with Ethnology and History of South – East Ethiopia, (Introduction by Donald N. Levine , African Sun Publishing), p. 59

[78] Mohammad Hassen, supra note 77

[79] ibid.

agricultural rural area of Oromia land is used based on private holding rights in which both cultivation and grazing land (in the form of resreved pasture for cattles) are kept separetly. There also exists open acess grazing land typically known as *goodaa* in which the cattle's of every member of the local community feeds on it. But, currently it is observable that scarcity of land is forcing peasants adjecent to *goodaa* who rival over it for cultivation purpose.

However, as we shall see later on, there are also different Oromo groups who practice pastoralism in strict association with regulated communal pasture land holding. For instance, Oromo areas such as parts of Bale, Arsi, Karrayyu, Guji, and Borana are few to mention. In these pastoral areas, however, customary law doesn't support the utilization of pastureland by claiming private property rights over it. However, based on such observation of property regime in Oromo pastoralists area Baxter argue that Oromo conception of property right does not recognize the institution of private property. Baxter "appears to suggest that the Oromo do not have distinct property rights demarcation."[80] According to Baxter's argument, "the Oromos [sic] do not classify land and water, and hence territory as material resources which people can control or use because the utilization of all natural resources has a religious dimension across all Oromo."[81] He further asserts that the proper allocation and use of natural resources is bound by ritual activities rather than by political or territorial boundary."[82] For Baxter, it means that the Oromo people do not recognize the institution of private property ownership of valuable resources as land and water and therefore lacking the economic valuation of scarce resources efficiently. However, the Oromo term *gulummaa [qabiyyee dhunfaa]* signifies the conception of

[80] Bichaka Fayissa, Aspects of Oromo Cultural Endowments and their Implications for Economic Development, Journal of Oromo Studies (1996), Vol. 3 No. 1 and 2, p. 41
[81] ibid.
[82] ibid.

private property rights and the term *waajirataa* indicate the conception of common property rights.[83] In other words, in the context of pastoralsim, while the herds belong to individuals and their family, grazing lands, water points and natural forests belong to the community as a common property regime.[84]

Accordingly, the problem with Baxter's observation is that he failed to provide the conceptual basis of what underlies "distinct property rights" within the context of "access to common resources". He makes no argument to support his contention that the property arrangements of Oromo pastoralists which he describes "common resources" necessarily yields lower benefits than private property regime.[85] Thus, Baxter failed to consult a wealth of evidences that witness the possibility of economic valuation of natural resources in the set up of community based property rights regime. Other writers such as Bichaka Fayissa also criticized Baxter for his failure to examine private property ownership in agricultural areas of Oromia region.[86] Therfore, Baxter's particular evaluation of property rights in pastoral Borana area suffers from lack of conceptual and empirical analysis of access to common resources within the context of community based proprty rights.

Yet, most importantly, a close examination of Baxter's statement hints at the notion that some how the Oromo conception of common property rights system is intertwined with the dynamics of Oromo cultural, political and ritual systems in which the utilization of land and its natural resources are effectively enforced by customary laws within such collectivity. This shows

[83] Dirribi Demissie, supra note 75, at p. 114

[84] Getachew Kassa, An Overview of Root Causes of Problems That Currently Affect Borana Pastoralists of Southern Ethiopia, in Mustafa Babiker (ed) "Resource Alienation, Militarization and Development Case Studies from East African Dry lands" (Organization for Social Science Research in Eastern and Southern Africa, Addis Ababa, 2002), p. 67

[85] Baxter, PTW, "One Possible New Perspective for Oromo Nationalism," Proceedings of the Oromo Studies Association, (University of Toronto, Ontario Canada,1993)

[86] Bichaka Fayissa, supra note 78

that the conception of land and other natural resources as a property in Borana Oromo area reflects its *par excellence* not only in their economic livelyhood but also in their social, cultural and political life. Therefore, once again, as Bichaka noted, "the pastoral Oromo can be [rather] assisted to diversify their activities into livestock and food production for domestic consumption and export" without undermining their communal property regime and indigenous ecological knowledge of resource management.[87] Eventually, as the above discussion reveals, it should be made clear that the issues of communal land holding in pastoralists context lies at the heart of common property rights debate. The following sub-section is devoted to investigate prespectives on communal land holding regime in the context of Borana pastoralists context.

2.2 CUSTOMARY COMMUNAL LANDHOLDING REGIME IN BORANA OROMO PASTORALIST AREA

In the arid and semi-arid plains of southern Ethiopia lives people, the Borana Oromo, whose ingenuity, strength and customs have stood the test of time for centuries. The Borana communities live in the Borana Zone of Oromia Regional State along the Ethio-Kenyan border. The Borana community predominantly practice cattle herding based on nomadic transhumance in strict association with natural resources management.[88] Many scholars argue that historical and cultural legacies of the Oromo people are preserved in Borana cradleland and still known for functioning Oromo gada democracy. The present day Borana including Guji and Karrayyu plateaus "represents part of the remaining core area or cradleland of the southern highlands and

[87] ibid.

[88] Boku Tache, Pastoralsim under Stress: Resources, Institutions and Poverty among the Borana Oromo in Southern Ethiopia (PhD Thesis, Department of International Environment and Development Studies, Norwegian University of Life Sciences, 2008), p. 1

rangelands from which the original Oromo culture expanded and conquered half of present-day Ethiopia."[89] According to Asmarom "the core rangeland area contains historical Oromo shrines still worshipped by the population."[90] More specifically he noted that the reason why Borana Oromo becomes reluctant to abandon or modify pastoralsim is attributable to the fact that "subjectively Borana view themselves as the custodian of Oromo heritage and are least likely, among all Oromo populations to trade their identity for some other identity."[91]

Based on such unique way of life, African Commission's Working Group listed Oromo pastoralists such as Borana and Karrayyu of Ethiopia and Orma and Borana of Kenya as some examples of ''indigenous'' communities in Africa.[92] However, Kealeboga and Wachira noted that the identification and listing of these groups by the African Commission's Working Group faced stiff resistance by a state delegate of Ethiopia at the launch of the African Commission's 36th ordinary session.[93] These writers observed how the State delegate of Ethiopia contested the authenticity of the statistics and identification of certain groups as being indigenous peoples in Ethiopia.[94] In this ordinary session, the delegate averred that there were no official statistics relied upon to make conclusions about groups who could be

[89] Asmarom Legesse, Oromo Democracy: An Indigenous African Political System (Red Sea Press, 2000), p. 62
[90] ibid.
[91] ibid., Such subjective criterion of self-identification is recognized under the ILO Convention No. 169, which attaches fundamental importance to whether a given people considers itself to be indigenous or tribal under the Convention and whether a person identifies himself or herself as belonging to this people.
[92] ACHPR and IWGIA, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (Adopted by The African Commission on Human and Peoples' Rights at its 28th ordinary session, Addis Ababa, 2006), pp.17-18. See also Kealeboga N Bojosi and George M Wachira, Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights, African Human Rights Law Journal (2006), Vol. 6 No 2, pp. 399-400.
[93] ibid., See Kealeboga N Bojosi and George M Wachira
[94] ibid.

identified as indigenous in the country.[95] Kealeboga and Wachira argued that "such a contestation shows how states' in Africa continued to deny the existence or categorization of certain peoples as being indigenous in their territories"[96] in order to keep the recognition of such people's rights at bay.

Despite the aversion of Ethiopia's delegate as noted above, studies conducted on Oromo tribal groups such as Guji, Karrayu and Borana reveals their distinct way of life even from the mainstream Oromo people. Their indigenous *gadaa* democratic institution is intertwined with their way of life as a way of preserving their religion, culture and identity.[97] For instance, Boku Tache observed how customary rules based on the *gadaa* system are designed to regulate social, economic and political life of Borana community in strict association with communal land holding and natural resource management.[98] The Borana pastoralists' community has long established system of regulating communal pastureland holding based on customary rules, called "*seera marra bishaanii*," literally mean "the law of pasture and

[95] ibid.

[96] ibid., The major reason why states continued to deny the existence of indigenous communities in their territory could be attributable to the rights associated with such a term, particularly, the rights to their communal lands and territories; to maintain their cultural traditions, religions; exercise their customary law; to govern themselves through their own institutions; to represent themselves through their own organizations; to control their own natural resources; and etc.

[97] See Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities (Department of Rural Economy and Agriculture, African Union, Addis Ababa, 2010), p. 11. According to this policy framework, "pastoral culture is a core part of Africa's culture, history and heritage. In common with other peoples in Africa, pastoral groups have their own languages and traditions, a rich body of oral and written stories and poetry, and songs and music." See also Baxter, P.T., Pastoralists are people. Why development for pastoralists not the development of pastoralism, Rural Extension Bulletin (1994), Vol. 4, p. 12–25.

[98] Boku Tache, Pastoralsim under Stress: Resources, Institutions and Poverty among the Borana Oromo in Southern Ethiopia, (PhD Thesis, Norwegian University of Life Sciences, 2008), p.1. "The past success of Borana pastoralism was based to a large extent on robust customary resource tenure rights and the gada institutions for managing the grazing lands. The gada is the supreme political authority and custodian of the Borana laws and regulations (aadaa seera Borana)". See Boku Tache & Gufu Oba, Policy-driven Inter-ethnic Conflicts in Southern Ethiopia, Review of African Political Economy (2009), Vol. 36, No. 121, pp. 409-426

water."[99] Communal pastureland in Borana refers to "the vast area to which clan members and their families have only access rights encompassing all migration routes during normal as well as drought years."[100] In Borana pastoralist community, rangeland is the property of the community as a whole and their customary law and institution does not recognize the holding of private land for pasture in any forms.[101] According to Asmarom Leggesse, "members of the Borana community share common interests in natural resource, which they own collectively."[102] This issues raises whether communal pastureland holding rights represent well-defined common property regime capable of efficient use and management of rangeland resources.

In this regard, Asmarom also noted Borana collectivity as a solution. He observed that "an enduring group of kinsmen in Borana has considerable influence on the life of the individual members on his behaviors and thoughts."[103] The Borana "lineage is fairly effective in coercing individuals to fulfill his obligations to the kin group, to his peer group and to his gadaa class… as the privileges, rights, duties and social identity of individuals are imbedded in the lineage."[104] Hence, such social cohesion helps to enforce customary rules on its users on collaborative basis in order to assure a balanced and sustainable management and utilization of common pastureland. For instance, elders in mixed-clan localities manage the

[99] Boku Tache D., Range Enclosures in Southern Oromia, Ethiopia: An innovative response or erosion in the common property resource tenure? (University of Sussex, 2011), p. 5. See also Marco Bassi, Boku Tache, The Community Conserved Landscape of the Borana Oromo, Ethiopia: Opportunities and problems, Management of Environmental Quality: An International Journal (2011),Vol. 22 Issue 2 pp. 174 - 186

[100] PFE, IIRR and DF, "Pastoralsim and Land: Land tenure, administration and use in pastoral areas of Ethiopia (International Institute of Rural Reconstruction, 2010), p.26

[101] Boku Tache, supra note 53, at p. 6

[102] Asmarom Legesse, Gadaa: Three Approaches to the Study of African Society (Macmillan publishing,1973), p. 37-38

[103] ibid.

[104] ibid.

utilization of communal pasture reserve enclosure, locally known as *kaloo* (enclosed pasture) through collaborative customary rules that "determines the closing and opening at appropriate times."[105] Furthermore, the rule that regulates the management and utilization of pasture depends on the seasonal mobility and availability of water and pasture resources in both dry and wet seasons.[106] Such mobility from one *madda* (pasture territory) to another was appraised by scholars as important for "the regeneration of pastureland and well-being of livestock."[107]

On the other hand, customary rules also regulate access by "excluding outsiders who do not belong to the Borana clan."[108] However, by maintaining the priority usage rights of the owners, customary rules govern the resource sharing arrangements based on reciprocity which allows access to other pastoralists in accordance with strict rules aimed at controlling and managing pastoral resources under regulated access."[109]

Consequently, Borana communal land is recognized as being one of "the most efficient and well-managed rangeland in the arid lands of Eastern

[105] Johan Helland, Pastoral Land Tenure in Ethiopia (Chr. Michelson Institute, Bergen, Norway, 2006), p.12

[106] Boku Tache, supra note 99. The acceptance of such collaborative behaviors also coexists with strong social disapproval and the threat of sanctions of groups who attempt to close their primary grazing areas to other users entirely. See also Desta, S. and D. L. Coppock, Pastoralism under Pressure: Tracking System Change in Southern Ethiopia, Human Ecology (2004), Vol. 32, pp. 465–486.

[107] Rachael E. Goodhue, Nancy McCarthy, Traditional Property Rights, Common Property, and Mobility in Semi-Arid African Pastoralist Systems, Environment and Development Economics (2008), Vol.14, p. 31. See also Susan Charnley, Pastoralism and Property Rights: The Evolution of Communal Property on the Usangu Plains, Tanzania, African Economic History (1997), No. 25, p.100

[108] A 'primary' user or user group is responsible for managing a grazing area, and often 'secondary' users must ask permission to graze from the primary user and abide by rules regarding water and pasture use promulgated by the primary user, or both. See Cossins and Upton, The Borana pastoral system of southern Ethiopia, Agricultural Systems (1987) Vol. 25 199–218. "Tribal grazing areas tended to strengthen the group sense of ownership over defined tracts of land, with a reluctance to let others 'trespass'." See Markakis J., Pastoralism on the Margin (Minority Rights Group International, London, UK, 2004), p.7

[109] Berhanu, W., and D. Colman, Farming in the Borana Rangelands of Southern Ethiopia: The Prospects for Viable Transition to Agro-pastoralism, Eastern African Social Science Review (2007), Vol. 23, No.3, p. 98

Africa."[110] As Scoones noted, "the major factor that contributed for such exceptional success is attributed to the indigenous knowledge of the Borana, the wealth of the Borana institutions and their capacity to regulate access to natural resources through adaptation to changes in the pasture resources."[111] Thus, compared to the north Ethiopian tradition of "*makinat"* (to straighten forest land for cultivation purpose) the Borana natural resource use and management through indigenous knowledge is appraised as "a typical concept of reverence to nature."[112] Hence, it is fair to argue that the customary communal land holding system in Borana pastoralist community is characterized by defined user group capable of regulating access through enforceable customary rules.[113]

On top of the overriding importance of communal land holding and customary resource management, Asmarom, once more noted, that Oromo pastoralist "cradleland serve other Oromo people living far-flung as a pilgrimage to Borana to find their roots and rekindle their distinctive identity as a nation."[114] Hence, this clearly shows that preserving the Borana way of life based on the *gadaa* democratic system, as a cultural heritage of Oromo, is important in holding the Oromo people together.[115]

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[110] See at Cossins and Upton, supra note 107. These writers credit the Borana system with eliciting a significant degree of cooperation regarding resource use. See also Gemedo Dalle et al., Indigenous ecological knowledge of Borana pastoralists in southern Ethiopia and current challenges, International Journal of Sustainable Development & World Ecology (2006) Vol. 13 No. 2, 113-130

[111] Elizabeth Watson, Inter-institutional alliances and conflicts in natural resource management: preliminary research findings from Borana Oromia Region (Marena Research Project working paper No. 4, University of Cambridge, 2001), p.12

[112] Elias N. Stebek, Dwindling Ethiopian Forests: The 'Carrot' and 'Stick' Dilemma, Mizan Law Review (2008), Vol. 2, No. 2, p.255

[113] Sabine Homann, Indigenous Knowledge of Borana pastoralists in natural resource management: a case study from southern Ethiopia, (Cuvillier Verlag, Gottingen, 2005) for further indepth analysis.

[114] Asmerom, at supra note 102, p.94

[115] Cultural heritage does not end at monuments and collections of objects. It also includes traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and universe or the knowledge and skills constantly recreated by communities and groups in response to their environment, their interaction with nature and their history that provides them with a

In short, it is important to note that pastoralist communities in general and Borana Oromo in particular have unique ways of life, and that their worldview is based on their special attachment with communal land. The land they traditionally use and occupy since time immemorial is critical to their physical, cultural and spiritual vitality. As such, land and natural resources are valued because of the social relationships that they symbolize as much as or more than any immediate or material uses the owner may have for them.[116] This unique relationship to customary land regime is expressed in terms of traditional use or presence, maintenance of sacred or ceremonial sites, nomadic herding, and customary use of natural resources in a sustainable way. For the Borana Oromo relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

3.THE RECOGNITION OF CUSTOMARY COMMUNAL LAND HOLDING IN ETHIOPIA

3.1.THE POLICY FRAMEWORK OF COMMUNAL LANDHOLDING REGIME

In the past, pastoralist way of life portrays the fact that the policy advice is based on stereotypical representations of pastoralist areas as backwards, prone to food insecurity, starvation, and hotbeds of violent conflicts.[117] Different scholars noted that pastoral way of life in Ethiopia was considered

sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. See the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, Art. 2

[116] M. Gluckman, Politics, Law and Ritual in Tribal Society (Chicago: Aldine Publishing Co. 1965), p. 47

[117] Crewett, W., A. Bogale, and B. Korf (2008) Land Tenure in Ethiopia: Continuity and Change, Shifting Rulers, and the Quest for State Control (CAPRi Working Paper 91, International Food Policy Research Institute: Washington, DC.) <http://dx.doi.org/10.2499/CAPRiWP91>

by the "ruling elites" as "an outdated mode of life that needs to be directed toward the path of modernity through sedentary farming or urban life and on technical interventions that focus on sedentarization of pastoralists by making them agro-pastoralists who only move livestock, but not their homes."[118] Yacob Arsano and several others described this public discourse as the "highland" bias – a kind of highlander, sedentary farming versus lowlander, pastoralist dichotomy.[119] It is widely discerned that such kind of portrayal continued to prevail in the state's policies and politics towards the pastoralist communities which resulted in land tenure policies that have largely ignored their specificities and have continued to consider sedentarization as the precondition of progress in the pastoral rangelands.[120] Regarding resource management, Pankhurst many years back also noted that indigenous pastureland management systems have not been given policy attention in Ethiopia.[121] According to his observation, past development approaches of Ethiopia undermines indigenous knowledge of resource management.[122]

[118] Hagmann, T., Pastoral Conflict and Resource Management in Ethiopia's Somali Region (PhD dissertation, Switzerland: IDHEAP, Université de Lausanne, 2006).

[119] Yacob Arsano, Pastoralism in Ethiopia: The Issues of Viability (Paper presented at the National Conference on Pastoral Development in Ethiopia, Addis Ababa, 2000) The Amharic version of Art. 40 (5) of the FDRE Constitution use the term "zelan" to refer pastoralist. According to Yacob Arsano, the term "implies being uncultured, aimless wonderer, lawless and vulgar. This perception is shared by almost all the highlanders who were and still are politically dominant." ibid p. 2

[120] Yacob Arsano, at supra note 117. See also FDRE Land Administration and Land Use Proclamation No. 456/2005, Art.11(5): "A settlement and villagization program to be undertaken at the request and participation of the community shall be undertaken taking into account the objective of land consolidation."

[121] Abera Ogato, Indigenous common Pasture Land Management in Chencha Wereda, South Ethiopia (MA Thesis, Department of Regional and Local Development Studies, AAU, 2006)) pp.11-12. see also Pankhurst A., Resource Management Institutions in Post Conflict Situations: Lessons from Yegof State Forest, South Wello Zone, In Alula P (ed.) Natural Resource Management In Ethiopia (Forum of Social Studies, 2001), p. 58

[122] See Scoones I., New directions in pastoral development in Africa, In Scoones I (ed.) Living with uncertainty. New directions in pastoral development in Africa (London: International Institute for Environment and Development IT publications,1995), p.1–36

Under the present regime, scores of policy documents unfold the move towards more "pastoralist friendly" policies. For instance, "Rural Development Policy and Strategy" recognized "the longstanding community traditions associated with the use of pasturelands and their considerable expertise and know-how."[123] Similarly, "Ethiopian Environmental Policy Document" also underlines the fact that 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 as well as the recognition and protection of customary rights over land."*[124] (Emphasis added). Particularly, this later policy aimed at protecting such customary rights as far as they are 'constitutionally acceptable, socially equitable and are preferred by local communities.'[125] More recently, "The Growth and Transformation Plan" (short for GTP) on pastoral development also recognized the link between the livelihoods of pastoralists with livestock resources.[126] The GTP clearly emphasized the importance of water resource development for livestock and human consumption, improvement of pastureland and development of irrigation schemes.[127] Like what happens in the past, the GTP in pastoral development also underlined the fact that sedentarization programs are going to be executed so as to enable pastoralists' to establish settled livelihoods.[128] Regarding natural resource management, the GTP indicated that "natural resource management in the pastoralists' area as an important component of *agricultural development* in pastoral areas."[129] So, as one reads these policy

[123] See FDRE Rural Development Policy and Strategies (Ministry of Finance and Economic Development Economic Policy and Planning Department, Addis Ababa, 2003), p. 54
[124] ibid.
[125] ibid.
[126] See "The FDRE Growth and Transformation Plan (2010/11-2014/15)" vol. 1: Main Text (Minstry of Finance and Economic Devlopement, Addis Ababa, Nov, 2010) p. 46 and 53
[127] ibid.
[128] ibid.
[129] ibid.

documents, it doesn't take a rocket scientist to figure out the contradictions and policy fluctuations in pastoralist areas. Firstly, on the one hand, while the policy document states that pastoral development plan will be based on traditional pastoralist systems, on the other hand, it also talks about sedentarization. Secondly, while it stipulates the development of livestock through range resources, it on the other hand, also mentions irrigation schemes as key assets to pastoral development and settlement.

Therefore, as one can understand from the above discussions, a clearly defined land tenure policy in the context of communal land regime is ignored despite the superficially attractive aspects of the policy documents. There exists a widely held consensus among pastoralist experts that the policy advice is still suffering from the hangover of past "ill-conceived" pastoral development policy.[130] In the literature, the reason for such policy fluctuation emanates from two main competing arguments. The first argument for in support of such policy justification is based on the assumption that land and resource use in pastoralist areas are inefficiently utilized. Accordingly, scholars on this chorus provide arguments that customary land holding as a communal property regime in pastoralist areas are susceptible to degradation and that land which is an important factor of production is wasteful in pastoralist's area.[131] Specifically, they criticize that customary land tenure in pastoralist area discourages investment on the land, because the individual occupants cannot be sure of reaping the full profits from their investment.[132] It is argued that custom prevents the emergence of a market for land, since

[130] Solomon T.B. et al., Cattle-Rangeland Management Practices and Perceptions of Pastoralists Towards Rangeland Degradation in the Borana Zone of Southern Ethiopia, Journal of Environmental Management (2007) Vol. 82, 481–494

[131] See generally Ambreena Manji, The Politics of Land Reform in Africa: From communal tenure to free markets, (New York, USA, 2006)

[132] ibid

transactions are confined to the traditional community unless private property system is opted.[133]

The second argument echoed the assumption that government should intervene in the pastoral way of life to provide a choice of life style – sedentarization. This argument basis its reasoning on the difficulty of providing public services to mobile pastoral communities unless they are willing to settle on a fixed area if possible as a cultivator if not at least as agro-pastoralist.[134] Group of scholars who lobby for government intervention in pastoral way of life comes from government policy makers, planners and NGO's.[135] This group of scholars believes that pastoralist areas are prone to drought, food insecurity and conflict over use of land resources. Therefore, settlements of pastoral communities and privatization of communal land regime were proposed as policy advice to bring about the long-term solution for such chronic problems.[136]

On the other hand, the bulk of the study, particularly in Borana Oromo pastoralist area, reveals the mounting substantial evidences against the above arguments. Quite to the contrary, there are group of scholars who argues that customary land tenure promotes productive investment as customary land laws vest land in a community, such as a clan or lineage.[137] These groups of scholars claim that individual occupants of the land do not have exclusive

[133] ibid

[134] See Pastoralists Forum Ethiopia, International Institute of Rural Reconstruction and Development Fund, supra note 100, at p. 35-37

[135] Abdul B. Kamara (2005) The Dynamics of Land Use and Property Rights in Semi-Arid East Africa: Ethiopia Case Study. See at <http://www.capri.cgiar.org/wp/..%5Cpdf%5Cbrief_dryl-11.pdf> (Accessed on April 23, 2013)

[136] Unlike resettlement of farmers from drought-prone settled areas that involves only a change of location, sedentarization for pastoralists, involves a complete change in lifestyle and a significant cultural transformation. See at Pastoralists Forum Ethiopia, International Institute of Rural Reconstruction and Development Fund, at supra note 100 p. 35

[137] Susan J. Buck, Cultural Theory and Management of Common Property Resources, Human Ecology (1989), Vol. 17, No. 1, pp. 101-116. See also Melanie G. Wiber and Peter Lovell Property, Kinship and Cultural Capital: The Ethics of Modelling Kinship in Sustainable Resource Management Anthropologica, (2004), Vol. 46, No. 1, pp. 85-98

rights to the land and they cannot freely dispose of the land through sale.[138] The claim that private property is better at protecting resources than customary common property regimes is refuted by scholars such as Ellinor Ostrom.[139] According to Ostrom, the fact that a certain property regime is collective or communal does not necessarily lead to the conclusion that it is inefficient.[140] Full members of communal groups argued Ostrom "has the right to use, exclude others and manage their rights over the communal land subject in many systems to the approval of the other members of the group."[141] Therefore, property rights under communal regime are utilized efficiently as customary institutions governing the commons provide allocative scheme without compromising the property regime.

In the same token, arguments against pastoral sedentarization largely drive from the studies of pastoral development issues in the context of East Africa. Many scholars noted that the classical paradigm for pastoral development in Africa based on sedentarization, privatization and intensification is futile and urged for a new paradigm based on mobility of livestock, common property management and extensive production systems.[142] According to Niamir-Fuller, for instance, the reason for shift in paradigm is precipitated by 'the reevaluation of the value of traditional pastoral production and that the

[138] ibid

[139] Elinor Ostrom (1933–2012) received the 2009 Nobel Prize in Economic Sciences for her groundbreaking research demonstrating that ordinary people are capable of creating rules and institutions that allow for the sustainable and equitable management of shared resources (for her analysis of economic governance, especially the commons). See at <http://elinorostrom.indiana.edu/> (Accessed on April 9, 2013)

[140] Ostrom, supra note 71

[141] Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action (Cambridge University Press, 1990), p. For further analysis of Ostrom's common property principles in Ethiopian context see also Shimelis Beyene and Dafa Gudina, Reviving a Traditional Pasture Management System in Fentale, East Central Ethiopia" Journal of Ecological Anthropology (2009), Vol. 13 No. 1 pp. 69-70

[142] Johan Helland, Land Allienation in Borana: Some Land Tenure Issues in A Pastoral Context in Ethiopia, in Mustafa Babiker's (ed), Resource Alienation, Militarization and Development Case Studies from East African Drylands (Organization for Social Science Research in Eastern and Southern Africa, Addis Ababa, 2002), p. 47

classical pastoral development paradigm benefited only a very small minority of elite pastoralists.'[143] Similarly, Jahnke also noted that "an appropriate end point of pastoral development may be seen as a situation in which pastoralists manage their own resources at a higher level of productivity, and in accordance with ecological principles of sustained yield, while basically maintaining their characteristic life style."[144]

3.2. THE LEGAL FRAMEWORKS OF COMMUNAL LAND HOLDING REGIME

During the Imperial regime, any permanently uncultivated and unsettled land was considered as no man's land (*terra nullius*) and claimed to be public domain, hence, state property.[145] However, the important legal framework enacted during imperial regime yet obsolete and often unnoticed by the academia, practitioners and judges in the present time is the Ethiopian Civil Code provisions on "Agricultural Communities".[146] This part of the civil code recognizes ownership [holding rights] of land by agricultural communities such as village or tribal groups to *collectively exploit in*

[143] M. Niamir-Fuller, Managing Mobility in African Rangelands: The Legitimization of Transhumance (Intermediate Technology Publications, Cambridge, 1999), 1-2

[144] Jahnke H E, Livestock Production Systems and Livestock Development in Tropical Africa (Federal Republic of Germany, 1982), p. 101. See also Coppock D Layne (ed.) The Borana Plateau of Southern Ethiopia: Synthesis of pastoral research, development and change, 1980-91 (ILCA, International Livestock Centre for Africa, Addis Ababa, Ethiopia, 1994) p. 189

[145] See The Revised Constitution of the Ethiopian Empire (1955), Art. 130(d): "all property not held and possessed in the name of any person, natural or judicial, including…all grazing lands… are State Domain."

[146] See Ethiopian Civil code Articles 1489-1500. "the original draft on 'Agricultural Communities' had envisaged two types of communities based on the twin factors of religion and the mode of life of a community.' He argued that while the first type of communities envisaged those of the chrsitan highlanders who lead sedentary mode of life based on agriculture and those who coneveive land as belonging to a family or a village. The second type of communities envisaged those non-christian pasturalsts [sic] who lived scattered throughout Ethiopia and those concieve of land as belonging to a tribe. It is based on this conception Bililligh argued that the term 'Agricultural Communities' in the Civil Code is used to cover the two types of communities described above. See See Bililligh Mandefro, Agricultural Communities and the Civil Code: A Commentary, Journal of Ethiopia Law (1969),Vol. 6 No. 1, pp.145-46

conformity with the tradition and custom of the community concerned.[147] Bililligh noted that the social milieu in which this part of Ethiopian Civil Code is drafted purports to preserve custom and tradition and is not an innovation.[148] He argued that it is declaratory of existing custom which consequently became legally binding.[149]

During the Dergue regime "all rural lands were declared to be the collective property of the Ethiopian people."[150] Yet, the traditional patterns of pastoralist's customary communal land holding were confirmed and "the possessory rights of nomads over land they customarily use for grazing or other purposes" was duly recognized.[151] Cohen and Koehn argued that the government during this regime differently treated kinship and village tenure from freehold tenure by separate treatment in the proclamation.[152] According to these writers, the most important example of differential treatment is found in the law that requires nomads to form an association aimed at inducing nomadic people to cooperate in using grazing land or water rights.[153] However, they argue that the issues which remain unresolved are whether the government will improve the nomads' economic potentials as ranchers, requires them to resettle as farmers or seize their land in the end for agrarian purposes.[154]

Following the suits of its predecessors, the Federal Democratic Republic of Ethiopian Constitution (FDRE Constitution hereinafter) clearly declared that ownership of rural and an urban land including natural resources as *a*

[147] see art. 1489
[148] Billilign, at supra note, 146
[149] ibid.
[150] See Public Ownership of Rural Lands Proclmation, 31/1975, Art. 3
[151] John M. Cohen and Peter H. Koehn, Rural and Urban Land in Ethiopia, African Law Studies (1977), No. 14 p. 6
[152] ibid.
[153] ibid, at p. 8
[154] ibid

common property of the Nations, Nationalities and Peoples of Ethiopia and the State.[155] Here it is important to note how state/public property and common property were construed in Ethiopia. As one can see from the above legal regimes, the nomenclatures such as 'state property' or 'public domain' during Imperial regime; 'collective property' or 'public ownership' during the Dergue and finally and presently 'common property' were used to refer property rights to land, without any reference to the underpinning conceptual distinctions. So, as noted before, the ways one appreciates these terms are important to better grasp perspectives on common property regime in Ethiopian context. Based on these triggering issues the following questions are worth examination. Firstly, does the concept of "common property" logically extend to public property or state property? Alternatively, does it mean that common property is always state or public property? Secondly, can the State under the FDRE Constitution claim exclusive ownership rights to land and its natural resources? Thirdly, does the term common property in the FDRE Constitution also intend to refer to property own[ership] of pastoralists communities such as grazing land in common? Fourthly, does the use and administration of land and its natural resource efficient if state or government claims ownership rights by disregarding of community based property regime? The following sub-topics try to address these questions.

3.2.1. Communal Property under the FDRE Constitution

As previously noted, the ownership of public property is held by the state who tries to allocate such resources based on the collective interest of the society as the focal point. In Ethiopia, however, the term common property is used (as terms like state or public property could not be inferred from the FDRE Constitution) to refer to a property regime in which ownership rights

[155] Federal Democratic Republic of Ethiopian Constitution (1995) Neg. Gaz. Proclmation No. 1, 1995, Art. 40(3)

of land and its natural resources are held by both the state and the peoples of Ethiopia. But, despite such ownership structure, the term state or public property, rather than common property, is widely used in both academic and public discourse. In this context, land including its natural resources as a common property of nation, nationalities and peoples of Ethiopia is used to describe state or public property in which state hold it in order to allocate this resources based on the interest and the common benefit of Ethiopian people. Such conception of state, public and common property convergence could also be understood from the reading of both FDRE Constitution and land administration and land use proclamation provisions. The first relates to the explicit use of the phrase 'common property' in article 40(3). The second relates to the duty of both federal and regional states to 'enact laws for the utilization and conservation of land and other natural resources' under article 51(5) and 52(2). The third relates to Article 89(6) which provides the duty of the government to hold land and other natural resources on behalf of the People and to deploy them for their common benefit. The fourth one relates to the provisions that provides for government ownership in article 5(3) of Proclamation No. 456/2005.[156]

However, the other reading of the same constitution poses ambiguity as to whether common property is really mean public property. Because, the FDRE constitution also provides other two possibilities in which common property regimes could be recognized. First, pastoralists have the right to free grazing land (though as we shall see its communal nature is often contested). Second, communities in appropriate circumstances may be specifically empowered by the law to own property in common.[157]

[156] This provision considers government as being the owner of rural land and empowers it to change communal rural land holdings to private holdings it finds it necessary to do so.
[157] FDRE Constitution, supra note 155, at Art. 40(2)

Therefore, these provisions may imply common property regime to imply pastoralists communal property regime but does not necessarily imply public/state property regime.

More specifically, without prejudice to the preceding analysis, the difference between common property and state property is nuanced by the competing and dominant debates in favour of public or state land ownership and the doctrinal interpretation of what signifies the terms "state and people" used in Article 40(3) of the FDRE Constitution. Does the phrase "state and people" in Article 40(3) of the FDRE Constitution the same because people are normally represented by their state? In this regard, Abdullahi noted that understanding "state and peoples" as the same is "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."[158] This writer noted that the manifestations made by the government favoring that land and its natural resources are public property and can only be owned by the state complicates the matter. Of course, it is beyond manifestation as the FDRE Rural Land Administration and Land Use Proclamation No. 456/2005 clearly illustrates the position of the government by including a clear provision declaring Government as the 'owner of rural land, and communal rural land holdings.'[159] Hence, it is important to address whether "people's rights" really means "state's rights" under the FDRE constitution and if that

[158] Mohammud Abdulahi, The Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities, International Journal of Minority and Group Rights (2007), Vol. 14 p. 113

[159] See FDRE Rural Land Administration and Land Use Proclamation No. 456/2005, Art. 5(3) which clearly indicates that the Proclamation considers only one form of ownership of rural land: i.e. government ownership, whereas the Constitution under Article 40(3) bestows ownership of land on the state as a political-administrative entity and peoples as a social collective which may take the form of nations, nationalities and the Ethiopian people in general." However, Art. 89(6) of the FDRE Constitution provide that "Government has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development." In other words, the Constitution doesn't entrust ownership to the Government." See Elias N. Stebek, supra note 111, at p.268

is the case whether state property regime is apt to efficiently manage land and its natural resources.

To begin with the first issue, as Abdullahi argues people's rights and states' rights are very different under Article 39 of the FDRE Constitution.[160] Particularly, he noted that, "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 recognizes this right of the people including secession.[161] Accordingly, 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. Per this understanding, the right to self-determination is nothing but the right of the "nation, nationality and people" to exploit land and its natural resources within the territory of a certain Regional State.

In this context, article 39 of the FDRE Constitution guarantee the right to self-determination of the "nation, nationalities and peoples" to use and administer land including its natural resources as an expression of regional autonomy by enacting laws to that effect. However, such law making power is vested in the federal government by the FDRE Constitution. Regional states are only mandated to administer land and other natural resources in accordance with federal laws.[162] If land use law is to be enacted by the Regional States, it shall only consist of detailed provisions necessary to implement Federal Land Law.[163] It is based on this mandate that "Oromia Rural Land Use and Administration" (proclamation No. 130/2007) has been enacted. However, this raises the issue whether states are empowered to enact land administration and land use law that recognizes the specificities of

[160] Abdulahi, supra note 158
[161] Ibid, at p. 121
[162] FDRE Constitution, supra note 155, at Art. 52 (2. d)
[163] FDRE Rural Land Adminstration and Land Use Proclmation No. 456/2005, Art. 17

its pastoral communities thereby encourages communal land holding systems currently in practice. As repeated several times in this paper, the FDRE Constitution clearly provides Ethiopian pastoralists with the right to free grazing land as well as the right not to be displaced from their own lands.[164]

As noted before, Oromo pastoralists' way of life is characterized by communality and hence suits to group rights but not individual rights. This very fact clearly demonstrates that the right of Ethiopian pastoralists to free grazing land under the FDRE Constitution is nothing but the right to their communal landholding system. Consequently, taking the justifications for the adoption of Article 39 and 40(3) together with Article 40(5), one can conclude that the FDRE Constitution has recognized the common property rights of Ethiopian pastoralists over their customary land holding system. The writer for stronger reasons argue that state council of Oromia has the constitutional power to enact land administration and land use law that clearly addresses the specificities of its pastoralists' communities in its regional territory. Needless to mention it, such power first and for most emanates from the right to self-determination over the exploitation of its resources within its constitutional territory.[165] Second, it emanates from the rights of Ethiopian pastoralists' in general and Oromo pastoralists in particular to free grazing land and the right not to be displaced from their own lands as enshrined under both FDRE and Oromia constitutions.[166]

The other issue relates whether land including its resources held by the state as noted before, could efficiently and adequately be managed through public property regime. As noted by Elias N. Stebek, the current public property

[164] FDRE Constitution, supra note 155, at Art. 40(5)
[165] However it should be clerly noted that the [Federal]"government has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development." ibid, at Art. 89(6)
[166] The Revised Constitution of Oromia Regional State, Magalata Oromiya, Proclmation No. 94/1997, Art. 40(5)

regime in Ethiopia is vague and ineffectively implemented as "it is usually impossible to effectively exclude persons from the use and overconsumption of common pool resources in Ethiopia."[167] He noted that in such state of affairs "*de jure* public property becomes *de facto* open access in which certain common-pool resources in the rural areas of Ethiopia such as forests [and pastures] are exposed to encroachment, unlawful logging and overgrazing."[168] As proposed by Elias, the cure for such kind of ills is "to dully recognize and clearly define the property rights of indigenous communities and collectives so that the right holders can have vested interest in the preservation, protection and development of these resources."[169]

In addition to what Elias has noted "*de jure* public property" also becomes *de jure* open access within the current Ethiopian communal property system. As noted before, the reason behind such assertion is that the there exists legal rights designed for rural communities for the purpose of free grazing land without specifically identifying well-defined user groups of the *de jure* public property regime. Obviously, this situation in turn creates a condition of open access this time with a legal back up of free grazing land with the right to graze without interference from elders as previously done through local customary institutions. As we shall see in what follows, this situation turns *de facto* managed communal property regime in to *de jure* open access resources since such legal scheme undermines previously managed common property regime by weakening the existing customary institutions of resource management. This is because of the fact that the legal scheme gives rights to recalcitrant members of the community to defy customary law and customary institutions over resource use and management. Generally, in the absence of decentralized and adequately defined community property

[167] Elias N. Stebek, supra note 67
[168] Ibid.
[169] ibid.

regime, it would be practically difficult for "the state and the peoples of Ethiopia" to effectively and adequately control such vast area of communal land in pastoralist area.. Having the above discussions, it is crucial to critically evaluate whether both federal and Oromia land administration and land use laws enacted so far conform to the above constitutional mandate and whether such laws takes the specificities and needs of Borana pastoralists communal land holding purposes.

3.2.2. Communal Land Holding Rights under Rural Land Law

To begin with, the "FDRE Rural Land Administration and Land Use Proclamation No. 456/2005" is enacted "for the utilization of and conservation of land and other natural resources…"[170] in general. As noted before, both the FDRE and Oromia constitutions clearly provides that the implementation of "Ethiopian pastoralists *right to free land for grazing* and cultivation as well as *the right not to be displaced from their own lands shall be specified by law*"[171] (Emphasis added). However, though the constitution provides for the mandatory enactment of "specific law" to implement this provision, a specific law that devotes to address the needs of Ethiopian pastoralists is not yet enacted. Rather, the concern of Ethiopian pastoralists are treated with the concern of Ethiopian peasants who lead sedentary life and depend on land cultivation under the generic rural land administration and land use legislation as a *one size fits all* approach. Had this been the intention of the legislature, separate treatment of Ethiopian peasants and pastoralists under separate sub-articles wouldn't have been warranted.[172] Therefore, as the saying goes, it takes two to Ethiopian land administration and land use as "it takes two to tango". Of course one may argue against

[170] See FDRE Constituion, supra note 155, at Art. 51(5)
[171] ibid Art. 40(5)
[172] Ibid. Both Art 40(4) and 40(5) clearly hint the manadatory enactment of specifc laws to implement respective rights, ultimately showing the intention of the legislature to separately treat both groups.

such separate dichotomy in so far as pastoralists demand for communal land is adequately addressed under a single proclamation. But the issue that requires critical evaluation is whether this is really the case.

The main reason that necessitated the enactment of Proclamation No. 256/2005 is "to establish a conducive system of rural land administration that promotes the conservation and management of natural resources, *and encourages private investors in pastoralist areas where there is tribe based communal landholding system*".[173](Emphasis added). The acontrario reading of this preamble clearly shows that communal land holding system is going to be discouraged in order to encourage private land holding. As previously noted, customary communal land holding system is conducive to encourage community based resource management as witnessed by the Borana case. But, how could "*the conservation and management of natural resources is promoted*" in pastoralist area by demoting the existing communal land holding system that is intertwined with natural resource management?

Moreover, neither the definition of the term "pastoralist" nor that of "communal holding" in this very proclamation depicts the significance of such collective or group interests. The term "pastoralist" is defined to signify an individual who pursues the raising and producing of cattle by holding rangeland from one place to the other in order to support himself and his family.[174] This definition clearly individualized the term pastoralists irrespective of the communal nature of pastoral way of life and communal land use for grazing purpose. Strictly speaking, one can argue that this proclamation clearly recognized private holding of rangeland (grazing land) among pastoralist as a family land holding. This raises the problematic issue

[173] See the prambular paragraphs of Proclmation No 456/2005, supra note 163
[174] FDRE Rural Land Administration and Land Use Proclamations No. 456/2005, Art. 2(8). See also Oromia Rural Land use and land Administration Proclamation No. 130/ 2007 Art. 2(14)

as to whether an individual pastoralist with his family could manage to 'hold rights'[175] separated from his clan given the existing customary communal grazing landholding system in pastoralists' area.

According to Beyene and several others the extensive allocation of land for private use in the pastoral areas is posing challenge to communal resource management such as pasture.[176] Beyene observed that change in property regime occurred by privatizing large pasturelands in pastoral areas in which 24 percent of land among pastoralists of southern Ethiopia has been put under private use either for cultivation or private ranches.[177] More specifically, the continuing enclosure of pastureland in the form of *kaloo* among Borana pastoralists by rich members of the pastoral community for private purpose while at the same time they are also sharing the communal grazing lands with others resulted in the breakdown of customary rules and institutions that govern common pastureland causing frequent conflicts even among members of the Borana pastoral communities.[178]

On the other hand, the term "communal holding" is defined as "rural land which is given by the government to local residents *for common grazing,*

[175] "holding right" is defined as the right of any peasant farmer or semi-pastoralist and pastoralist … to use rural land for purpose of agriculture and natural resource development, lease and bequeath to member of his family or other lawful heirs, and includes the right to acquire property produced on his land thereon by his labour or capital and to sale, exchange and bequeath same." See ibid at Proclamation 456/2005, Art. 2(4). A closer look at this definition simply shows list of purposes of holding rights of rural land but holding right of rural land for the purpose communal grazing is ignored either by default or design.

[176] Fekadu Beyene, (2011), "Dismantling of common property, land use and pastoral livelihoods in eastern Ethiopia," Journal of Development and Agricultural Economics Vol. 3 No. 10, p. 480

[177] ibid

[178] Demese Chanyalew et al, "Ethiopia's Agriculture Sector Policy and Investment Framework: Ten Year Road Map (2010-2020)" (Addis Ababa, Ethiopia May 3, 2010) p. 114. "One reason for the deterioration of traditional institutions may be that there has been an increase in the cost of maintaining traditional rights or that the cost of negotiating the rules determining these rights has increased, perhaps due to a competing state-sponsored system of property rights." See Fuys et al. (2006), 'Securing common property regimes in a "modernizing" world: synthesis of 41 case studies on common property regimes from Asia, Africa, Europe and Latin America', Paper presented at 'Survival of the Commons: Mounting Challenges and New Realities', the Eleventh Conference of the International Association for the Study of Common Property, Bali, Indonesia.

forestry and other social services."[179] Thus, pastoralists as "local residents" may use land for common grazing as communal holding only upon the authorization of the government. But given the historic and customary rights of pastoralists to grazing land, why such authorization of the government is required as a prerequisite to use land for common grazing purpose is difficult to reckon. Similar provision is also found in Oromia rural land use and administration proclamation which too recognize the right of rural community to have access to rural land for grazing; religious or ritual places, water points and other social services.[180] At first glance, it seems that this provision ultimately addresses the needs and specificities of pastoralists' communal landholding for grazing, religious and ritual activities. But, such free grazing land to rural communities does not clearly show whether it refers to rural areas of land cultivators, agro-pastoralists' or pastoralists separately as defined user groups.

Another legal provision that strengthen the fact that federal rural land administration and land use discourages communal land holding regime in pastoralist area can be found in the definition of both "minimum size holding" and "minimum private land holding". The former refers to size of pastoralists' rural land holding the productivity of which can ensure the food security of pastoralist family or which suffices for grazing.[181] The later refers to rural land in the holding of pastoralist who is entitled by law to use rural land.[182] Therefore, these legal provisions clearly recognize private grazing land holding system which as noted before weakens communal pasture land

[179] 456/2005 art. 2(12). See also Oromia Rural Land Administration and Land Use Proclamation No. 130/ 2007 Art. 2(5). According to this proclamation, the term "Communal Holding is used to refer rural land which the local community commonly uses for grazing, woodlots and other social purposes" irrespective of government authorization.
[180] Oromia Rural Land Use and Admisntration Proclmation No. 130/2007, Art. 5(4)
[181] See Proclmation No. 456/2005 Art 2(10)
[182] ibid art. 2(11). See also supra note 177, at Art. 2(6) that defines the term 'private land holding' in pastoralists' context as rural land in the holding of pastoralists who are entitled by law to use the land

holding and customary institutions designed to sustainably utilize such resources. Yet, the trend as provided under Article 13 of this proclamation shows that in the future "a system of free grazing" is prohibited and a system of "cut and carry" feeding is going to be introduced step by step [183] This very fact clearly contradicts the constitutional rights of pastoralists to "free grazing land".

In general, three types of property regimes can be identified in the pastoralist area. The first one is related to a regime in which grazing land is customarily hold by pastoralists' in common as a community based property regime since time immemorial. The second is a regime in which "a member" of the pastoralist and his family hold pastureland for private purposes. The third, one is open access to rural land for grazing; religious or ritual places, water points and other social services to rural communities. However, such "use rights of the different types of landholdings in the country"[184] may possibly create potential conflict as different user groups rival over scarce resources by disregarding the customary law and institution. For instance, in areas where pure pastoralists exist but land is allocated to "a member" of a pastoralist, it seems probable that rivalry over grazing land would be created among such member of pastoralists who previously use resources in a collegial way. The same is true in rural area inhabited by predominantly pastoralists or agro-pastoralists and land cultivators. In this situation too grazing land encroachment for the purpose of land cultivation may negatively affect the grazing rights of rural communities who are pastoralists and could be a potential for conflict over resource use. Therefore, it may

[183] See FDRE Rural Land Adminstration and Land Use Proclmation No. 456/2005, Art. 13(3). See also "Ethiopia – Strenghening Land Tenure and Adminstration Program, Training Manual on Rural Lands Policy and Adminstration: Short Term Training Course for Regional Judges of the Amhara, Tigray, Oromia and the SNNPR States of Ethiopia"(USAID and Minstry of Agriculture and Rural Development, 2006), p. 71 which describes the prohibition of free grazing to be gradually replaced by zero-grazing.

[184] See the Preamble of Proclmation No. 456/2005

practically remains difficult to administer such fragmented landholding regime in pastoralist's communities who outrightly reject individualized holding of rangelands for private use purposes.

4. CONCLUDING REMARKS

This paper critically examined the contemporary perspectives on common property regime in Ethiopian Borana Pastoralists context. Particularly, attempted is made to show how early misconceptions related to resource administration and use in common property regime has continued to influence policy makers to intervene in the administration of common property regimes. However, despite such untenable and old-fashioned conceptions of communal property regime, the paper has critically evaluated how the Borana Oromo pastoralists communities, are capable of efficient resource management in common property regimes and how Ethiopian policy and legal frameworks has attempted to approach it. In doing so, the paper argued that both policy and legal approach towards clearly defined pastoralist's communal land holding regime is still suffering from the past misconceptions about common property regime. It is true that both policy and legal documents clearly depict the determination of government to promote the proper management of land and its natural resources through pastoralists' knowledge and experience. But, it is easier said than done as the law is very clear beyond the iota of doubt since it discourages customary communal land holding rights and alternatively encourages private land holding regime.

More specifically and firstly, the current land use and administration legislations both Federal and Oromia are designed to suit the demands of land cultivators where communal land holding for grazing purpose is lost in both policy and legislative tatters. Second, the existing customary land

holding system and its accompanying customary institutions of resource administration is relegated, weakened and threatened through the deliberate introduction of "free grazing system" that creates *de jure* open access to "common/public property of the nations, nationalities and peoples of Ethiopia". The implication of such legal and policy moves in the context of Borana Oromoo unfold its insurmountable problems that require immediate and prudent legal and practical responses.

To mention but few of such problems, firstly, it entirely affects the Oromo *gadaa* system, the remnants of Oromo cultural and political heritage in the cradleland which are embedded in the practice of pastoral way of life symbolized by the customary rights of communal land holding. It goes without saying that this situation brings a far reaching consequence on the social fabric of Oromo pastoralist communities – it probably erodes their culture, customary institution and religious practices.[185] Secondly, it affects their constitutional right to engage freely in any economic activity and to pursue a livelihood of once own choice.[186] Thirdly, it erodes their indigenous knowledge of resource use and administration through customary institutions which in turn undermines community based resource management. Fourthly, in the absence of legal regime that clearly defines customary land holding rights in pastoralist context it precipitates conflict among Borana groups and other ethnic groups as we are witnessing today due to the rivalry over pasture resource. In particular, such rivalry, by and large, is attributable to both

[185] See FDRE Constitution Art. 41(9) that reads; "[T]he State has the responsibility to protect and preserve historical and cultural legacies …" See also ibid, at Art. 39(2) which provides the rights of nation, nationalities and peoples in Ethiopia, "to develop and to promote its culture; and to preserve its history."

[186] See FDRE Constitution Art 41(1 and 2) that reads: Every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory. Every Ethiopian has the right to choose his or her means of livelihood, occupation and profession." (Emphasis added)

legalization of "free grazing systems'' and private land holding systems in a previously managed common property regime.

It should be made clear from the outset that, the fact that the ancestors of Borana Oromo were pastoralists and hence the present groups also should remain pastoralists would be very difficult to succumb. It would, neither mean that Borana Oromo groups remain a museum of indigenous peoples where researchers, tourists and Oromo fellows alike pay tribute to their cultural heritage while they are suffering from draught, poverty and illiteracy. But for all its intention and purpose, to repeat the remark made by Jahnke and many other scholars, both federal and regional governments should genuinely design appropriate pastoral development policy and law that unequivocally guarantee pastoralists right to manage and utilize their own resources at a higher level of productivity, and in accordance with ecological principles of sustained yield, while basically maintaining their characteristic life style. Therefore, in view of the preceding critical appraisal of communal land holding regime in Ethiopia, the following recommendations are provided as the way forward.

First, it is crystal clear from the readings of both the FDRE and Oromia Regional State constitutions require the mandatory enactment of an enabling legislation. Therefore, the implementation of constitutional rights of pastoralists to free land for grazing and other purposes as well as the right not to be displaced from their own lands should be specified by law. Second, the major parts of Rural Land Use and Administration of Oromia Regional state are designed to suit land cultivators. However, a well-defined customary land right is crucial for the vitality of Oromo pastoralists as they represent the home for Oromo *Gadaa* democracy, which if not given serious attention, would endanger Oromoo cultural heritage. The state council of

Oromia Regional State, both under its constitution and under the Federal land administration and land use proclamation is mandated to enact not only detail laws that adequately address the demands and specificities of Oromo peasants, but also Oromo pastoralists in its territory. It goes without saying that a threat to their communal customary land rights in Borana, Karrayu, and Guji Oromo is a threat to Oromo cultural heritage preserved in that very "cultural corridor". Therefore, given this unique importance of Oromo pastoralists, the state council of Oromia should enact a specific legislation that specifically addresses their customary land rights. Third, the potentials of indigenous community in the proper resource management should be harnessed as a suitable condition for cooperative behaviors and co-management or as shared responsibilities with government bodies. Yet, this situation could happen only by recognizing customarily well-defined communal pastureland holding regime such as the Borana case, within the broader context of public property regime in Ethiopia. The author firmly believes that unless community based property rights are put in place, the current legal conception of land including its natural resources as "the common property of the nations, nationalities and peoples of Ethiopia" possibly creates *de facto* open access that result in the real "tragedy of the commons". Therefore, the government both at federal and regional level should not only encourage indigenous customary institutions of resource management through community based property regime but also provide clear policies and guidelines that could be applied to existing institutions in pastoral areas. Finally, I will conclude by two advices one provided by Hernando De Soto and the other by the Ethiopian Civil Code. De Soto writes:

> *"Where have all the lawyers been? Why haven't they taken a hard look at the law and order that their own people produce? The truth is*

> *that lawyers in these countries are generally too busy studying Western law and adapting. They have been taught that local practices are not genuine law but a romantic area of study best left to folklorists. But if lawyers want to play a role in creating good laws, they must step out of their law libraries into the extralegal sector, which is the only source of the information they need to build a truly legitimate formal legal system."*[187]

Ethiopia's Civil Code reads:

> *"No law which is designed to define the rights and duties of the people and to set the principles governing their mutual relations can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs and customs and to the natural justice."* [188]

[187] Hernando De Soto, The Mystery of Capital. Why Capitalism Triumphs in the West and Fails Everywhere Else (New York: Basic Books, 2000), p. 187
[188] See the Preface of Civil Code of the Empire of Ethiopia (1960)