THE POST-1991 RURAL LAND TENURE SYSTEM IN ETHIOPIA: SCRUTINIZING THE LEGISLATIVE FRAMEWORK IN VIEW OF LAND TENURE SECURITY OF PEASANTS AND PASTORALISTS

By

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Summary

In this thesis I examine the extent of legal protection afforded peasants' and pastoralists' secure of land tenure in post-1991 Ethiopia. To this end, I analyse constitutions, laws, policy documents, judicial decisions, constitutional interpretations as well as the literature, critically. The prevailing premise in academic discourse is that land tenure security is realized when the landholder is granted an adequate number of rights in land; with longer duration; deprivation of land rights for greater societal interest occurs only in terms of due process of law and upon payment of adequate compensation; enforcement of land rights through an independent judiciary is affordable, and there is participatory and low-cost registration and certification of rights. I argue instead that the components of tenure security are not formulated comprehensively and clearly nor defined contextualised to different landholding systems. This is because of the prevalence of\ variations in understanding the concept itself; the assumption that private land ownership best guarantees land tenure security; a view of security of tenure as one set of rights in the bundle of rights property metaphor; and a piecemeal approach to studying each construct of tenure security.

I also argue that the notion of land tenure security is broader than a single set of rights and should be studied in a holistic approach separated from land ownership discourse. The extent of legal protection should be formulated taking into account the nature of landholding systems, extent of dependency on land rights and the historical land question, as land rights are central to political movements in Ethiopia. As perpetuation of land tenure insecurity prevails in the making of law, provision of constitutional protections founded on the aforementioned factors and adoption of a constitutional interpretation approach that seeks to enhance land tenure security are also essential.

Academic and policy discourses on land tenure security in post-1991 Ethiopia's predominately centre on the land ownership dichotomy. Some claim the "people's and state ownership of land" adopted in the constitution of the country aims to ensure land tenure security of peasants and pastoralists. Others argue that it is a source of land tenure insecurity as it empowers government to exercise political control over landholders as in past political regimes. Both sides fail to take the nature of constitutional protections afforded peasants' and pastoralists' land rights seriously, unnecessarily focusing on the ownership deliberation. I argue that a regionalized understanding of the nature of ownership adopted in state constitutions forms an ethnic base, and has implications for displacement of peasants and pastoralists from other states. Absence of clear constitutional

demarcation of federal and state power over land contributes to power competition between the two levels of government and contradictory legal pluralism, which makes landholders uncertainty of their land rights. Furthermore, I argue that subordinate legislation do not translate constitutional protections and do not define legal constructs sufficiently to ensure land tenure security for peasants and pastoralists. Besides, judicial practice and constitutional interpretation tend to abridge rather than promote their security of land tenure.

Declaration

I hereby declare that this thesis submitted in the requirement for the award of Doctor of Laws (LLD) at Department of Public Law, University of Pretoria is my original work. I have observed rule of citations and properly acknowledged the other peoples' work. I have published an article based on a section of one chapter prior to the submission of the thesis. However, I haven't published any part of the thesis before the commencement of my study. Nor I have submitted the thesis for an award of another degree in University of Pretoria or any other university.

Dedication

To my late father, Gebremichael Ganta, my wife, Eden Fesseha and my children.

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List of Acronyms

FAO	The United Nations Food and Agriculture Organization
UN-HABITAT	The United Nations Human Settlements Program
UNCESCR	The United Nations Committee on Economic, Social and Cultural Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
R	Ruled
Neg. Gaz.	Gazette Negarit
Fed.	Federal
Proc.	Proclamation
No.	Number
Reg.	Regulation
The Code	The 1960 Civil Code of Empire of Ethiopia
PMAC	Provisional Military Administrative Council
PAs	Peasant Associations
PDRE Constitution	The 1987 People's Democratic Republic of Ethiopia (PDRE) Constitution
EPRDF	Ethiopian Peoples' Revolutionary Democratic Forces
FDRE Constitution	The 1995 Federal Democratic Republic of Ethiopia's Constitution
GTP I	The First Growth and Transformation Plan
GTP II	The Second Growth and Transformation Plan
ESM	Ethiopian Student Movement
UDHR	Universal Declaration of Human Rights
HOF	House of Federations
CCI	Council of Constitutional Inquiry
SNNP State	Southern Nations, Nationalities and Peoples State
FSC	Federal Supreme Court
EPLAUA	Environmental Protection, Land Administration and Use Authority
CSOs	Civil Society Organizations
SSC	State Supreme Court
APAP	Action Professionals Association for People
EGLDAM	*Ye Ethiopia Goji Limadawi Dirgitoch Aswogaji Mahiber*
EWLA	Ethiopian Women Lawyer's Association
HPR	House of Peoples' Representatives
SC	State Council
SJAC	State Judicial Administration Council
FJAC	Federal Judicial Administration Council
JAC	Judicial Administration Council
NNP	Nations, Nationalities and People
GDP	Gross Domestic Product

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Introduction

The question of rural land rights and land tenure security has been at the centre of the modern political history of and the struggle for social and economic justice in Ethiopia.[1] Given the agrarian nature of the country's economy,[2] that the overwhelming majority of its population depends on land for livelihood[3] and the state's tendency to use rural land rights as a means for political control,[4] the centrality of rural land tenure security in the country is not surprising. Security of land tenure, that among other things depends on the extent of legal protection guaranteeing peasants and pastoralists liberty and freedom over their land rights and limiting interference in their rights by the state and other bodies, also has implications for the enhancement of investment, economic growth, reduction of poverty, environmental protection, state democratization and realization of human rights.[5]

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[1] Gebru Tareke. *Ethiopia: power and protest: peasant revolts in the twentieth century*. New York. Cambridge University Press, 1991; Teshale Tibebu. *The making of modern Ethiopia: 1896-1974.* New Jersey. The Red Sea Press, 1995; Dessalegn Rahmato. Agrarian change and agrarian crisis: State and peasantry in post-revolution Ethiopia. (1993) 63 *Africa.* 36–55. The continued eviction of the peasants in different regional states on ethnic basis, after the adoption seemingly ethnic federalism in the post-1991, and last three years political movements and violence since 2015 mainly in Oromia state that has resulted in the stepping down of the Prime Minister Hailemariam Dessalegn and replacing with Abiy Ahmed from the Oromo ethnic group in April 2018 was caused by *inter alia* in opposition to the Addis Ababa Master Plan that was designed to expand the city through expropriation of the surrounding rural land that belongs to peasants living in the adjacent towns of Oromia State.

[2] The country's economic policy in the post-1991 has still based on Agricultural Development Led Industrialization Strategy. (See Ministry of Finance and Economic Development. Sustainable development and poverty reduction program. Addis Ababa. *The Federal Democratic Republic of Ethiopia*, 2002; Ministry of Finance and Economic Development. Rural development policy and strategies. Addis Ababa. *The Federal Democratic Republic of Ethiopia*, 2003).

[3] Still 83% of the total population of the country is one way another dependent on the rural land rights for their livelihood. (See The World Bank. Options for strengthening land administration Federal Democratic Republic of Ethiopia. *The World Bank Document, Report No: 61631-ET*, nd. P 17; Population Census Commission. Report of Ethiopia`s 2007 Population and Housing Censes. Addis Ababa. Federal Democratic Republic of Ethiopia, 2008. P 7).

[4] In the pre-1974 monarchical-feudalist regime rural land rights were used as a means to get political loyalty, legitimizing power and suppression of any resistance by denying the land rights. (See Sigfried Pausewang. *Peasants, land and society: a social history of land reform in Ethiopia*. München/Köln/London. Weltforum Verlag, 1983; Dessalegn Rahmato. *Agrarian reform in Ethiopia*. Uppsala. Scandinavian Institute of African Studies, 1984; Donald Crummey. *Land and society in the Christian Kingdom of Ethiopia: from the thirteenth to the twentieth century*. Urbana and Chicago. University of Illinois Press, 2000). In the Derg regime (1974-1991) for the sake of effective state control the access to rural land rights were made contingent upon memebership to peasant assoaciations and by denying the economic freedom as the peasants were deprived of the fruits of their labour. (See Tibebu (n 1) p 5; Bahru Zewde. *A history of modern Ethiopia*, 1855–1974. Addis Ababa. Addis Ababa University Press, 1991. Pp 13–14). Whilst, in the post-1991 regime it has claimed that the ruling party has been using granting access to land to the needy to get a vote and to be elected and threatening to deprive land rights to who support and allied with oppositions. (See Dessalegn Rahmato. *Searching for tenure security? The land system and new policy initiatives in Ethiopia.* Addis Ababa. Forum for Social Studies, 2004. P 16).

[5] Klaus Deininger. *Land policies for growth and poverty reduction*. Washington DC. The World Bank, 2003. About its contribution to realization human rights see for instance Alejandro Morlachetti, The rights to social protection and

In all three politico-economic regimes the country has gone through over the course of the last century, the issue of rural land tenure security has been at the centre of political movements. For instance, the monarchical-feudalist regime, when the term "to be landless is to be sub-human"[6] emerged, was faced and brought to an end by the peasants' rebellion in different parts of the country and the student movement under the slogan of "Land to the Tiller" in 1974.[7] In the same fashion, the *Derg* socialist regime, that was brought to power on the land rights question among other things, and which considered access and security of land tenure as a defining element of "a person's status, honour and freedom" and its predecessor's land tenure as a means of exploitation of the mass by the few,[8] was forcibly removed from power due to its failure to secure rural land rights in 1991.[9]

In the post-1991 politico-economic regime of Ethiopia, the question of rural land tenure security has continued. Centring on peasants' individualistic land holding system and in piecemeal manner, social science and economic research findings mainly reveals that the post-1991 land tenure system of Ethiopia is obstructive and a cause of peasant land tenure insecurity.[10] Pastoralists' communal

adequate food. Rome. *FAO Legal Paper No.97*, 2016. P 13; Olivier De Schutter. *The transformative potential of the right to food.* Report of the UN Special Rapporteur on the right to food, A/HRC/25/57, 2014. P 3; UN. International covenant on civil and political rights. Adopted 16 Dec. 1966, G.A. res 2200(XXI), UN GAOR, 21st Sess., Supp. No. 16, UN doc A/6316, (1966), 993 U.N.T.S. 3. Article 1(2); UN. International covenant on economic, social and cultural rights. Adopted 16 Dec. 1966, 993, U.N.T.S. 3, Annex to G.A. res 2200(XXI). Article 6.

[6] Harrison C. Dunning. Land reform in Ethiopia: a case study in non-development. (1971) 18 *UCLA L. Rev.* 271–307. P 271.

[7] Tareke (n 1); Saheed A. Adejumobi. *The history of Ethiopia*. London. Greenwood Press, 2007. Pp 117-120.

[8] See the preamble of Ethiopia. A proclamation to provide for the public ownership of rural lands proclamation No. 31/1975. *Neg. Gaz.* Year 34 No. 26. 1975.

[9] Rahmato Agrarian Change (n 1) p 49.

[10] "Peasant" means a member of a rural community who has been given a rural landholding right and the livelihood of his family and himself is based on the income from the land. (See Federal Democratic Republic of Ethiopia. Rural land administration and land use proclamation No. 456/2005. *Fed. Neg. Gaz.* Year 11 No. 44. 2005. Article 2(7)). For the claim, centring on the nature of land ownership adopted, that the post-1991 land tenure system is the source of land tenure insecurity of peasants see for instance Dessalegn Rahmato. *Land to investors: Large-scale land transfers in Ethiopia* (No. 1). Addis Ababa. Forum for Social Studies, 2011. P 6; Stefan Dercon and Daniel Ayalew. Land rights, power and trees in rural Ethiopia. CSAE WPS/2007-07, 2007. P 7; D.K. Grover and Anteneh Temesgen. Enhancing land-use-efficiency through appropriate land policies in Ethiopia. (The International Association of Agricultural Economists Conference, Gold Coast), 2006. P 7; Tesfaye Teklu. Land scarcity, tenure change and public policy in the African case of Ethiopia: evidence on efficacy and unmet demands for land rights. (The third international conference on development studies in Ethiopia, Addis Ababa), 2005. P 7; Berhanu Abegaz. Escaping Ethiopia's poverty trap: the case for a second agrarian reform. (2004) 42 *The Journal of Modern African Studies*. 313–342; Ethiopian Economic Association/Ethiopian Economic Policy Research Institute. Land tenure and agricultural development in Ethiopia: research report. Addis Ababa. *EEA/EEPRI*, 2002. There is some legal research that has bypassed and only in a piecemeal manner touched on the issue of land tenure security. (See for instance, Muradu Abdo Srur. *State policy and law in relation to land alienation in Ethiopia*. (Doctoral dissertation University of Warwick, UK), 2014; Daniel W. Ambaye. *Land rights and expropriation in Ethiopia*. Switzerland. Springer, 2015; Solomon

land rights have also been neglected, both in the academic and policy discourse, as a manifestation of their social, economic and political marginalization.[11] Nevertheless, the contribution of the legal regime defining land tenure and administration towards the perpetuation of the land tenure insecurity has not been holistically and critically examined. Rather without considering the nature of the constitutional protection afforded to the peasants' and pastoralists' land rights in-depth, critics have mainly attributed the problem to the nature of the land ownership adopted.[12]

Taking and positioning land tenure security away from the land ownership discourse, in this thesis I argue that as far as adequate constitutional and subordinate legislative measures are taken, legal land tenure security can be established in any form of land ownership. The appraisal of legal protections afforded to establish land tenure security can be done by taking the objective elements of land tenure security, which I call "legal constructs." These are breadth, duration, assurance, enforceability and registration and certification of land rights.[13] However, these constructs are not

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Fikre Lemma. *The challenges of land law reform: smallholder agricultural productivity and poverty in Ethiopia*. (Doctoral dissertation University of Warwick, UK), 2015; Belachew Mekuria. 'Human rights approach to land rights in Ethiopia' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 49–94; Gudeta Seifu. 'Rural land tenure security in the Oromia National Regional State' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 109–146; Brightman Gebreichael. *The role of Ethiopian rural land policy and laws in promoting the land tenure security of peasants: a holistic comparative legal analysis*. (Master's Thesis, Bahir Dar University), 2013.

[11] "Pastoralist" means a member of a rural community that raises cattle by holding rangeland and moving from one place to the other, and the livelihood of himself and his family is based mainly on the produce from cattle. (See Proc. No. 456/2005 (n 10) Article 2(8)). In the entire modern history of Ethiopia their land rights are marginalized except during the *Derg* regime, where their customary land rights were legal recognized. In post-1991 land tenure their land holding is regarded as 'unutilized' or 'unoccupied' and subjected to transfer to large-scale commercial farming and conversion to private holdings. (See Proc. No. 456/2005 (n 10) Article 5(3); National Planning Commission. Growth and transformation plan II (2015/16-2019/20). Addis Ababa. *Federal Democratic Republic of Ethiopia*, 2016. P 26; Jon Abbink. 'Land to the foreigners': economic, legal, and socio-cultural aspects of new land acquisition schemes in Ethiopia. (2011) 29 *Journal of Contemporary African Studies*. 513–535. P 517; Mohammud Abdulahi. The legal status of the communal land holding system in Ethiopia: the case of pastoral communities. (2007) 14 *International Journal on Minority and Group Rights*. 85–125; Philip Carl Salzman. Afterword: reflections on the pastoral land crisis. (1994) 34/35 *Nomadic Peoples*. 159–163. P 161; Bekele Hundie and Martina Padmanabhan. The transformation of the Afar commons in Ethiopia: State coercion, diversification and property rights change among pastoralist*s* (No. 87). *International Food Policy Research Institute (IFPRI),* 2008. P 5; Sara Pavanello. Pastoralists' vulnerability in the Horn of Africa: Exploring political marginalisation, donors' policies and cross-border issues–Literature review. London. *Humanitarian Policy Group (HPG) Overseas Development Institute,* 2009. P 9).

[12] Wibke Crewett and Bendikt Korf. Ethiopia: Reforming land tenure. (2008) 35(116) *Review of African Political Economy*. 203–220. Although revisionists demands enactment of more law to provide additional protection without changing the nature of ownership, they still fail to appreciate what constitutional protection is afforded to the peasants' and pastorlists' land rights and to what extent the legislature is autonomous in defining the land tenure system.

[13] In general, in order to ensure the objective element of security of land tenure, first the legal regime that regulates the land tenure system has to guarantee the land holder with well-defined and clearly identifiable, wider, basic breadth of land rights that the holder can enjoy as they wish. Second, it has to provide landholders on a continuous basis with a long enough duration to the land rights to have an incentive to improve or invest on land. Finally, the legal regime

well-defined enough and articulated in the existing literature to translate into legal protections. As I argue in this thesis, this is due to variations in understanding the concept of land tenure security, adoption of a piecemeal approach to studying the legal constructs, consideration of privatization of land as the ultimate means to secure land tenure and treatment of security of land tenure as one right in the property right regime.

The construct of breadth of land rights has been understood in the Hohfeldian bundle of rights metaphor and in terms of the quality and quantity of the rights in land in the existing theoretical framework.[14] Apart from disregarding the other conceptions of property which have their own unique contribution in delimiting the breadth of land rights,[15] I couldn't find any objective standard that defines the adequacy of the breadth of land rights, except that the inclusion of sale of land is not a necessary requirement to establish the legal construct at hand.[16] Similarly, about the legal

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should create certainty of land rights to landholders to assure that land rights are not arbitrarily overridden by others, including the state and investors. Also, it has to establish an effective and efficient enforcement means in cases where arbitrary eviction occurs. Moreover, the element of certainty of land rights will be realised when the legal regime imply that the loss of land rights should occur in exceptional situations (under clearly stipulated grounds) and should be a result of due process, and a decision of an independent body, in which case the holder, is compensated for the loss of land rights, and the investments on the land. These elements are mentioned in, Shem E. Migot-Adholla, George Benneh, Frank Place, Steven Atsu, and John W. Bruce. 'Land, security of tenure, and productivity in Ghana' in John Bruce and Shem E. Migot-Adholla (eds.). *Searching for Land Tenure Security in Africa*. Washington DC. The World Bank, 1994. 97–118. P 108; UN-HABITAT and Global Land Tools Network. Secured land rights for all. Nairobi. *UN-Habitat,* 2008. P 7; Rahmato Searching (n 4); Deininger (n 5) p 36.

However, the theoretical contribution of registration and certification of land rights to enhance land tenure security is examined in a separately from the above legal constructs. (see Gershon Feder and Akihiko Nishio. The benefits of land registration and titling: economic and social Perspectives. (1999) 15 *Land Use Policy*. 25–43. P 26; UN-HABITAT. Handbook on best practices, security of tenure and access to land. Nairobi. *UN-Habitat,* 2003. Pp 25-26; Helle Munk Ravnborg, Bernard Bashaasha, Rasmus Hundsbæk Pedersen, and Rachel Spichiger. Land tenure security and development in Uganda (No. 2013: 03). *DIIS Working Paper*, 2013. P 1; Camilla Toulmin. Securing land and property rights in Africa: improving the investment climate global competitiveness. *Report, 2005-06 World Economic Forum, Switzerland*, nd; Alexandrino Njuki. Cadastral systems and their impact on land administration in Kenya. *(International Conference on Spatial Information for Sustainable Development, Nairobi)*, 2001. P 6; The World Bank. Land registration and land titling projects in ECA countries. *Agriculture Policy Note #2*, 1996. P 2).

[14] Wesley Newcomb Hohfeld. Some fundamental legal conceptions as applied in judicial reasoning. (1913) 23 *Yale Lj.* 16–59; Rahmato Searching (n 4) pp 34-35; Deininger (n 5) p 36; Frank Place, Michael Roth, and Peter Hazell. 'Land tenure security and agricultural performance in Africa: Overview of research methodology' in John Bruce and Shem E. Migot-Adholla (eds.). *Searching for land tenure security in Africa*. Washington DC. The World Bank,1994. 15–40. P 20.

[15] The other conception of property includes Blackstonian exclusionary approach (see William Blackstone. *Commentaries on the laws of England*. (WM. Hardcastle Browne, A.M., ed) West Publishing Co. St. Paul, 1897); Arnoldian web of interest metaphor (see Craig Anthony (Tony) Arnold. The reconstitution of property: Property as a web of interests. (2002) 26 *Harv. Envtl. L. Rev.* 281–364); and Bakerian authority of decision-making approach (see Edwin Baker. Property and its relation to constitutionally protected liberty. (1986) 134 *U. Pal. L. Rev.* 741–816).

[16] Deininger (n 5) p 76; Food and Agriculture Organization. Land tenure and rural development. Rome. *FAO Land Tenure Studies 3,* 2002. P 19.

construct of duration of land rights, be it general or for specific rights in land, except for requiring it to be adequate to harvest an investment,[17] specific factors to be considered in delineating it are not well provided for.

In relation to the assurance of land rights in existing literature, what is provided is that the overriding interest should be limited to land expropriation for public use upon payment of adequate compensation and according to due process of law.[18] Although it has not shown on which theoretical foundation the state authority to expropriate land should be based to ensure land tenure security,[19] empowering the central and regional authority and the local government with the supervision and oversight of the higher authority or a public hearing is provided to ensure timely acquisition of land and to limit arbitrary deprivation.[20] Moreover, it doesn't provide on what foundation the public use clause is to be defined, except for requiring it to be limited and clearly defined in an illustrative manner in legislation.[21] Viewing it from the economic value of land mainly requires the compensation to be adequate to serve the purpose of an economically wise decision on the side of the government and achieving social justice to the affected parties.[22] The procedural due process, on the other hand, is defined in terms of participation of the affected parties in the whole process and stages of expropriation and judicial review.[23]

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[17] Deininger (n 5) p 8; Place *et al* (n 14) pp 19–21.

[18] Migot-Adholla *et al* (n 13) p 108; UN-HABITAT (n 13) p 7; Rahmato Searching (n 4); Deininger (n 5) p 36; Place *et al* (n 14) pp 20–21.

[19] In the existing scholarship three theoretical foundations, such as inherent power theory, reserved right theory and consent theory are formulated to justify and provide the genesis of state power of expropriation of property rights. (See Matthew P. Harrington. "Public Use" and the Original Understanding of the So-Called "Taking" Clause. (2001) 53 *Hastings LJ*. 1245–1301; Ambaye (n 10)).

[20] Deininger (n 5) p 8; Food and Agriculture Organization. Compulsory acquisition of land and compensation. Rome. *FAO Land Tenure Studies 10,* 2008. P 13.

[21] Daniel B. Kelly. The public use requirement in eminent domain law: a rationale based on secret purchases and private influence. (2006) 92 *Cornell L. Rev*. 1–66; Deininger (n 5) p 173; FAO Compulsory (n 20). Generally, three alternative foundations are provided to define the notion of public use clause in political justification. These are weak rationality model, deontological justification and cost-benefit rationality model of political justification. (See Micah Elazar. Public Use and the Justification of Takings. (2004) 7 *U. Pa. J. Const. L.* 249–278).

[22] Paul Niemann and Perry Shapiro. 'Compensation for taking when both equity and efficiency matter' in Bruce L. Benson (ed.). *Property rights: eminent domain and regulatory takings re-examined*. New York. Palgrave Macmillan, 2010. 55–76. P 57; Rachel D. Godsil and David Simunovich. 'Just compensation in an ownership society' in Robin Paul Malloy(ed.). *Private property, community development, and eminent domain*. Aldershot. Ashgate Publishing, 2008. 133–148. P 137.

[23] D. Zachary Hudson. Eminent domain due process. (2010) *The Yale Law Journal*. 1280–1327; FAO Compulsory (n 20) pp 5, 20–21 and 45–47; Linlin Li. Adoption of the international model of a well-governed land expropriation system in China —problems and the way forward. (2015 World Bank Conference on Land and Poverty, Washington DC), 2015.

Nevertheless, in the existing conceptual framework of objective land tenure security, the demand for observance of land tenure security in the defining and exercising of the state's power of land use regulation and taxation is not identified as an aspect of the construct of assurance of land rights. It in effect may provide another less burdensome way for the state to deprive land rights of an individual and a community.[24] Moreover, the uncertainty of land rights created as a result of normative and institutional pluralism is also not well regarded as a component of the assurance of land rights.

On the other hand, in the prevailing conceptual framework, the element of enforceability of land rights is defined in terms of affordability of enforcement and independence of the enforcing organ – the judiciary.[25] It demands that the cost of enforcement should not be inhibiting and the enforcing organ is required to be independent and neutral. Nonetheless, in the prevailing framework the state's legislative encroachment to make the cost of enforcement unaffordable, undermine the legal empowerment and legislatively restrict actionable grounds are not anticipated.

The existing conceptual framework has viewed the establishment of the legal construct of registration and certification of land rights from the perspective of the participatory and impartial nature of the process of land registration, inclusiveness and affordability.[26] However, its legal effect is not treated as an aspect implicating land tenure security.

Regulating all the above constructs in subordinate legislation may result in their abridgement in the making of laws, as Edwin Baker claims.[27] This, then, forces one to establish certain aspect of these legal constructs in the constitutional framework. The defining base about which aspect of land tenure security is required by the constitutional norm is determined by what the constitution makers intended the property clause to serve.[28] Apart from this, the nature of the resource and the extent of dependency of the community on a particular resource should be taken into account in determination of what aspect of the legal constructs of land tenure security were incorporated in the constitution. Moreover, given that land policy is required to be flexible in order to go hand in

[24] Abraham Bell and Gideon Parchomovsky. The uselessness of public use. (2006) 106 *Colum. L. Rev.* 1412–1449.
[25] Deininger (n 5) p 36; Place *et al* (n 14) p 21.
[26] Klaus Deininger and Gershon Feder. Land registration, governance, and development: Evidence and implications for policy. (2009) 24 *The World Bank Research Observer*. 233–266.
[27] Baker (n 15).
[28] Ibid.

hand with socio-economic and policy changes,[29] the extent of detail in the Constitution and its openness to be made compatible through constitutional interpretation to address the problems caused, through the stringency of requirements for constitutional amendment, the approach to constitutional interpretation adopted in constitutional review also has its own implications for legal security of land tenure. In federations, the role of the constitutional rule in promoting land tenure security also comes onto the scene when it has avoided the possibility of power competition and conflict between the central and state governments. Particularly, the division of powers and functions related to land matters among the national government and the federated states must be made clear in constitutional rules. Otherwise, it may expose the landholders to double standards, subjecting their land rights to mutually contradicting land tenure and administration.

Consequently, upon establishing an ideal legal constructs of land tenure security in a holistic and integrative approach,[30] the aspects to be regulated in the constitutional norms and the approach of constitutional interpretation to be adopted, the thesis is further aimed at analysing the post-1991 statutory land tenure system of Ethiopia in light of the legal land tenure security of peasants and pastoralists. Specifically, as doctrinal research I critically assesses and synthesise where the federal and state legislative protections afforded to peasants' and pastoralists' land rights fit into the ideal legal constructs of land tenure security.[31] I also appraise, this in an historical-comparative perspective, in terms of improvements made and measures taken from the previous politico-economic regimes the country went through. Additionally, from a constitutional angle I look into the nature of constitutional protections afforded to peasants' and pastoralists' land rights in the post-1991 regime, whether they are properly and adequately translated in subordinate legislation and ensured in constitutional interpretation. Finally, I examine how the constitutional norm has defined the division of powers and functions between the national government and federated states so as to limit uncertainty of land rights created as a result of the proliferation of mutually

[29] Deininger (n 5) p 51.
[30] The holistic approach refers to assessing the land tenure security in terms of the all the legal constructs together at once. The integrative approach in my context refers viewing the notion of property in all different approaches employed to define it.
[31] Dawn Watkins and Mandy Burton. 'Introduction' in Dawn Watkins and Mandy Burton (eds.). *Research methods in law*. Oxon and New York. Routledge, 2013. 1–6. P 2; Terry Hutchinson. 'Doctrinal research: researching the jury' in Dawn Watkins and Mandy Burton (eds.). *Research methods in law*. Oxon and New York. Routledge, 2013. 7–33. Pp 9-10.

contradictory legal stipulations between the federal and state subordinate legislation in defining the land rights of peasants and pastoralists.

To do so, apart from the introduction and conclusion the thesis has eight Chapters. These Chapters fall under four parts: an examination of the conceptual underpinning of legal land tenure security (Chapter 1); an historical contextualization of rural land tenure security problems in the pre-1991 Ethiopia (Chapter 2); the Constitutional protection afforded to land tenure security of peasants and pastoralists in post-1991 Ethiopia (Chapter 3), and translation of Constitutional protection into and implications of rural land laws on land tenure security of peasants and pastoralists in post-1991 Ethiopia (Chapter 4 to 8).

In Chapter 1 I discuss the conceptual underpinning of land tenure security from a legal perspective. I analyse the essence of land tenure security with its roles in an agrarian developing country, like Ethiopia; its elements /legal constructs in the literature from a legal perspective; and the defects in the prevailing theories of land tenure security, taking into account both individual and communal landholding systems. The Chapter forms a foundation on the basis of which to assess the status of land tenure security of peasants and pastoralists: in the historical context of Ethiopia (Chapter 2), in terms of the constitutional protection afforded post-1991 (Chapter 3), and translation of the constitutional protections into and the fitness of the post-1991 rural land laws of the country to the theories of security of land tenure (4 to 9).

In Chapter 2 I examine the historical context of peasants' and pastoralists' security of land tenure in the different political-economic regimes the country had passed through pre-1991. The Chapter is basically an analysis of the legal measures taken in defining the land rights of peasants and pastoralists from the perspective of the legal constructs of land tenure security. This is done, to explore how deeply the issue of land tenure security is rooted in the country's modern history; and to provide the historical context against which it can be assessed how to improve it in post-1991 (Chapter 3 to 8).

Chapter 3 establishes the post-1991 constitutional protection afforded to security of land tenure of peasants and pastoralists in response to the pre-1991 historical economic and social injustices and to restrain the state from repeating the same mistakes, among other things through enactment of subordinate legislation. It critically analyse the legal protections afforded in the FDRE Constitution

to the land rights of peasants and pastoralists in light of the Bakerian functions of a constitutional property clause and the extent to which it limits the possibility of the state using land rights as a means of political control. This is done to delineate the extent of the constitutional protections afforded to the peasants' and pastoralists' land rights, and to provide a constitutional foundation against which to assess the translation of the constitutional protections in the subordinate legislation defining the rural land tenure system of the country in the following Chapters (Chapter 4 to 8).

Chapters 4 to 8 in common consider the extent to which: the constitutional protection afforded to the land tenure security of peasants and pastoralists (Chapter 3) is translated to rural land laws; and where these laws fit into the theories of land tenure security that are established in Chapter 1. In each Chapter I consider one of the specific constructs of objective land tenure security.

Chapter 4 is devoted to an assessment of rural land laws of the country in relation to the nature of rights in land. I review the federal and state rural land laws in terms of how they regulate the right to free access to rural land for all people in need, the approach adopted in defining peasants' and pastoralists' rights in land and the duration thereof, and the manner and legal effect of registration and certification of land rights. Also, I review the approach to constitutional interpretation adopted in the delineation of peasants' and pastoralists' property rights.

Chapter 5 shows the restrictions on the land rights of peasants and pastoralists and their implications for their legal land tenure security. Specifically, against the legal land tenure security and the FDRE constitutional protections, I examine in the Chapter the legislative introduction of peasants' and pastoralists' duty to pay for land use, restrictions imposed on their legally guaranteed specific rights to transfer, and grounds of deprivation of their land rights for other reasons than land expropriation.

In Chapter 6 I analyse the statutory framework for the compulsory acquisition of the land rights of peasants and pastoralists in the post-1991 land tenure system of Ethiopia. I examine critically the substantive and procedural protections afforded peasants' and pastoralists' land rights so as not to expose them to arbitrary eviction. Since the notion of land expropriation is surrounded with contradicting interests – public need of land and securing of land tenure of peasants and pastoralists – adequate legislative measures are required to strike the balance. The establishment of the balance

depends on how: we approach to understand the notion itself, the authority to expropriate land is assigned to the state organ, the justification for expropriation – public purpose clause defined, extent and modes of compensation established, and the procedural safeguards provided.

Chapter 7 is an exploration of how the legal construct of enforceability of land rights of peasants and pastoralists is governed in the post-1991 land tenure system of Ethiopia. I assess the nature of the constitutional recognition of the right to access to judicial remedy, affordability of enforcement, independence of the judiciary, and the robustness of the right.

The last substantive Chapter, Chapter 8, provides an account of the legal and institutional pluralism created due to the federal form of government established post-1991 and the unclear determination of the status of the customary land tenure system and its implications for the land tenure security of peasants and pastoralists. I analyse the constitutional division of power between the federal government and federated states in general and on land matters in particular, the fundamental variations between the federal and state rural land laws and the legislative interference of each level of government on the respective powers of the other, the judicial relation between the federal and state rural land laws, and the legal status and role of the customary land tenure system.

The thesis concludes with Chapter 9, in summarise my conclusions and findings and make some tentative recommendations toward strengthening the land tenure security of peasants and pastoralists in Ethiopia.

Chapter 1

The Concept of Land Tenure Security

In an agrarian economy and infant democracy like Ethiopia, rural land tenure security plays a pivotal and central role in the advancement of sustainable development, democracy and good governance,[1] and human rights realization. From a legalistic point of view, establishment of land tenure security, on the other hand, is the outcome of the cumulative effect of the legal constructs of the nature, the duration, the assurance, the enforceability, and the registration and certification of land rights.[2] The extent to and manner in which these elements, or legal constructs of objective land tenure security are defined and regulated in statutory land tenure system indicates the status of security of land tenure of landholders.

The purpose of this Chapter is to formulate the conceptual framework of legal/objective land tenure security against which the legal protection of a given nation is appraised to determine and understand its implications for security of land tenure. Specifically, I review here critically how the objective elements of land tenure security are defined in the existing academic discourse, the gaps in that discourse and the theoretical factors that have affected the formulation of well-established analytical frameworks of objective land tenure security for different landholding systems. Moreover, the Chapter also deals with the extent to which the legal constructs of land tenure security should be regulated under constitutional rules.

I argue that the objective elements of land tenure security are not defined comprehensively enough in the literature to be translatable to legal protection. The conceptual dilemma confronting the concept of land tenure security is one of the factors for failure to establish a comprehensive conceptual framework so far. Consideration of the right to security of property as one component

[1] Klaus Deininger. *Land policies for growth and poverty reduction*. Washington DC. The World Bank, 2003. Pp xx-xxi.

[2] Frank Place, Michael Roth, and Peter Hazell. 'Land tenure security and agricultural performance in Africa: Overview of research methodology' in John Bruce and Shem E. Migot-Adholla (eds.). *Searching for land tenure security in Africa*. Washington DC. The World Bank,1994. 15–40. P 20; Deininger (n 1) p 36; Dessalegn Rahmato. *Searching for tenure security? The land system and new policy initiatives in Ethiopia.* Addis Ababa. Forum for Social Studies, 2004. P 35; UN-HABITAT and Global Land Tools Network. Secured land rights for all. Nairobi. *UN-Habitat,* 2008. P 7.

of the bundle of rights in the ownership[3] and the piecemeal approach to study the objective elements of land tenure security have also undermined the establishment of the framework. Moreover, the tendency to consider the private land ownership form as the best way to secure land tenure and non-appreciation of the nature of communal landholdings and collective land rights undermine the comprehensive and clear development of the conceptual framework of legal land tenure security that works for different nature of landholding and utilization systems.[4] In addition, what role constitutional law plays, without affecting the flexibility of land policy,[5] in providing constitutional protection to land rights and guiding the enactment of subordinate legislation that defines the legal land tenure security is not well-articulated.

In this Chapter, I show that prevailing definitions of land tenure security are subject to criticisms in two ways. One, certain definitions focus on subjective aspects – the landholder's perception of and confidence in the security of their land rights. They fail to provide and set out the objective elements of land tenure security necessary to secure land rights. Two, certain definitions uncritically proceed from the presupposition of individual landholding systems and individualized land rights. These definitions do not consider the concept of land tenure security from the perspective of communal landholdings and collective land rights.

Moreover, I claim that the tendency to view the idea of land tenure security within the ambit of land ownership and as one bundle of rights also affects the attempt to develop its conceptual framework. In this Chapter my purpose is to delineate the view that it is not possible to determine the implications of the land tenure system over land tenure security by simply considering the form of land ownership adopted. The experience of Ethiopia reveals that policy and academic discourse has focused on identification of the nature of land ownership that secures the land rights. In

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[3] Anthony M. Honore. 1961. Ownership. In A.G. Guest (ed.). *Oxford essays in jurisprudence* 107 as cited in Stephen R. Munzer. *A theory of property*. Cambridge. Cambridge University Press, 1990. P 22.

[4] See for instance Deininger (n 1) p 55 and p 186; Harold Demsetz. Toward a theory of property rights. (1967) 57 *American Economic Review*. 347–359; Christian Lund. *African land tenure: Questioning basic assumptions.* International Institute for Environment and Development. 2000. Pp 15–16; Janine M Ubink. 'Legalising land rights in Africa, Asia, and Latin America: An introduction' in André J Hoekema, Janine M Ubink, and Willem J Assies (eds.). *Legalising Land Rights Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*. Leiden. Leiden University Press, 2009. 7–32. P 14; Samuel Mwakubo. Land tenure and natural resource management in semiarid areas, Kenya. (the Beijer research workshop on property rights, Durban), 2002. P 4; Wibke Crewett and Bendikt Korf. Ethiopia: Reforming land tenure. (2008) 35(116) *Review of African Political Economy*. 203–220. Pp 206–207.

[5] Deininger (n 1) p 51.

contrast, I argue here that the security of land tenure should be examined out of the context of land ownership debate; and I view it as a broader concept than the notion of ownership. This is because the adoption of a particular land ownership form neither secures land tenure nor perpetuates land tenure insecurity. Rather, the detailed and holistic analysis of the legal protections afforded in terms of the nature of rights in land, the duration, the assurance, the enforceability and the registration and certification of land rights implies the status of the security of land tenure of the holders. Thus, in this Chapter I attempt to provide explanations for and additions to the objective elements of land tenure security. This is done with a view to providing a clear conceptual foundation against which the Ethiopian legislative framework is evaluated in light of peasants' and pastoralists' land tenure security in the subsequent Chapters of the thesis.

Further, I explain in this Chapter how it is pertinent that constitutional law has to incorporate and regulate the Bakerian five functions of property to secure land tenure security.[6] The five functions – use-value, welfare, personhood, protective and sovereign – are concerned with demarcating and limiting the manner and situation in which the state is authorized to interfere with the land rights of holders; ensuring freedom to the landholder in exercising the land rights; and guaranteeing to land right holders access to justice to enforce their land rights in a situation of unlawful interference. I argue that it is not only the intention of the constitution makers that has to be considered to determine the function the constitutional property clause is intended to serve,[7] but also the nature of the landholder and extent of dependency on the land rights should be accounted for in delineation of the constitutional protections. Furthermore, in countries that adopt a federal form of government, constitutional rules shall make a clear apportionment of legislative and administrative power in relation to land. Otherwise, the unnecessary additional details and/or specificity in the constitutional rules affect the flexibility required from the land policy and law, I show in Chapter 4 with reference to the Ethiopian situation. The failure of constitutional law to make a clear division of land related legislative and administrative powers between the central and federating states threatens land tenure security by subjecting the landholders to a legal and institutional pluralism, as I argue in Chapter 8.

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[6] Edwin Baker. Property and its relation to constitutionally protected liberty. (1986) 134 *U. Pal. L. Rev.* 741–816. Pp 755–774. The sixth function, allocative function, has no role in shaping the constitutional norms towards securing land tenure.

[7] Ibid.

I start by examining the definitional dilemma and significance of land tenure security in the first section, followed in the next section by an explanation of the nexus and interplay of the form of land ownership and land tenure security. In the third section I explore and develop a comprehensive conceptual framework of land tenure security. In the last section I consider those land tenure security issues to be governed by constitutional law. A conclusion follows.

A. Understanding the Importance of Land Tenure Security

Before I look into and explore the objective elements of land tenure security, it is pertinent for this Chapter to highlight on its meaning and significance in the literature and the defects thereof.

i. Definitions and Their Drawbacks

Mostly, with regard to the conceptual understandings of the concept of land tenure security one finds that literature is determined by the context in which the concept is employed.[8] There has been little in the way of development of a general definition of the concept. Instead it is defined in the context of either rural land or urban land or resources in general. However, I believe that since the general idea behind the concept of land tenure security is provision of adequate rights and protections to the landholder and to develop a sense of security and confidence in the landholder's perception about his/her/their land rights, its essence should not be defined in an urban-rural land specific context. Otherwise, it leads to a discriminatory way of understanding that favours those who can influence the policy makers like investors and urban-landholders. As the theme of my thesis is rural land and for the sake of showing the contradictions in defining the notion of land tenure security, I start by analysing some of the definitions provided for in the context of rural land.

Also, within the rural land context there are variations among individuals and institutions in defining the concept and what it deals with. To look at them in a systematic way, these understandings can be grouped into three perspectives. These are the subjectivist, the objectivist, and the dualist perspectives. The subjectivist conception regards land tenure security in light of

[8] Gudeta Seifu. 'Rural land tenure security in the Oromia National Regional State' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 109–146. P 113.

the landholders' perception or confidence about the security of their land rights. In the subjectivist approach, Larson, Barry and Dahal, for example, have defined tenure security as "the degree to which an individual or group believes its relationship to land or other resources is safer, rather than in jeopardy."[9] They go so far as to assume that a configuration of rights doesn't constitute security.[10] They regard tenure security in general from both the individual and group perspective. However, their argument to disregard the configuration of rights in tenure security is not tenable. As I discuss in Section C below, the detailed configuration of rights is a precondition for individuals' or groups' development of the perception of their relationship to land as safe.

Likewise, Gudeta, although he later claims that it has both subjective and objective elements, defines the concept of land tenure security as "the degree of reasonable confidence not to be arbitrarily deprived of the land rights enjoyed or of the economic benefits deriving from them."[11] Apart from in this sense being a subjectivist conception, Gudeta's definition of land tenure security revolves around the perception that develops from one element of objective/legal land tenure security – assurance of land rights. He doesn't account for the other legal elements of land tenure security that are discussed in Section C below. The subjectivists' definitions of the concept of land tenure security do not consider its objective elements. In this sense it is only half an understanding of the full essence of the concept. The prevalence of land tenure security depends on both aspects – the confidence of landholders about the security of their land rights and the legal constructs/objective elements which are well defined and discussed in Section C.

The objectivists, on the other hand, understand the concept of land tenure security from the objective perspective. They incorporate the bundle, duration, assurance and enforceability of land rights in their definition without considering the subjective aspect. Nonetheless, they still differ from each other in the scope of incorporating these elements and clarity in their definitions. On this basis, the United Nations Food and Agriculture Organization (FAO) defines it as the right of all landholders either individually or in a group to effectual safeguards by states against arbitrary

[9] Anne M. Larson, Deborah Barry, and Ganga Ram Dahal. 'Tenure change in the global south' in Anne M. Larson, Deborah Barry, and Ganga Ram Dahal (eds.). *Forests for People Community Rights and Forest Tenure Reform*. London. Earthscan, 2010. 3–18. P 13.
[10] Ibid.
[11] Seifu (n 8) p 113.

eviction.[12] This definition emphasizes only one legal construct – the certainty of land rights - which by itself is the outcome of the assurance of exerting land rights and enforceability of land rights in specific challenges.[13] Moreover, it describes land tenure security from the perspective of both individual and communal landholding systems. Nonetheless, it has not incorporated the other objective constructs of land tenure security such as the nature of rights in land, its duration and the like. (See Section C below for detail).

Migot Adholla *et al* (also objectivists) on their part understand land tenure security as "the ability of a farmer to cultivate a piece of land on a continuous basis, free from imposition, dispute or appropriation from outside sources, as well as the ability to claim returns from input or land improvements while the farmer operates the land and when it is transferred to another holder."[14] Although their definition considers individual farmer land rights only and not communal land rights like in the case of pastoralists, it is broader in scope in incorporating the legal constructs of land tenure security compared with the FAO's. It refers to the duration, freedom in exercising, and assurance of land rights. However, it doesn't incorporate the other legal constructs like enforceability of land rights. Moreover, they also refer to the Subjective element indicating that land tenure security involves the perception of the farmer towards their land rights.[15] Generally, in defining land tenure security, the objectivist perspective doesn't give a proper place or position to its subjective element – the perception of landholders about the security of their land rights. Again, this understanding doesn't give a full picture of the concept.

The dualist perspective understands the concept of land tenure security from both the subjectivist and objectivist perspectives. It defines land tenure security by incorporating both the subjective and objective elements. In this regard, Place, Roth and Hazell's definition is worth mentioning. According to them, land tenure security should be understood as:

> "the perceived right of the possessor of a land parcel to manage and use the parcel, dispose of its produce, and engage in transactions, including temporary or permanent transfers,

[12] Food and Agriculture Organization. Land tenure and rural development. Rome. *FAO Land Tenure Studies 3,* 2002. P 18; Alain Durand-Lasserve and Harris Selod. The formalization of urban land tenure in developing countries. (The World Bank urban research symposium, Washington), 2007. P 6.
[13] Ubink (n 4) p 13.
[14] Shem E. Migot-Adholla, George Benneh, Frank Place, Steven Atsu, and John W. Bruce. 'Land, security of tenure, and productivity in Ghana' in John Bruce and Shem E. Migot-Adholla (eds.). *Searching for Land Tenure Security in Africa*. Washington DC. The World Bank, 1994. 97–118. P 108.
[15] Ibid.

> without hindrance or interference from any person or corporate entity, on a continuous basis."[16]

This definition views the idea of land tenure security from the two perspectives in an alluded manner. It considers the concept from the subjective perspective while it regards the land tenure security deals with the landholder's perception of his/her rights to a piece of land. Moreover, it implies that this perception is the result of the landholder's right to manage and use the parcel, engage in transactions, the protection against hindrance and interference with the land rights and the right to enjoy the land rights on a continuous basis. And these rights are the objective elements/legal constructs of land tenure security. Particularly, they are related to the nature of rights in land, assurance, and duration of land rights legal constructs of land tenure security.[17] Nevertheless, this conception is not still free from criticism and it doesn't provide the full-fledged legal constructs. First, it doesn't consider the enforceability of the land rights. Second, even the legal constructs incorporated in this approach are not well elaborate and their constituting elements are not clearly defined and/or stated.

Given all these difficulties and drawbacks in the definition, now there is a tendency to approach the concept of land tenure security as a continuum.[18] Here too, there is no unanimity among authors and they adopt two related, but different approaches to measuring the land tenure security. Authors in the first group are keen to argue that land tenure security can be measured by the extent of certainty. The other group, on the other hand, adds two additional criteria – duration and breadth of land rights.[19] Even though the latter approach is broader and claimed to give details with respect to the position of the landholders, the constituting elements of these each element are not well defined. Moreover, it is possible and necessary to develop the constituting elements of these objective constructs and even adding more, so as to determine whether the given land tenure system ensures the legal land tenure security of the landholders. In this regard, the required objective constructs for ensuring legal land security in any form of land tenure system are developed in Section C.

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[16] Place *et al* (n 2) p 20.
[17] Ibid.
[18] Ubink (n 3) p 13.
[19] Ibid.

Reserving the detailed discussion to Section C, the legislation has to be profound to guarantee the required protection in terms of nature, duration, assurance, enforceability, registration and certification of rights in land. This theoretical framework helps to evaluate the Ethiopian legislative framework in relation to the legal land tenure security of the peasants and pastoralist in the subsequent Chapters. Furthermore, the issue of land tenure security has to be seen in a holistic way. The "holistic approach" renders the land tenure security from both the subjectivist and the objectivist perspective based on the entire objective constructs that are discussed in Section C. These two perspectives (subjectivists and objectivists), can be researched disjointedly and the "objectivists" perspective is considered in this treatise. This is because the subjective perspective of land tenure security depends upon what the landholders perceive about their land rights after looking into the objective constructs provided for them. Otherwise, it would not be real land tenure security rather it becomes the imagined or perceived one.[20]

ii. Significance

The role the prevalence of land tenure security plays is multi-dimensional. Especially, in developing an agrarian economy in which the majority of the population is dependent on land, like Ethiopia,[21] its significance counts from ensuring sustainable development, improving democratization and good governance to the realization of human rights. Basically, the academic discourses show how land tenure security contributes to sustainable development and building of the democratic system and good governance.[22] Nonetheless, not much has as yet been said about its role towards the realization of human rights. Therefore, below I provide a brief note on its role in relation to these three domains.

To begin with, the prevalence of land tenure security has an important role in the enhancement of sustainable development and the process of democratization in agrarian developing countries like Ethiopia.[23] With respect to sustainable development – which constitutes economic growth, social

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[20] Id p 15.

[21] The rural population constitutes 83.9% of the total population whose livelihood one way or another depends on rural land. (See Population Census Commission. Report of Ethiopia`s 2007 Population and Housing Censes. Addis Ababa. Federal Democratic Republic of Ethiopia, 2008. P 7). Agriculture contributes for GDP 39% in the year 2014/15 as the government itself confirms. (See National Planning Commission. Growth and transformation plan II (2015/16-2019/20). Addis Ababa. *Federal Democratic Republic of Ethiopia*, 2016. P 24).

[22] Deininger (n 1) pp xx-xxi.

[23] Ibid.

development, and environmental protection - it has a tendency/potential to enhance economic growth/investment and productivity,[24] and contributes to the eradication of poverty[25] and environmental protection.[26] Land tenure security augments economic growth in two ways. First, it reduces the possibility of unnecessary resource disbursements to protect the land rights since it avoids the fear of loss of or encroachment on land rights.[27] Besley has called this the "security argument."[28] Second, it encourages investment on the land. This can be realized in two ways - "a collateral-based view," and "a gains-from-trade perspective."[29] Secured land tenure encourages investment. It does so first, by avoiding idling of the land. It raises the payoff from investments associated with the land through transfer to others in the case when the original peasants or pastoralists are not in a position to use it personally.[30] It does so, second, by triggering and boosting further investment through the means of access to credit, using land rights as collateral.[31]

About environmental protection, land tenure security also has the capability to diminish environmental degradation. Because of its tendency to provide the landholders with adequate duration and certainty of land rights, peasants or pastoralists prefer to employ environmentally sustainable cultivation or grazing and exploitation of land so that they can exploit it in the long run.[32] This is because the secured land tenure provides the landholder with the incentive to

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[24] The empirical studies imply two types of relation between land tenure security and investment. Some indicates that the prevalence of land tenure security enhances investments, which is true in Ethiopia. (See for instance Stein Holden and Hailu Yohannes. Land redistribution, tenure insecurity, and intensity of production: A study of farm households in southern Ethiopia. (2002) 78 *Land Economics.* 573–590; Daniel Ayalew Ali, Stefan Dercon, and Madhur Gautam. *Property rights in a very poor country: tenure insecurity and investment in Ethiopia*. Washington DC. The World Bank, 2007; Timothy Besley. Property rights and investment incentives: theory and evidence from Ghana. (1995) 103 *Journal of Political Economy*. 903–937). Other studies reveal little impact of security of land tenure on land-related investments. (See for instance Shem E. Migot-Adholla, Frank Place, and W. Oluoch-Kosura. 'Security of tenure and land productivity in Kenya' in John Bruce and Shem Migot-Adholla (eds.). *Searching for Land Tenure Security in Africa*. Washington DC. The World Bank, 1994. 119–140; Michael Roth, Jon Unruh, and Richard Barrows. 'Land registration, tenure security, credit use, and investment in the Shebelle region of Somalia' in John Bruce and Shem E. Migot-Adholla (eds.). *Searching for land tenure security in Africa*. Washington DC. The World Bank,1994. 199–230).

[25] See for instance Ruth Meinzen-Dick. Property rights for poverty reduction? *DESA Working Paper No. 91*, 2009.

[26] For the general role in this regard see Demsetz (n 4); and Ronald H. Coase. The problem of social cost. (1960) 3 *Journal of Law and Economics*. 1–44. But both of them argue that these benefits can be realized only in private ownership regime.

[27] Place *et al* (n 2) p 15.

[28] Besley (n 24) p 908.

[29] Id pp 908–909.

[30] Deininger (n 1) p 43.

[31] Ibid.

[32] Daniel Kwabena Twerefou, Eric Osei-Assibey, and Frank Agyire-Tettey. Land tenure security, investments and the environment in Ghana. (2011) 3 *Journal of Development and Agricultural Economics*. 261–273.

internalize the externalities – as noted by Harold Demsetz– for the establishment of property rights.[33]

In addition to these effects, land tenure security also plays a key role in poverty reduction. In developing countries like Ethiopia, for the majority of the people land is the main source of income for living and investing, accruing capital, and bequeathing it to the coming generations.[34] In these countries, land tenure security permits peasants and pastoralists to make fruitful use of their labour and be less dependent on wage labour, thereby reducing their susceptibility to disruptions.[35]

From the perspective of good governance and democratization process too, its prevalence has a positive implication. This is because it has a clear impact on empowering landholders, giving them the power to speak loudly and creating a foundation for democratic and participatory local government and whole-inclusive development.[36] This claim is further reinforced in a contextualized way by Amartya Sen's view of economic freedom: that is, land tenure security is an instrument to endeavour economic growth for pastoralists and peasants as a means of political freedom, which secures political empowerment and participation.[37]

From the perspective of realization of human rights, there are some theoretical developments that show the contribution of the prevalence of land tenure security with regard to the realization of some human rights. Much is not said on this point, but the human rights approach to land rights, in general, emphasizes access to land.[38] For some specific human rights, as I explore here below, the existence of legal land tenure security with the concomitant perception of the landholders is a prerequisite. That is why FAO Council requires that states shall "protect the assets that are important for people's livelihoods"- like land to peasants and pastoralists - even to conduct policy and legal reforms "consistent with their human rights obligations and in accordance with the rule

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[33] Demsetz (n 4).
[34]Ethiopian Economic Association/Ethiopian Economic Policy Research Institute. Land tenure and agricultural development in Ethiopia: research report. Addis Ababa. *EEA/EEPRI*, 2002. P 3.
[35] Deininger (n 1) pp xix–43.
[36] Id p xxi.
[37]Amartya Sen. *Development as freedom*. New York. Alfred A. Knopf, 1999.
[38] See for instance Jeremie Gilbert. Nomadic territories: A human rights approach to nomadic peoples' land Rights. (2007) 7 *Human Rights Law Review*. 681–716; Denise Gonzalez Nunez. Peasants' right to land: Addressing the existing implementation and normative gaps in international human rights law. (2014) 14 *Human Rights Law Review*. 589–609; Belachew Mekuria. 'Human rights approach to land rights in Ethiopia' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 49–94.

of law."[39] Besides, it also demands that States "take measures to promote and protect the security of land tenure of… the poor and disadvantaged segments of society."[40] These measures include legislative reforms among, other things.[41]

The specific human rights and how they are affected due to the absence of legal land tenure security are discussed here. This is done without undermining the indivisible, interdependent and interrelated nature of human rights,[42] and with the aim only of showing examples. I discuss in particular the rights to food, housing, culture, and work and subsistence in the context of Ethiopian agrarian society.

To begin with, one of the human rights that presuppose the prevalence of land tenure security for its realization is the right to food.[43] As it is provided in General Comment 12 of the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR), the right to food is "the right of every individual, alone or in community with others, to have physical and economic access at all times to sufficient, adequate and culturally acceptable food that is produced and consumed sustainably, preserving access to food for future generations."[44] In an agrarian society where the livelihood depends on land, like in the case of peasants and pastoralists in Ethiopia, individuals can secure access to food by earning income from their land rights through leasing or by producing their own food.[45] This situation presupposes that the landholders have secured land tenure in the form of protection against arbitrary dispossession, and freedom in the substantive and instrumental use of land rights on a continuous basis as some of the legal constructs of security of land tenure.

Accordingly, for its realization, *inter alia*, the government is required to do the following: not to arbitrarily evict or displace people from their land – duty to respect; to intervene when a powerful

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[39] Food and Agriculture Organization Council. Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security. Rome. *FAO Council*, 2004. Guideline 8.1.
[40] Id, guideline 8.10.
[41] Ibid.
[42] UN. The world conference on human rights: Vienna declaration and programme of action. *U.N. Doc. A/CONF. 157/23*, 1993. Part 1, para. 5.
[43] UN. International covenant on economic, social and cultural rights. Adopted 16 Dec. 1966, 993, U.N.T.S. 3, Annex to G.A. res 2200(XXI). Article 11.
[44] Committee on Economic, Social and Cultural Rights. General comment No. 12: The right to adequate food. *UN Doc. E/C*, 1999. Paras. 6 and 7; see also Olivier De Schutter. *The transformative potential of the right to food.* Report of the UN Special Rapporteur on the right to food, A/HRC/25/57, 2014. P 3.
[45] Alejandro Morlachetti. The rights to social protection and adequate food: Human rights-based frameworks for social protection in the context of realizing the right to food and the need for legal underpinnings. 2015. P 13.

individual evicts people from their land – duty to protect; and take positive actions to identify vulnerable groups and to implement policies to ensure access to adequate food by facilitating their ability to feed themselves – duty to promote and fulfil.[46]

Therefore, it is viewed that the state has a responsibility to take legislative measures, as per the discussion in Section C, that broadens the breadth and duration of the land rights; avoids the state's and others' arbitrary interference in the land rights of rural communities; and provide for an effective legal protection through an independent body to ensure land rights when arbitrary interferences happen. In the case when the state fails to take these legislative measures, tenure security is at stake and it in effect adversely affects their right to food. In such situation, the landholders may be reluctant to produce adequately and sustainably due to the fear of loss of their land rights and investments on the basis of their rights. Moreover, in the absence of the legal protections, the state and other actors may arbitrarily deprive the land rights of the agrarian community. As a result, the landholders may not have sufficient food, since they were deprived of their means of production and income; and this, in turn, exposes them to hunger, undermining their right to food.

As is the case with all other human rights, governments must respect and enforce respect for, as well as protect and implement, the right to adequate housing.[47] One way to discharge these obligations is to outlaw conduct and acts that undermine the realization of the right and provide a mechanism to enforce it in an independent judicial organ. This means that the government has to ensure the land tenure security of the landholders for the realization of the right to housing. Particularly, in the case of peasants and pastoralists in Ethiopia, the realization of their right to housing depends upon the securing of their land rights. This is because it has been identified that the absence of the legal aspect of land tenure security – in the form of expropriation without adequate compensation and forced evictions is one of the causes for failure to realize the right to housing.[48] Moreover, one element of the right to housing is the legal security of tenure and the

[46] Jean Ziegler. Report of the UN Special Rapporteur on the right to food. New York. *Fifty-seventh Session of the United Nations General Assembly,* 2002. P 11.
[47] The right to housing is also incorporated under Article 11 of ICESCR (n 43).
[48] Rajindar Sachar. The right to adequate housing (Vol. 7). *United Nations*, 1995. P 15.

absence of land tenure security clearly undermines the realization of the right to housing.[49] This right is realized when there is access to land and the land tenure is secured.

In relation to the realization of the right to culture too, land tenure security plays an immense role. The right to culture is, as per the General Comment number 21 of the UNCESCR, understood as an "inclusive concept encompassing all manifestations of human existence" and as "a living process, historical, dynamic and evolving, with the past, a present, and a future."[50] It also ensures the freedom to "follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities."[51] Especially, for agrarian society – peasants and pastoralists - their way of life as part of their culture predominantly relies on their land rights. Therefore, to ensure the realization of the right to culture, their land tenure must be secured.

Otherwise, if they are deprived of their land rights and exposed to land grabbing, in effect, their right to culture is undermined. It is true, especially for pastoralists, because "their cultural values and rights [are] associated with their ancestral land."[52] And that is why protection against illegal or unjust exploitation of land by State entities or private or transnational enterprises and corporations must be provided.[53]

Lastly, a human right that requires the prevalence of land tenure security for its realization in an agrarian society is the right to work and subsistence. The right to work and the right to subsistence are different but related human rights. Specifically, the ICESCR states that "[t]he States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take *appropriate steps to safeguard this right.*"[54]

[49] Committee on Economic, Social and Cultural Rights. General comment No. 4: The right to adequate housing. *UN Doc. E/C*, 1991.
[50] Committee on Economic, Social and Cultural Rights. General comment No. 21: Right of everyone to take part in cultural life. *UN Doc. E/C*, 2009. P 3.
[51] Id p 4.
[52] Id p 9.
[53] Id p 13.
[54] ICESCR (n 43) Article 6(1).

In an agrarian society, the right to work of individuals is predominately related to the security of their land tenure. In order to secure their right to work, the state is required to secure their land tenure. In the situation wherein, arbitrary eviction and dispossession of land occurs, the right to work of agrarian society is in effect deprived. Therefore, for the realization of the right to work in an agrarian society, this right imposes on the state an obligation to take appropriate steps to ensure land tenure security. One of the steps is providing land right holders with the legal aspects of land tenure security is discussed under section C.

The other related right that is indirectly incorporated into the International Covenant on Civil and Political Rights (ICCPR) is the right to subsistence.[55] Particularly, under article 1 paragraph 2, it provides that "…in no case may a people be deprived of its means of subsistence."[56] This means that if a given resource is a means of livelihood or subsistence to a particular society, by no ground a state or any other actor can deprive it. Unlike other rights, this right seems to be absolute and without any exception. Nevertheless, I claim that if it is possible to provide the people with other means of subsistence, it is possible to take away their previous means of subsistence for a greater societal interest.

It is possible to summarize that peasants' and pastoralists' land right is a means of their subsistence and livelihood. Depriving land rights in effect means depriving their means of subsistence. Hence, for the realization of the right to the means of subsistence in agrarian society; the prevalence of land tenure security is a prerequisite. So, in order to protect, promote, fulfill and respect the right to subsistence of agrarian society, a given state is required to ensure the elements of legal land tenure security that are discussed under Section C.[57]

Generally, for an agrarian society and a country like Ethiopia, addressing the issue of land tenure security contributes immensely in terms of social, economic, political, and environmental and human rights advancement. Then it becomes crucial to deal with how this important aspect of the land issue is going to be ensured. In the following two Sections (Section B and C) I develop a conceptual analysis to ensure legal land tenure security.

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[55] UN. International covenant on civil and political rights. Adopted 16 Dec. 1966, G.A. res 2200(XXI), UN GAOR, 21st Sess., Supp. No. 16, UN doc A/6316, (1966), 993 U.N.T.S. 3.
[56] Id Article 1(2).
[57] Taking legislative measure is one of the ways to ensure the realization of human rights. (See ICESCR (n 43) Article 2(1); ICCPR (n 54) Article 2(2)).

B. Forms of Land Ownership *visa-vis* Land Tenure Security

There are two reasons to consider the relation between the form of land ownership and legal land tenure security. The current dominant thinking about their relationship;[58] and the prevalence of different modes of land ownership – status quo/peoples and state joint/, privatization and associative perspectives – as a proposal to address the land tenure security issues in Ethiopia.[59]

The dominant thinking among scholars is the fact that private ownership of land in which there is the right of disposition of land is a key to tenure security.[60] In this view, it is accepted that private ownership of land is the most effective and efficient way to achieve land tenure security.[61] However, some affirm the possibility of ensuring land tenure security through other forms of land ownership, although they still opt for private ownership as the best way. They do this by equating long-term and fully transferable leases that provide levels of tenure security, virtually identical to those provided by individual ownership, with ownership.[62] Here again, their foundation is the level of land tenure security the private land ownership provides for. They do not argue for the independent assessment of legal land tenure security from the land ownership.

In Ethiopia too, there is a narrative of the form of land ownership to be adopted to address the problem of legal land tenure insecurity in the post-1991 land tenure system discourse. This narrative takes three forms: the privatization, associative and the status quo perspectives. The first two perspectives are dealt with below and the third is analysed in Chapter 3 Section B.

Those who follow the privatization path argue for granting of complete rights in land to the rural landholder, peasants, to secure their land tenure. Their basic assumption is that the peasants' landholding in the country has been insecure throughout the history of the country as a modern state, and that this perpetuation of land tenure insecurity would be rectified once and for all if land is privatized.[63] In other words, the basic quest in Ethiopia, as it used to be in the past, is rural land tenure security and this can be addressed only if private land ownership is introduced.

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[58] Deininger (n 1); Demsetz (n 4); Lund (n 4); Ubink (n 4); Crewett and Korf (n 4); Coase (n 26).
[59] Crewett and Korf (n 4).
[60] Deininger (n 1) p 55; FAO (n 10) pp 18–19.
[61] Demsetz (n 4); Lund (n 4); Ubink (n 4); Crewett and Korf (n 4); Coase (n 26).
[62] Deininger (n 1) pp 43 and 74.
[63] Muradu Abdo Srur. *State policy and law in relation to land alienation in Ethiopia*. (Doctoral dissertation University of Warwick, UK), 2014. Pp 35–36.

In this regard, the view of Berhanu Abegaz gives an illustration of how privatization is advocated to address the land tenure insecurity problem in Ethiopia. He asserts that:

> "private ownership provides the strongest incentives for agricultural investment and the greatest flexibility for generating optimal farm sizes. Ownership also confers more clout on long-suffering rural residents to obtain public services. That is, secure and complete rights to land provide the first line of defense against the impunity of political elites whose capture of power has yet to face an effective domestic restraint from an enfeebled civil society."[64]

He concludes by stating that:

> "[w]hile the form of land ownership may not be decisive for agricultural growth in many countries, this paper argues that it does matter greatly in the case of Ethiopia. Freehold [private land ownership] provides the greatest security of tenure and the strongest incentive to invest on the part of empowered, propertied farmers."[65]

This perspective together with the dominant thought in relation to land ownership and land tenure security stated above is subject to criticism from three directions. First, this perspective is based on a one-size-fits-all approach. It doesn't consider the different kinds of landholding systems prevailing in different places and in Ethiopia too. Besides the individual landholding and utilization system against which private ownership is possible, there are also communal holding systems wherein the land rights are exercised and held at community/clan/tribe/ level.[66] Individualizing land in such a system is impossible and it may affect the very coexistence of the community as an institution. In the case of Ethiopia, privatization may be operative in relation to peasants' landholding, since it is possessed at the individual level. However, it would be difficult to implement it on the ground with regard to pastoralists' landholding, because the pastoralists' landholding and utilization are communal in its nature. That is why the proponents of this line of thinking in Ethiopia only consider peasants' land tenure security to claim land privatization.

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[64] Berhanu Abegaz. Escaping Ethiopia's poverty trap: the case for a second agrarian reform. (2004) 42 *The Journal of Modern African Studies*. 313–342. P 315.

[65] Id p 338.

[66] See Ross Andrew Clarke. Securing communal land rights to achieve sustainable development in sub-Saharan Africa: Critical analysis and policy implications. (2009) 5 *Law Env't & Dev. J.* 130–151; PFE, IIRR and DF. Pastoralism and land: Land tenure, administration and use in pastoral areas of Ethiopia. 2010; Elliot Fratkin, and Terrence McCabe. East African pastoralism at the crossroads: an introduction. (1999) 3 *Nomadic Peoples.* 5–15; John G. Galaty, Anders Hjort af Ornäs, Charles Lane and Daniel Ndagala. 'Introduction' in John G. Galaty, Anders Hjort af Ornäs, Charles Lane and Daniel Ndagala (eds.). The pastoral land crisis: Tenure and dispossession in East Africa. (1994) 34/35 *Nomadic Peoples*. 7–21; Ayele Gebre-Mariam. The alienation of land rights among the Afar in Ethiopia. (1994) 34/35 *Nomadic Peoples*. 137–146.

Second, the adoption of private land ownership doesn't guarantee automatic provision of the holistic objectives of land tenure security that are discussed in Section C below. In fact, in terms of duration and breadth of land rights, it can be assumed that private ownership provides the owner with an indefinite period and complete bundle of rights in land respectively. Nonetheless, the legal regime may subject the exercise of the specific rights in land to strict adherence to contingent procedural requirements. It may also incorporate a limit to the right in the form of deprivation of the land rights for a broad and ambiguously defined public interest/purpose upon payment of inadequate compensation and against which taking a legal action to an independent judiciary is outlawed. Moreover, there may not be registration and certification of land rights.[67] These stipulations still perpetuate the legal land tenure security irrespective of the form of land ownership adopted. That is why in Latin America and Kenya the privatization of land ownership has contributed to perpetuating peasant land tenure insecurity.[68]

Third, legally and theoretically speaking, drawing a distinction between private and other forms of land ownership in terms of the nature and duration of property rights is becoming difficult, if not impossible.[69] Without underestimating the difference in the economic value of the rights, it is more of a political-economy ideological dichotomy. With respect to the duration of land rights, just like with private ownership, an indefinite period is also granted to the landholder in other forms of land ownership. As seen in Chapter 4 Section C, for instance, in Ethiopia, although land is not privately owned, the duration of land rights of peasants and pastoralist is indefinite and unbounded in time.[70]

[67] Gershon Feder and David Feeny. Land tenure and property rights: Theory and implications for development policy. (1991) 5 *The World Bank Economic Review*. 135–153. P 136. They indicate the absence of enforcement mechanisms and registration though private property rights is granted in the constitutional rule.
[68] Dessalegn Rahmato. The land question and reform policy: Issues for debate. (1992) 1 *Dialogue*. 43; Dessalegn Rahmato. Revisiting the land issue: Options for change. (1999) 2(4) *Economic Focus*. 9–11.
[69] See Markus Haller. Private, Public and State Ownership. (1998) 20 *Analyse & Kritik*. 166–183.
[70] Federal Democratic Republic of Ethiopia. Rural land administration and land use proclamation No. 456/2005. *Fed. Neg. Gaz.* Year 11 No. 44. 2005. Article 7(1).

Similarly, in regard to the nature of rights in land, be it the Bakerian authority of decision making,[71] Hohfeldian bundle of rights,[72] Arnoldian web of interests,[73] or Blackstonian exclusive dominion[74] conception of property, there is a convergence among the different forms of land ownership. It is assumed that it is only private ownership of property that grants the highest decision-making authority, complete bundle of rights or web of interest and exclusive dominion over a thing, in my case land. In other land ownership forms wherein, landholders have property rights less than ownership of land, but ownership of rights in land, be it use right, usufruct rights or holding rights,[75] it is possible to get an equalization with private ownership of land. This can be understood once we make a distinction between ownership of land and ownership over rights in the land.[76]

It is possible to authorize the person entitled to the rights in land, not the landowner, to use, lease, mortgage, inherit, donate and sell the property right, he/she has over the land in the same fashion that the landowner can do with the land itself. It only the right to sell the land that can distinguish private ownership from the other land ownership forms.[77] In other ownership forms, it is possible to incorporate the right to sell the other rights in land. It means then, the owner of the property right over land can exercise the same kind of rights with the owner of the land itself. Thus, legally speaking, it is possible to develop this conceptual model to achieve equalization.

Alternatively, whether arguing from the scope of an authority, a bundle of rights, a web of interests or exclusive dominion, there is still an insignificant theoretical difference between private ownership and other forms of land ownership. The only difference relies on the alienation right, particularly through sale of land, which presents in private ownership but not in another land ownership forms. Because in the case of the other forms of land ownership the scope of the land

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[71] See Baker (n 6).
[72] Wesley Newcomb Hohfeld. Some fundamental legal conceptions as applied in judicial reasoning. (1913) 23 *Yale Lj*. 16–59.
[73] Craig Anthony (Tony) Arnold. The reconstitution of property: Property as a web of interests. (2002) 26 *Harv. Envtl. L. Rev*. 281–364.
[74] William Blackstone. *Commentaries on the laws of England*. (WM. Hardcastle Browne, A.M., ed) West Publishing Co. St. Paul, 1897. P 43 and pp 167ff; Carol M. Rose. Canons of property talk, or, Blackstone's anxiety. (1998) 108 *The Yale Law Journal*. 601–632.
[75] Holding rights is a form of property rights that exists in Ethiopia by which peasants and pastoralists are authorized to use rural land for purpose of agriculture and natural resource development, lease and bequeath to members 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 Proc. No. 456/2005 (n 70) Article 2(4)).
[76] Rahmato Searching (n 2) p 21.
[77] Haller (n 69).

rights can extend to that and it is clear that incorporation of sale in the scope is not necessary to ensure legal land tenure security.[78] For these reasons, the privatization of land to remedy the problem of legal land tenure security is not an essential option.

As an alternative to the privatization perspective, some scholars propose an associative form of land ownership to deal with the problems of land tenure insecurity of peasants. This approach advocates that the ownership of land rests on the communities and individual members get user rights which are transferable to outsiders in any way subject to the supervision of the community.[79] Here restraining the power of state authorities over land is assumed as the strategy to secure land tenure through decentralization of decision making.[80]

However, it doesn't consider the state's perpetuation of legal land tenure security through the legislative measure that empowers the government to expropriate the land rights under the guise of public purpose without due process and paying adequate compensation, and limiting the ability to enforce land rights in an independent court of law. Dessalegn is a well-known proponent of this view before he changes it towards the need to change the debate from ownership dichotomy to the issue of land tenure security.[81] He lists the issues pertaining to land tenure insecurity as follows:

> "[t]he main weaknesses of the prevailing tenure system are the following: a) lack of tenure security [...] Because of the high sense of tenure insecurity, [the] peasants cannot employ sound land management practices and are reluctant to invest on the land. The system is also responsible for the recurrence of food shortage and famine. With per capita farm plots less than a hectare and getting smaller in a majority of the rural areas, peasants do not produce enough food to sustain themselves through the year even under normal circumstances."[82]

To address this problem, he calls for reforming the land tenure system, which demands as he says "reforming the constitution, which will be a difficult task."[83] Accordingly, he demands the introduction of another form of land ownership other than private and the *status quo* stating that:

> "[…] [w]hat I call associative ownership, which combines private rights with community responsibilities, is a viable option. Under this system, the peasants have secure[d] and

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[78] Deininger (n 1) p 76; FAO Land Tenure (n 12) p 19.
[79] Srur (n 63) p 49.
[80] Ibid; see also Crewett and Korf (n 4) p 206. It is because in the present land ownership form the government authorities threaten the peasants with the loss of their land rights. (See Siegfired Pausewang. Ethiopia: A political view from below. (2009) 16 *South African Journal of International Affairs*. 69–85).
[81] Rahmato Revisiting (n 68).
[82] Ibid.
[83] Ibid.

> individual rights to their holdings[,] but the community, in the form of the peasant association, for example, protects this right if it is threatened by outsiders."[84]

Dessalegn's option to address the land tenure insecurity problem through the introduction of an associative ownership form in Ethiopia is also subjected to criticisms, just like the private ownership approach. For one thing, like in the case of privatization, the mere incorporation of associative land ownership doesn't guarantee the automatic reflection of the legal constructs of land tenure security in the land tenure system. The statutory land tenure system should rather incorporate the objective elements I discuss in Section C below to ensure the legal land tenure security.

Moreover, this may work for the pastoralists whose landholding system and utilization are communal already – in fact, his proposal applies to pastoralists only. However, for the peasants, who utilize and hold land on an individualized basis, the introduction of associative land ownership further perpetuates their insecurity of tenure. This is because of the following two reasons. First, for the protection of individual land rights threatened by outsiders, Dessalegn's proposal presupposes formation of peasant associations in communities where peasants have individual land rights. However, given the political control, forced redistribution of land, and denying of access to land roles the peasant associations played during the *Derg*-socialist regime,[85] peasants do not welcome the formation of peasant associations and may consider it as the state's means of political control. Mimicking the roles it played in the past regime (see for details Chapter 2 Section C) the peasants may not regard it as a guarantor as Dessalegn claims, but a threat to their land rights and tenure security. Furthermore, the leaders of the peasant associations may be appointed by the government or elected by the community in the presence of the government body as a facilitator. Their impartiality to protect the community members' land rights from the encroachment of the state is also questionable.

Second, it subjects the landholders to another institutional involvement in the exercise of their land rights. In the existing land tenure system administrative authorities' interference with peasant's

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[84] Ibid.

[85] Ethiopia. A proclamation to provide for the public ownership of rural lands proclamation No. 31/1975. *Neg. Gaz.* Year 34 No. 26. 1975. Article 23; Dessalegn Rahmato. Agrarian change and agrarian crisis: State and peasantry in post-revolution Ethiopia. (1993) 63 *Africa.* 36–55. P 40; Teshale Tibebu. *The making of modern Ethiopia: 1896–1974.* New Jersey. The Red Sea Press, 1995. P 5.

land rights takes in two forms: deprivation for greater societal interests as I discuss in Chapter 6 in detail and for other reasons mentioned in Chapter 5 Section C and D; and registering and/or approving the transfer of land rights as explained in Chapter 5 section B. Apart from these administrative involvements, the introduction of associative land ownership as Dessalegn describes, leaves peasants exposed to another institutional interference in their land rights through the peasant association, since the transfer of land rights is subject to its supervision.[86] This, in effect further compromises the liberty and freedom of peasants in the exercise of their land rights. It also may undermine peasants' land tenure security through exposing them to different standards set by the different land governance authorities.

Consequently, associative land ownership is also not a remedy to the land tenure insecurity problem in Ethiopia, because it is not the form of land ownership that ensures the land tenure security. Rather, it is the holistic granting of the objective elements of land tenure security that are discussed in Section C in the constitutional rules and subsidiary law that secures the land tenure. That is why Dessalegn himself in his later research advocates that the land ownership debate is a dead end and now approaches the land tenure security issue from another angle, which I call the legal construction of objective land tenure security angle.[87] Thus, in the next section, I sketch out an alternative framework for the analysis of legal land tenure security, which I adopt for purposes of this thesis.

C. Theoretical Constructs/Legal Perspectives/ of Land Tenure Security

I note in Section A above that land tenure security is the consequence of the cumulative effect of the perception of the landholders about their land rights (the subjective element) and the legal constructs (the objective element). Since the focus of this thesis pertains to the objective element, the legal constructs as mentioned earlier, below the ideal framework of these constructs is analysed and established, against which the post-1991 rural land tenure system of Ethiopia is evaluated in the following Chapters. The legal constructs encompass the nature, duration, assurance, enforceability and registration and certification of land rights.

i. The Nature of Rights in Land

[86] Srur (n 63) p 49.
[87] Rahmato Searching (n 2) pp 34–35.

The nature of the rights in land landholders have is one of the legal constructs that can imply the condition of legal land tenure security. Its establishment requires understanding of property rights in all metaphors of property together, not to mention the breadth of land rights and their practicability. As I discuss below all of the Blackstonian exclusionary, the Hohfeldian bundle of rights, the Arnoldian web of interests and the Bakerian decision making authority conceptions of property rights have their own distinct roles in establishment of the construct of nature of rights in land to ensure legal land tenure security. It is my view that only the conceptual integration of these versions can give us the complete picture of this construct to ensure legal land tenure security.

The prevailing literature conceives what ought to be the nature of rights in land to secure land tenure from the Hofeldian bundle of rights perspective, giving peripheral space to the other perspectives. It defines the breadth and robustness of rights only in terms of the quality and quantity of rights in land guaranteed to landholders.[88] It claims that the satisfaction of this element of objective land tenure security depends on the provision of clearly defined and an adequate number of rights, and the guarantee of landholders with key rights if certain ones are more important than others.[89] How many of them are adequate and which are the key rights is not defined.

However, authors define or list the rights terminologically in a different manner. For instance, some provide that it includes the:

> "freedom to: occupy, use, develop or enjoy one's land; bequeath land to heirs, or sell land; lease or grant land or use rights over that land to others with reasonable guarantees of being able to recover the land; restrict others' access to that land; and use natural resources located on that land."[90]

Similarly, the FAO disaggregates a bundle of rights existing on a parcel of land into:

> "the right to derive benefit from the land (e.g. through cultivation or grazing, which is a use right); the right to decide how to use the land and to decide who shall be permitted to use it and under what conditions (management right); the right to derive income from the use of the land (income right); the right to transform it (capital right); the right to convey the land to others (e.g. through intra-community reallocations) or to heirs (i.e. by inheritance), to sell it or to give it away (transfer right); and the right to exclude others from using the land or otherwise interfering with it."[91]

[88] See Id p 36; Place *et al* (n 2) p 20; Deininger (n 1) p 36.
[89] Place *et al* (n 2) p 20.
[90] Rachael Knight. Statutory recognition of customary land rights in Africa: An investigation into best practices for law making and implementation. Rome. *FAO Legislative Study* 105, 2010. P 19.
[91] Food and Agriculture Organization. Land and property rights. Rome. *FAO,* 2010. P 12.

Other writers integrate these bundles of rights into three – the right to exclude, the right to transfer and the right to possess and use.[92] The first right to exclude dismisses others from the use or occupancy of the particular parcel of land. The second right to transfer, on the other hand, empowers the right holder to alienate the land in favor of others either through a sale, rental, bequeathing, mortgaging or gifting.[93] And the third, the right to possess and use, enables the right holder to employ the land for the intended purpose in accordance with a set of rules.

Further, Schlager and Ostrom define five property rights that show the range of entitlements in tiers of capacities. They are:

> "*access,* or the right to enter a defined physical area and enjoy non-subtractive benefits; *withdrawal,* or the right to obtain resource units or products of a resource system; *management,* or the right to regulate internal use patterns and transform the resource by making improvements; *exclusion, or* the right to determine who will have access rights and withdrawal rights, and how those rights may be transferred; and *alienation,* or the right to sell or lease management and exclusion rights."[94]

The bundle of rights' way of understanding rights in land is not sufficient to secure land tenure, except for the establishment of the presence of the right to sell the land to outsiders as not a necessary element of the bundle to ensure the security of land tenure.[95] Thus, it is left to the legislature of a given state to determine the bundle of rights the landholders have with no further requirements and criteria.

However, this proposes and will justify that the social, historical, and economic context of the society shall be taken into account in delimiting the scope of the rights. The social and economic dimensions of sustainable development that are discussed above in relation to the significance of land tenure security also have an implication for defining the nature of rights in land to secure land tenure. Moreover, the integrative approach of understanding property rights gives a better security of land tenure.

The social context enables us to look into the manner how land is utilized and held and valued in the society. In the society wherein land is utilized and held in a communal manner – in a pastoralist

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[92]John G. Sprankling. *Understanding property law*. LexisNexis, 1999. Pp 4–7; see also Kevin Guerin. Property rights and environmental policy: A New Zealand perspective (No. 03/02). New Zealand Treasury, 2003. P 4.
[93]Besley (n 24) p 905.
[94]Edella Schlager and Elinor Ostrom. Property rights regimes and natural resources: a conceptual analysis. (1992) 68 *Land Economics*. 249–262. Pp 250–251.
[95]Deininger (n 1) p 76.

community in the case of Ethiopia - the introduction of individualized rights in land which demand an individual landholding system not only makes the rights impracticable, but also may lead to intra-community conflict as it results in competing interests. In such a system, the legal recognition of the way the rights in land is defined in the customary tenure system would serve best for ensuring security of land tenure.[96] In the individualized landholding systems – peasants in my case – in turn, granting of all of the bundle of rights, except the sale of land itself, contributes to the landholders' tenure security. Moreover, in a society where a social value is attached to land besides its economic value, like with Ethiopian peasants and pastoralists, attempts must be made to enable the landholders to carry out their social/family responsibility through their land rights. This is by way of entrusting them with the right to inherit and donate their land rights. In fact, this contention is sustained when the integrative approach is utilized in understanding the concept of property rights, as seen later.

The historical context implies that one must have regard to how the previous land tenure systems delimits the bundle of land rights and how the society feels about it. This consideration in the current demarcation of the bundle of rights is crucial, especially in a country such as Ethiopia, where the question of land is at the center of the political agenda.[97]

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[96] See Collins Odote. The dawn of Uhuru? Implications of constitutional recognition of communal land rights in pastoral areas of Kenya. (2013) 17 *Nomadic Peoples*. 87–105; Clarke (n 66).

[97] The centrality of the quest of rural land issue in Ethiopia can be evidenced from the "Land to Tiller" slogan that resulted in the overthrown of the last emperor of the country. (See Peter Bodurtha, Justin Caron, Jote Chemeda, Dinara Shakhmetova, and Long Vo. Land reform in Ethiopia: Recommendations for reform. *Solidarity Movement for a New Ethiopia*, 2011. P 16; Daniel Weldegebriel. Land rights in Ethiopia: Ownership, equity, and liberty in land use rights. Rome. *FIG Working Week*, 2012. P 4). The Amharic proverb says: *to be landless is to be sub-human* although somewhat extreme still shows the political sensitivity of land in Ethiopia. (See Paul Brietzke. Land reform in revolutionary Ethiopia. (1976) 14 *The Journal of Modern African Studies*. 637–660. P 638). In the imperial regime the land rights were granted to keep "a retinue of warlords, governors, and nobles personally obliged to the emperor." (See Wibke Crewett, Ayalneh Bogale, and Benedikt Korf. *Land tenure in Ethiopia: Continuity and change, shifting rulers, and the quest for state control*. Washington Dc. International food policy research Institute (IFPRI), 2008. P 2). In the *Derg* regime there was an assumption that "[a] person's right, honour, status and standard of living is determined by his relation to the land; …it is essential to fundamentally alter the existing agrarian relations so that the Ethiopian peasant masses.may be liberated from age-old feudal oppression, injustice, poverty, and disease, and in order to lay the basis upon which all Ethiopians may henceforth live in equality, freedom, and fraternity." (See Proc. No. 31/1975 (n 85) the preamble). The post-1991 debate on the quest of rural land has also a political view point. The argument to keep the state and joint ownership of land to protect the identity of minorities from being vanished through sale if privatized and the privatization argument has feared that the government may use the issue of land for vote buying during election. (See Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 4, Nov. 23-29/1994, Addis Ababa), 1994. Deliberation on Article 40. (Amharic document, translation mine)). Moreover, the protest of the Oromo people, the largest ethnic group in the country, that has happened since for the last three years since 2015, against the Integrated Development (Addis Ababa) Master Plan that was designed to expand the city through expropriation of the surrounding rural land rights that belong to peasants living in the adjacent areas; has also political implication. (See The Guardian. Violent clashes in Ethiopia over 'Master Plan' to expand Addis. (Dec. 11 2015); and

In the economic context too, the bundle of rights should incorporate those rights that have the potential to transform the landholders to better economic situations without causing the permanent loss of the possession of the land. Besides use rights, the alienation rights such as the right to lease and mortgage the land rights must be incorporated. However, this doesn't mean that one disregards the social context I discuss above.

Furthermore, the bundle of rights perspective on delineation of the rights in land on its own is in the social, historical and economic context not enough to secure land tenure. Rather, it is imperative to adopt the integrative approach, which combines the four different conceptions of property, especially in a land tenure system in which land is not privately owned, like Ethiopia. This is because each perspective adds their own unique elements to the nature of rights in land that contributes to the security of the land tenure.

The Blackstonian exclusionary path, for instances, in my contextualization, advocates for the non-interference of state in particular in the exercising of the specific rights in land.[98] The state may intervene in the exercise of specific land rights in the form of providing cumbersome procedural requirements in which the state involves and subject the exercise of the right to state organ approval. This *de facto* narrow the *de jure* bundle of the land rights. This is because the procedural conditions may cause the landholders to be disinterested in exercising the specific land rights and the state organ may not approve it. The incorporation of the exclusionary path in this context avoids this danger.

The Bakerian authority of decision-making path also ensures the freedom of the landholder's authority to make a decision within the bounds of the bundle of rights.[99] The land tenure system, after delineating the scope of the bundle of land rights, may further restrict the situations for and manner of utilizing the rights. This restriction in effect limits the landholders' authority to decide on the legitimate land rights.[100] The Bakerian view, as against that, proposes to avoid the restrictions on the authority of decision-making within the bundle of rights given.

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see also Addis Ababa and Addis Ababa Zuria Oromia Special Zone Integrated Development Plan Project Office. Addis Ababa and Addis Ababa Zuria Oromia Special Zone integrated development plan (2006 – 2030 E.C). Bela Printing Press, nd. (Amharic document; translation mine).

[98] Blackstone (n 74); Rose (n 74).

[99] Baker (n 6).

[100] For instance, about the amount and duration of land to rent and lease, to whom to inherit and donate the land rights.

Finally, the Arnoldian web of interest dimension adds the need to clearly define the responsibility of landholders towards the land itself.[101] This conception avoids making land rights conditional upon compliance with vague and ambiguous environmental standards and land use regulation the state may employ to abuse the community or individuals' land rights.

Therefore, the establishment of the ideal rights in land to ensure land tenure security demands defining the concept from an integrative perspective and in the social, historical and economic context of the given society. Moreover, the determination of the manner of substantive use of the land, not its instrumentality, shall be given to the landholders to transform the land use in line with the social and economic dynamics.

ii. The Duration of Land Rights

The duration of land rights is the other legal construct of legal land tenure security that holds implications for the landholders' security of land tenure. Landholders have to be given a longer duration for one or more land rights – the length of time for which these rights are valid.[102] As a rule, as duration lengthens, tenure security improves.[103] By contrast, inadequate duration of one or more rights,[104] for instance, short periods for land leases and rent,[105] is assumed as one of the contributing factors for the insecurity of land tenure.

Nevertheless, in qualifying the duration – how long a period contributes to securing tenure – there are no well-defined standards. Rather, different subjective stipulations are provided for. UN-HABITAT claims simply that a reasonable duration of rights appropriate to the use to which the land is put and the social needs of the land user should be given. [106] Hanstad states that tenure

[101]Arnold (n 73).
[102] Deininger (n 1) p 8; FAO Land Tenure (n 12) pp 18-19; Place *et al* (n 2) pp 19-21; Rahmato Searching (n 2) p 35; UN-HABITAT and Global Land Tools Network (n 2) p 7; USAID. Land tenure and property rights framework. *Vol. I*, 2007. Pp 18–20.
[103] Li Ping, Roy Prosterman, Ye Jianping, Wu Jian, and Benjamin van Rooij. 'Land reform and tenure security in China: History and current challenges' in André J Hoekema, Janine M Ubink, and Willem J Assies (eds.). *Legalising Land Rights Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*. Leiden. Leiden University Press, 2009. 409–434. P 410.
[104] See Place *et al* (n 2) p 21.
[105]Solomon Bekure. 'Benefits and costs of rural land titling: The international experience' in Solomon Bekure, Gizachew Abegaz, Lennart Frej and Solomon Abebe (eds.). *Standardization of rural land and cadastral surveying methodologies; experiences in Ethiopia*. Addis Ababa. *Ethiopia-Strengthening Land Tenure and Administration Program (ELTAP)*, 2006. 39–58. P 46.
[106] UN-HABITAT and Global Land Tools Network (n 2) p 7.

security exists when an individual or group can confidently enjoy rights to a specific piece of land on a long-term basis. [107] Deininger also argues for "sufficiently long-term"[108] land rights. He asserts that the duration must be at least enough to recoup returns from investment, although he opts for an indefinite duration, or else a long-term, automatically renewable one.[109] For Place, Roth, and Hazell it requires the duration to be sufficiently long to enable the holder to recoup with confidence the full income stream generated by the investment.[110]

The subjectivity with respect to the duration of land rights creates the difference that what is adequate for one would be inadequate to another. Then its determination is subject to the individual or group perception towards it – the subjective element of land tenure security. The main contention here is that it is possible to provide an objective guideline in two dimensions – the duration of land rights in general and of specific land rights.

The duration of land rights in general has to be determined on the basis of the purpose for which it is acquired. Particularly, rural land rights are acquired for an investment or a means of livelihood. The duration to be stipulated in these two situations may not be similar to secure the land tenure. In the case of investment, the duration should be set by the mutual negotiation of the land provider – the state and the investor, taking into consideration the duration that enables the latter to recoup the intended income from the investment.[111] In the context of means of livelihood – peasants and pastoralist in my case - it should not be time bounded and rather it should be for an indefinite period like in the case of private ownership.[112] This is because for the rural community "land is the primary means for generating a livelihood and the main vehicle for investing, accumulating wealth, and transferring it between generations."[113] Therefore, the interruption of the land rights brought about by fixing the expiry of the duration would increase "their vulnerability to shocks."[114]

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[107]Tim Hanstad, Roy L. Prosterman and Robert Mitchell. 'Poverty, law and land tenure reform' in Roy L. Prosterman, Robert Mitchell and Tim Hanstad (eds.). *One billion rising, law, land and the alleviation of global poverty*. Amsterdam. Leiden University Press, 2007. 17–56. P 21.
[108]See Deininger (n 1) p 8.
[109] Id p xxii.
[110] Place *et al* (n 2) p 20.
[111] Deininger (n 1) p xxii.
[112] Ibid.
[113] Id p xix.
[114] Id pp xix-xx; see also The World Bank. Liberia insecurity of land tenure, land law and land registration in Liberia. *Report No. 46134-LR*, 2008. P 2.

The duration of specific rights the landholders have over land – leasing rights, in particular – shall not be in the purview of the legislation. It should rather be left to be determined by the contracting parties – the landholder-lessor and the lessee. Otherwise, the legislature specified duration which has uniform application to the society may be regarded as impinging on and/or restricting land tenure security. Moreover, it impedes the authority of decision-making of the landholders regarding the duration of the specific rights within the bundle of rights.

iii. The Assurance of Land Rights

The assurance of land rights rest upon effective legal protection against arbitrary eviction and overriding of rights by others, and curbing the subjecting of land rights to mutually contradicting and overlapping legal and institutional pluralism.

a. Legal protection against arbitrary curtailment of land rights

The legal regime, in principle, shall expressly outlaw the overriding interests over the landholders' land rights. It has to give a guarantee against deprivation of land rights with an exception to expropriation. This in effect eliminates the risks of losing land rights to discretionary bureaucratic behaviour.[115]

Expropriation - also called eminent domain, taking, resumption, compulsory acquisition or compulsory purchase in different jurisdictions - is an exception to a property right in general and land rights in particular.[116] The philosophical foundation and understanding of the concept have

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[115] Deininger (n 1) p 8.

[116] Daniel W. Ambaye. *Land rights and expropriation in Ethiopia*. Switzerland. Springer, 2015. P 95; Food and Agriculture Organization. Compulsory acquisition of land and compensation. Rome. *FAO Land Tenure Studies 10,* 2008. P 1; William Michael Treanor, Original Understanding of the Takings Clause and the Political Process. (1995) 95 *The Colum. L. Rev.* 782–887; Joseph L. Sax. Takings, private property and public rights. (1971) 81 *The Yale Law Journal*. 149–186.

taken three theoretical formulations: reserved rights,[117] inherent power,[118] and consent theory.[119] Nevertheless, from the land tenure security path, these theories tend to give the State a stronghold and position to transcend rights in land rather than secure land tenure. Rather than understanding it from the perspective of state authority to deprive property rights as the above three philosophical foundations presuppose, and as the state's authority to impose the limitation, it is better to view it from the landholders prespective as an exception to land rights and to focus on the protection of land rights. Thus, its theoretical foundation should be a "limit to rights" theory. This is because of the existence of the canon of interpretation that dictates limitations to be interpreted narrowly and restrictively and rights and powers broadly and widely.

Even in land expropriation – a limit to land rights - there are certain requirements to be incorporated in the legal regime to establish the legal construct of assurance of land rights. Before the substantive requirements, the decision to initiate the expropriation of a particular landholder's land rights should not be invidiously made. The burdening of a particular individual or community for some general public welfare-promoting action must be based on general, public, and ethically permissible policies.[120] The enactment of the expropriation law and its application should not be on the basis of a bill of attainder and *ex post facto* law.

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[117] Reserved right theory establishes expropriation on the presupposition that state had an original and absolute ownership of the whole thing possessed by the individual and community, and their possession and enjoyment of it is a grant of the sovereign and with implied reservation of the right retakes it for public purpose. (Matthew P. Harrington. "Public Use" and the Original Understanding of the So-Called "Taking" Clause. (2001) 53 *Hastings LJ*. 1245–1301. P 1250). The prevailing criticism against this conception is that it may entail state to expropriate property without compensation and due process. It does not consider from the dimension of the scope of the authority and makes property rights unsecured and totally depend on the will of the government. (See Id p 1252; Ambaye (n 116) pp 100–101.

[118]In inherent powers theory, which is also developed in civil law legal tradition and exposed to common criticism with the reserved right theory, the foundation of expropriation is the inherent right of sovereignty - police power and unlike reserved right theory it does not depend on the pre-existing property right. It rather considered as the aspect of state's authority to regulate and subject properties and persons in its jurisdiction. (Harrington (n 117) pp 1251–1252). It considers the constitutional norms as limitations rather than granters of the power. (See Nichols. The Public Use Limitation on Eminent Domain: An Advance Requiem. (1949) 58 *Yale LJ*. 599; Ambaye (n 116) pp101–102). This view goes against the very purpose of Constitutional law and highly empowers the state than protecting the property rights.

[119] The consent theory, that traces its origin in Anglo-American legal tradition, states that expropriation is the result of the legislature sanction by which the property right holder has consented through its representative - the members of the law makers, elected by them. (See Harrington (n 117) pp 1258ff; Ambaye (n 116) p 102). Here again once the legislature has defined the expropriation in whatever manner it is assumed as valid.

[120] Baker (n 6) pp 764–765.

Substantively, first, the legislation should provide clearly defined and limited public purposes which justify land expropriation.[121] Legal scholars are not in agreement on the extent to which it is to be limited,[122] but all agree on the danger it poses if it is vaguely and broadly defined – abusively used for the benefit of the haves at the expense of the land tenure security of the landholders.[123]

Terminologically, the concept is coined with alternative phrases like a public benefit, public use, public good, or public interest.[124] However, from the land tenure security perspective, these phrases have their own implications. Public purpose, good, use and benefit narrow down the grounds to the direct societal utilization of the expropriated land in the form of public infrastructure, environmental protection, and security and defence. The notion of "public interest," on the other hand, is wider, including indirect benefits to the society, and creates more space for unaccountable decision making. For instance, expropriation of land to lease for private investors may well be in the public interest, when it generates an important source of income for the state, technology transfer and employment opportunities.[125]

Nevertheless, states' legislation provides the contextual meaning to the terminology employed.[126] What is required for establishing the assurance of land rights here is clear identification in

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[121] Klaus Deininger and Songqing Jin. Tenure security and land-related investment: Evidence from Ethiopia. (2006) 50 *European Economic Review*. 1245–1277; Paul De Wit, Christopher Tanner, Simon Norfolk, P. Mathieu, and P. Groppo. Land policy development in an African context. Lessons learned from selected experiences. *FAO Land Tenure Working Paper*, 2009. P 72; Deininger (n 1) p 173.
[122] Harrington (n 117).
[123] Daniel B. Kelly. The public use requirement in eminent domain law: a rationale based on secret purchases and private influence. (2006) 92 *Cornell L. Rev*. 1–66; Deininger (n 1) p 173.
[124] Daniel Weldegebriel. 'Compensation during expropriation' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 191–234. P 191; Ambaye (n 116) p 98; FAO Compulsory (n 116) p 10.
[125] FAO Compulsory (n 116) p 12; Paul De Wit *et al* (n 121) p 72.
[126] Concerning the manner of listing of the components of public purpose, it is possible to identify three different ways. The first way is exclusive listing whereby the legislation of the concerned state lists all possible purposes for which the government can compulsorily acquire private land rights. This approach reduces ambiguity by providing a comprehensive, non-negotiable list beyond which the government may not compulsorily acquire land. Nevertheless, the problem here is that it may be too rigid to provide for the full range of public needs; and the government may one day need to acquire land for a public purpose that was not considered when the law was enacted. (See FAO Compulsory (n 116) p 11).
The second approach is inclusive listing that contains some list of permissible purposes, along with an open-ended clause to allow the necessary flexibility. This approach identifies specific purposes for which land may be acquired and then adds a word or phrase that imply the government to expropriate land rights for similar purposes. This means, it provides the flexibility to expand the eligible purposes when required and at the same time, limiting the scope for expansion only to purposes similar in nature with the list of purposes provided as instance. (*Ibid*).

legislation of the constituting elements of the public purpose in an open-ended way, and in its absence in the list, to conduct a public hearing or judicial review especially regarding indirect public benefits. [127] Moreover, the manner how the public purpose is listed, the authority which is entitled to define it, and the variation of the constituting elements of it for different land rights holders also have an implication for legal land tenure security as I discuss it in Chapter 6 Section B.

Second, legislation should require the government to attempt acquiring the land in question through voluntary transactions, before exercising its compulsory restriction through expropriation.[128] While doing this, the legislation should impose on the government the obligation to provide the affected parties with all necessary information so that they can effectively participate in the decision-making process of the expropriation.[129] This process helps to determine the amount and nature of compensation, the time to conduct the expropriation and the duration of notice periods demanded by the affected parties if an agreement is not reached.

Third, the legal basis should establish an obligation on the expropriator to pay adequate compensation to the affected parties, depending on the nature of the affected land rights and the duration for which the expropriation lasts.[130] The compensation establishes the legal construct of assurance of land rights in two ways. First, it protects the affected parties from the impoverishment caused by the loss of land rights through expropriation for the benefit of the public at large – social justice.[131] Second, it restrains the state from making unwise and frequent decision of expropriation of land rights – the economic dimension.[132] This will make sense if the compensation to be paid is adequate.

The final approach is the one taken under the Federal Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005 of Ethiopia, article 2(5). This approach neither exhaustively nor in open-ended manner lists purposes for which a government can compulsorily acquire land rights. Instead, it leaves the determination of the public purpose to the appropriate government body by providing general standards.

[127] Klaus Deininger (n 1) pp 170 and 173; FAO Compulsory (n 116) p 11; Paul De Wit *et al* (n 121) p 72.

[128] FAO Compulsory (n 116) p 54.

[129] Linlin Li. Adoption of the international model of a well-governed land expropriation system in China —problems and the way forward. (2015 World Bank Conference on Land and Poverty, Washington DC), 2015. P 5.

[130] FAO Compulsory (n 116) pp 6-14; Deininger (n 1) p xlii; Baker (n 6); Rahmato Searching (n 2) p 36; Ambaye (n 116); Seifu (n 8).

[131] Weldegebriel (n 124) p 200.

[132] Ibid.

Given its ability to distribute or transfer risk to the society in the form of taxes or service charges and the deep pocket it has, the State must be obliged to pay adequate compensation to build the assurance of land rights legal construct. The adequacy of compensation in this context depends upon the modes, valuation method, and the valuer. The choice of the mode of compensation – substitution of land holdings (land-to-land), monetary and other economic opportunities (individually or severally), should be given to the affected parties when both are available. When the affected party is a peasant or pastoralist, the legislation should provide an alternative form of compensation and resettlement plan by granting substitute land as a preferential step.[133] The substitute land must as much as possible be equivalent to the taken land in terms of usability, size, fertility, and location. Additionally, monetary compensation should be paid for the costs and inconvenience incurred in the course of the expropriation proceedings.

In monetary compensation, the basis and methods of valuation of the compensation have an impact on the fixing the amount. The basis may take the form of the value of land to the affected parties or the value of the market,[134] "[affected parties] loss" or "taker gain" principles.[135] With the assurance of the land rights, the adoption of "the value of land to the affected parties" is better. Nevertheless, it may incorporate some sentimental values which are not objective and difficult to measure, cause variations in assessing the compensation and result in exaggerated claims to avoid the expropriation itself.[136] The variation of awards for each case is not a problem, as far as the affected parties are satisfied with it, and it is determined through negotiation with them. Moreover, the difficulty in measuring it can be set right by imposing the burden of proof on the affected parties[137] and adopting the principle of equity.

However, with regard to the measurable aspects, we can employ the market value of the land rights, not the land itself, on the basis of affected parties' loss. In fact, the market value method presupposes and operates in the circumstances where land rights, be it ownership or less, are transferable through the sale and there are strong land markets and clear value for the land rights.[138]

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[133] Li (n 129) p 9.
[134] Jack L. Knetsch and Thomas E. Borcherding. Expropriation of private property and the basis for compensation. (1979) 29 *U. Toronto LJ*. 237–252. P 237.
[135] Robert Kratovil and Frank J. Harrison Jr. Eminent Domain--Policy and Concept. (1954) 42 *Calif. L. Rev*. 596–652. P 615.
[136] Knetsch and Borcherding (n 134) p 239.
[137] Ibid.
[138]FAO Compulsory (n 116) p 28; Deininger (n 1) p 166.

This is because the market value method is aimed at enabling the affected parties to procure new and exactly equivalent land rights.[139]

The market value of the land rights can be determined by the mechanism of "willing seller and willing buyer,"[140] "comparable sale,"[141] or "purchase substitute" approach.[142] From the land tenure security precept, the purchase substitute approach is preferable, because it accommodates all rounded cost and future increments to buy the same type of land rights within a reasonable time. In fact, this happens when the land rights are expropriated permanently. In temporary expropriation, the compensation should be assessed according to the "income capitalization" approach for the unused duration.[143] The reduction in the value of the land rights can also be compensated and calculated by deducting the purchase substitute value of the current land rights from the original one.

In countries where the land rights market is not well advanced, land rights are not transferable through sale and landholders have a strong attachment with and sentiment to their land rights, like Ethiopian peasants' and pastoralist' land rights, assessment of compensation is very difficult. Leaving the immeasurable aspects to be valued based on the discussion above, the measurable ones can be assessed in the income capitalization approach. Here, this approach assists only if the

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[139]Leif Norell. 'Is the market value a fair and objective measure for determining compensation for compulsory acquisition of land?' in Food and Agriculture Organization. Land Reform, Land Settlement and Cooperatives. Rome. *FAO*, 2008. 19–30. Pp 19–20.

[140]FAO Compulsory (n 116) p 27.
It to mean that the price of the land right the well-informed willing buyer and seller agree on if the land right is taken to the land market for sale at the time of expropriation. It is determined without the consideration of the probability of the expropriation. Because, the threat of expropriation affects the price of the land right. But the price here also affected by the market forces – supply and demand. Accordingly, if the expropriation is done at the time when the demand for land right is high and supply less, the affected parties are going to be compensated in a better way. Conversely, when the supply of land right is higher than the demand for it, the affected parties are going to be compensated less.

[141]Ambaye (n 116) p 198.
In this case a consideration is made to the price for which similar land right is sold in the same locality within reasonable time prior to the expropriation. This approach subjects the compensation to be assessed in the previous price of the same land right in the same vicinity and it does not clearly establish the reasonable time condition. Moreover, it does not help to determine the compensation if there is no sale of the land right in the locality before. Thus, the compensation here may not reflect the actual value of the land right but less.

[142] The purchase substitute approach on the other hand values the compensation based on the costs to be incurred and the price paid to purchase the same land right in the same locality in future reasonable time. Here unlike "Willing Seller and Willing Buyer" approach, the future increment of the price of land rights is taken into account. This approach can be used for loss of partial land rights – lease rights for instance, instead of replacement cost model. (See Weldegebriel (n 124) p 209).

[143]Ambaye (n 116) p 199.
The Income Capitalization Approach calculates the compensation based on the utility value – the income that would have been generated during the expropriation period from substantive or instrumental use of the land right.

duration of the land rights is fixed in advance and the land rights are utilized for the production of marketable items or employed in income generating transactions like leasing. Conversely, in cases of unfixed duration, like peasants' and pastoralists' land rights in my case, and where land outputs and uses are untradeable, like the pastoralists' case, assessment of compensation becomes more difficult if not impossible.

Thus, in the latter case, the compensation should be fixed through negotiation with the affected parties – self-assessment[144] - and the amount should be determined in such a way as not to impoverish them from their previous economic and social status. This is because expropriation is supposed to be done for the sole purpose of betterment and development of the society and the affected parties, being part of the society, should also be beneficiaries and expropriation should not be realized at their expense.

The role-playing nature of the valuer also influences the amount of compensation to be awarded to the affected parties. Unless the valuer is an independent organ or person and the affected party is given the right to hire his valuer at the expense of the State, besides negotiating on the amount first, there is a high tendency to under-compensation.[145] Thus, the legislation has to guarantee the compensation to be valued by an independent valuer that is freed from the State influence. And the legislation has to specify the basis upon which the compensation is allocated between the landholder and the actual user in cases when the expropriation is made while the land use right is in the hands of others.[146]

Besides, the assessment and determination of the amount of compensation and the mechanism of payment of monetary compensation have an implication on the land tenure security. Especially for those for whom land rights are a means of livelihood and who do not have other skills of generating income and are discouraged from acquire one, like Ethiopian peasants and pastoralist, the lump

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[144] Deininger (n 1) p 166.
[145] See Food and Agriculture Organization. Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security. Rome. *FAO Council,* 2012. Guideline 16; and also, FAO Compulsory (n 116) p 25.
[146] FAO Governance of Tenure (n 145).

sum modes of payment affect their future life. It results in social exclusion as well.[147] The FAO summarizes its effect as follows:

> "[w]ithout adequate training on how to manage a large lump sum payment, people may spend the money quickly and unwisely, or may be fooled into investing in fraudulent schemes. If compensation is paid to the male head of the household, the needs of women and children may be ignored as the money vanishes, to the detriment of the family's health and welfare. The end result may be people with no land to farm, no income stream to support themselves, and no job skills to compete in a non-agricultural economy."[148]

The fourth component of the legal construct of assurance of land rights that has to be stipulated and observed in the expropriation proceeding is the due process or procedural guarantee. Besides the enforceability of the land rights, which is discussed in sub-section iv, there are four due process requirements to be stipulated in legislation to secure the land tenure, because these proper and effective procedural safeguards have the implication of promoting land tenure security.[149]

Expropriation must not be conducted at an inconvenient time for the affected parties, unless it is for emergency cases. For instance, it should not be conducted at the time of grazing and cultivation in the case of pastoralist and peasants respectively. Moreover, the notification about the decision of expropriation shall be made in advance, before the actual handover of the land rights; and the time allowed to vacate land or recoup the investment in the land should be a sufficient one.[150] This must be complemented by advance payment of the compensation. Furthermore, when an appeal regarding the expropriation is made to a judicial review, as it is seen in sub-section iv, the legislation must ensure that affect parties hold the land rights until the final verdict, unless the ground of appeal relates to procedural irregularities.

Finally, the legislation should provide the affected party with the opportunity to reclaim the land or demand restitution if the land is not used for the purpose of the initial plan, or the land is no longer needed due to changes of plans afterward.[151] The right to restitution serves a dual function. On the one hand, it promotes the timely implementation of the intended project and avoids idling of land. On the other hand, it enhances the land tenure security of the landholder, implying that he

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[147] See for instance the China situation in Eddie Chi Man Hui, Hai Jun Bao, and Xiao Ling Zhang. The policy and praxis of compensation for land expropriations in China: an appraisal from the perspective of social exclusion. (2013) 32 *Land Use Policy*. 309–316.
[148] FAO Compulsory (n 116) p 40.
[149] Id p 2; Srur (n 63) p 160.
[150]Li (n 129) p.9; FAO Compulsory (n 116) pp 27 and 44.
[151] FAO Governance of Tenure (n 145) guideline 16.5.

can claim the land if the project is not carried out. This, indeed, requires setting the time limit within which the plan is required to be carried out on the land.

To sum up, the assurance of land rights as a legal construct of land tenure security can be established through the incorporation of the legal protection against arbitrary curtailment of land right elements I discuss above, and the avoidance of the legal and institutional pluralisms subsequently stated here below from the land law.

b. Avoidance of legal and institutional pluralism

The assurance of land rights can be also affected by the way in which land tenure system rules are formulated and the land administration institutions are set up. The parallel existence of the statutory land tenure system and the customary land tenure system is considered as a source of land tenure insecurity.[152] However, it is not the mere parallel existence of the two land tenure systems that is regarded as a threat to land tenure security. It is, rather, putting the landholders in a dilemma about which rule governs their land rights, while the land rights are defined in mutual contradicting and different ways. It then creates uncertainty among the landholders and in effect undermines their land tenure security.

It is not the very existence and application of the different land tenure system rules that causes the problem. In any one country different land tenure systems' rules may prevail and their application may occur in different land tenure arrangements. It perpetuates land tenure insecurity if the different land tenure rules are contradictory to each other and they apply to the same subjects at the same time. Mostly, this contradiction is created due to the failure of the legislature to enact a land law that contextualizes the landholding systems and the customary rules prevalent in the society.

This problem occurs not only because of the parallel existence and application of the statutory land tenure system and customary land tenure. It also occurs between different statutory land tenure systems, especially in federal countries like Ethiopia. It happens when the two levels of government – the central government and the federating states - enact contradicting land laws that

[152] Odote (n 96); Clarke (n 66).

apply to the same subjects. Unclear constitutional apportionment of legislative power and intervention of one in the other's power are the main causes for this pluralism.

In relation to land administration institutions too, their appropriateness, proximity, accessibility, and accountability contribute to tenure security.[153] But at the same time, their fragmentation and multiplication causes overlapping and complexity of responsibility, leading to an abusive system.[154] Moreover, it exposes landholders to a dilemma about where to go in order to deal with land administration issues. [155]

Further, the absence of a harmonized institutional setup and the existence of multiple land management authorities, where the decision of the lower organ in relation to land rights is done without the supervision of the higher organ and judicial review enhances the risk of corruption. This is because it opens a door to authorities to demand a bribe for registry of the land rights, changes to or forges of titles and land acquisition information, etc.[156] This situation affects the assurance of land rights.

Furthermore, also in relation to carrying out land expropriation, the diversified and localized institutional setup with no oversight may result in losing land rights to discretionary bureaucratic behaviour;[157] and be open to abuse and perpetuate tenure insecurity of landholders.[158] Thus, it

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[153] Monique van Asperen, Lucia Goldfarb and Katie Minderhoud. *Strengthening land governance for poverty reduction, sustainable growth and food security*, 2011. P 8; Klaus Deininger, Harris Selod, and Anthony Burns. *The Land Governance Assessment Framework: Identifying and monitoring good practice in the land sector*. Washington DC. The World Bank, 2012. Pp 16–17.
[154] Deininger *et al* (n 153) pp 20–21.
[155] The land administration system consists of the following major things:

1. "land rights: the allocation of rights in land; the delimitation of boundaries of parcels for which the rights are allocated; the transfer from one party to another through sale, lease, loan, gift or inheritance; and the adjudication of doubts and disputes regarding rights and parcel boundaries;
2. land use regulation: land use planning and enforcement, and the adjudication of land use conflicts;
3. land valuation and taxation: the determination of values of land and buildings; the gathering of tax revenues on land and buildings, and the adjudication of disputes over land valuation and taxation." (See Tony Burns and Kate Dalrymple (eds.). *Land administration: indicators of success, future challenges.* Wollongong, Land Equity International Pty Ltd, 2006. Pp 13–14; Food and Agriculture Organization. Access to rural land and land administration after violent conflicts. Rome. *FAO Land Tenure Studies 8*, 2005. Pp 23–24).

[156] See Anni Arial, Craig Fagan and Willi Zimmermann. Corruption in the land sector. *IT Working Paper 04/2011, FAO and Transparency International*, 2011.
[157] Deininger (n 1) p 8.
[158] FAO Compulsory (n 116) p 13.

becomes imperative to curb or account for the legal and institutional pluralisms I discuss above, so as to establish the assurance of land rights and land tenure security.

iv. The Enforceability of Land Rights

The legislative provision of the required nature, duration, and assurance of rights in land, which is discussed above, is not a guarantee by itself to secure land tenure. This is because, as Baker has noted, the unjust deprivation of, restrictions on or interference with land rights not only results from the making of government rules, but also from their application.[159] Thus, the enforceability of land rights through an independent organ at the time of specific challenges is required to supplement the other legal constructs of land tenure security.

It is clear that, to secure land tenure, the cost of enforcing the rights should not be inhibiting. The high cost of enforcing rights is regarded as one of the contributing factors to perpetuate land tenure insecurity.[160] Moreover, legal knowledge about land rights also contributes to the enforcement of land rights.[161] The legal regime should try to create the enabling environment that mitigates the cost of enforcement and the knowledge gap in the form of exemption of the court fees,[162] and creation of a favourable environment for civil society organizations to provide advocacy and legal aid services for free.

However, it is not only the cost of enforcement that undermines the enforceability of land rights. The scope of grounds to take legal action defined in the legal regime also affects it. The specific challenges to landholders' land rights come from two sources: private individuals and the state. The private individual's encroachment on legitimate landholders' land rights is the result of competing interests. Such challenges can be deterred amicably through the customary dispute resolution mechanisms prevalent in the society. Perhaps, the landholders should be entitled to an appeal to the state machinery in when aggrieved with these more informal decisions.

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[159] Baker (n 6) p766.
[160] Place *et al* (n 2) p 21; Seifu (n 8) p 173; Deininger (n 1) p 36.
[161] UN-HABITAT. Land tenure security in selected countries: Synthesis report. Nairobi. *UN-Habitat,* 2014. P 9.
[162] Food and Agriculture Organization. Agrarian law and judicial systems. Rome. *FAO Legislative Study 5,* 1975. P 19.

Challenges from the state can take the form of unjustified and unlawful interference with the exercise of specific land rights, like the restriction of the duration of the right, the size of land on which the given right is exercised, and to whom the land rights are transferred. Moreover, the challenges may also take the form of inappropriate delimiting of boundaries, failure to effect land registry, improper assessment of land valuation and taxation. Furthermore, other challenges from the state happen in the land expropriation process. Here the expropriation may be conducted without observing due process and considering convenience to the landholders, paying adequate compensation, giving sufficient time to evacuate and recoup the investment, or the satisfaction of the public purpose requirement. Thus, the parties affected by any of these problems should be entitled to seek judicial review to ensure their access to justice and land tenure security.[163] Legislative restriction of the grounds upon which landholders can claim a judicial review is a curtailment of enforceability of land rights and undermines land tenure security.

Moreover, the geographic location and time to be taken in the process of judicial review also affect the enforceability of land rights.[164] Especially in the situation where the land rights are a means of livelihood, like for Ethiopian peasants and pastoralists, the delay in and the practical remoteness of judicial review amounts to a denial of justice and affects land tenure security. The establishment of a physically accessible and separate bench with qualified human resources in the judicial system to entertain land-related claims is perhaps the best way to address this puzzle.

v. The Registration and Certification of Land Rights

Theoretical conceptions reveal that the registration and certification of land rights enhance the security of land tenure.[165] However, empirical studies produce three kinds of results.[166] Some

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[163] FAO Governance of Tenure (n 145) guideline 21.1.
[164] FAO Agrarian (n 162) p 44. The delay in the judicial process is because of the case load.
[165] See for instance Gershon Feder and Akihiko Nishio. The benefits of land registration and titling: economic and social Perspectives. (1999) 15 *Land Use Policy*. 25–43. P 26; UN-HABITAT. Handbook on best practices, security of tenure and access to land. Nairobi. *UN-Habitat,* 2003. Pp 25–26; Helle Munk Ravnborg, Bernard Bashaasha, Rasmus Hundsbæk Pedersen, and Rachel Spichiger. Land tenure security and development in Uganda (No. 2013: 03). *DIIS Working Paper*, 2013. P 1; Camilla Toulmin. Securing land and property rights in Africa: improving the investment climate global competitiveness. *Report, 2005-06 World Economic Forum, Switzerland*, nd; Alexandrino Njuki. Cadastral systems and their impact on land administration in Kenya. *(International Conference on Spatial Information for Sustainable Development, Nairobi)*, 2001. P 6; The World Bank. Land registration and land titling projects in ECA countries. *Agriculture Policy Note #2*, 1996. P 2; Place *et al* (n 2).
[166] Most of the empirical studies examine the contribution of land registration and certification towards agricultural investment, productivity, land rental and access to credit. However, since these things are the outcome or significance

authors prove that the registration and certification of land rights significantly enhance the security of land tenure.[167] Other studies point out that no significant relation between the two, positive or negative, can be found.[168] Other studies still, indicate that registration and certification in fact undermine security of tenure.[169] For instance, in Ethiopia, registration and certification was initially considered a threat to land tenure security since peasants think that it comes with "a hidden agenda that would result in their land being taken away or redistributed or the tax increased."[170]

Because of these divergent results, authors are looking for alternative policies to registration and certification to strength land tenure security.[171] However, it has been argued that the contribution of registration and certification of land rights presupposes the existence of the other legal constructs of land tenure security I discuss above.[172] These studies reach these conclusions without assessing the legal regimes that define the land tenure system on the basis of the above legal constructs, and have examined the registration and certification of land rights' implication for land tenure security in isolation from the other legal constructs. In non-satisfaction of the other legal constructs, land registration and certification alone doesn't contribute to land tenure security.[173] This is the reason for requiring a holistic approach of examining and understanding all legal constructs together for the study and review of legal land tenure security.

Moreover, it is not the titling *per se* that can adversely affect land tenure security. Rather, the process of carrying it out, the cost and whose land rights are registered and certified – individuals and/or the communal – all affect security of tenure.[174]

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of land tenure security, impliedly they indicate the relation of the two. Little assess the direct impact of it on land tenure security.

[167] See for instance, Roth *et al* (n 24) p 211; Quy-Toan Do and Lakshmi Iyer. Land titling and rural transition in Vietnam. (2008) 56 *Economic Development and Cultural Change*. 531–579; Lee J. Alston, Gary D. Libecap and Robert Schneider. Property rights and the preconditions for markets: the case of the Amazon frontier. (1995) 151 *Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft*. 89–107.

[168] See for instance the summary note provided in Ubink (n 4) pp 8–10.

[169] Svein Ege. Land tenure insecurity in post-certification Amhara, Ethiopia. (2017) 64 *Land Use Policy*. 56–63.

[170] Solomon Abebe. 'Land registration system in Ethiopia comparative analysis of Amhara, Oromia, SNNP and Tigray states' in Solomon Bekure, Gizachew Abegaz, Lennart Frej and Solomon Abebe (eds.). *Standardization of rural land registration and cadastral surveying methodologies experiences in Ethiopia*. Addis Ababa, *Ethiopia-Strengthening Land Tenure and Administration Program (ELTAP)*, 2006. 165–188. P 171.

[171] Ubink (n 3) p 9.

[172] Klaus Deininger, Songqing Jin, Berhanu Adenew, Samuel Gebre-Selassie and Berhanu Nega. *Tenure security and land-related investment evidence from Ethiopia*. The World Bank, 2003. Pp 17–18.

[173] Ibid.

[174] David A. Atwood. Land registration in Africa: the impact of agricultural production. (1990) 18 *World Development*. 559–571; Eric C. Wood. 'Experiences in cadastral surveying for land registration in Africa: an overview' in Solomon

Through the holistic approach to the legal constructs of land tenure security, the registration and certification of land rights contribute to the enhancement of land tenure security in two ways. First, it does so by making some of the advantages flowing from rights in land practicable. For instance, as De Soto's claims, the right to use land rights as collateral to access credit is effectively practiced if the land rights are registered and certified.[175] Moreover, the right to lease land rights can be practiced upon showing the lessee that the lessor is the rightful holder of the land rights. And landholders transfer land rights temporarily to another effective and efficient user if they have a reasonable guarantee of being able to recover it.[176] The registration and certification of land rights is one way to ensure this.[177]

Second, it avoids the possibility of the threat of competing interests, since it can serve as a means of proof of the entitlement. In practice, this role of land registration and certification in the land tenure security depends upon the evidentiary weight given to it by the particular legal regime.[178] Consideration of the registration and certification as conclusive evidence to prove the entitlement of the land rights, unless the very registration and certification itself are contested, can play its part to enhance land tenure security.

D. Scope of Constitutional Law in Governing the Issue of Land Tenure Security

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Behure, Gizachew Abegaz, Lennart Frej and Solomon Abebe (eds.). *Standardization of rural land registration and cadastral surveying methodologies experiences in Ethiopia.* Addis Ababa. *Ethiopia-Strengthening Land Tenure and Administration Program (ELTAP)*, 2006. 21–38; Feder and Feeny (n 67). The predefined purpose and significance of land registration and certification of land rights also affects its contribution to security of land tenure. For instance, if it is carried out with the assumption of redistribution of excess land and valuation for taxation, the landholders may perceive it as a perpetuation to their land tenure insecurity as it inferred from the Ethiopian experience. (See Abebe (n 170)). In contrast, if it is done with the view to identify who holds which land and serves to establish the legitimate holder of the land rights, it can enhance land tenure security.

[175] Hernando Do Soto. *The mystery of capital*. London. Black Swan, 2001; and see also Feder and Nishio (n 165) pp 26–28.

[176] UN-HABITAT and Global Land Tools Network (n 2) p 7.

[177] Empirical evidence also supports this claim. (See for instance, Roth *et al* (n 24) p 211).

[178] Amhara National Regional State. Revised rural land administration and use proclamation No. 252/2017. 2017. Article 35(5); Benishangul Gumuz National Regional State. Rural land administration and use proclamation No. 85/2010. 2010. Article 27(5). However, the federal supreme court cassation division of Ethiopia, the decision of which has a binding effect on both the federal and state courts, has demanded the production of collaborative evidence in addition to the land registration and certification to establish the entitlement of land rights. (See *Tilahun Gobeze vs Mekete Hailu and Aweke Muchie*, file No.69821 (27January 2011) the Federal Supreme Court Cassation Decisions, Vol.13 (Addis Ababa, Federal Supreme Court of Federal Democratic Republic of Ethiopia, November 2011); Federal Democratic Republic of Ethiopia. Federal courts proclamation reamendment proclamation No. 454/2005. *Fed. Neg. Gaz.* Year 11 No. 42. 2005. Article 2(1)).

In Section C above it is highlighted what the legal constructs for legal land tenure security ought to look like to secure land tenure. The next logical issue that arises is where to regulate them in the hierarchy of laws. Much of the written constitutional law of any nation is devoted to establishing and maintaining a system for the allocation (and reallocation) of power over wealth among individuals, groups and the state.[179] Particularly, regulation of the aspect of legal land tenure security in constitutional law aims at restricting the law maker's power of enacting laws that perpetuate land tenure insecurity. This is because the issue of property rights has comprised two competing interests – protecting property rights of holders and promoting the public welfare.[180] However, at the same time, land policy is always intertwined with contradicting policy issues: flexibility to cope with socio-economic changes and securing tenure through constitutional protection. Constitutional amendment is of course not an easy task and may even limit the land policy from catching up with the socio-economic changes.

On this basis, critical examination of Edwin Baker's thesis on property and its relation to constitutional norms helps to delineate the scope of constitutional regulation of the issue of legal land tenure security.[181] Nonetheless, his work doesn't deal with central-state constitutional power division in federal countries, which is at the center of avoiding the kind of legal and institutional pluralism that creates uncertainty for landholders, as seen in Section C Subsection iii (b).

Baker notes that the constitutional status or regulation of property rights, in general, depends on its relationship with constitutionally grounded values that emanate from the property functions the constitutional rules are intended to serve.[182] Nevertheless, he doesn't claim that the functions are to be deduced by looking into the nature of the property right holder apart from the intention of the constitution maker, although some of the functions he identifies indicate it. He identifies

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[179] John Henry Merryman. Ownership and Estate (Variations on a Theme by Lawson). (1973) 48 *Tul. L. Rev. 48*, p.916–945. P 916.

[180] Theunis Roux. 'Property' in Stuart Woolman, Theunis Roux and Michael Bishop (eds.). *Constitutional law of South Africa*. Cape Town. Juta and Company LTD (Lty) (2nd ed), 2006. 46-1–46-37. P 46-2.

[181] See Baker (n 6). The constitutional human rights of the right to property also has the role in indicating the extent the constitutional norms shall govern the issue of land tenure security. However, compared with Bakerian conception it is narrower. It just outlaws deprivation of property rights and put the exception of expropriation for public purpose in due process and upon payment of adequate compensation as prescribed by law. (See Christophe Golay and Loana Cismas. Legal opinion: the right to property from a human rights perspective. *Geneva Academy of International Humanitarian Law and Human Rights,* 2010). In other words, it provides freedom form arbitrarily deprivation, freedom from unjustified controls on use of property and peaceful enjoyment of possessions. (See Peter Sparkes. *A new land law*. Oxford and Portland. Hart Publishing (2nd ed), 2003. Pp 71–72.

[182]Baker (n 6) p 744.

six functions. These are: a protective function that ‘‘protect[s] the individual against certain forms of unjust exploitation by other individuals or by governments;’’[183] a use function, which means ‘‘people rely on, consume, transform resources in many of their self-expressive, developmental, productive and survival activities;’’[184] a personhood function that “protect[s] people's control of the unique objects and the specific spaces that are intertwined with their present and developing individual personality or group identity;’’[185] a welfare function, meaning “[securing] individuals’ claims on those resources that a community considers essential for meaningful life;’’[186] a sovereign function, which ‘‘provide[s] people with a means to exercise power over others.;’’[187] and an allocative function that defines ‘‘certain means and … block[s] other means by which individuals or groups secure the resources.’’[188]

From the legal security of tenure perspective as well as Baker’s suggestions, the first four functions and the sovereign function to some extent raise constitutional issues and need to be regulated in the constitution. The last function – allocative function - is more about politics and depends upon a value judgment rather than a doctrinal stipulation.[189] These functions of property can give us a direction about what issues of property rights, in general, are to be regulated in the constitution, which has also an implication for the legal constructs of land tenure security that are discussed in the above section.

The use value function demands a constitutional rule to limit the authority of the government to restrict “substantively valued uses of [land].”[190] Since it is concerned with individuals’ or communities’ decisions regarding land use, it has a great role in promoting their autonomy and the democratization process. In fact, this constitutional limitation of government’s authority is not absolute. The government can prohibit it if it “determine[s]” the social world – “makes other people’s contrary choices irrelevant.”[191]

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[183] Id p 747.
[184] Id p 744.
[185] Id p 747.
[186] Id p 745.
[187] Id p 751.
[188] Id p 748.
[189] Id pp 767–768.
[190] Id p 759. By substantive use he mean that the actual utilization of the resource carrying out different activities.
[191] Ibid.

The welfare function adds protection to individuals' and communities' claim to land on which livelihood depends. This constitutional protection requires the insurance of equal protection theory – a government guarantee of all society members with the minimum quantity of land necessary for their livelihood.[192] This clause in effect limits the government's authority to statutory classification that affects the land availability serving the welfare function; to allow a due process hearing to the members of society to effect access to land; and not to allow the government to "forego the due process hearing relying on an irrefutable resolution that presumes claimants do not merit, need or have legitimate claims on the land".[193]

The personhood function further demands the constitutional protection of the resources – land - to which people develop some degree of psychological attachment and in which they invested their identity. This protection takes two forms – a "limit of encroachment" and "special compensation" regime. The constitutional rule prevents the government's authority to encroach on land rights "based merely on the community's general welfare-advancing policies".[194] It means that the public purpose requirement to encroach on those land rights is to be defined narrowly, at least compared with the other land rights, which do not have the personhood function.

Even in the permissible encroachment, the constitutional rules should demand special concern in treating those land rights in the form requiring 'full and perfect equivalent' compensation.[195] First, the government, before initiating the taking should show that the absence of any alternative to achieve the intended collective goals to taking the personhood-related land.[196] Second, in its cost-benefit decision-making to encroach on personhood-related land rights, the government should consider more than market value.[197] Finally, it requires special compensation schemes that in the mode and amount "come[…] as close as possible to being a real equivalent."[198] Here, the assessment of compensation should consider replacement cost and the psychic and out-of-pocket costs of change, besides the market value of the land rights.[199] In fact, this - Baker's third criterion – doesn't consider the situation of a country where sale of land rights is legally prohibited and the

[192] Id pp 760–761.
[193] Ibid.
[194] Id p 762.
[195] Id p 763.
[196] Ibid.
[197] Id p 764.
[198] Id p 764.
[199] Ibid.

land rights market is not well-advanced. Besides, in terms of the amount, the purchase substitute approach compensates in a better way, as it is discussed above.

The protective function demands constitutional protection that regulates the expropriation clause and procedural aspects of the due process clause in case of all resources, including those on which people do not invest their identity. These constitutional rules can provide protection against arbitrary curtailment or "unjust individualized exploitation"[200] of land rights I discuss above in Section C sub-section iii(a). In the form of a precautionary measure, the constitutional protection, as Baker claims, should guarantee a "ban on rule changes or individualized decision that, without just compensation or [/and] due process, reduce property rights that people have."[201] However, the *a contrario* reading of this provision implies the probability of taking the property rights. Baker's suggestion as such doesn't incorporate the requirement of the greater interest justification for the expropriation. The constitutional protection provision should incorporate this.

In relation to the sovereign function, Baker indicates that the exercise of power over others is not desirable by itself, since it limits the autonomy of others.[202] However, it is justified by the good it creates.[203] To keep a balance between these contradicting outcomes, Baker argues for a declaration of the doctrine of unconstitutional conditions by prohibiting certain exchanges so as to limit the landholders' right to use the property to exercise power over others.[204] The limit should be for the purpose of protecting constitutional rights.[205] And the legislature's limiting of this power for other purposes amounts to violation of the constitutional norm. Moreover, he notes that this power exists only when the state recognizes the property rights that serve this function.[206] Here the constitutional norm demands that the limit on the sovereign function be only for the protection of constitutional rights and their existence depends upon the legislature's sanction.

In sum up, from the legal land tenure security perspective, the constitutional incorporation of the above five property functions is necessary. Because perpetuation of legal land tenure insecurity in my context may result even from the government's making of legislation, constitutional

[200] Id p 765.
[201] Ibid.
[202] Id p 770.
[203] Id p 771.
[204] Ibid.
[205] Ibid.
[206] Ibid.

incorporation limits the opportunity to affect legal land tenure security through making or applying of governmental rules.

Besides, in a federal country, constitutional norms are also required to demarcate apportionment of land rights-related power in a clear manner, because the mandate to allocate power, in general, among the different tiers of government in the federal country is the task of constitutional norms. In particular, the power to enact a law that defines the land tenure system and administers same, should be clearly apportioned to the two levels of government – the central and state governments. Its failure in this regard results in legal and institutional pluralism, which undermines legal land tenure security as it is seen in Section C Sub-Section iii (b) above.

E. Conclusion

Despite the role land tenure security plays in advancing sustainable development, democratization and good governance and human rights in agrarian developing countries, comprehensive and well-established legal constructs of legal land tenure security are not established yet. This is because of a lack of understanding of the concept, the prevalence of the view that private ownership of land ensures legal land tenure security and piecemeal approach to study the objective elements of land tenure security. Moreover, failure to appreciate the role of constitutional norms in ensuring it and the different landholding systems operating in the world undermine the development of an inclusive conceptual framework for the legal constructs of land tenure security.

As a result, the question of land tenure security should be shifted from the debates on land ownership, since the legal constructs imply the possibility of ensuring legal land tenure security in any form of land ownership. Nonetheless, adequate and comprehensive legal constructs are not formulated.

For instance, the existing framework in relation to the nature of rights in land requires the provision of adequate breadth and robustness of land rights, defining the property from the bundle of rights perspectives. It doesn't provide a guide to determine the adequacy and robustness of the rights and to appreciate the contribution of the integrative approach of understanding property to land tenure security. The social, economic and historical contexts of the society and the integrative

approach to understanding property should be taken into account in delineating the bundle of land rights.

In relation to the duration of land rights, it is required to be adequate. But how much is adequate is left to the determination of the legislature, without any guide. This causes the legislature to assign a certain period without logical justification. To minimize arbitrariness, the duration should be defined in consideration to the purpose for which the land rights are acquired in the case of general land rights. And for specific land rights, the duration should be determined by the free agreement of the parties.

Also, to assure land rights, it is clear that the overriding interest should be limited to the land expropriation for public purpose upon payment of adequate compensation and procedural due process. Nonetheless, the very understanding of expropriation as inherent rights or power of state empowers the state with a strong position. It rather shall be understood as a limit to a right to ensure the assurance of land rights. The limit to a right is required to be exercised for clearly defined public purposes after an attempt to acquire the land rights in a voluntary negotiation. In case of failure to reach an agreement, the government can take the land upon payment of adequate compensation that depends upon the form, the valuation method, and valuer; giving advance notice with sufficient and convenient time to evacuate the land; and with the right to reclaim the land when is not needed or not used for the initial plan or within a defined time. Moreover, the legal and institutional pluralism should be avoided to ensure the assurance of land rights.

Furthermore, the legal construct of enforceability of land rights is realized when the cost of enforcement is not inhibiting. However, alternative means must be introduced to so as to avoid the possibility of non-enforceability of the land rights due to cost. Besides, the protection on limiting the grounds to demand judicial review must be there, because the enforceability of land rights is inhibited not only by the cost, but also by the restriction on the grounds to take legal action.

Finally, supplementing the above legal constructs with registration and certification of land rights gives the legal land tenure security a complete foundation. However, the certification must be inclusive and made for the individual as well as the communal land holdings, and it must be considered as conclusive evidence to prove the land rights, unless the document itself is contested.

These legal constructs of land tenure security can be established when the constitutional norms have given a direction. Because the making of the government rules may affect the establishment of the above legal constructs if there is no constitutional direction, the constitutional norms direct in two ways. One, in the form of providing normative rules that define the Bakerian five functions of property; and two, by providing a clear delineation of land-related powers among the central government and states in a federal country.

This conceptual analysis gives the foundation to assess the implication of the statutory land tenure systems on the legal land tenure security. Thus, in the subsequent entire Chapter s, I analyse the implications of post-1991 statutory land tenure system of Ethiopia on the legal land tenure security of peasants and pastoralist. Ahead of this, in Chapter 2, it is imperative to analyse from a bird's eye view the position of the peasants' and pastoralist' legal land tenure security through the legal constructs in the pre-1991 historical context.

Chapter 2

Historical Contextualization of Legal Land Tenure (In) Security of Peasants and Pastoralists in Pre-1991 Ethiopia

In Chapter 1 I highlight that legal land tenure security can be brought to fruition through the holistic satisfaction of the required nature, duration, assurance, enforceability and registration and certification of land rights. Moreover, it also entails a reservation of some of the land tenure system aspects for constitutional rules, so that they direct the legislative definition of the legal protections to secure the land tenure. For well-defined protection and attainment of these legal constructs in the contemporary legal framework, a thorough historical understanding of the ways in which land tenure security was protected in the land tenure systems of the different previous political-economic systems is crucial, because, besides the economic and social factors, history also has its own role in defining the legal protection to secure the land tenure.

Against this background, in this Chapter, I delve into the legal land tenure security status of peasants and pastoralists in the pre-1991 rural land tenure system of Ethiopia. I do so to determine whether there is continuity or discontinuity in the post-1991 land tenure system. I consider in particular the monarchical-feudalist (1889-1974),[1] and revolutionary socialist (1974-1991) political-economic regimes the country went through pre-1991 as a modern state.[2] With a brief glimpse of customary land tenure rules, the emphasis is on the statutory legal regimes defining the land tenure system that were promulgated since the country began to enter into a period of legal

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[1] The monarchical-feudalist here refers to the political-economic system by which a country is governed in autocratic kingship system, and the economic means of productions and products, like land rights are controlled by the ruling elites and the nobility classes. The Ethiopian scholars characterize the post-1974 period as "feudal mode of production" and feudal land rights. (See Donald Crummey. *Land and society in the Christian Kingdom of Ethiopia: from the thirteenth to the twentieth century*. Urbana and Chicago. University of Illinois Press, 2000. Pp 8–9).

[2] The period 1889 was the time in which Emperor Menelik II, who claimed to be the former of the modern Ethiopian State territorially, begun to rule the country and started the territorial formation of the country. (See Harold G. Marcus. *A history of Ethiopia*. Berkeley and Los Angeles. University of California Press, 1994; Gebru Tareke. *Ethiopia: power and protest: peasant revolts in the twentieth century*. New York. Cambridge University Press, 1991. Pp 37–42; Teshale Tibebu. *The making of modern Ethiopia: 1896–1974.* New Jersey. The Red Sea Press, 1995). And 1974 was the time that marked the end of the monarchical-feudalist political-economic regime and the commencement of the revolutionary socialist regime that had introduced radical rural land tenure reform until it ended in 1991. (See Dessalegn Rahmato. Agrarian change and agrarian crisis: State and peasantry in post-revolution Ethiopia. (1993) 63 *Africa.* 36–55).

modernization. The country commenced modernization of its legal system during the reign of the last Emperor of the monarchical-feudalist regime, Emperor Haile Selassie I (r 1930 -1974).[3] The legislation enacted and the land tenure reform introduced during his period, seen together with some empirical studies, define the land tenure security of peasants and pastoralists of the regime. The revolutionary socialist political-economy introduced after Emperor Haile Selassie I's overthrow, during the *Derg* (Amharic for 'council' or 'committees')[4] regime, produced a signal shift in the land tenure system as a whole, but the rural in particular.[5] It, among others, led to the reform of land policy and the law that defines the land tenure security issues of the rural community.

A judicious review of peasants' and pastoralists' land tenure system during the monarchical-feudalist regime against the legal constructs of land tenure security reveals variations in the implications of land tenure security among the peasants and pastoralists, and among the peasants themselves. The pastoralists' land tenure was highly unsecured due to the conversion of their customary land holdings into state domain – *Terra Nullis* - and its transfer to large-scale commercial farming and parks without any compensation. Peasants, on the other hand, experienced regional variations. While the northern peasants experienced relatively secured land tenure, the southern were denied their customary land rights and exposed to highly unsecured tenancy, which to some extent improved in the legal modernization regime. Generally, the absence of meaningful agrarian reform to enhance the legal land tenure security of peasants and pastoralists, and denial of the peasants from being owners and beneficiaries of the fruits of their labour, led to the Peasants' Rebellion combined with the "Land to Tiller" student movement, which brought an end to the monarchical-feudalist system by military overthrow in 1974.

Even though the revolutionary socialist Government that assumed political power was committed to addressing the personal dignity, historical injustice, agricultural development and egalitarianism that brought it to power, it rather substituted the ruling class landlordism with state-landlordism until it embarked upon further rural land tenure reform. In fact, it succeeded in ensuring access to

[3] Especially after the departure of Italy since 1942, Emperor Haile Selassie I was intensely involved in the modernization of the legal system through enactments of statutory law and establishment of the judiciary machineries.
[4] Bahru Zewde (ed.). *Documenting the Ethiopian student movement: an exercise in oral history.* Addis Ababa. Forum for Social Studies, 2010.
[5] John M. Cohen and Peter M. Koehn. Rural and urban land reform in Ethiopia. (1977) 14 *Afr. L. Stud*. 3–62.

land for the southern landless tenants and reinstating the customary land rights of pastoralists legally. For the northerners who had better land tenure security and protection before, the reform abridged their land rights and undermined their land tenure security. Thus, the insufficient land tenure reform and continued denial of the peasants from being owners and beneficiaries of the fruits of their labour *inter alia*, resulted in the regime facing opposition and insurgent struggle that led to its overthrow through military coup d'état in 1991 – this, even though it had made and declared a further land tenure reform to improve the land tenure security of the peasants.

In the first section below, I explore the historical context of peasants' and pastoralists' legal land tenure security in the monarchical-feudalist regime. Dividing the period into pre-legal modernization and legal modernization, I analyse the land tenure system against the legal constructs of land tenure security, to show the legal status of land tenure security of the peasants and pastoralists with regional variations. In the next section I analyse the rural land tenure reform introduced in the Socialist *Derg* regime, in light of the legal constructs of land tenure security. I goes through the explanations for the reform, and analyse the content of the reform, to address the land tenure security issues of the peasants and pastoralists. Moreover, the failed further reform is also examined, to show how it was intended to enhance legal land tenure security. In the final section I make concluding remarks on the continuity and discontinuity of the peasants' and the pastoralists' land tenure (in)security issues in the two political-economic regimes.

A. During the Monarchical-Feudalist Regime

The formation of the current/modern Ethiopia - at least its territorial demarcation - traces back to the reign of Emperor Menelik II (r 1889-1913); and the exploration of the rural land tenure system here doesn't consider the situation before then.[6] Moreover, it is the reign of Emperor Menelik II and Emperor Haile Selassie I that really defined the rural land tenure system at the time.[7] During

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[6] Marcus (n 2) p 105.
[7] In between two rulers namely *lij* Iyasu (r 1913-1916) and Empress Zeweditu (r 1916-1930) had governed the country. But their time was mostly dominated by fought for assumption of power and they did not lead the country in sustainable way so that they had affected the land tenure system.

this time the rural land issue intertwined with personhood - 'to be landless is to be sub-human'[8] - and it carried with it social, economic and political power.[9]

The then customary and monarchy-implanted rural land tenure system of monarchical-feudalist Ethiopia is described as one of the most complex amalgamations of various land use forms in all of Africa, with a diversity of tenure systems.[10] Brietzke illustrates the complex nature of land tenure at the time, by taking the case of the province of Wollo where it is estimated that there were 111 different forms of tenure.[11] However, in this period, land was controlled by the king and the ruling elites and the expansionist wars of particularly the late 19th century meant that vast territories were included into the domain.[12] The king distributed the captured land to his favorites and supporters. As a result, the then rural land tenure in Ethiopia was predominantly based on a feudal system, where the majority of land was in the hands of the nobility and the Ethiopian Orthodox church.[13]

Besides the complex arrangements of land rights, the rural land tenure system of the time was characterised by three further factors: regional differences in the land tenure arrangements between especially the North and the South due to diverse geographical and cultural settings, and the different socio-political events that occurred in different parts of the country; the different literatures written on rural land tenure classified and described the tenure system differently; and failure to give regard to the pastoralists' land tenure arrangements. These factors together make it

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[8] Harrison C. Dunning. Land reform in Ethiopia: a case study in non-development. (1971) 18 *UCLA L. Rev.* 271–307. P 271; Paul Brietzke. Land reform in revolutionary Ethiopia. (1976) 14 *The Journal of Modern African Studies*. 637–660. P 638.

[9] John W. Van Doren. Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case Study of the Ethiopian Legal System. (1994) 3 *J. Transnat'l L. & Pol'y*. 165–204. P 168. For the general overview of the social, economic, political, cultural and religious account of the pre-legal modernization era of Ethiopia see Marcel Griaule. Labour in Abyssinia. (1931) 23 *Int'l Lab. Rev.* 181–202.

[10] Saheed A. Adejumobi. *The history of Ethiopia*. London. Greenwood Press, 2007. Pp 40–41; Peter Bodurtha, Justin Caron, Jote Chemeda, Dinara Shakhmetova, and Long Vo. Land reform in Ethiopia: Recommendations for reform. *Solidarity Movement for a New Ethiopia*, 2011. P 14.

[11] See Brietzke (n 8) p 639; Raymond Noronha. A review of the literature on land tenure systems in Sub-Saharan Africa. *Agriculture and Rural Development Department, World Bank*, 1985. P 42.

[12] See Tareke (n 2) pp 55–85; Tibebu (n 2) pp 71–84.

[13] Dessalegn Rahmato. *Agrarian reform in Ethiopia*. Uppsala. Scandinavian Institute of African Studies, 1984; Bodurtha *et al* (n 10) p 15; Mohamed M. Ahmed, Simeon K. Ehui, Berhanu Gebremedhin, Samuel Benin and Amare Teklu. *Evolution and technical efficiency of land tenure systems in Ethiopia.* Nairobi. International Livestock Research Institute (ILRI), 2002. P vii. Since the church was considered as a source of legitimacy for the power of the crown and a major ally to the imperial power at that time, the state rewarded land to the church in order to get and sustain its support. There is no agreement on the amount of land held by the church then. The range was from 10 to 20 percent of the country's cultivated land.

impossible to give a fully-fledged and comprehensive description of the rural land tenure of the period, as the information is mainly anecdotal and incomplete.[14]

Bearing these factors in mind, a brief analysis of the predominant land tenure arrangements revolving around the peasants and pastoralists and their implication for legal land tenure security is discussed here. At that time the regional variation of the land tenure system operated in relation to peasants' land rights. The pastoralists' land tenure system continued to be regulated customarily without being absorbed by the northern socio-economic order until Emperor Haile Selassie I changed things with the expansion of commercial farming and modernization of the legal system.[15]

i. The North

In the context of rural land tenure, the North of Ethiopia refers not only to geographical location, but also to the place of privileged socio-economic life, where the nobility and the ruling class of the country associates themselves and belong, and also to the power base of the authorities.[16] In this part of the country, the two land tenure systems revolving around peasants were well known to define land tenure security. As Hoben recounts, these were the *rist* system that confers usufructuary "land use rights" and the *gult* system that entails "fief-holding rights".[17] Thus, the determination of the objective land tenure security of peasants here is the outcome of these two.

The *rist* tenure system was a form of corporate landholding based on descent that granted usufruct rights – the right to appropriate the return from the land.[18] It was a right with which a holder could claim a portion of land from his or her ancestors who had originally held the land. Under this system, individuals' rights over *rist* landholding were decided essentially on the basis of his/her membership to a village community, and by virtue of their blood ties to the "founding fathers".[19] Access to *rist* land rights was also tied to other conditions. Besides establishing the bloodline, a

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[14] Wibke Crewett, Ayalneh Bogale, and Benedikt Korf. *Land tenure in Ethiopia: Continuity and change, shifting rulers, and the quest for state control*. Washington Dc. International food policy research Institute (IFPRI), 2008. P 6.
[15] Andargachew Tiruneh. *The Ethiopian revolution, 1974-1987: a transformation from an aristocratic to a totalitarian autocracy*. Cambridge. Cambridge University Press, 1993. Pp 7–15.
[16] Ibid; Adejumobi (n 10) p 41.
[17] Allan Hoben. *Land tenure among the Amhara of Ethiopia: the dynamics of cognatic descent*. Chicago. University of Chicago Press, 1973. P 5. The *gult* as argued later did not strictly provide rights in land. Rather it provided both property rights; to have separate *rist* land rights and claim from the peasants' product; and office power.
[18] Tibebu (n 2) p 73; Dunning (n 8) p 274; Crewett *et al* (n 14) p 8.
[19] Tibebu (n 2) pp 73–78; Crummey (n 1) p 9–10.

person was expected to be a follower of the then dominant religion of Christianity – *Ethiopian Orthodoxy*. As disadvantaged and discriminated groups in the north, the followers of other religions, especially Islam, Bete Israel "House of Israel" and artisans did not have access to it.[20] Otherwise, it was assumed that it recognized the principle of equality of descendants regardless of sex.[21] Nevertheless, Bereket has indicated the late claims for the *rist* land rights were made by

[20] Bereket Kebede. Land tenure and common pool resources in rural Ethiopia: a study based on fifteen sites. (2002) 14 *African Development Review*. 113–149. P 128; Tareke (n 2) p 65; Dunning (n 8) p 297.
[21] Muradu Abdo Srur. *State policy and law in relation to land alienation in Ethiopia*. (Doctoral dissertation University of Warwick, UK), 2014. P 58; Kebede (n 20) pp 119–120; Crummey (n 1 above) p 9.

This gender invariability assertion is taken for granted as apodictic historical truth paradoxical to the archaic patriarchal tradition in feudal Ethiopia. However, secondary status of Women in pre- 1974 revolution, the gender invariability argument is not as such unencumbered. One way of rethinking the *rist* land rights and its gender relations lies in a popular culture and lexical representation of Man and Women in relation to land and inheritance.
The lexical examination has noted the two dominant linguistic groups in the northern Ethiopia: Amharic and Tigrigna where the *rist* system was ubiquitous. The selection of the lexicons is made based on the role of land in defining the quality of relationship-closeness and distance, enmity and amity-among family members.

Before going to the lexical interpretation, it is vital to note that land inherited to women is assumed to be lost to the family of the in-laws, because of two factors. First, following the Judaeo-Christian tradition a woman subdues her will to the wishes of her husband and in-laws after marriage. This is symbolized in the custom moving out of her family to the house of her husband-apparently the family of in-laws. Second, genealogical line follows paternal descent than maternal descent that the ownership of assets like land to be known in communal memory through paternal line of lineage.

On account of these, the nephew from a brother and the nephew from a sister are not considered equally. The nephew from one's brother is considered a part take of inheritance with his uncle and male cousins, whereas, the nephew from a sister is not. This is represented in the Amharic and Tigrigna lexicon of *Balegara* and *Wedi-Hawubo* respectively. According to the lexical definition and *Natsila* dictionary of Tigrigna languages, both terms have double-entendres/pun, according to Donald Levine known Wax and Gold. The wax of the terms means contender, enemy and antagonist. It is common usage to refer to a mortal enemy as *Balegara* in Amharic and *Wedi-Hawubo* in Tigrigna.

The hidden/root meaning of the terms considered here as gold reveals the pun. A *Balegara* is one who is partaker in case of inheritance or any other entitlement. The closest *Balegara* in terms of inheritance is male family member, a brother or his sons. Often conflicts do not involve female members and sons of a female family member because they are not by tradition assumed entitled to in their maternal siblings, but they are considered *Balegara* on their paternal siblings instead. This is more evident and elaborate in the pun involved with the Tigrigna term *Wedi-Hawubo* which means the son of one's uncle, a male cousin born from a paternal uncle. Not a female cousin or a male cousin from a maternal uncle. The *Wedi-Hawubo,* in this sense is a rival antagonist and at the same time a male cousin born from a paternal uncle. The Tigrigna idiom "*Wedi-Hafti emun Kefti*"-literally means "the son of one's sister is a reliable asset" implies the fact that the son of one's brother has grounds not to be reliable. The tangible and visible reason for this nothing but that the former has no reasons to go into conflict with his maternal uncle but his paternal uncle and the vice versa. The only reason for this is that the male nephew and cousin are part takers of inheritance, mainly land.

In feudal Ethiopia, women had very marginal roles and subaltern status, surely excluded from the public sphere and basic decision making on matters affecting their life and society. Yet, on matters of I discuss above maternal descent is preferred for both state of peace (familial affinity) and violent conflict (vendetta) to paternal descent; yet everyone is accounted for the same via his maternal descent though. To assume this owing to positive attitude offered to women is so silly reason to accept, for this does not reflect on other aspects of social roles.

males only.[22]

It was claimed that the *rist* system provided for general tenure security, which couldn't be infringed under any pretext.[23] In other words, it is claimed that there was no tenure insecurity or fear of being evicted from the *rist* land either by landlord intervention or by the Emperor.[24] Nonetheless, the possibility of a claim at any time to a part of the land continuously threatened the security of an individual's effective rights to use a specific plot of land and encouraged fragmentation and successive reduction in individual plot size.[25] Still, "the periodic land redistribution that was conducted to accommodate all claims of the generation of young peasants was managed within the concerned community as an "in-house" matter."[26] However, in order to minimize the fragmentation of the land the claimants residing in other villages or localities, who were politically in weaker positions and power, and whose near ancestor did not work in the land were excluded although they were in the bloodline of the founding father.[27]

The importance of the then *rist* rights rests on both economic benefit; and social and psychological importance for the northern peasants. As it was vital economically, it was also a source of freedom, pride, and self-esteem.[28] Nonetheless, in the literature, its contribution to the legal constructs of land tenure security is not well appreciated.

In relation to the nature and duration of the property rights it granted, the *rist* system entitles time-unlimited usufructuary land rights. In fact, in the literature, there is no indication how to determine on whom property rights may be conferred and the extent to which holders may transfer property

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Therefore, one concludes, against the widely held assumption that *rist* had not had gender parity, that the lexical representation and customary practices I discuss above stand for the disavowal to the absence of gender-based discrimination which in actual fact was invisibly built in the social structure of society. The power of this argument is reflected vividly in the role of gendered relation to land in defining the quality of relationship between male and female members, and among their male descendants.

Thus, this brief reflection is an indication of the need for further in-depth examination of the social structure of gendered relations with land under the *rist* system, the avowal of equal right of man and woman to land proclaimed in the formal rule notwithstanding.

[22] Kebede (n 20) p 120.

[23] Hussien Jemma. The politics of land tenure in Ethiopian history. (XI World Congress on Rural Sociology, Trondheim, Norway), 2004. P 3; Ahmed *et al* (n 13) p 5.

[24] Jemma (n 23) p 3.

[25] Ibid; Ahmed *et al* (n 13) p 5; Crewett *et al* (n 14 above) p 8.

[26] Jemma (n 23) p 3.

[27] Dunning (n 8) p 273.

[28] Hoben (n 17); Jemma (n 23) p 3.

rights. Regarding to whom property rights of *rist* land are conferred contradictory interpretations are found, with some calling it "collective property".[29] It is, however, also described as "rigorously individualistic" by others.[30] Indeed *rist* land is a synergy of both natures. It was collective property held by the family, and at the same time with individual members having specific rights on their respective share, which would include the right to use, as well as transfer.

With respect to the extent to which property rights permit transfer by the *rist* holder, some literature states that *rist* rights holders normally lacked the right to sell their share outside the family, or to mortgage, bequeath, or transfer it as a gift, as the land belongs to the descendants of the original right holder, which would indicate the possibility that it could be sold or transferred within the family.[31] The contrary opinion would have it that *rist* rights totally prohibit the sale of land even within the family, as land was in effect a common property of the village community and not the private property of an individual.[32] Furthermore, other literature has interpreted *rist* as allowing holders of the *rist* to bequeath their holdings but prohibiting a sale, mortgage or an exchange in any form.[33] On the other side of the spectrum of opinion, some indicate that *rist* land rights were both inheritable and saleable even to "outsiders," although practically this right was rarely exercised, because the rist land was a means of livelihood and if the rist holder sold it then he would lose the right to claim from family *rist* land later.[34]

Legally speaking, this ambigutiy in the nature of the land rights conferred by the rist system are attributing factors for perpetuating the land tenure insecurity of peasants. However, a critical examination of it reveals that *rist* holding is a collective property – land may be conceived of as being held by those currently living in trust, honouring ancestral and descendant rights and within which the individual holders have personal property rights. The act of permanent alienation to outsiders is against this fundamental link between people and the land. However, the holders are entitled to transfer their rights in *rist* land in any form, but only to family members, as it doesn't defeat the nature of the *rist* system as a whole. Moreover, they can still rent it to non-family

[29] See for instance, Jemma (n 23) p 3; Ahmed *et al* (n 13) p 5; Crewett *et al* (n 14) p 8; Bodurtha *et al* (n 10) p14.
[30] See for instance, Brietzke (n 8) p 641; Noronha (n 11) p 43.
[31] Crewett *et al* (n 14) p 8; Daniel Weldegebriel. Land rights in Ethiopia: Ownership, equity, and liberty in land use rights. Rome. *FIG Working Week*, 2012. P 2.
[32] See for instance, Jemma (n 23) p 3.
[33] Ahmed *et al* (n 13) p 5.
[34] See Tiruneh (n 15) p 8; Noronha (n 11) p 43.

members as well, since the renting as such would not take away the *rist* from the direct descendants of the right holder.

In assurance of the land rights – curtailment of arbitrary eviction - as mentioned above, the *rist* land rights are secured and even the Emperor, the owner of all land in the empire couldn't take it away. This claim was reinforced by the three edicts, two passed by Emperor Menelik II in 1891 and 1908, and one by his daughter Empress Zewditu in 1928.[35] Menelik's 1891 edict provided that no *rist* land rights may be expropriated, irrespective of the nature of the crime the holder committed.[36] In similar fashion, the 1908 general decree that was passed by the Emperor's ministries of council indicated that one can be evicted from the *rist* land only if he was a runaway killer or guilty of treason.[37] Finally, Empress Zeweditu's edict reaffirmed the *rist* holders with a guarantee against expropriation of *rist* land rights for any crime committed.[38] In actual fact, these edicts did not govern the issue of expropriation of land rights for the public purpose in the present understanding. They dealt with the issue of confiscation of the land rights as a punishment for commission of a crime.

Emperor Menelik II's engagement in the development of social and economic infrastructures and urbanization implied that there was expropriation of land rights in general, both in the North and South. The practice followed, for instance, in the taking of rural land rights of peasants for the construction of a road from Dire Dawa to Harar in 1903 had incorporated the founding elements of expropriation.[39] Especially, the public purpose and payment of compensation were satisfied. Moreover, the Emperor's 1908 Addis Ababa City Land Charter reflected on expropriation of privately owned land rights for a public purpose and upon payment of compensation.[40] The charter indicated that, although its application was limited to the urban land of Addis Ababa, urban land rights can be expropriated by the state for greater societal interest, upon payment of compensation in kind or cash through experts' assessment.[41] Nonetheless, it did not entail the observation of due process and judicial review in expropriation proceedings. Perhaps, it was at the time not possible

[35] Daniel Weldegebriel Ambaye. The history of expropriation in Ethiopian law. (2013) 7 *Mizan Law Review*. 283–308. P 299.
[36] Ibid.
[37] Marcus, (n 2) p 111.
[38] Ambaye The History (n 35).
[39] Id p 298.
[40] At that period urban land was under private land ownership regime.
[41] Ambaye The History (n 35) p 300.

to imagine the existence separate judicial review, because all governmental power roles were played by the Emperor and the Governors. Consequently, it can be argued that what was reflected in this Land Charter was the prevailing conception on land expropriation. And it applied also in the context of rural land rights.

Above all, the assurance of the land rights of the *rist* holder depended on his capability to discharge the three obligations attached to the land rights. These were payment of land tax, *geber*, which accounted for one-fifth of the peasant's total product; tithe, *asrat*, that amounted one-tenth of the yearly product; and provision of labour service in the form of farming, grinding corn, and building houses and fences, that was assumed to take up to one-third of his time.[42] Failure to discharge these obligations would entail the eviction from the land rights.

Registration and certification of land rights were not carried out during this period.[43] Because of this, Dunning has noted that its absence had affected land tenure security in two ways. First, the absence of reliable land measurements and land records caused for landholders uncertainty about the boundaries of the land parcels that would be acknowledged by their neighbors and recognized by the State.[44] Moreover, the insecurity intensified due to the landholders' perception that the later land measurement – *qalad* - was aimed at the seizure of all or part of surplus, if such was discovered by the State.[45] Second, lack of reliable land registration and certification had increased the land tenure insecurity due to its absence contributing to the development of land disputes and litigation. The then major source of civil disputes of the rural community emanated from land matters. And the improvement of the peasants' social status realized "more easily through litigation than through agriculture."[46]

The enforceability of the rist land rights in case of specific challenges, on the other hand, calls for the other land tenure arrangement of the time – *Gult*. Besides the customary dispute settlement

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[42] Bahru Zewde. *A history of modern Ethiopia*, 1855–1974. Addis Ababa. Addis Ababa University Press, 1991. Pp 14-15; Tesfaye Teklu. Land scarcity, tenure change and public policy in the African case of Ethiopia: evidence on efficacy and unmet demands for land rights. (The third international conference on development studies in Ethiopia, Addis Ababa), 2005. P 5; Weldegebriel (n 31) p 2; Daniel W. Ambaye. *Land rights and expropriation in Ethiopia*. Switzerland. Springer, 2015. P 41.

[43] Arthur Schiller. 1969. Customary land tenure among the highland peoples of Northern Ethiopia: a bibliographical essay. (1969) 1 *Afr. L. Stud.* 1–22. P 3.

[44] Dunning (n 8) p 299.

[45] Ibid.

[46] Id p 300.

mechanisms, the *gult* holder, *gultegna*, had the power to resolve disputes.[47] Accordingly, with regard to private disputes – disputes other than with the government, the peasants were required to take their case to the *gult* lord, in which case he was required to pay for the judicial services.

Although the Crown exercised the ultimate authority over all land, in practice, administrative, justice and managerial responsibility in the North was bestowed upon an aristocratic class who were rewarded a fief known as *gult* in exchange for their service and loyalty.[48] Most scholars consider *gult* to be a right to land embedded in a land tenure system.[49] The literary understanding of the *gult* as Hobenian "fief holding rights" may indicate that the *gult* holder had actual rights in land on the granted land.[50] Some regard it as a right over the produce of land. In this line Teshale regards it as the right of tribute appropriation from peasants, in return for military and administrative services.[51] Nonetheless, some others have characterized it as a right to the manpower of the peasants living on the land. Gebru notes that the *gult* land was linked to an office of state, with *gult* lords carrying out a number of duties for the Crown such as administration, maintenance of security in the region, entertaining disputes among the inhabitants, and collecting tributes, among others.[52]

However, in-depth scrutiny shows that the *gult* system granted the governor of the *gult* both land rights and administrative office. This is because, besides empowering the governor of the *gult* to perform certain judicial and administrative functions, it also assigned him the right to revenue and goods and services, since the *gult* holder was entitled to retain a certain amount of tributes (products of peasants), the whole amount of judicial fees and fines for himself. Moreover, the governor had also his own *rist* land within the *gult*, which was expected to be cultivated by the *rist* holders. Due to its dualist nature, Bereket argues that the *gult* system can be best understood as a

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[47] Kebede (n 20) p 121.

[48] Tiruneh (n 15) p 8; Tibebu (n 2) pp 78-79; Bodurtha *et al* (n 10) p 15.

[49] The very essence of land tenure system is to define the person who has, the conditions under which, and nature and duration of rights in land and the related restraints and responsibilities. (See Food and Agriculture Organization. Land tenure and rural development. Rome. *FAO Land Tenure Studies 3,* 2002. P 7).

[50] Crummey treated *gult* system as a distinct property rights separated from the *rist* right in the same land. (See Crummey (n 1) p 12).

[51] Tibebu (n 2) p 79.

[52] Tareke (n 2) p 65.

borderline case between an administrative position and a form of property.[53] I prefer to describe it as an assortment of both property rights and office power.

ii. The South

The South in this context refers to the locational south and the marginalized society in the process of the formation of the modern state Ethiopia in the reign of Emperor Menelik II. It constitutes two categories. The first was the pastoralist society with a non-hierarchical lifestyle, following Islamic or traditional religion and living in the south-western, arid and semi-arid lowland along the red sea coastal area, and the Somali frontier.[54] These southerners were politically marginalized in two ways. First, since they were followers of Islam or traditional religion and not Christianity; they had no political authority in a christianized state. Second, their pastoralist lifestyle and their being a non-sedentary, non-ploughing society, caused them to be considered "uncivilized". Due to these factors, they were given peripheral status in the socio-political dynamics of the time. Moreover, they were not absorbed into the northern socio-economic order.[55] They managed to utilize and regulate their land rights on the basis of their own customary rules and institutions up until the 1950s, when Emperor Haile Selassie I began to regulate and define their tenure statutorily.[56] They had not suffered eviction from their land before the 1950s.[57] They were burdened only with the duty to pay tax on livestock, salt and trade to the government, when possible.[58]

The second group in the South were the peasants situated in the southern, southeastern and southwestern province of Ethiopia who lost their self-governing autonomy and were annexed to the northern ruling system under Emperor Menelik II in the year 1875 to 1889.[59] Before the annexation, these southern indigenous peasants used to practice a communal land tenure system

[53]Bereket Kebede. Administrative allocation, lease markets and inequality: 1995-97. *ESRC Research Group on Research Group on Wellbeing in Developing Countries, working paper 7*, 2004. P 6.
[54] Tiruneh (n 15) pp 7–8; Marcus (n 2) p 104.
[55] Tiruneh (n 15) p 8.
[56] As it is discussed later it was with the promulgation of the 1955 Revised Constitution that pastoralists in Ethiopia legally denied of any land rights except use of state land in the monarchical-feudalist regime.
[57] Tiruneh (n 15) p 15.
[58] Tibebu (n 2) p 86.
[59] Ambaye Land Rights (n 42) p 45; Marcus (n 2) pp 104ff.

which was identical to the northern *rist* system.[60] However, the later Menelik's march towards the South abolished this customary tenure and introduced a new one.[61]

The predominant land tenure in the southern part of the country, initially under the monarchical-feudalist regime, following the Emperor Menelik II's military conquest, was a private land tenure system.[62] This system applied exclusively in the South. During the military campaign, the Emperor's forces crushed any attempts at resistance and confiscated all the lands of the resisters. In places where the native chiefs peacefully submitted and accepted the dominance of the Ethiopian empire, the people were allowed to keep their lands intact.[63] All the confiscated land was distributed to the Ethiopian Orthodox Church, to the emperor's soldiers as a reward for their service in the expansion process, to local chiefs to maintain their support, and to the state itself.[64]

Moreover, to create effective control over newly conquered territories, northern people were encouraged to settle in the south.[65] As a result, almost the entire native population, which formerly cultivated land on a community and clan base, were left landless *gabbars.*[66] The northern socio-economic order was introduced,[67] and they became servants and tenants to the northern peoples up until the 1974 Ethiopian Revolution.[68]

This situation, created, *inter alia*, politically-imposed, private land tenure (a form of freehold tenure) in the southern part. Holders of such rights, such as the powerful officials and loyalists of the Crown, had the privilege to transfer the land through sale, mortgage or exchange, subject to

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[60] Srur State Policy (n 21) p 58.
[61] Some authors argue for the continuation of the customary land tenure of the southern. (See for instance Srur State Policy (n 21) p 59). Nevertheless, the prevalence of the private and tenancy land tenure systems clearly justified the abolishment of the customary one especially one those forcefully annexed provinces.
[62] Further the literature identifies two processes that led to the emergence of private property in Ethiopia during the reign of Emperor Haile Selassie. First, after the return of Emperor Haile Selassie from exile in 1942, land tenure (what is referred to as "freehold") was granted to selected individuals such as soldiers and civilian victims of the Italian occupation. Second, a tax reform in 1941 defined the land for which tax had been paid to the government as the property of the taxpayer.
[63] Ambaye Land Rights (n 42) pp 44-45; Weldegebriel (n 31) p 3.
[64] Ibid.
[65] Crummey (n 1) p 223.
[66] Dunning (n 8) p 298; Ambaye Land Rights (n 42) pp 46-47. The term *"gabbar"* has understood in two different ways having unique meaning. For the northern it keynotes the tax payer, whereas for the southern it refers to landless local peoples of then.
[67] Tiruneh (n 15) p 7.
[68] Ahmed *et al* (n 13) pp 6–7; Jemma (n 23) p 4; Weldegebriel (n 31) p 3.

payment of a land tax.[69] This *status quo*, in turn, resulted in the emergence of dominant-subordinate relationships of actors, and social stratification, with the privileged northern landowning and political elites, assisted by the co-opted local governor (*balabat)* dominating the people of the southern territories, who were marginalized to a large degree.[70]

Further, it created a high rate of tenancy, with land access for locals contingent on landlord-tenant agreements, characterized by great inequality. The local population's land tenure system became tenancy and their status was reduced from being peasants to being tenants and servants to the northern absentee landlords.[71] It was in other words not freehold, but the tenancy land tenure system that defined the southern peasants' land tenure. Thus, the evaluation of their legal land tenure security can be done by looking into the terms of the landlord-tenant agreements.

The terms of the landlord-tenant and servant agreement were not set by their mutual negotiation. Rather the tenant/servant was bound to the exploitive terms of the landlord and assumed indenture servant status to access land. The tenants and servants were uncertain about the duration of their land use. It was up to the whim of the landlords to determine their use or their eviction. The tenants were not even given a long-term lease, which would provide security for investment on land.[72]

Moreover, the tenant's access and use of rural land were conditioned with onerous burdens and duties. They were required to cover the total cost of cultivation and expected to pay for the use of land and tributes for agricultural products to the government in kind. There was no legal limit on the amount they were expected to give the landlord. It ranged from 35 to 55 percent of the total product. Moreover, as a tribute, they were duty bound to pay tithe to the government. They remained only with 25 percent of the total product and 75 percent was relinquished to the landlord and the government.[73] This situation meant that, quite apart from the insecurity of tenure of their

[69] Ahmed *et al* (n 13) p 6.
[70] Alienated 2/3 to 3/4 arable land of indigenous people to the northern settlers and the 1/3 (Siso) was left for the local gantries. (See Dunning (n 8) p 282 in footnote 55 and p 289: Doren (n 9) p 169).
[71] Adejumobi (n 10) p 104; Ambaye Land Rights (n 42) p 46. Tenancy was also to some extent prevailed in the North, but it did not affect the majority and applied on the disadvantaged and discriminated groups of the North. (See Tareke (n 2) p 75; Dunning (n 8) pp 297–298).
[72] Dunning (n 8) p 398.
[73] Tareke (n 2) pp 77–78; Ambaye Land Rights (n 42) p 47.

land use, even the products of their labour and capital was unsecured, since the lion's share of it went to the landlord and the state.[74]

Besides, the conditions of the tenants were worsened by the added burden imposed on them in the form of compulsory labour. They were forced to serve the northern settlers through cultivating their land, building houses and so on, for free.[75] It in effect implied the introduction of a limited form of slavery to the southern local people. Accordingly, they were not only deprived of their customary land rights prevailing before the annexation, but also of their labour and the humanity that they were born with. However, through the enactment of the 1960 Civil Code some reforms on the tenancy arrangements were introduced to improve the conditions of the tenants. (See the next sub-section for detail).

The *gult* system was also introduced to the South through Menelik's conquest. However, unlike in the north, where *gult* rights were reserved for the imperial family and provincial nobles, in the south, it extended to civil and military officials and supporters of the state.[76] Moreover, unlike in the North, granting of a *gult* right in the South was aimed at achieving two purposes: payment of compensation for the services the individuals rendered to the state and control of the native peoples in the newly occupied areas.[77]

iii. Statutory Land Tenure Reform and Its Implications for Land Tenure Security

After returning from exile in 1941, Emperor Haile Selassie I tried to modernize Ethiopia's legal system. In particular, he attempted land tenure reforms with the adoption of different legal instruments. Given the historical insecurity of land tenure, especially among the southern peasants, one might presuppose that the land tenure reforms were aimed at the protection and improvement of the land access and tenure security of the previously landless and overburdened and unsecured peasants (hereafter the term peasants is used for both the northern rist holders and the southern

[74] Some argue that the *gabbar*s – the landless tenants had the right to freely transfer their land rights to their heirs according to the custom. (See for instance Srur State Policy (n 21) p 62). But it is questionable how this could be happened once the local peoples land right were taken away and distributed to the northern settlers and land lords except on those peacefully submitted provinces.
[75] Ambaye Land Rights (n 42) p 47.
[76] Bodurtha *et al* (n 10) p 15.
[77] Crummey (n 1) p 223; Jemma (n 23) p 4.

tenants). The examination of the legal reforms is done under the heading of tax burden and securing land rights.

The tax burden:

The tax burdens of the peasants that conditioned the exercise of their land rights in both the North and South in the form of tributes, tithe, and compulsory labour were reformed by tax legislation enacted in the year 1941 to 1967. Below I consider to what extent these reforms reduced the peasants' burden.

During this period, the Emperor's regime promulgated four sets of peasant-related tax laws: The 1941, 1942 and 1944 land tax laws; the 1947 education tax law; the 1959 health tax law; and the 1966 and 1967 income tax laws.[78] The main justification for the promulgation of these tax laws was not lightening of burden that the tributes and labour service imposed on peasants' land utilization. They were rather aimed at enhancing the government's revenue from taxation either by broadening the tax base, or by avoiding wastage in the process of tax collection, because the Emperor's regime, that intended to modernize the country in all spheres, believed that the traditional tax and its collection through *gult* holders had not generated enough revenue to the state.[79]

Two reasons were mentioned for this. First, the traditional tax was collected by the *gult* holder who kept some of it for himself for the official duty he assumed, in the form of payment. The amount the *gult* holder was entitled to retain was not fixed. Consequently, what the government got was the remaining amount after satisfying the needs of the *gult* holder. Second, since the tax was collected in kind, government agents were required to take it into the market to convert it into cash. The marketing process most often took time and the value of the agricultural products (perishables) quickly diminished or dissipated altogether.[80] Accordingly, the peasants' tax reforms

[78] These laws are compiled in Haile Selassie I University. Consolidated Laws of Ethiopia. Vol. I. Addis Ababa. The Law Faculty, 1972. The Empire of Ethiopia. Land Tax Proclamation No. 70/1944. *Neg. Gaz*. Year 4 No. 2. 1944. Pp 641–647; The Empire of Ethiopia. Education Tax Proclamation No. 97/1947. *Neg. Gaz.* Year 7 No. 3. 1947. Pp 565–566; The Empire of Ethiopia. Health Tax Decree No. 37/1959. *Neg. Gaz.* Year 18 No. 14. 1959. Pp 596–597; The Empire of Ethiopia. Income Tax Proclamation No. 173/1967. *Neg. Gaz.* Year 27 No. 7. 1967. Pp 598–629. On the pastoralist's cattle tax was imposed. (see The Empire of Ethiopia. Cattle Tax Proclamation No. 142/1946. *Neg. Gaz.* Year 14 No. 1. 1946. Pp 562–564).
[79] Ambaye Land Rights (n 42) p 48.
[80] Ibid.

introduced in the year 1941-1967 were not much concerned with the burden on the peasants. Quite to the contrary, they were intended to increase revenue for the government and were consequently regarded as inequitable and imposing a high burden on the peasants.[81] That was why, as is seen below, the tax reform caused a bitter rebellion of the peasants in different parts of the country.

Even so, the 1941 land tax decree did introduce two important reforms in relation to the tax system, among which one was related to the lightening of the peasant's burden. The first change was taking away the *gult* holders' power of tax collection. Before this decree, the *gult* holder used to have three basic authorities among others over the subjects in his *gult* – tax collection, local administration and dispensing of justice. This decree required the tax to be paid directly to the government treasury and it outlawed the intermediary role of *gult* holders in this regard, although in some parts of the country, *gult* holders continued to collect it from their *rist* holding cultivators up until 1966.[82] The second reform was the abolishment of all forms of compulsory labour serves imposed on the peasants in addition to the tax burden. As it is noted above, in addition to tribute and tithe, peasants were required to provide labour services to the *gult* holder or the landlord which took one-third of their time. However, the law in this regard wasn't applied and effective, and the peasants were in practice required to provide the compulsory labour services towards the landlords and *gult* holders even after the abolishment.[83]

In 1942, another land tax law, which had retroactive application and was amended in 1944, was promulgated. This tax law also introduced two basic reforms in the Ethiopian tax system in general. For the first time, it adopted cash rather than in-kind payment of tax. It required the peasants to pay the tax in the printed Ethiopian currency – *Birr*. Moreover, it changed the grounds for taxation from the amount of agricultural product to the level of fertility and size of the land. Along these lines, for a *gasha* of fertile, semi-fertile and poor land holding 15, 10 and 5 *birrs* tax respectively was imposed.[84] In the South, where the land was owned by the landlords, the tax was imposed on the landlords. However, what the landlords did was that they transferred the tax burden to the

[81] Ann K. S. Lambton. Ethiopia: an approach to land reform. (1971) 34 *Bulletin of the School of Oriental and African Studies*. 221–240. P 225; Mark Blaug. Employment and unemployment in Ethiopia. (1974) 110 *Int'l Lab. Rev.* 117–144. P 131.
[82] Tareke (n 2) p 82.
[83] Ambaye Land Rights (n 42) p 52.
[84] Id p 50.

tenants in the form of increasing their share from the share-cropping. This situation worsened the economic as well as the social status of the peasants.[85]

The 1942 land tax law was not clear with regard to its position on the previous tribute and tithe. Nevertheless, from the general aim of the tax reforms – collecting sufficient revenue - one can deduce the parallel application and the existence of both tax regimes in the absence of express or implied repeal. That is why, after a year from its promulgation, the first peasant rebellion – the Tigray Peasant Rebellion - erupted in 1943 as an implication of the peasants' grievances with respect to the land tax and measurement system.[86]

In 1944 another land tax law that repealed the previous one was also promulgated.[87] This land tax law incorporated three basic reforms in the tax system, but still further burdened the peasants. The reforms related to the amount of tax, provincial variations, and clarified the status of the previous tribute and tithe systems. In relation to the status of the tribute and tithe system, the 1944 land tax law abolished other form of tax and labour services attached to the land utilization. It introduced a new tax scheme and also a tithe, depending on land fertility and size.[88] However, with regard to the amount, the law had doubled the tax burden of peasants from the 1942 land tax law. It did not impose a uniform tax rate for all the peasants in the country. There were regional variations. Given where the nobility and ruling classes belonged, it is clear in which part the higher amount was imposed – the South. To an extent, the northern peasants – *ristegna*s - were even allowed to continue with their old system. Since their land was not measured in *gashas*, they were required to pay a lump sum tax and tithe depending on the fertility level of the land,[89] while the pastoralists were also required to pay live cattle tax, calculated on the type and number of cattle, although they were denied land use rights.[90]

As part of the project to collect sufficient revenue from the tax, the Emperor Haile Selassie's regime also introduced two additional taxes on the peasants. The 1947 education tax law and the

[85] Tareke (n 2) p 82.
[86] The Tigray Peasant Rebellion which put the seed for the current ruling party had instigated by the grievance of the peasants towards the land tax reforms. (See Tareke (n 2)).
[87] Proc. No. 70/1944 (n 78).
[88] Id Article 4.
[89] Id Article 8-10.
[90] Proc. No.142/1946 (n 78).

1959 Health Tax Decree imposed two additional tax duties on the peasants.[91] This situation aggravated the peasants' burden of taxation and it added fuel to the peasants' grievances that led to further peasant rebellions in some parts. The then government seemed to have been obsessed with collection of as much tax revenue as possible. It couldn't have imagined its impact on the peasants' life. On the top of this, peasants' failure to pay the taxes resulted in the loss or deprivation of their land rights. This was especially true for the *rist* holders in the North.[92]

Finally, in 1966 and 1967, the Emperor's regime tried to lighten the burden of the peasants. The 1966 land tax law totally abolished the *gult* system and amended the 1944 land tax law.[93] The 1967 Agricultural Income tax law outlawed the tithe system; and in that way reduced the peasants' burden to surrender one-tenth of their product to the *gult* holders. The total abolishment of the *gult* system and the introduction of the Agricultural Income-tax met with great opposition from the landlords and the previous *gult* holders, because the previous *gult* holders, who were exempted from paying tax on their *rist* land and collected it for themselves from the cultivators, were required to pay tax in the 1967 law. As a way of expressing their opposition, after losing the battle in the parliament,[94] and to avoid the assessment of their agricultural income they harassed and even assassinated tax assessors.[95] However, these reforms were not sufficient to address the peasants' grievances toward the tax system. Because of this, two additional peasants rebellions erupted one in the north – Gojjam Peasants Rebellion of 1968 - and the other in the South – the Bale Peasants Rebellion of 1967-70.[96]

Securing land tenure:

As is noted in Chapter 1, legal security of tenure is the outcome of the holistic provision and incorporation of the legal constructs in the legal system that defines the land tenure system. The nature, duration, assurance, enforceability and registration and certification of land rights provided for in statute can all together indicate the peasants' and pastoralists' legal land tenure security

[91] See Proc. No. 97/1947 (n 78); and Decree No. 37/1959 (n 78) respectively.
[92] Tibebu (n 2) p 106 and 137.
[93] Tareke (n 2) p 82.
[94] The landlords and the *gult* holders were at the same time the members of the law maker parliament.
[95] Tareke (n 2) p 83.
[96] See Tareke (n 2) for extended discussion about the peasants' rebellion.

status. Moreover, the constitutional protection afforded to property rights in general on the basis of the Bakerian five functions, can also imply the extent of security of land tenure.

To begin with the Constitutional protection, the 1955 Revised Constitution of Ethiopia employed a double standard in treating the land rights of peasants and pastoralists. In relation to the pastoralists' land, the 1955 Revised Constitution converted the customary pastoralists' land rights to the public domain. Article 130 of the Constitution made it clear by stipulating that "all property not held and possessed in the name of any person… including all forests and *grazing lands* are state domain."[97] Thus, for the first time, the vast pastoral lands that had been customarily owned and administered by pastoral communities through customary tenure systems, indigenous to the pastoral area, were considered as "state domain" categories of open access land, typically known as "*terra nullius.*"

The shift of the customary communal land rights to the state domain had enabled the government to take away, without due process and payment of compensation, the pastoral lands for large-scale commercial farming, infrastructural development, and environmental protection. It was during this time that the Ethiopian pastoralists lost much of their grazing land without any compensation, for instance, when the government established national parks and state farms across their former communal landholdings.[98] Given that the pastoralists were denied any entitlement, but the use of the land until taken by the government at any time without any condition, the legal constructs of land tenure security were totally absent.

The policy shift regarding the pastoralists' land rights was the result of the dominant thinking of the time about the pastoralists' lifestyle, their resource utilization dynamics, their contribution to the economy and a view of their land rights from the economic perspective only, as well as their representation and involvement in the policy decision making. Even though Ethiopia had never been colonized, so as to be influenced by western, libertarian property thinking to disregard customary communal land rights, the modernization plan in the reign of Emperor Haile Selassie I, driven by an appreciation for the Western form of life and philosophy, placed the pastoralists in a

[97]The Empire of Ethiopia. Proclamation promulgating the Revised Constitution of the Empire of Ethiopia. *Neg. Gaz.* No. 4. 1955. Article 130.
[98] National parks such as Awash National park and big state farms in Awash River valley were established on Afar pastoral lands during this time.

peripheral position in the country's socio-economic and political discourse. They and their way of life was considered uncivilized, primitive and dirty in the eyes of the then western educated policy framers and influencers, who urged for modernity in the western sense.[99]

This misconception persuaded the country to end the pastoralists way of life by putting their customary land under state domain. This kind of thinking also contributed to the pastoral land policy shift in Emperor Haile Selassie I's regime. Pastoralists utilize land in a communal and mobile manner. Their communal utilization was considered as presenting a threat of overgrazing and resource competition and conflict since there is no incentive to internalize externalities, as Hardin argued in his "tragedy of commons" thesis, to justify a private property regime.[100]

However, this conception of common resources and communal land utilization has been refuted and new conception developed by Elinor Ostrom. In her seminal work governing the commons Ostrom has argued that state coercive control or privatization imposed by external actors as the only solution to address the problems of common-pools do not necessarily work. Taking empirical evidence where common pools are utilized in a non-tragic way without state control or privatization, she argues for shifting the discourse on governance of commons from the feasibility of the governance mechanism and state control or privatization to the condition and situation under which commons are feasible.[101] She also alternatively claims for collective actions to provide appropriate governance of the commons should be placed to prevent spill overs by the nonmembers and to prevent over-exploitation by some members.[102]

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[99]Philip Carl Salzman. Afterword: reflections on the pastoral land crisis. (1994) 34/35 *Nomadic Peoples*. 159–163. P 161; Bekele Hundie and Martina Padmanabhan. The transformation of the Afar commons in Ethiopia: State coercion, diversification and property rights change among pastoralist*s* (No. 87). *International Food Policy Research Institute (IFPRI),* 2008. P 5; Sara Pavanello. Pastoralists' vulnerability in the Horn of Africa: Exploring political marginalisation, donors' policies and cross-border issues–Literature review. London. *Humanitarian Policy Group (HPG) Overseas Development Institute,* 2009. P 9.

[100] Garrett Hardin. 1968. The tragedy of the commons. (1968) 162 *Science*. 1243–1248. Alternative argument to put the commons under state domain for state control to avoid the tragedy is also proposed and recommended as a policy option in governance of common natural resources.

[101] Elinor Ostrom. *Governing the commons, the evolution of institutions for collective action*. New York. Cambridge University Press, 1990.

[102] Muradu Srur. Rural commons and the Ethiopian state. (2013) 1 *Law, Social Justice & Global Development*. 1–49. P 7. Co-management of the commons is advocated in situation where the state policy is ineffective and the local institutions are weak. (See Steven W. Lawry. Tenure policy toward common property natural resources in Sub-Saharan Africa. (1990) 30 *Nat. Resources J.* 403–422).

Nevertheless, Ostrom's view also claims for a self-set contractual command-and-control way developed by the collective action of the members to govern the non-tragic utilization of commons.[103] Her view has not appreciated the prevalent conception among especially the clan and tribe members that utilize the common resources.[104] In those homogenous communities, the members perceive that they hold and utilize their ancestral resources, and have the duty to transfer it as it is to future generations, as they are keeping the resources in trust for them. This conception is predominately true in the case of pastoralist communal land rights in Ethiopia. For instance, in the Afar pastoral community there is a belief that the dead are fewer than the living; the living is fewer than the future generations to come; so, we have to protect our trees, land and environment for our children as our fathers have done so for us.[105] This deeply-rooted believe in the community controls the members from using the commons in a tragic way since they are supposed to preserve it for the future generation to come. In such scenario, the introduction of a new command-and-control mechanisms to the members either through state impostion or self-set contractual terms is not necessary, although it may help to avert the spill-overs caused by nonmembers.

By contrast, during Emperor Haile Selassie's period, the dominant conception of pastoralists' communal land utilization in Ethiopia was that it was "extravagant," "wasteful" and "inefficient." It was not assumed that pastoralists' communal utilization of land fell within Hardin's "tragedy of commons" conception. Therefore, the government's main ambition was to use the pastoralists' land efficiently. The government thought this could be realized through requiring the pastoralists to experience sedentary life and agriculture, and transferring their land for large-scale farming after putting the land under state domain.[106] That is why, as stated above, the 1955 Revised Constitution put the pastoralists' land rights under state domain and the government transferred some portion of it to commercial farming.[107]

At the time, the misconceived and non-securing policy and legal decision concerning the pastoralists' land rights were made due to the political marginalization and non-representation of the pastoralist community in the decision-making process. The political marginalization of the

[103] Ostrom (n 101) pp 15–18.
[104] Commons can be of two kinds. The one utilized by heterogeneous community and the other by the homogenous community like clan or tribe members.
[105] Afar Regional State Justice Bureau. *Afar Madaga*, NP. Afar Justice Bureau Archive, 2008. P 12.
[106] Hundie and Padmanabhan (n 99); Dunning (n 8).
[107] Even the transfer of land for commercial farming was set as a development plan. (See Dunning (n 8) p 285).

pastoralist's community was the main factor in causing chronic vulnerability for them in the form of legal land tenure insecurity. Since the then political power was controlled by the northern nobility and landlords, there was nobody there to speak for the interests of the pastoralist communities. Moreover, as policy making and legislating is a highly political process that reflects the interests of economically and politically strong communities, for the marginalized pastoralist community there was no way to make their voice heard and have their interests incorporated in the decision-making circles.[108]

Further, in the monarchical-feudalist regime, the pastoralists land rights were seen from an economic perspective only. The cultural value, as seen in Chapter 1, and peace-building significance of their land rights was not appreciated. Even this purely economic appreciation had not properly analysed the pastoralist land utilization's contribution to the national economy. It simply considered the pastoralist way of utilizing land as a wasteful practice and assumed that commercial farming would more efficiently use the land and contribute significantly to the economy. Nonetheless, this hypothesis in the Ethiopian context, for instance, proved to be unsustainable, in the sense that pastoralists utilization of land is economically comparable or more advantageous than commercial farming.[109]

In sum, the time of modernization of the legal system in Ethiopia seriously exacerbated the land tenure insecurity of pastoralists. It deprived them even of the customary land rights they used to have before the modernization period and at the time of annexation. This denial was the result of social, political and economic marginalization.

In relation to the peasants, legislative and policy measures were taken in the 1960s that had clear implications for the legal constructs of land tenure security, because those land tenure reforms were mainly aimed at consolidating political power for the rulers and did not have an economic development and social justice flavour.[110] To incorporate the latter issues, which are in fact affected by the status of land tenure security, the 1960 Civil Code (the Code), the four Five Years Development Plans and the rules on certain judicial reforms were promulgated. These legal and

[108] Pavanello (n 98) pp 6–7.
[109] For instance, see Roy Behnke and Carol Kerven. Replacing pastoralism with irrigated agriculture in the Awash Valley, North-Eastern Ethiopia counting the costs. (The International Conference on Future of Pastoralism), 2011.
[110] Dunning (n 8) p 277.

policy documents made their own stipulations that have implications for the legal constructs of land tenure security.

On the nature and duration of land rights of peasants the Code reinforced what was reflected in the 1955 Revised Constitution. The Civil Code, that conceptualized property in light of the Hofeldtian bundle of rights paradigm, had adopted a private ownership of land tenure regime that grants peasants the complete bundle of rights for an indefinite period.[111] It has been argued that the Code's approach to let land freely transfer in the market from non-valuing and non-efficient users to valuing and efficient users and to attach collateralization value to it enhances the productivity of land.[112] Nevertheless, this can be realized even without adopting a private land ownership regime, as argued in Chapter 1.

For the South, since private ownership of land was politically imposed during the reign of Emperor Menelik II, denying the local peoples' customary land rights, the Code's promulgation was not a new phenomenon. However, what is new for them was the incorporation of some rules that had a direct bearing on their tenancy contracts. These are the general contract rules and the special rules of tenancy. So, for example, in the section that regulates contractual engagement, one finds a rule making unconscionable contracts subject invalidation in exceptional cases. In fact, the contract rules were adopted from a liberal conception of freedom of contract. This may imply that the rules of the Code favour the landlords. Nonetheless, it had also adopted the doctrine of unconscionable contracts that incorporates the situation of the southern *gabbars* or tenants, to enable them to invalidate a contract when it was substantially more favourable to the landlords.[113] This was potentially important, because the *gabbars* accepted the entire terms of the contract due to their state of want – no other means of sustaining their life was available to them other than to access the land based on the terms of the landlords. In this way, the Code had tried to mitigate the

[111] The assumption of the Ownership right as a widest property rights that incorporate the usus, *fructus* and *abucus* rights imply the adoption of the bundle of rights metaphor. See, The Civil Code of the Empire of Ethiopia. Proclamation No. 165/1960. *Neg. Gaz.* Extraordinary Year 19 No. 2. 1960. Articles 1204-1205. A direct provision is not made in the Code about the adoption of private Ownership regime of land. But the tacit adoption can be inferred from the reading of, for instance, Articles 1207–1256 and Articles 1460–1487. The Code merely facilitated the traditional abusive social structure with some modifications. (See Paul Brietzke. Private Law in Ethiopia. (1974) 18 *J. Afr. L.* 149–167).
[112] Srur State Policy (n 21) p 67.
[113] See, The Civil Code (n 111) Article 1710(2). However, Muradu argued as if not incorporated but the exception clearly adopted the situation of the tenants. (See Srur State Policy (n 21) p 69).

exploitation of the tenants under the guise of freedom of contract, but this exception did not apply for the amount of the rent and other terms, which were regulated in the special part.[114]

Moreover, the Civil Code had also introduced special legal rules that govern tenancy. Although it lacked legal backing, the Second Five Years Development Plan (1963-1967) had incorporated the objective of improving the landlord-tenant relationships.[115] The Code stipulated legal rules that protected the tenants from then prevalent abusive and exploitative acts of the landlord in some extent. These protections could take two broad categories – creation of favourable conditions for access and utilization of land, and the protection against arbitrary eviction.

The conditions for access and utilization of land by the tenants were to some extent liberalized in the Code. This liberalization can be inferred from a number of different stipulations. For example, the Code's requirement for the model contract to be drafted by a non-contracting party and a government body – then the Ministry of Agriculture - was intended to come up equitable terms of contract recognizing the fact of a bargaining power imbalance between the tenant and the landlords.[116] However, the problem was that the Code allowed derogations from the model on both sides – lightening or burdening – provided that the mandatory stipulations in the Code were observed.[117]

The Code also improved the conditions of the tenants by limiting their obligations towards the landlords to only keeping the land in a good state of productivity and paying the agreed amount of rent in kind or in money.[118] The previously attached conditions like compulsory labour services were not recognised in the Code. In fact, however, the amount of the rent stipulated in the Code did not differ from the previous exploitive custom. As Dunning puts it correctly in this regard, the Code had legalized and treated agricultural tenancy as a simple contractual relationship, and, inexplicably, permitting a maximum share rent of seventy-five percent, even though customary maximums apparently never exceeded fifty percent.[119] Of course, this amount would apply only if

[114] The Civil Code (n 111) Articles 2975–3018.
[115] Imperial Ethiopian Government. 1962. Second Five Year Development Plan 1963–1967:327 as cited in Dunning (n 8) p 281.
[116] The Civil Code (n 111) Article 2976.
[117] In the Code there are mandatory rules that outlaw the contrary agreements and customs in some cases.
[118] The Civil Code (n 111) Article 2979 and 2988.
[119] Id Article 2991; Dunning (n 8) p 280.

explicitly agreed to in the contract, but in the absence of any agreement in regard, the rent would consist of half of the agricultural products of the land.[120]

The Code tried to mitigate this burden of the tenant through shifting the rent to the other crop year when what was produced is for his subsistence and that of the persons living with them. In such a case, the landlord was not allowed to claim the rent unless it was equally necessary for his subsistence and of persons living with him.[121] Also, when the yield of the year diminished by half in consequence of natural disaster that occurred before the yield was separated from ground, and which did not exist and was unknown at the time of the making of the contract, the Code empowered the tenant to claim revision and remission of the rent.[122]

In relation to the protection of tenants from arbitrary eviction with respect to their land use, the code came up with different provisions. First, the Code limited the grounds for termination of the contract. In addition to the mutual consent that derived from the philosophy of freedom to contact, the termination could happen only upon the expiration of the lease duration or due to the tenant's failure to discharge the obligations mentioned above.[123] In such cases, the Code, further, required the landlord to observe due process requirements. Among others, it required the provision of a default notice. Especially, in relation to the expiry of the lease period the Code entitled the tenant the right to continue cultivation for four more years if the landlord had not declared the intention of termination at least six months before the expiry date.[124]

At the same time, it authorized the tenant alone with the right to unilateral alteration of the provision as to the time, when the lease has been made for a lifetime or for a period more than ten years, once the ten-year period elapsed.[125] This stipulation was aimed at discontinuing the over-exploitation of the tenant under the guise of contractual terms. Furthermore, the Code authorized the tenant to terminate the contract without waiting for the elapse of the period and paying of compensation, when the lease was made for less than ten years. This would happen in case his or

[120] The Civil Code (n 111) Article 2990.
[121] Id Article 2992 and 2993.
[122] Id Articles 2998–3000.
[123] Id Article 2996 and 3003.
[124] Id Articles 3003–3004.The four more years of the tacit renewal of the lease imply that the initial contract duration in no means lesser than four years. However, some criticized the Code as if it failed to stipulate the minimum duration. (See for instance Dunning (n 8) p 280).
[125] The Civil Code (n 111) Articles 3005–3006.

his family's illness prevents land exploitation in the normal manner. The only duty imposed on the tenant here was giving six months' notice.[126] However, if the landlord wanted to terminate the contract on this ground, he was required to pay compensation.[127]

To ensure the continuation of the family's means of livelihood, the Code gave the option of termination of the contract to the heirs of the tenant upon his death. This meant that if the heirs of the deceased tenant wanted to exploit the land for the rest of the lease period, the landlord had no right to prohibit it before the lapse of the period. In the same fashion, to ensure the tenant's exploitation, the choice to terminate the lease upon the death of the landlord was given to the tenant.[128] The heirs of the landlords were not allowed to terminate it before the lapse of the period.

Finally, to reduce the landlord's capacity for arbitrariness and to protect the interest of the tenant in the termination of the contract, the Code entitled the tenant to take or claim for the improvements made to the land and the expenses incurred for the exploitation when the termination occurred before the detachment of the fruits. The courts would determine when equity required the amount for the expenses of cultivation. For the improvements made, it was up to the tenant either to remove, or destroy the improvements or to leave and claim compensation.[129]

These provisions of the Code at least theoretically put the tenants in a better position than before. However, some authors, like Dunning have wrongly and without detailed analysis of the stipulations of the Code concluded that the Code assumed the issue of tenancy as a matter of contract alone, the terms of which were stipulated through negotiation between the tenant and the landlord. Nevertheless, the above analysis of the stipulations of the Code shows its recognition of the fact that "tenants frequently occupy a position little better than that of serfs" and did not have equal bargaining power to negotiate with the landlords.[130]

However, this doesn't mean that the reforms introduced in the Code were sufficient for the betterment of the tenancy relation. And that was why the Land Reform Committee set up in 1961 proposed further regulation of tenancy and land titling.[131] Moreover, the draft tenancy legislation,

[126] Id Article 3010.
[127] Id Article 3011.
[128] See Id Article 3009.
[129] See Id Articles 3016–3018.
[130] Dunning (n 8) p 280.
[131] Lambton (n 81) p 229.

among other things, proposed the reduction of the rent to twenty-five to fifty percent of the total product or product value, and to give tenants security of land tenure by stipulating a four year minimum duration of the contract and reducing tenancy agreements to writing (for me the Code had already adopted both things while providing the four year automatic renewal of the contract and demanding contracts related to immovable things to be in writing),[132] and reform of taxation.[133] The draft was presented to the Council of Ministers only in 1970. When it was submitted to Parliament for approval, the popularly elected chamber of deputies approved it, while the Senate, the members of which were nobility and landlords appointed by the emperor, rejected it, as it affects them.[134]

The stand taken by the Code about *rist* land rights defined customarily and prevailing in the North, was not clear. Nonetheless, by taking the general stand that the Code took on the customary norms, so some authors argue, the Code outlawed it.[135] The justification raised was that it "impede[s] land markets, encourage[s] incessant land litigation, fragmentation, diminution of land and thus [poses] impediments to the modernization of the agriculture and thus the wider economy".[136] Nevertheless, some legal and theoretical arguments can justify the continuation of the *rist* system even after the Code. First, although the Code in principle outlawed customary rules, exceptionally it indicated its application too. That is in the case when the Code expressly provided for its application.[137] One of the areas the Code expressly allowed the application of the customary rules in is the rules governing Agricultural Communities.[138]

The Agricultural Communities in the Code referred to land owned at the village or tribal level, where the land was utilized either at the collective or individual level.[139] One such Agricultural Community was, in other words, the *rist* system, where the land is communally owned on the basis of the bloodline and utilized in a collective or individual manner.[140] Otherwise, there was no other

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[132] See, The Civil Code (n 111) Article 3004 and 1723.
[133] Lambton (n 81) p 229; Dunning (n 8) p 280; Srur State Policy (n 21) p 72.
[134] Lambton (n 81) p 229; Srur State Policy (n 21) p 72.
[135] The Civil Code (n 111) Article 3347(1).
[136] Srur State Policy (n 21) p 68.
[137] The Civil Code (n 111) Article 3347(1).
[138] Id Article 1489.
[139] Id Article 1489 and 1497.
[140] Jemma (n 23 above) p 3. Jemma argues that the Haile Selassie's regime that enacted the Code had tacitly recognized the continuation of the *rist* system. There is also an argument that claims that one of the areas the Civil Code left a room for the application of the customary rules is the land tenure system prevailing in the northern Ethiopia. (See

community in the country, at least then, that utilizes land for agriculture on a community or tribal basis but for pastoral land. Moreover, the stand taken in the *Derg* rural land tenure reform in 1975 also had an indication about the continuity of the *rist* system after the promulgation of the Code. The *Derg* regime land tenure system converted the *rist* land rights to possessory rights and prohibited any further claims of land in *rist* areas.[141] This implies that up until the *Derg's* reforms of 1975, the *rist* system had continued even after the promulgation of the Code in 1960. Thus, it is not legally and theoretically tenable to argue the *rist* system was completely abolished after enactment of the Code in 1960. Rather, the above legal and theoretical assessment implies its continuation up until the *Derg's* reform of 1975.

With regard to the assurance of peasants' land rights, the 1955 Revised Constitution provided that no one may be deprived of his property without due process of law[142] and that such deprivation may occur only through expropriation and upon payment of compensation.[143] These Constitutional rules adopted the Bakerian protective function only. Further, this Constitution said nothing about whether expropriation should be done for a public purpose or for any other ground. The perception of the time that there was a need to intensify land expropriation during this period can also be inferred from the Third Five Years Development Plan (1969-1973), which was focused on and aimed at the expansion of large-scale commercial farming by investors in thinly populated areas.[144]

So as to operationalize the constitutional protection of the land rights, the Code provided detailed rules on the issue of expropriation.[145] The Code expressly stipulated that expropriation could be done only for a public purpose, but then failed to define and determine the constituting elements of public purpose. All it determined in this respect was that public purpose doesn't constitute solely obtaining financial benefit, but enabling "the public to benefit from [an] increase in the value of

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Kaius Tuori. Legal pluralism and modernization: American law professors in Ethiopia and the downfall of the restatements of African customary law. (2010) 42(62) *The Journal of Legal Pluralism and Unofficial Law*. 43–70. P 49).

[141] See Ethiopia. A proclamation to provide for the public ownership of rural lands proclamation No. 31/1975. *Neg. Gaz.* Year 34 No. 26. 1975. Articles 19–20.

[142] The 1955 Revise Constitution (n 97) Article 43.

[143] Id Article 44.

[144] Imperial Ethiopian Government. 1969. Third Five Year Development Plan 1968-1973: 191 as cited in Dunning (n 8) p 285.

[145] See The Civil Code (n 111) Articles 1460–1488.

the land by the work done in the public interest".[146] Moreover, it required the conducting of a public inquiry, when necessary, to ensure determination of the public interest through consultation.[147]

To ensure procedural due process, the Code required the expropriating authority to notify persons whose land rights were to be expropriated in advance and give them a reasonable time to express their views on the necessity of such expropriation.[148] This process had the potential of ensuring participation by affected parties in the making of the expropriation decision, but the Code did not determined what the effect would be were the affected parties to oppose expropriation. Expropriation thus clearly retained its compulsory nature: It could be carried out without the consent of affected parties, and their opposition would not stop the authority from taking their land rights.

Once these procedural requirements were complied with, expropriation could be carried out once the expropriation order had been made and served on the affected parties.[149] Once served with the order, the affected parties also had to inform the authority within a month of the amount of compensation they claim.[150] This stipulation of the Code ensured the participation of the affected parties in the process of assessment of the amount of compensation. Giving the chance to fix the amount of compensation to the affected parties helped to know the sufficient amount that ensured the land tenure security of the affected parties. However, when a dispute arose with regard to the amount of compensation, an independent arbitration appraisement committee would determine it.[151] This lead to a neutral assessment of compensation. The expenses of the appraisal were required to be covered by the state when the amount claimed by the affected parties was finally found reasonable.[152] Even though the Code defined the different modes of compensation –

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[146] Id Article 1460 and 1464. The code employed the different terminologies for the concept like public interest, public utility, public purpose etc. Moreover, in other part it provided that the need for land for roads or streets constructions only constitutes the public purpose. (*Id* Article 1450).
[147] Id Article 1465.
[148] Id Article 1466.
[149] Id Article 1467 and 1468.
[150] Id Article 1470.
[151] See Id Article 1473.
[152] Id Article 1482. The neutrality of the compensation assessor is inferred from article 1478(4) that stipulates that the state authority can challenge to a court of law when it thinks the amount fixed excessive. Otherwise, if it assumed that the assessor is not neutral and favours to the state authority, it could would have authorized only the affected parties to challenge to a court.

substitute land and monetary compensation - it did not determine that in the case of peasants substitute land would be the preferential mode.[153] What it provided was the payment of additional monetary compensation when the affected parties took legal action on the amount of compensation.[154] This implies that in cases where the substitute land was not equivalent to the land taken in terms of size, fertility or location, the law demanded the difference to be made good in monetary terms.

In the assessment of monetary compensation, the Code incorporated the affected parties' loss as a foundation to determine the value of compensation, as well as the value of the land to the affected parties. This can be inferred from the provision in the Code the committee determining compensation should, among other things take into account any statement the affected parties made about the value of the expropriated land. Besides, the Code also indicated the incorporation in the assessment of compensation of any future increment in the value of the land due to the development of public works.[155] It also required compensation to be assessed not based on prior previous damage, but on damage as on the day of making the decision.[156] Furthermore, the Code demanded the taking of the land to happen after advance payment of the compensation.[157] Where the affected parties refused to accept the compensation amount, the authority could take over the land after depositing the amount fixed by the Committee.[158] All these all aspects of valuation, and time of payment of compensation worked toward compensating the affected parties adequately and timely. This, in turn, served as assurance of the land rights, in effect securing the tenure.

On top of this, the Code also granted the affected parties the right to pre-emption should the project for which the land right was expropriated be abandoned.[159] The only duty imposed on the affected party to exercise this right, was to pay back the amount he had received in the form of compensation during the expropriation.[160] However, the Code did not mention the duration within which the project had to be implemented and how long the affected party had to wait to claim

[153] Id Article 1478(3)
[154] Id Article 1479(2)
[155] Id Article 1475. Well sometimes to avoid the tax burden lesser value may be provided by the land rights holder which in effect affects the amount of the compensation.
[156] Id Article 1474(2).
[157] Id Article 1478(1).
[158] Id Article 1478(5).
[159] See Id Article 1484.
[160] Id Article 1484(3).

restitution. Further, the Code did not entitle the affected party to retain an amount of the compensation upon restitution to make good the loss of the use of the land in the period between expropriation and restitution.

In general, in terms of assurance of land rights to secure land tenure, the Code had incorporated the majority of the components. Even taking into account the monarchical-feudalist political system, it could be said that the legal measures were advanced. The only basic threat to legal land tenure security in relation to the expropriation process was the Code's embrace of institutional pluralism with respect to implementation of expropriation. It implied this by using the term "competent authorities" to define the state organs that could carry out the expropriation decision.[161] It neither defined nor limited the authorities. This in effect exposed peasants to different standards of treatment and abuse.

In terms of enforcing the land rights in an independent body in specific challenges, innovations were made since 1942 in the judicial system of Ethiopia.[162] This judicial reform was at the time driven by two competing interests: On the one hand, the need for an independent judiciary and on the other, the demand for centralization of administration.[163] The structure and hierarchy of the courts had followed the administrative division of the territory. The jurisdiction of courts was determined by the number of claims and nature of disputes in civil cases and the seriousness of the committed crime in the criminal cases.[164]

With these competing interests, the lower level of the judiciary was compromised with the centralization of the administration: the administrative and judiciary functions at this level were

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[161] Id Article 1460.

[162] Before 1942, besides, the esteemed institutions like "road-side courts" and "family arbitrations" different layers of regular court structures were there to dispense justice. At that time adjudication of cases was considered as part of administration and the governors were at the same time entertaining cases. The administrative and judiciary functions were intertwined and exercised by the governor of the area. The case entertainment was done in local level by the local chiefs and appeal to the higher governor was possible. In terms of cost of enforcement, it can be argued that it was not inhibiting one then. Because, the institutions of justice were highly localized and easily accessible. The only cost of the litigants was the judicial fee to the governor. However, when the appeal lies to the higher governor the cost of litigation going to be increased.

[163] Abera Jembere. *Legal history of Ethiopia 1434–1974: some aspects of substantive and procedural laws*. Rotterdam. Erasmus Universiteit, 1998. P 220.

[164] For details of the Court structures and jurisdiction see *Id* pp 213–236; KI Vibhute. The judicial system of Ethiopia: from 'empire' and 'military junta' to 'federal democratic republic'. (2013) 7 *Malawi L. J.* 95–117. Pp 99–104.

merged and carried out by the governors.[165] In terms of cost of enforcement and accessibility for peasants, the lower courts in which the administrative and judicial functions were merged, such as *Mikitil Woreda* (sub-district) court and the *Atibia Dagna* (local chief) court, were very important.[166] The *Atibia Dagna* court judges were quite often the *gult* holders that are discussed above. It exercised a judicial function in civil cases where claims were up to 25 *Birr* in value, until this was abolished by implication through the 1965 Civil Procedure Code.[167] On the other side, the jurisdiction of *Mikitil Woreda* court was determined by warrant. It had in the first instance jurisdiction over civil matters with a value not exceeding 100 *Birr*, and not less than 25 *Birr*. It also had an appellate jurisdiction from the local chiefs' courts that and lasted until it was abolished by the Emperor's order in 1961.[168]

For the peasants, taking land disputes to the other levels of court was costly then, as it is still today.[169] At the same time the jurisdiction of the two accessible courts I discuss above was highly limited and almost all land disputes exceed their jurisdiction. Furthermore, apart from the peasants themselves, also the presiding judges in these two courts lacked legal knowledge, since they were simple *gult* holders and members of the nobility. That was why, even in the cases they entertained, miscarriage of justice was prevalent, since the judges were highly corrupt and invariably decided in favour of the haves and privileged.[170]

Regarding the challenges against the government, particularly in the process of expropriation, peasants were authorized to take court action only with regard to the amount of compensation

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[165] The two court structures, the High Court and Supreme Court, were detached from the provincial influence and they were exercising only the judicial functions. (See Jembere (n 163) pp 220–221).

[166] They were abolished in the early 1970s. the next level courts includes the *woreda* (district) court, *Awerja* (provincial) court, *Tekelay-Gizat* (Governate-General) court, High court and Supreme Imperial Court. As a prerogative of the emperor without having a legal basis the *Zufan Chilot* (Crown Court) was at the apex by which the emperor renders justice.

[167] See Jembere (n 163) p 226; The Empire of Ethiopia. Civil Procedure Code. *Neg. Gaz.* Extraordinary Issue No. 3. 1965.

[168] Jembere (n 163) p 226.

[169] Dessalegn Rahmato. 'Peasants and agrarian reforms: the unfinished quest for secure land rights in Ethiopia' in André J Hoekema, Janine M Ubink, and Willem J Assies (eds.). *Legalising Land Rights Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*. Leiden. Leiden University Press, 2009. 33–58. P 46. The Other courts' jurisdictions were: the *woreda* court the claim of up to 1000 Ethiopian Birr for civil cases, the *Awerja* courts up to 10,000 Birr; *Tekelay-Gezate* Court, not exceed 2000 Maria Theresa (abolished by implication through the criminal procedure code in 1961), High Court exceeds 10,000 Ethiopian Birr and the Supreme Imperial Court had appellate jurisdiction on civil matters. (See Jembere (n 163) pp 223–225).

[170] See Rahmato Peasants (n 169).

only.[171] Besides, the jurisdiction for entertaining issues relating to expropriation was given exclusively to the High Court that had national jurisdiction and sat in the capital, Addis Ababa, which was too far for the peasants. Also, in terms of costs, it was unimaginable for them to enforce their land rights there.[172] Moreover, the absence of legal knowledge and legal empowerment on the side of peasants, made the enforcement of their land rights in an independent court of law very difficult, if not impossible. This in effect affects land tenure security, putting the peasants in a position that they were unable to claim the legal remedies against arbitrary encroachment on their land rights.

Finally, the legal modernization period in Ethiopia also introduced the concept of registration and certification of land rights, which in collaboration with the other legal constructs promote land tenure security. It was the aim of the First Five Years Development Plan (1957-1961) to secure private land rights in particular through the means of boundary demarcation and land valuations.[173] This conception was later legalized through the Civil Code, which promulgated the Cadastral Survey plan to demarcate the boundaries, nature, situation and area of land.[174] However, the central aim of the registration of land rights then was not to define the nature of the land rights of the person or a community so as to produce it as a means of proof. Rather, it was carried out for the purpose of facilitating land markets and enhancing accurate tax assessments.[175] Indeed, the Code introduced the issuance of title deeds to prove ownership of immovable property,[176] but it did not incorporate the issuance of registration and certification of land rights below the level of ownership – lease rights of the tenants in the South and the *rist* land rights of the North.

Overall, the failure of the regime to provide meaningful land tenure reforms that improved the conditions and land tenure security of the peasants and pastoralists led to popular protest against the regime.[177] The Tigray, Gojjam and Bale Peasants Rebellions, the 1960 aborted coup d'état with

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[171] The Civil Code (n 111) Article 1477.
[172] Jembere (n 163) p 224; The Civil Procedure Code (n 167) Article 15(2e).
[173] Imperial Ethiopian Government. 1957. First Five Year Development Plan 1957-1961 as cited in Dunning (n 8) pp 278-279.
[174] The Civil Code (n 111) Article 1199 and1606.
[175] Dunning (n 8) p 279.
[176] The Civil Code (n 111) Article 1195 and 1196.
[177] The reasons were: the government's lack of political willingness, the members of the senate were the nobility classes who were going to be affected by the land reform if introduce since they were landlords at the same time, and the demands of the peasants were not clearly articulated etc. (See Lambton (n 81) p 240; Srur State Policy (n 21) p 73.

the absence of agrarian reform among its causes, and the students protests of 1960 and onwards under the slogan of "Land to Tiller," were the implications of how much the land tenure insecurity of peasants and pastoralists was perpetuated.[178]

Being aware of these facts, the regime had introduced the draft Fourth Five Years Development Plan (1974-1978), which was dramatically different from the previous one in recognizing the need for and importance of land tenure security of peasants.[179] However, still, the issue of the pastoralists was not a concern of the regime, even in its final time. Although the regime coupled this plan with a new draft constitution, it was too late to save itself from a military coup d'état driven mainly by the rural land question.

B. During the Socialist Regime (1975 – 1990)

In 1974, the monarchical-feudalist regime of Haile Selassie I, that faced a challenge from the forces of political change calling for "Land to the Tiller" and frustrated with the prevalence of dramatic inequality of land distribution and exploitation by few, was overthrown by a creeping coup d'état of the Soviet-backed (communist) military junta known as the Provisional Military Administrative Council (PMAC) - the *Derg*.[180] Following assumption of power, the PMAC took different actions that drastically altered the social, political and economic structure of Ethiopia. One such measure was promulgation and implementation of rural land tenure reform that was influenced by a radical communistic ideology. A year after occupying power, in 1975, in response to one of the basic questions of the revolution, the *Derg* issued a proclamation to deal with the issues of rural land, introducing fundamental tenure system change.[181]

i. Justifications for Reforming the Land Tenure System

Before looking into these land tenure reforms in light of the legal constructs of land tenure security, it is paramount to analyze the reasons forwarded for the change, because it helps to understand whether the historical land reform questions were given attention and whether the detailed reforms

[178] See Tareke (n 2) for detail analysis on the Peasants rebellion, the 1960 attempted coup and the "Land to Tiller" student movement.
[179] Srur State Policy (n 21) p 71.
[180] Doren (n 9) p 169; Bodurtha *et al* (n 10) p 16; Teklu (n 42) p 5; Adejumobi (n 10) p 117 and 120.
[181] Proc. No.31/1975 (n 141). For the Socialist ideological influence of the legal system of then Ethiopia see Paul H. Brietzke. Socialism and Law in the Ethiopian Revolution. (1981) 7 *Rev. Socialist L.* 261–303.

fit into the justifications mentioned. These justifications mentioned in the preamble of the rural land law were shaped by four basic principles: personal dignity, historical injustice, agricultural development, and egalitarianism.

The personal dignity principle justified land tenure reform in relation to the importance of land for agrarian society. It propounded that in a society like Ethiopia "a person's right, honor, status, and standard of living is determined by his relation to the land".[182] Thus, it provided insurance of that relation by granting land rights for all, or at least the needy whose plight had necessitated the reform. The assumption was that the monarchical-feudalist regime had denied the mass of ordinary peasants' access to land as a means of livelihood and that the peasants had, due to this lost their basic rights, honor, status and standard of living and were converted and minimized into serfdom.[183] As I discuss in Section A above, this argument holds true for the southern peasants especially. Accordingly, the reform was needed to address their undermined personality through the means of entrusting them with secured land rights. This in effect assumed "to lay the basis upon which all Ethiopians may henceforth live in equality, freedom, and fraternity".[184]

This claim of reform was further justified on the principle of rectifying historical injustice. The reform had recognized the historical injustices committed against the peasants by the monarchical-feudalist regime. The reform was justified with the need to overcome the exploitative character of feudal agrarian relations prevailing before. The discussion in Section A above note that the lion's share of agricultural products of northern peasants and southern tenants was taken away to the landlords and the government in the form of tribute and tithe, and in the South also rent. The peasants and tenants were not the owners of the fruits of their labour - the landlords and the government were. Thus, to deal with this problem the *Derg* rural land tenure reform had the objective of abolishing the exploitive system. It stated that:

> "[...] to make the tiller the owner of the fruits of his labour, it is necessary to release the productive forces of the rural economy by liquidating the feudal system under which the nobility, aristocracy and a small number of other persons with adequate means of livelihood have prospered by the toil and sweat of the masses."[185]

[182] Proc. No.31/1975 (n 141) the preamble.
[183] Ibid.
[184] Ibid.
[185] Ibid.

The enhancement of agricultural development and productivity was the other justification for the introduction of land tenure reform in the socialist regime. The reform attacked the prevailing poverty during the monarchical-feudalist regime and under-development of agriculture and non-productive use of land. It assumed that these problems were the result of the exploitation of the many peasants by the few nobles and landlords; and the failure to make the tiller the owner of the fruits his labor.[186] Consequently, in order to ensure the development of the country and enhance agricultural productivity, reforming the land tenure system was necessary. It was implied in the reform that the only way to realize this was "...by instituting basic change in agrarian relations which would lay the basis upon which, through work by cooperation, the development of one becomes the development of all".[187] This is typical socialist dogma that demands work through cooperation and to be rich or poor together.

Finally, egalitarianism as a justification for the reform was also incorporated, to remedy the historical injustice in relation to access to land. The reform recognized the fact that "the several thousand *gashas* of land have been grabbed from the [peasants] by an insignificant number of feudal lords and their families".[188] To address this inequality and "to provide work for all rural people", it was assumed that the redistribution of land was necessary.[189]

Generally, the justifications for the reform were meant to address the land question of the time. However, nowhere in these justifications was the pastoralist land question mentioned, although the legal modernization in the monarchical-feudalist regime had denied their customary land rights by putting their land rights in the state domain. This implies that the Socialist regime had also and again given a peripheral position to their land right questions. The entire rural land tenure reform debate was dominated by the peasant question. Substance-wise, too, the subsequent discussion on the contents of the reform proves this fact.

ii. The Situation of Land Tenure Security of Peasants and Pastoralists

The establishment of the status of peasants' and pastoralists' legal land tenure security requires the evaluation of the substantive contents of the reform introduced by the rural land proclamation.

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[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] Ibid.

This evaluation can be done against the holistic legal constructs of land tenure security that are defined in Chapter 1. Moreover, its appraisal with the justifications provided for it also implies the extent to which the substantive content of the reform was really suited to address the rural land issues in the country.

To begin with the nature and duration of rights in land afforded to the pastoralists and the peasants, the proclamation had followed the bundle of rights approach, particularly in relation to the peasants' land rights. It began with changing the rural land ownership regime and abolished, without compensation, the private land ownership form. In its place, it introduced a public ownership regime that provided that all rural land was the collective property of the Ethiopian people.[190] Working from this basis, the Proclamation then defined the nature of the land rights of peasants and pastoralists respectively, by considering their unique forms of land utilization. For pastoralists, it was left to customary rules to define their land rights, with them simply being granted the possessory rights which they were denied during the legal modernization period of the monarchical-feudalist regime.[191] Moreover, their obligations towards the landlords or any other person, if any, were annulled.[192]

In the case of peasants, before exploring the nature of the rights in land granted, it is crucial to address how the reform had governed the issue of their access to land. It is particularly important to determine whether the substantive content of the proclamation met the personal dignity, historical injustice and egalitarianism justifications provided for it. As a starting point, the proclamation provided any Ethiopian who was personally willing to cultivate with the right to free access to rural land for livelihood up to ten hectares.[193] However, there are two ways in which to assess whether the proclamation had substantively given effect to the justifications in relation to the rules of land redistribution – access to land. The first is by looking into the priority rules stipulated in the proclamation for conducting the rural land distribution process. Article 10 that says that distribution must as far as possible be equal, listed priority orders that went against these justifications. For instance, landlords, who used to exploit the peasants and for whose benefit the peasants land rights were deprived, were given priority over tenants they may have evicted;

[190] Id Article 3.
[191] Id Article 24.
[192] Id Article 25.
[193] Id Article 4.

landless workers, of whom there were many, came after tenants and landlords, and evicted tenants.[194] The Proclamation entrusted the government with protecting the interest of the landowners/landlords, in any way it thought fit, besides equally sharing the land the tenant or hired labourer tills.[195]

The second reason concerns the *basis* of land allocation. The Proclamation intended land distribution to be conducted based on household "needs" – sufficient to a person's maintenance and that of his family.[196] This stipulation also favoured the landlords, who had extended family. Moreover, due to the legislation's failure to provide an operative guide to determine sufficiency, empirical studies revealed mixed results. Some implied that the allocation of land was emphasized on the capacity of households to use it, favouring households with a better supply of adult labour and oxen.[197] Other empirical studies indicated that the allocation was done based on the number of household members.[198] Both criteria were still in favour of the landlords. At the time, it was the landlords who better capacity in terms of cultivating instruments, adult labour and the oxen. Tenants, at that time, had less adult labour and fewer oxen since the lion's share of their products was taken by the landlords and the government as I discuss in Section A above. In terms of the number of people of households, it was assumed that landlords would have extended family members, as they had more than one wive, as opposed to the peasants. This in effect implied that it was the landlords who had a priority and better share in the land redistribution. Thus, when one scrutinizes the provisions of the proclamation, it is evident they were not enacted in accordance with the justifications.

The Proclamation also defined the duration and nature of the rights in land of the peasants and pastoralists. The general duration of their land rights was not fixed in time. It was rather time-unbounded, unless taken away by other reasons that are discussed below under the other legal construct – protection against arbitrary curtailment of land rights.

[194] Id Article 10.
[195] Id Article 6(1).
[196] Id Article 4(1).
[197] Kebede Administrative (n 53) p 32.
[198] Rahmato Agrarian (n 13); B. Nega, B. Adenew and S. Gebre Sellasie. 'Current land policy issues in Ethiopia' in Food and Agriculture Organization. Land reform, land settlement and cooperatives. Rome. *FAO Especial Edition Land Reform*, 2003. 103–124. P 107.

While the Proclamation left the pastoralists' rights in land to be defined customarily, it defined the peasants' in the form of "what is not prohibited is allowed." The peasants were only given use rights on their plots of land as the same proclamation banned all kinds of land transactions and wage labour in rural areas. Therefore, peasants could neither sell, mortgage, lease out, donate, nor generally transfer the land allocated to them, or use hired labour, except in situations where a woman without other adequate means of livelihood held the land, or where the holder died or was too sick to farm and his children were minors.[199] Moreover, it severely restricted the right to transfer the land use right by way of inheritance to family on death of the holder. Inheritance was permitted to spouses or children, with minor children preferred; they would continue to use the land personally, or exceptionally by hiring labourers.[200]

Since the land tenure reform introduced through the rural land proclamation had national application, the nature of the rights in land defined in the *rist* system in the North was also affected. Peasants in the *rist* land had possessory rights and no one was allowed to put a new claim on the *rist* land by showing his bloodline to the "founding father."[201] Like tenants in the South, landless tenants in the North in *rist* land were granted with possessory rights over the land they tilled.[202] The resident *ristegna* who had leased the land had the right to share it equally. Thus, the reform had narrowed the scope and freedom of the rights in land the *ristegna* used to exercise. It then negatively affected the legal construct of nature of the rights in land of land tenure security.

The reform not only highly narrowed and restricted the nature of the rights in land of peasants, but it also highly limited the peasants' freedom with respect to the fruits of their labour. The peasants' land tenure insecurity intensified in the *Derg* regime, because peasants were forced into hastily organized producer cooperatives, thereby losing their individual rights to land; and due to grain requisition to these cooperatives, they were not beneficiaries of what they produced.[203] The process of grain acquisition, with fixed quotas of agricultural production to the state marketing cooperative, which paid only fixed official rates, limited the peasants' right to use and transfer the fruits of

[199] Proc. No.31/1975 (n 141) Article 4(5) and Article 5.
[200] Ibid.
[201] Id Articles 19–20.
[202] Id Article 22. Not apply to women's *rist* land who had no other means of livelihood, or any person unable to cultivate personally due to under age, old age or illness.
[203] Rahmato Peasants (n 169) pp 43–44.

his/her labour in a manner it thinks fits.[204] The price of the products was determined by the government and the peasants were not at liberty to sell to the person they wanted to and at the price determined by market forces.[205] Thus, the 1975 land tenure reform confirmed the continuity of the exploitation of peasants that prevailed before through the landlords.

For the enforcement of the land rights, the *Derg* rural land reform had introduced the formation of the Peasant Associations (PAs), which, in relation to land, combined the judicial and administrative function.[206] The proclamation entitled the local PAs created in every village to 800 hectares of land, the lowest administrative unit of the regime.[207] In pastoralists' area the proclamation didn't demand the immediate establishment of the same kind of association, but left the discretion to the pastoralist community. [208] These associations, intended to replace the *gult* system, were empowered to redistribute land (the Pastoralists Associations and the PAs in the *rist* land area were not empowered with this function), maintain common assets, resolve land dispute conflicts, enable development activities taking place in their areas, and implement "villagization" programs, among others.[209]

The tribunals established by the PAs at local, *Woreda* (district), and *Awerja* (provincial) level were entitled to adjudicate land disputes.[210] The Proclamation had empowered the PAs with the judicial power by taking it from the regular courts, which used to entertain it before. It further annulled all the land disputes pending in the regular courts and prohibited taking any new land case to the court of law until the tribunals were established.[211] On the top of that, the Proclamation outlawed taking any legal action against the acts of the government, even to the tribunals.[212] The peasants and pastoralists right to enforce their land rights was confined to enforcement against private individuals or groups. Nevertheless, the majority of illegal encroachment on lawful land rights

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[204] Rahmato Agrarian (n 13) p 66; Siegfried Pausewang. Economic reconstruction and the experience of Ethiopian peasant communities. Chr. Michelsen Institute, Development Research and Action Programme (DERAP) (working paper, 3, the symposium on the Ethiopian economy, Bergen), 1992. P 26.
[205] Ibid.
[206] Proc. No.31/1975 (n 141) Article 10 and 14.
[207] Id Article 8.
[208] Id Article 26. Given the mobile nature of the pastoralists it was not possible to have such form of associations that demands sedentary existence to operate its tasks. Moreover, the pastoralist communities have their own unique customary institutions to perform the tasks assigned to the Pastoralists Association in the law.
[209] Ibid and see also Id Article 23.
[210] Id Article 10 and 14.
[211] Id Article 28.
[212] Id Article 28(4).

emanated from the acts of the government, as is seen in Chapter 1. As a result, the legal construct of enforceability of the peasants' and pastoralists' land rights was highly curtailed and that would affect land tenure security.

It is so that enforcing land rights against private individuals or groups in the local PAs was no longer inhibited by cost, because the tribunals were located in the vicinity of the peasants, particularly the local tribunals. Nevertheless, the judges in the tribunals, elected from the peasants, and also the peasant parties to the dispute, most often had no legal knowledge, given the illiteracy of the rural community at that time.[213] Thus, the absence of civil society organizations working on legal empowerment would make it difficult to enforce the land rights.

With regard to the assurance of land rights for the peasants and pastoralists too, the *Derg* rural land reform had worsened their land tenure security. First, the reform, rather than limiting the grounds for deprivation of land rights for expropriation, introduced other reasons for which the peasants and pastoralists might be deprive of their land rights that were not before mentioned in the law. The continuity of the peasants' and pastoralists' land rights was contingent upon being a member of the PAs and physical presence in the area. Failure to observe membership of PAs and compliance with physical residency requirements in the area resulted in loss of the land.[214] Furthermore, even in the case of observance of these conditions, deprivation of the land rights without payment of compensation was allowed. This was during the redistribution of the land. The PAs were empowered to carry out a periodic redistribution of land without paying any compensation for the loss land.[215] Accordingly, they conducted periodic land distribution so as to accommodate the interest of new claimants, which, in turn, contributed to the growth of land scarcity, mainly in the densely populated regions of the country.[216]

The other issue of the reform worthy of noting here is how the Proclamation treated the status of the peasants and pastoralists whose holdings were needed by the government for a public purpose after the redistribution process or legalization of the previous holdings. In this respect, the

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[213] Rahmato Peasants (n 167) p 42. Well in *woreda* and *awerja* level this problem would be minimized as the Land reform officer who would be educated but not law presided as a chairperson in the tribunal.
[214] See Ahmed *et al* (n 13) p 8; Teklu (n 42) p 5.
[215] Proc. No.31/1975 (n 141) Article 10(1).
[216] Kebede Land Tenure (n 20); Bodurtha *et al* (n 10) p 17.

proclamation was ambiguous and open to different lines of interpretation. What the Proclamation stated in two provisions, in this regard, was the following:[217]

> "17. Power of Expropriation
>
> 1) The Government may use land belonging to peasant associations for public purpose such as schools, hospitals, roads, offices, military bases and agricultural projects.
>
> 2) The Government shall make good such damage as it may cause to the peasant association by the decision to expropriate the holding."

These provisions could be understood in two different ways. First, the reform introduced only the expropriation of the PAs land, not the peasants and the pastoralists. This is with the assumption that the PAs had their own separate land like the peasants and the pastoralists. Consequently, the peasants and the pastoralists did not face the risk of expropriation. However, this way of interpretation is not tenable, given the non-absolute nature of property rights in any country and political-economic system – since expropriation is a limit to right. Besides, the nature of the PAs' land rights was not defined in the Proclamation and they only had administrative and judicial power over land.[218]

The second interpretation is that the proclamation assimilated the peasants' and the pastoralists' land right to the PAs just for the sake of expropriation by the government. On this basis, it provided for compensated expropriation of land held by PAs, for public purposes such as schools, hospitals, roads, military bases and agricultural projects.[219] Given the nature of functions assigned to it, this line of interpretation is sound. However, this interpretation also leads to questions: why was there such assimilation and would the compensation go to the affected parties?

From the perspective of the legal construct of assurance of land rights, the reform seemingly enhanced land tenure security in defining the concept of "public purpose," because, the proclamation had adopted the narrow illustrative approach – direct benefit and state use - to define the constituting elements of the "public purpose."[220] This in effect limited the state's power of interference with land rights in exercising the limit of rights – expropriation. However, there were

[217] Proc. No.31/1975 (n 141) Article 17.
[218] Cohen and Koehn (n 5) p 13.
[219] Proc. No.31/1975 (n 141) Article 17(1).
[220] See ibid.

no means to enforce this in an independent judiciary when it was carried out for the other purposes, since, as I discuss above, taking a legal action against the state authority in the exercise of functions stipulated in the proclamation was totally outlawed.

Moreover, the proclamation was not clear on whether the compensation was to be paid to the affected peasants and pastoralists. The form it takes and the amount thereof were not regulated in the proclamation. The proclamation, in fact, imposed a duty to "settle peasants or to establish cottage industries to accommodate those who, as a result of the [re]distribution of land remain with little or no land".[221] However, this provision was applied not only for the peasants' affected by the expropriation but for the others as well. Thus, it couldn't be taken as a compensation for expropriation.

When the compensation took a monetary form, the proclamation did not provide specific rules on who should valuate it, the method of valuation, the compensable interest etc. This situation may reflect two opposing views about the compensable nature of interests in land. First, from the spirit of the Proclamation one may argue that the land rights were not compensable interests. Particularly, from the nature of land ownership adopted, and the non-payment of compensation for the land interest in conversion of private large scale farming to the state or cooperative farm or land allotted to peasants, it can be inferred that legally the land rights interests was a non-compensable interest.[222] By contrast, the Proclamation's failure expressly to mention the non-compensable nature of the land loss as it did in the other cases; and its failure to specify the nature of the damage to be compensated, makes it plausible to argue that the land loss was a compensable interest during expropriation. Nevertheless, the failure to mention detailed rules about the techniques of assessment of compensation, begs for the technical application of the Civil Code, because the Code was not in contradiction with the Proclamation in this regard.[223] However, the question yet to be answered was whether the monetary compensation paid to the PAs was paid to

[221] Id Article 18.
[222] Id Article 3 and 7.
[223] Id Article 32 repealed those laws which are in contradiction with the proclamation. But the rules of expropriation enshrined The Civil Code (n 111) Article 1461(1) and 1470 about the payment of compensation were not in conflict with the proclamation. The Code, rather, could serve as a gap filling role since the proclamation was silent in this regard.

the affected peasants and pastoralists. This uncertainty coupled with the other defects in the reform had a negative bearing on legal land tenure security.

In conjunction with land registration and certification, the proclamation provided the Minster of Land Reform and Administration with the task of the register, and required the Minister to assign surveyors to help with the delineation of areas.[224] Nevertheless, nothing was mentioned in the proclamation about the components of registers and their effects. It simply required the registers containing the names of peasants at every area, *woreda* and *awerja* level.

The general wrap up of the *Derg* rural land tenure system implies that it had taken measures which had the implication of affecting the land tenure security of peasants and pastoralists in different ways. This rural land reform for the first time in the rural land tenure history of Ethiopia imposed a uniform land tenure system upon the country as a whole, without setting aside the uniqueness of the pastoralists. As I explained above, during the monarchical-feudalist regime, the tenure systems for peasants were complex and differed from place to place, with the main difference being between the northern and the southern part of the country. As a result, the uniform land tenure imposed by the *Derg* regime meant varying levels of reform and affected the tenure security of peasants residing in the North and the South differently.

In the North, where *rist* rights predominantly governed tenure relations, a significant amount of equity and security of land tenure already existed prior to the 1975 proclamation and thus reform was more moderate.[225] Moreover, the peasants of the North who held their own *rist* land that gave them effective control over it were threatened by a measure which required their land right to be governed in the same fashion with the landless of the South. Furthermore, it narrowed the nature of the rights in land, and diminished the assurance of their land rights and their capacity to enforce their land rights that they used to have in the previous regime as I discuss in Section A.

By contrast, the reform in the South and for pastoralists meant quite a radical change from the tenure systems of the monarchical-feudalist time. For the pastoralists, it revived their customary land rights that were denied during the legal modernization period of the past. For tenant farmers and landless peasants of the South, the abolition of land ownership removed a major source of

[224] Proc. No.31/1975 (n 141) Article15.
[225] Bodurtha *et al* (n 10) p 17.

exploitation and provided guaranteed access to land.[226] In short, as the evidence revealed, for former tenant farmers in the south as well as landless populations, the reform enabled them to enjoy some increase in tenure security by allowing access to land through PAs.

General to all, for the peasants, especially living in the heavily populated regions in the north, and to some extent in the south, frequent land redistribution gave rise to insecurity of holdings. Further, the grain acquisition program that was developed denied the peasants from being the owners of the fruits of their labour, a need which was the justification for the reform. Furthermore, the above analysis in terms of the holistic legal constructs of land tenure security implies that the rural land tenure reform of the *Derg* regime was not proclaimed in a manner that bettered the legal land tenure security of peasants and pastoralists. In support of this claim, Dessalegn summarized the outcome of the reform in relation to peasants as follows:

> "[t]he end product of the land reform was that it failed where it succeeded. It transformed rural Ethiopia into a society of self-labouring peasants. To promote social equity, it undermined peasant confidence. It redefined the land system in a radical way but in doing so made insecurity of holding an enduring element. It replaced the landlord with the state, providing the latter with direct and unencumbered access to the peasantry."[227]

iii. The Further Land Tenure Reform

The rural land tenure reform I discuss above, in conjunction with other social, economic, and political reasons led various insurgent groups to take up arms against the *Derg* regime.[228] To address such opposition and protest the *Derg* Socialist regime tried to incorporate further land tenure reforms. These reforms were aimed at addressing the cause of land tenure security, because the regime had already admitted that the insecurity of land holdings was the main obstacle to peasant agriculture.[229] These reforms were adopted in and after the promulgation of the 1987 People's Democratic Republic of Ethiopia (PDRE) Constitution.[230]

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[226] Cohen and Koehn (n 5) p 49.
[227] Rahmato Agrarian Change (n 2) p 40.
[228] See John Young. *Peasants and revolution in Ethiopia: Tigray 1975–1989*. (Doctoral dissertation, Dept. of Political Science, Simon Fraser University), 1994 for the main insurgent group that led the final overthrown of the *Derg* regime.
[229] Rahmato Agrarian Change (n 2) p 49.
[230] See Menghistu Fisseha-Tsion. Highlights of the Constitution of the Peoples' Democratic Republic of Ethiopia (PDRE); A Critical Review of the Main Issues. (1988) 14 *Rev. Socialist L.* 129–180 for a general overview of the Constitution.

The 1987 PDRE Constitution reaffirmed the public ownership of land and had some provisions that incorporated the Bakerian protection function of property and tend to enhance the assurance of land rights legal construct.[231] Although it was not in the form of a limit to rights, but rather in the form of empowering the state, the Constitution provided that the state may expropriate *any property* for public interest upon the payment of compensation.[232] Except for saying expropriation had to be carried in accordance with the law – implying the particulars to be determined in other law - the Constitution did not grant procedural due process. Moreover, the Constitution was still not clear on whether compensation was to be paid to the affected parties or to the PA, just as in the Proclamation.

Even though the 1987 PDRE Constitution had again recognized the fact that the peasantry was denied of the fruits of their labour in the monarchical-feudalist regime, and the insurgent groups' struggle was carried out in its time, the Government was not committed to taking measures to abolish the grain acquisition program and entitle the peasants to sell the fruits of their labour in the market, up until 1990.[233]

In 1990, when the military insurgent struggle reached its peak, the *Derg* regime introduced two further rural land reforms that were also the result of the economic system change from a socialist to a "mixed" system.[234] The measures had positive implications on the nature of rights in land and the assurance of land rights legal constructs. In relation to the nature of rights in land during this time, the *Derg* regime allowed the peasants the right to lease their land. However, the detail was not known. Moreover, the previous restriction on succession of land rights to heirs, prohibition on hiring of labour, and the grain acquisition with fixed price were also withdrawn.[235]

Further, to enhance the assurance of the land rights, this rural land tenure reform of the *Derg* regime halted the redistribution of peasants' landholding which was periodically carried out by the

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[231] The Constitution of the Peoples' Democratic Republic of Ethiopia (PDRE). Proclamation No. 1/1987. *Neg. Gaz.* Vol. 47 No. 1. 1987. Article 13 and 17.
[232]See Id Article 16. While the Constitution used personal property to refer to private property; the use of term any property implied that the state take non-personal property includes land for public purpose and upon payment of compensation.
[233] PDRE Constitution (n 231) preamble.
[234] Rahmato Agrarian Change (n 2) p 49; Kebede Land Tenure (n 20) p 129.
[235] Rahmato Agrarian Change (n 2) p 49; Nega *et al* (n 198) p 109.

PAs to ensure access to land for new claimants.[236] As it was carried out without the payment of compensation, it worsened the poverty situation of the previous landholders. The temporary outlaw of such redistribution granted the peasants that part of their land holdings would not be taken away. On the top of this, the further reform declared protection against arbitrary eviction and determined that eviction would occur only in exceptional situations and only in accordance with the law.[237]

However, in taking the further land tenure reform the regime was too late; and at the same time, the measures were not sufficient to save the regime.[238] The further reform was not genuine; but it was proclaimed to get popular support from the rural community against the "escalating anti-government insurgency in the countryside".[239] Because of this, after a protracted struggle, the regime was overthrown in 1991 by the Ethiopian Peoples' Revolutionary Democratic Forces (EPRDF).

C. Conclusion

The historical contextual analysis of the pre-1991 rural land tenure system of Ethiopia against the legal constructs of land tenure security of peasants and pastoralists shows an amalgamation of outcomes. While in certain situations the continuation legal land tenure insecurity was inferred, in others improvements were observed, legally and theoretically speaking. Nonetheless, in the two political-economic regimes of the period the issue of land tenure security played a central role to dethrone from and enthrone to the political power.

The pre-legal modernization monarchical-feudalist regime had recognized the pastoralists' customary land tenure system and their land rights were more or less secured. Nevertheless, the peasants' land rights showed region-wise regulation differences and tenure security implications. The northern *rist* land rights holding peasants had better legal tenure security than the southern local peasants who converted into tenants. The *rist* system, although not accommodative of other religious fowollers than Ethiopian Orthodox Christianity and the other minority groups, granted perpetual usufracory land rights, dependent on the discharge of duties of land tax, tithe and labour

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[236] Ibid; and see also Kebede Land Tenure (n 20) p 129.
[237] Rahmato Agrarian Change (n 2) p 49.
[238] Dustin Miller and Eyob Tekalign Tolina. Land to the Tiller Redux: Unlocking Ethiopia's Land Potential. (2008) 13 *Drake J. Agric. L.* 347–376.
[239] Rahmato Agrarian Change (n 2) p 49.

services to the *gultegna* that had among others the judicial power to enforce the land rights against private challenges. Moreover, it guaranteed protection against the fear of eviction. Even expropriation was done for a public purpose and upon payment of compensation. Furthermore, although there was some ambiguity in demarcating the nature of the rights in land, the *rist* system gave the peasants broader land rights that even incorporated the right to alienate permanently to family members. The only source of the insecurity of land tenure in this system was a continuous claim to part of the land by family members, complexity of disputes due to absence of land registration and certification, and dispossession of labour and fruits of labour in the form of forced labour service, and land tax and tithe.

For the southern local peasants, in the area annexed forcibly by Emperor Menelik II, this period was characterized by the denial of their customary land rights and their access to land was possible only through tenancy. The politically imposed private ownership regime in the area was not the tenure arrangement that defined the land tenure system of the local people – theirs was defined by tenancy. The contingent terms of the tenancy were stipulated by the northern settler landlords to which the local *gabbars* had only acceptance or rejection as an option. These terms entitled the landlords to evict the tenants at any time, and tenants' utilization of the land was subjected to onerous burdens. They were required to pay the rent which was not legally limited, the tithe and also required to provide labour service to the landlord. Thus, the perpetuation of their insecurity related not only their land rights, but also to their labour and humanity.

The legal modernization introduced during the reign of Emperor Haile Selassie I, on the other hand, did away with the continuity of the customary land rights of pastoralists. The legal modernization of the regime that was highly influenced by western libertarian property right thinking affected the communal land rights of pastoralists and effectively put them on *terra nullis.* With the increase of commercial farming, the pastoralists' land tenure insecurity was intensified due to the uncompensated expropriation of their land rights and conversion of their grazing land to state domain. This was because of the view reflected then about the pastoralists' way of life and land utilization as uncivilized, degrading and wastage; and the inaccurate appreciation of their economic contribution and political marginalization.

The legal modernization in the case of the peasants entailed legislative and policy measures that improved their legal land tenure security. The reinforcement of private ownership of land in the 1960 Civil Code, the application of which was arguably confined to the non-*rist* land rights, brought with it the aim of enhancing the productivity of land through free transfer and collateralization. It granted the landholder with perpetual complete/full land rights. However, the privatization had nothing to do with addressing the land tenure insecurity of the southern *Gabbars*. Rather, the separate section in the Code that regulated the tenancy relationship and the general contract rules only slightly improved their tenure security. This improvement was done in the form of lightening the conditions for access to land and limiting the discretionary power of the landlord to evict the tenants. However, with respect to the amount of the rent, the Code legalized an excessive amount to agree on and that was why a further proposal to regulate the tenancy relationship was drafted, but it was rejected by the Senate landlord nobles whose interest was going to be affected.

To ensure the assurance of the land rights of the peasants, upon the adoption of the protective function of property in the Revised 1955 Constitution, the civil code had adopted some of the defining elements of this legal construct. Confinement of the deprivation for a public purpose only, which doesn't incorporate the financial benefit only; upon the payment of compensation valued by an independent body on the basis of the value of the land to the affected party; with the participation of the affected parties in the decision-making in four stages; and with the observance of procedural due process through advance notification of the expropriation decision and the taking to be done after payment of compensation had greatly improved the legal construct of assurance of the peasants land rights.

However, the Code's assignment of the task of expropriation to multiple authorities and limiting of access to a court of law to enforce land rights only on the ground of amount of compensation had a negative implication for the land tenure security of peasants. Moreover, the assignment of this matter to the material jurisdiction of the High Court that was located far away from the vicinity of the peasants, made the cost of enforcement inhibiting. On top of this, the peasants' legal knowledge gap also made the enforcement of their rights limited.

In spite of this, in the legal-modernization period, an attempt was made to introduce and effect the registration of land rights. However, the purpose attached to it was not to define and prove the nature of the land rights of peasants, but for facilitation of a land market and accurate assessment of tax.

The above mentioned legal problems in collaboration with the grievances about tax burdens imposed on the peasants through the tax law, instigated the three popular peasants rebellions and the Student movement of "Land to Tiller" that brought an end to the monarchical-feudalist regime in 1974. The *Derg* socialist regime brought to power the same year took radical land tenure reform steps in its 1975 Proclamation. The reform was justified on the basis of the principles of personal dignity, historical injustice, agricultural development and egalitarianism.

However, a content analysis of this reform also showed different results of legal land tenure security between peasants and pastoralists, and among the northern and southern peasants. For the pastoralists the reinstatement of their customary land rights was a great progress in ensuring their land tenure security. Also, for the southern tenants, the abolition of the feudal system and nationalizing all rural land without compensation to adopt the public ownership of land, granted them with land rights which they were denied in the monarchical-feudalist regime. That is, in relation to the nature and duration of land rights, the reform put the northern and the southern peasants in the same feet. They were entitled to a perpetual possessory right, defined in the Hohfeltdian bundle of rights approach, with a list of prohibited land rights. The exclusion of the right to lease, mortgage and sell and strong restriction on inheritance narrowed the bundle of rights the northern peasants used to have in the *rist* system before, in a modest form. Thus, it was not logical to expect that the northerners would welcome the reform.

Moreover, the prohibition of the use of hired labour, and the introduction of the grain acquisition program that required the peasants to sell their products at a government fixed price denied the peasants from being owners of the fruits of their labour. Above all, the periodic redistribution and conditioning of land rights with the requiremnt of physical presence in the area where the land was located and membership of the PAs, and the incorporation of unclear expropriation rules that failed to define when the compensation was to be paid to the peasants and pastoralists, had serious negative implications for the assurance of land rights. Furthermore, the outlawing of legal action

against the acts of the government in relation to land rights, and the empowerment of the PAs to carry out the judicial function together with their administrative task through the establishment of the tribunals to entertain land disputes, undermined the enforceability of the peasants' and pastoralists' land rights in an independent judiciary. This problem was further intensified by the failure to adopt a genuine registration and certification system of land rights in the reform.

These legal land tenure measures that worsened insecurity and has been considered as simnply replacing individual-landlordism with state-landlordism, particularly for the northern peasants, coupled with other social, economic and political reasons led the emergence of various oppositions from insurgent groups in the countryside. Because of this, the socialist regime introduced further rural land tenure reform with the change of the economic system to the a mixed economy in 1990 and the adoption of a new Constitution in 1987. With the incorporation of the Bakerian protective function of property in the PDRE Constitution, these further reforms were aimed at liberalizing the nature of land rights like allowing for the use of hired labour, leasing and free inheriting of land, and withdrawal of grain acquisition. Moreover, in relation to the assurance of land rights, it halted periodic land distribution temporarily and guaranteed protection against arbitrary eviction, declaring that the eviction be done only exceptionally and in accordance with law. Unfortunately, the *Derg* regime was too late in introducing such further reforms, as the insurgent struggle reached its climax, which brought an end to the regime in the next year, 1991. Thus, it becomes necessary to analyze whether the post-1991 rural land tenure system is shaped in a way to enhance the legal land tenure security of peasants and pastoralists in such a way as to relieve itself from opposition and insurgent struggle, taking a lesson from the two prior regimes.

Chapter 3

Constitutional Protection Afforded to the Land Tenure Security of Peasants and Pastoralists in the Post-1991 Ethiopia

The constitutional protection afforded to land rights is regarded as a means to secure land tenure from legislative abrogation. In addition, to avoid unnecessarily extended protection and to enable land policy and law to be flexible to go hand in hand with the socio-economic and political changes, it is argued that constitutional protection should be limited to the Bakerian five property functions. Moreover, especially in a country where economic exploitation by the state or landlord was prevalent before, like Ethiopia, constitutional protection is necessary while establishing constitutional government in the aftermath of the civil war. In such countries, constitutional norms have been considered a guarantee against the repetition of historical injustices, and for assurance and promotion of benefit sharing.[1]

The post-1991 rural land tenure system of Ethiopia has come into the picture after the deep-rooted land tenure insecurity problems of peasants and pastoralists in the previous two political-economic regimes that the country went through. It took almost five years to establish a constitutional democratic government and to deal with the land issue in the constitution in the post-revolution.[2] Then, it was only in 1995 that the Federal Democratic Republic of Ethiopia's (FDRE) Constitution was adopted, that represented a landmark land-related policy and legal decision that dealt with the land tenure security of peasants and pastoralists. Consequently, the central theme of this Chapter is to engage in an analysis of the content of the FDRE Constitution to determine whether it

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[1] See for instance, Constitution of Federal Democratic Republic of Ethiopia (FDRE). Proclamation No.1/1995. *Fed. Neg. Gaz.* Year 1 No.1. 1995. The preamble.

[2] The country has ruled by the Transitional Government under the Transitional Charter from 1991 to 1995. In this period, the land tenure system has not made a fundamental change from the *Derg* period's reform in 1990. After promulgating the free market economic system, the Transitional Government adopted the continuation of the *Derg* rural land tenure system with its further reform of 1990 until the promulgation of the Constitution. The Transitional Government of Ethiopia had postponed the decision on the land policy to the constitution makers. (See Transitional Government of Ethiopia (TGE). Transitional period charter of Ethiopia. *Neg. Gaz.* No. 1. 1991; Transitional Government of Ethiopia (TGE). 1991. *Ethiopia's transitional period economic policy*). For details on the economic and agricultural reforms in the transitional period see (______). 'Transitional Period Economic Reform Programme in Ethiopia: 1991–1993' in Reginald Herbold Green and Mike Faber (eds.). The Structural Adjustment of Structural Adjustment: Sub-Saharan Africa 1980-1993. (1994) 25(3) *ids bulletin*. 67–72; Stefan Bruce. 'Economic policies under review' in Abebe Zegeye and Siegfried Pausewang (eds.). *Ethiopia in change: peasantry, nationalism and democracy*. London. British Academic Press, 1994. 119–127; John W. Bruce, Allan Hoben and Dessalegn Rahmato. *After the Derg: an assessment of rural land tenure issues in Ethiopia*. Land Tenure Centre, University of Wisconsin-Madison, and the Institute of Development Research, Addis Ababa University, 1994.

incorporates, or gone beyond the Bakerian five functions of property to curtail the state's adverse affecting of the land tenure security of peasants and pastoralists through the enactment of land legislation. Also, in this Chapter I explore how the historical perpetuation of land tenure insecurity, that we see in Chapter 2, is addressed in the Constitution.

An in-depth assessment of the FDRE Constitution reveals that the Constitution goes beyond the Bakerian five functions in affording protection to the land rights of peasants and pastoralists. It also incorporates a sixth function. Moreover, it addresses the historical land tenure insecurity of peasants and pastoralists. It does so by guaranteeing them free access to land; and by defining the nature of property rights, protection against arbitrary eviction and displacement, the right to compensation and relocation, and the right to participate and to be consulted in the development affairs that affect their land rights in particular and the right to a fair price for their products.

However, the Constitution also contains some ambiguous stipulations that create a dilemma about the nature of the protection it affords to land tenure security of peasants and pastoralists. This has, in turn, forced the state to take legislative and policy measures that go against the spirit of the Constitution. In addition, the prevailing scholarship on post-1991 land tenure system, without analysing the constitutional norms and by merely regarding land ownership as state or public, reinforced and empowered the state to have excessive power over peasants and pastoralists by using land rights as political strategic assets, like the past political regimes.

I begin the discussion by looking at peasants' and pastoralists' right to free access to rural land. A section where I analyse the nature of the rights in land constitutionally afforded to peasants and pastoralists then follows, after a synthesis of the debate on the constitutional rules about property. The third section is devoted to examining how the FDRE Constitution protects peasants' and pastoralists' land rights against arbitrary eviction and its various complexities. In the fourth section I deal with the constitutional guarantee of the right to compensation and relocation as a means to ensure land tenure security of peasants and pastoralists. In the final section I deal with the constitutional empowerment of peasants and pastoralists to participate and have their voice heard in the decision-making that affects their land rights and with the right to a fair price for their products. I then conclude.

A. Free Access to Rural Land Rights

It is a given that access to land is an important issue for the majority of Ethiopians who, one way or the other, depend on agricultural production for their income and subsistence.[3] Moreover, to address the historical injustice of the exploitation of the majority by the few, the FDRE Constitution continues to incorporate the *Derg* rural land system egalitarian principle of "free rural land for all."[4] Accordingly, the Constitution guarantees peasants and pastoralists the right of free access to rural land, to ensure the Bakerian welfare function of property. As it was also provided for in *Derg* rural land policy and law, the idea of free access to rural land rights for peasants and pastoralists is not a new introduction of the post-1991 land tenure system of Ethiopia. The novelty lies in stipulating it in the Constitution as a substantive right of peasants and pastoralists.

In none of the previous written constitutions of the country was the manner of peasants' and pastoralists' access to rural land mentioned in any form – as either a right or policy objective.[5] Moreover, stipulations granting actual land rights are rare the world over.[6] This unique approach of the FDRE constitutional rule was the result of the constitution makers' to retain the communist ideal of ensuring for the poor at least the means of survival/livelihood – eschewing the "survival of the fittest" principle of capitalism.[7]

In addition, the concept of "free access to rural land" in the FDRE Constitution is mentioned as a substantive right of peasants and pastoralists.[8] This is inferred from the way in which the provisions are framed and from where the relevant sections are situated. The stipulation is located in chapter 3 of the Constitution, which deals with human and democratic rights.[9] This chapter stipulates the human and democratic rights and freedoms, with their respective limitations. Article 40 of the

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[3]Samuel Gebreselassie. Land, land policy and smallholder agriculture in Ethiopia: options and scenarios. (The Future Agricultures Consortium, the Institute of Development Studies), 2006. P 3.

[4] FDRE Constitution (n 1) Article 40(4) and (5). In fact, as I discuss in Chapter 2 the concept of "free access to land for the peasants and the pastoralists" first introduced in the 1975 land tenure reform of the *Derg* regime.

[5] Three written Constitutions were adopted before the FDRE Constitution. These are: the 1931 Constitution, the 1955 Revised Constitution and the 1987 Constitution of the People's Democratic Republic of Ethiopia.

[6] Montgomery Wary Witten. The protection of land rights in Ethiopia. (2007) 20 *Afrika Focus*. 153–184. P 155.

[7] Wibke Crewett and Bendikt Korf. Ethiopia: Reforming land tenure. (2008) 35(116) *Review of African Political Economy*. 203–220. P 205.

[8] Well in the FDRE Constitution it seems that further provision of free land for pastoralists is not incorporated. It rather authorizes them to utilize the currently in hand land for free.

[9] The FDRE Constitution (n 1), chapter three (Article 13 to Article 44) deals with fundamental human and democratic rights and freedoms.

FDRE Constitution that regulates the issue of the right to property in general and peasants' and pastoralists' right to free access to rural land rights in particular, is located in this Chapter. Moreover, the way the provisions were framed also directly indicates that the Constitution guarantees peasants and pastoralists the substantive right to free access to land. They state that "[the] Ethiopian peasants have the right to obtain land without payment..."; and "[the] Ethiopian pastoralists have the right to free land...".[10]

The legal consequences of this constitutional right are multi-faceted. First, it is an indication of the incorporation of the Bakerian welfare and allocative function of property. By guaranteeing peasants and pastoralists the substantive right of access to land for their livelihoods, the recognition of the welfare function in the Constitution is inferred. In addition, the Constitution also incorporates the allocative function, the means of securing the land as free grant, although this is more of a political value judgment than a doctrinal stipulation.[11] Generally, it is not advisable for this function of property to be stipulated as a legal rule, at least not in constitutional norms. It should rather be left for other normative frameworks that can accommodate the ongoing changes in value judgments and the flexibility required for land policy. [12] Incorporation into the FDRE Constitution of this allocative property function as a doctrinal stipulation, cannot achieve the capacity for changing value judgments and flexibility required for land policy, because unlike other legislation, the constitutional norms amendment is not an easy task that can go in hand with the changes in the value judgments.[13]

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[10] Id Article 40(4) and (5).

[11] As Baker notes the allocative function of constitutional property is more of value judgment and is not advised to stipulate in the constitution as it is not doctrinal stipulation. (See Edwin Baker. Property and its relation to constitutionally protected liberty. (1986) 134 *U. Pal. L. Rev*. 741–816. Pp 767-768). In contradiction to this the FDRE Constitution that come aftermath of civil war and continuation of the rural land questions has expressly stipulated that the peasants and pastoralists have the right to free access to land. (See FDRE Constitution (n 1) Article 40(4) and (5)). These provisions are stipulated in the Constitution with the view to ensure the continuity of addressing the political injustice committed in depriving the rural land rights of peasants in the monarchical-feudalist regime as I discuss in Chapter 2. The constitutional assembly minutes also reveals that the incorporation of the issue of pastoralists' land rights in the constitution is aimed at addressing, the past political marginalization among others. (See Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 4, Nov. 23–29/1994, Addis Ababa), 1994. Deliberation on Article 40. (Amharic document, translation mine).

[12] Baker (n 11) pp 767–768.

[13] FDRE Constitution (n 1) Article 105.The FDRE Constitution adopts two forms of its amendment approaches depending on the section subjected to amendment. Particularly, if it from the chapter that deals with the fundamental rights and freedoms, which includes the Constitutional protections afforded to the peasants and the pastoralists, more stringent mechanism and requirements are stipulated. (Id Article 105(1)).

Moreover, the constitutional right to free access to land of peasants and pastoralists creates the right-holder and the duty-bearer notion of human rights jurisprudence.[14] It establishes a juridical relationship between peasants and pastoralists as right-holders to claim their rights against the state as the duty-bearer. The state is required to satisfy the claims of free land for all as it is under a duty to respect and enforce all the human and democratic rights incorporated in the Constitution.[15] In addition, the failure of the state to realize it amounts to the violation of peasants' and the pastoralists' constitutional right to free land.

Nevertheless, it is pressing to ask two related questions here. It is about the nature of the right – immediate or progressive realizability, and its sustainability in the long run. Even though the academic discourses and state policy stands are converging to see human rights holistically (as initially inspired in the Universal Declaration of Human Rights) because of their indivisibility, interdependence and relatedness,[16] still there is a division of the immediate realizability of civil and political rights,[17] and the progressive realization of socio-economic rights,[18] but with observance of the "minimum core obligations."[19] Here the question becomes: as socio-economic rights, are peasants' and pastoralists' rights to free land supposed to be realized progressively?

This question requires us to see socio-economic rights not only from the perspective of "state capacity" to realize them and observation of "minimum core obligations," but also from the perspective of the nature of a particular socio-economic right. I claim that there are some socio-

[14] Amartya Sen. Elements of a Theory of Human Rights. (2004) 32 *Philosophy & Public Affairs.* 315–356.
[15] FDRE Constitution (n 1) Article 13(1).
[16] See UN. The world conference on human rights: Vienna declaration and programme of action. *U.N. Doc. A/CONF. 157/23*, 1993. Part 1, para. 5; Mario Gomez. Social economic rights and human rights commissions. (1995) 17 *Hum. Rts. Q*. 155–169; Craig Scott. Interdependence and permeability of human rights norms: towards a partial fusion of the International Covenants on Human Rights. (1989) 27 *Osgoode Hall LJ*. 769–878; Gillian MacNaughton and Diane F. Frey. Decent work for all: a holistic human rights approach. (2010) 26 *Am. U. Int'l L. Rev.* 441–483; Lanse Minkler and Shawna Sweeney. On the indivisibility and interdependence of basic rights in developing countries. (2011) 33 *Hum. Rts. Q.* 351–396; Masa Marochini. Civil and Political, and Economic and Social Rights - Indivisible or Separable? (2014) 64 *Zbornik PFZ*. 307–332.
[17] See UN. International covenant on civil and political rights. Adopted 16 Dec. 1966, G.A. res 2200(XXI), UN GAOR, 21st Sess., Supp. No. 16, UN doc A/6316, (1966), 993 U.N.T.S. 3. Article 2(2); Matthew Lippman. Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights. (1980) 10 *Cal. W. Int'l LJ*. 450–513. P 482.
[18] UN. International covenant on economic, social and cultural rights. Adopted 16 Dec. 1966, 993, U.N.T.S. 3, Annex to G.A. res 2200(XXI). Article 2(1).
[19] Committee on Economic, Social & Cultural Rights. General Comment No. 3: The Nature of States Parties' Obligations. UN Doc. E/C, 1991. For further discussion on the contents of 'minimum core obligations' see Katharine G. Young. The minimum core of economic and social rights: a concept in search of content. (2008) 33 *Yale J. Int'l L.* 113–175.

economic rights that do not require a state's capability to realize them and demands full and immediate realization, just like civil and political rights. For instance, in a country like Ethiopia, where land cannot be sold and the state is mandated to hold unoccupied land on behalf of the people,[20] the state should be required to fulfil the right to free access to land of peasants and pastoralists in the same fashion as with civil and political rights. This is so, because land, being a natural resource, does not need for its provision to peasants and pastoralists special positive action from the state, nor does it require special financial and human resource capability of the state. This is without discounting the incidental costs and human resources required to realize the right, which holds true even for civil and political rights; and converging nature of the positive and negative duties of state in human rights discourse.[21]

However, the question still remains whether the right is sustainably realizable, all the time, for new claimers. It may be argued that the Constitution has stipulated the right believing that in the future, rural land dependence and population will decrease, as citizens engage in other sectors of economic activity than agriculture and people migrate to urban areas or urbanization expands. Moreover, the Constitution may have been enacted on the assumption that rural land was available in excess of the people's demand. However, the limited nature of land coupled with the ever-increasing numbers of the rural population create doubt with respect to the realization of the right for newcomers.

The post-1991 government has also taken inconsistent policy measures that have aggravated the problem and pressure on the demand for rural land. The Population Policy stipulates the *reduction of the rural to urban migration rate* as one basic policy objective.[22] This despite the fact that the population of the country has almost doubled enactment of the Constitution in 1995, with only a slight change in the urban-rural population percentage.[23] In addition, there has been no comparable

[20] FDRE Constitution (n 1) Article 40(3) and Article 89(5).
[21] Danie Brand. 'Introduction to socio-economic rights in the South African Constitution' in Danie Brand and Christof Heyns (eds.). *Socio-economic rights in South Africa*. Pretoria. University of Pretoria Law Press, 2005. 1–56. Pp 10–12.
[22] Government of Federal Democratic of Republic of Ethiopia. The National Population Policy of Ethiopi*a*. Addis Ababa. 1993.
[23] At the time of the enactment of the Constitution in 1995 the total population of the country was around 54 million and 85% which were rural residence and dependent on agriculture for their livelihood. (See Population and Housing Census Commission (Central Statistical Authority). The 1994 population and housing census of Ethiopia. Addis Ababa. *Transitional Government of Ethiopia*, 1995). And currently the population is estimated to be 104 million (the national census is yet done as it is carried out in every ten years and the government has extended it). (See FDRE

expansion of the amount of arable land in the country.[24] Consequently, with the limited amount of rural land available to satisfy the right to free land for an ever-increasing rural population, a preference against migration to the urban centres is impossible. Due to this, it was revealed that in 2011 forty-three percent of rural Ethiopians already had no access to rural land.[25]

On the top of this, the land policy and law of the country have also incorporated inconsistent land policy measures with the constitutional right to free land. First, by discouraging off-farm employment to enhance other means of livelihood and migration to the urban centres to look for other job opportunities and source of income, it pressed peasants and pastoralists demand for free land to support the livelihood of their expanding families.[26] This is because, as is discussed in Chapter 5, the engagement in non-farming and non-pastoral livelihood activity of peasants and pastoralists is often raised as one of the grounds for depriving peasants' and pastoralists' of their land rights.[27] The peasants and pastoralists may not engage in other economic activities due to the fear of loss of their land rights. Instead, they claim from the state for more free land to sustain their families.

The second inconsistency is between the constitutional right to free land and the policy of enhancing land tenure security of peasants and pastoralists through outlawing periodic redistribution. Given the limited availability of land, the realization of the right to free land for new claimants can be effected either through forced periodic redistribution or through distributing unoccupied state land.[28] The forced redistribution of peasants' and pastoralists' land is totally outlawed in the rural land policy and the law of the country, because it was believed to be one of the major sources of land tenure insecurity that peasants and pastoralists experienced in the

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Constitution (n 1) Article 103(3)). The 2007 census indicated that still 83.8% of the total population is rural resident and dependent on agriculture for their livelihood.

[24]Dessalegn Rahmato. *Searching for tenure security? The land system and new policy initiatives in Ethiopia.* Addis Ababa. Forum for Social Studies, 2004. P 15.

[25] Peter Bodurtha, Justin Caron, Jote Chemeda, Dinara Shakhmetova, and Long Vo. Land reform in Ethiopia: Recommendations for reform. *Solidarity Movement for a New Ethiopia*, 2011. P 1.

[26] Ethiopian Civil Society Network on Climate Change (ECSNCC). A review and analysis of land administration & use legislation and applications of the Federal Democratic Republic Ethiopia and the Four regional states of Amhara, Oromia, SNNP and Tigrai. Addis Ababa. *ECSNCC*, 2011. P 6.

[27] This restriction is stipulated on the Amhara, Tigray and Benishangul Gumuz States' law. In the other states and Federal Laws, we cannot find such type of restrictions. The cause for such differential treatment is the absence of the clear-cut natural resources related power division between the Central and state governments. See Chapter 8.

[28] We may think of other sources of land to satisfy the right to free land to the new claimants. Like abandoned, land remained without inheritor, land taken away by the state due to the peasants' and pastoralists' failure to carry out the conditions and obligations attached with the land utilization. But they are rear and not basic sources.

previous political regime. Therefore, the post-1991 land tenure system has the intention to promote the land tenure security of peasants and pastoralists by outlawing the periodic redistribution of land.[29] However, this in effect avoids the realization of the right to free land of new claimants. Dessalegn puts this paradox thus:

> "[t]he promise of the right to [free] land to all adults living in the rural areas that is made in the Constitution and the regional [legislation] can only be fulfilled if the demands of new claimants are met, and this can only be done through periodic redistribution. But redistribution and the leveling down of holdings that it gives rise to means that there is generalized insecurity and little incentive on the part of holders to invest on the land and to manage it properly."[30]

The distribution of "unoccupied land" is the second way to ensure the constitutional right to free land for new claimants. Nevertheless, the question of which land is in fact unoccupied, and to whom government policy prioritises the transfer of such land creates another policy ambivalence. The government's conception of unoccupied land includes, *inter alia*, the rangelands held by pastoralist communities in a mobile manner for the grazing purpose.[31] This understanding of pastoralists' land denies pastoralists communities any land rights and enables the state to deprive it without any expropriation proceeding. Thus, it takes pastoralists' land tenure insecurity back to as it was in the monarchical-feudalist legal-modernization period. It also disregards the constitutional protection of immunity against displacement afforded to pastoralists, which I discuss in detail in Section C below.

Moreover, in transferring the so-called "unoccupied land" the Ethiopian government has also made policy measures inconsistent with constitutional provisions. The constitutional rules imply that

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[29] FDRE Constitution (n 1) Article 40(4) and (5). The peasants' and the pastoralists' constitutional right to immunity against eviction and displacement from their landholding is aimed at addressing the historical eviction and periodic forced redistribution of land.

[30] Rahmato Searching (n 24) p 12.

[31] Philip Carl Salzman. Afterword: reflections on the pastoral land crisis. (1994) 34/35 *Nomadic Peoples*. 159–163; African Union Department of Rural Economy and Agriculture. *Policy framework for pastoralism in Africa: securing, protecting and improving the Lives, livelihoods and rights of pastoralist communities*. Addis Ababa, 2001; PFE, IIRR and DF. Pastoralism and land: Land tenure, administration and use in pastoral areas of Ethiopia. 2010. The two five-year development plans have basic intended to transfer the pastoralists' land to commercial farming by forcing the pastoralists to sedentary way of life. (See Ministry of Finance and Economic Development. Growth and Transformation Plan (GTPI) 2010/11–2014/15. Vol. 1. Addis Ababa. *Federal Democratic Republic of Ethiopia*, 2010; National Planning Commission. Growth and transformation plan II (2015/16–2019/20). Addis Ababa. *Federal Democratic Republic of Ethiopia*, 2016). Both of them were with the assumption that there is huge track of 'empty land' that is in fact the land possessed by the pastoralists. (See James Keeley, Wondwosen Michago Seide, Abdurehman Eid and Admasu Lokaley Kidewa. *Large-scale land deals in Ethiopia: Scale, trends, features and outcomes to date*. London IIED, 2014. P 13).

priority to access rural land is given to peasants and pastoralists over investors. This can be inferred from the historical concerns regarding peasants and pastoralists in the constitution making process and the structure and the wording of the provisions. Historically, as is seen in Chapter 2, the quest for rural land in Ethiopia mainly revolves around peasants and pastoralists. The whole effort of the opposition movements during the two pre-1991 regimes were aimed at guaranteeing peasants and pastoralists access to secured land rights. Investor's access to rural land was not an issue at that time. For the post-1991 regime that had also opposed the pre-1991 regimes, in particular their land policy, the land rights issue of peasants and pastoralists was of concern. It was concerned to address the land rights question of peasants and pastoralists as a priority policy objective.

This can be inferred from the debates in the constitution making process regarding the land tenure system of the country. Among others, the group that argued for the "state and people's ownership of land," (which is adopted in the FDRE Constitution) put forward two peasants' land tenure security related reasons to justify its position. These are the availability of huge amounts of unoccupied land to transfer to investors without affecting the peasants' land, and protection of peasants from eviction that can be caused by the disguised sale of their land if it is privatized.[32] It presupposed that unoccupied land would remain even after the satisfaction of the claims of peasants and pastoralists, and if private ownership of land is adopted, the peasants would engage in sale of land to solve temporary problems and would then be evict premanently and expose to exploitation by the bourgeoisie.[33]

The structure of the provisions under Article 40 of the FDRE Constitution and the wording thereof also indicates that priority in accessing land is given to peasants and pastoralists. Structurally, the provision dealings with the allocation of land to investors come after the provisions that deal with peasants' and pastoralists' free access to land.[34] In conjunction with this, the wording of the provisions dealing with the allocative function for the two groups, peasants and pastoralists on one hand,[35] and investors on the other hand, implies that priority be given to the former group in the

[32] The Constitutional Minutes (n 11) debate on Article 40.
[33] Ibid.
[34] FDRE Constitution (n 1) Article 40(4), (5) and (6) respectively.
[35] Prioritization between the peasants and the pastoralists claim for land access was not intended. The two separate provisions were given due to the fact that the issue of the pastoralists land was incorporated in the later time not in the initial draft of the Constitution after deliberating and reaching on the agreement that the provision dealing with the peasants' land rights does not address the pastoralists land rights. See the Constitutional Minutes (n 11) debate on Article 40.

allocation of rural land. In the case of peasants and pastoralists, without any modifying phrases, the Constitution provides it in a right establishing way, stating that "Ethiopian peasants have the right to obtain land without payment…" and "Ethiopian pastoralists have the right to free land for grazing and cultivation…"[36] It only requires peasants and pastoralists to be an Ethiopian national as the only criteria to access land.

Whereas, in the case of the investors, the Constitution stipulates an introductory modifier phrase, while defining their manner of accessing land in such a way as to leave it up to the state to ensure it. It states the following: "[w]ithout prejudice to the right of Ethiopian Nations, Nationalities, and Peoples [hereafter "peoples"] to the ownership of land, the government shall ensure the right of private investors to the use of land on the basis of payment arrangements".[37] The modifier phrase "[w]ithout prejudice to the right of Ethiopian…peoples to the ownership of land" in the provision which is absent in the relation to the provisions dealing with peasants' and pastoralists' land rights has the implication of some inferior treatment of the investors in relation to allocation of land.

That different treatment can only be the issue of prioritization in the access to land and the nature of the land rights and protection afforded. Moreover, in the case of investors, unlike with peasants and pastoralists, access to land is not defined in the form of substantive rights. It is instead formulated as authority or a mandate for the state to ensure the investors' access to land. In effect, this means that, unlike peasants and pastoralists, the investors are not entitled to claim access to land as of right. It is up to the state to ensure their access to land. This by itself implies that the investors have secondary status in access to land. That is why the rural land law reaffirms the priority rights of peasants and pastoralists in this regard.[38]

In contrast, the Ethiopian government took a policy shift away from this prioritization principle of the Constitution after the global food crisis of the 2007/8 that marked the intensification of the global land rush for agricultural investment.[39] With the introduction of further policy and

[36] See FDRE Constitution (n 1) Article 40(4) and (5). However, a question may be posed here that whether the free access to land ensures the free use of the land for ever or the government's power to levy tax or other means of charge for land use.

[37] Id Article 40(6).

[38] Federal Democratic Republic of Ethiopia. Rural land administration and land use proclamation No. 456/2005. *Fed. Neg. Gaz.* Year 11 No. 44. 2005. Article 5(4).

[39] For the extent of the large-scale agricultural land transfer in Ethiopia in the post-2007/2008 see for instance Dessalegn Rahmato. *Land to investors: Large-scale land transfers in Ethiopia* (No. 1). Addis Ababa. Forum for Social

legislative measures, the prioritization principle of the constitution was overturned. The introduction and establishment of the “Federal Land Bank” in 2008, in terms of which regional states are required to reserve land to the Federal Government to be made available to investors, is one of the indications of this policy shift.[40] Given the prevalence of insufficiency of peasants’ and the pastoralists’ land and their landlessness, accumulating land for the future need of the investors is to put the constitutional principle of priority of peasants and pastoralists aside. Moreover, the aim of the two Growth and Transformation Plans (GTP I (2010–2015) and GTP II (2016–2020) to transfer millions of hectares of arable land to investors without having regard to reducing the land insufficiency and landlessness of peasants, is also a policy implication of the shift.[41]

In general, the prevailing reality, the limited nature of land resources, the ever-growing rural population, the ramifications of inconsistent policy measures and certain constitutional rule violating criteria for peasants’ and pastoralists’ access to free land incorporated in rural land law that is discussed in the subsequent Chapter make the “right to free access to land” not sustainable, if not impossible to realise.[42]

B. Nature of Rights in Land

i. The Debate on and Form of Land Ownership

Studies, 2011; Elias N. Stebek. Between ‘land grabs’ and agricultural investment: Land rent contracts with foreign investors and Ethiopia’s normative setting in focus. (2011) 5 *Mizan law review*. 175–214; Semahagn Gashu Abebe. The need to alleviate the human rights implications of large-scale land acquisitions in sub-Saharan Africa. (2012) 4 *Goettingen J. Int'l L.* 873–890; Dessalegn Rahmato. The perils of development from above: land deals in Ethiopia. (2014) 12 *African Identities*. 26–44. About the reasons and justifications for the expansion of large-scale agricultural investments see Felix Horne and F. Mousseau. Understanding land investment deals in Africa. Country report: Ethiopia. Oakland CA. *The Oakland Institute,* 2011; Rabah Arezki, Klaus Deininger, and Harris Selod. What Drives the Global “Land Rush”? (2013) 29 *The World Bank Economic Review*. 207–233; Tinyade Kachika. (Land grabbing in Africa: a review of impacts and the possible policy responses. *Oxfam International*, nd.

[40] Rahmato Land to Investors (n 39) p 10; Keeley *et al* (n 31); see also Federal Democratic Republic of Ethiopia. Ethiopian agricultural investment land administration agency establishment Council of Ministers regulation No. 283/ 2013. *Fed. Neg. Gaz.* Year 19 No. 32. 2013. The legality and Constitutionality of the Federal government’s power to transfer land to investor and the process thereof is in detailed examined in Chapter 8.

[41] GTPI (n 31) p 25. It planned the transfer of 2.3 million hectares of land but not realized. See also GTPII (n 31) which has intended to reach 3.3 million of hectares the land to be transferred.

[42]Tesfaye Teklu. Land scarcity, tenure change and public policy in the African case of Ethiopia: evidence on efficacy and unmet demands for land rights. (The third international conference on development studies in Ethiopia, Addis Ababa), 2005. P 19; and ECSNCC (n 26) p 42.

An issue that is currently still contentious and that was hotly debated during the drafting of the FDRE Constitution is the form of land ownership adopted.[43] This can be inferred from the votes cast in the Constituent Assembly of the Transitional Government in framing the draft of the Constitution to the Constitutional Assembly;[44] the extent of the reflections and deliberations in the Constitutional Assembly;[45] and the ongoing academic and political discourse.[46] The vote in the Constituent Assembly was very close: 499 voted for the retention of the *status quo*, and 495 voted for privatization.[47] Moreover, the Constitutional Assembly also had heated deliberation and debate on the type of land ownership, which can be inferred from the extent of arguments made by the members in support of their respective stand. Mainly, this debate had taken a binary dichotomy between the supporters of “state and people’s ownership” and advocates of a tenure policy shift in favor of privatization.[48]

Furthermore, though the Constitutional Assembly finally adopted “state and people’s ownership,” the debate over land ownership has continued between scholars and among the political parties. Some scholars and the ruling party advocate for maintaining the *status quo* and other independent researchers, international institutions, and opposition parties propagate the introduction of the other forms of land ownership, as to some extent highlighted in Chapter 1 Section B. For instance, given that the seats of the two houses[49] and State Councils[50] that decide constitutional amendments[51] have been overwhelmingly held by the ruling party, any window of opportunity to initiate an amendment process of ownership was shut tight when in 2004, the late Prime Minister Meles Zenawi in his end-of-year report to the Parliament in June 2004 announced that the privatisation of land in Ethiopia would take place only over the grave of Ethiopian People’s

[43] See Ethiopia. 19 *Ann. Hum. Rts*. Rep. Submitted to Cong. by U.S. St. 78, 1994. P 85; Fasil Nahum. Ethiopia: Constitutions for a Nation of Nations. (1998) 60 *ICJ Rev*. 91–101. P 95.
[44] Gebru Mersha and Mwangi wa Githinji. 2005. *Untying the Gordian Knot: The Question of Land Reform in Ethiopia*. ISS/UNDP Land, Poverty and Public Action Policy Paper No.9, The Hague: Institute of Social Studies as cited in Stefan Dercon and Daniel Ayalew. Land rights, power and trees in rural Ethiopia. CSAE WPS/2007-07, 2007. P 6.
[45] The Constitutional Minutes (n 11) debate on Article 40.
[46] Yigremew Adal. Review of landholding systems and policies in Ethiopia under the different regimes. Addis Ababa. *Ethiopian Economic Policy Research Institute working paper 5,* 2002; Crewett and Korf (n 7).
[47] Dercon and Ayalew (n 44) p 6.
[48] See The Constitutional Minutes (n 11) debate on Article 40.
[49] House of Peoples’ Representatives and House of Federations. (See FDRE Constitution (n 1) Article 53).
[50] Id Article 50(3) and (5).
[51] Id Article 105.

Revolutionary Democratic Front (EPRDF's).[52] This stand is also provoked and supported by scholars, especially those arguing that land privatization would result in eviction of poor peasants and pastoralists and restoration of the land tenure of the Feudal-Monarchical regime and demanding affirmation of the constitutional principles.[53] By contrast, some other scholars, the Ethiopian Economic Association, international institutions like the International Monetary Fund and opposition parties have been appealing for privatization.[54] Leaving the post-constitutional debate for later, I turn first to the debate during the making of the Constitution.

During the making of the Constitution, three different stands were reflected with respect to the form of the land ownership to be incorporated. Nevertheless, the proponents of the "state and people's ownership" and the advocates of privatization dominated the debate.[55] The third option, that argued for progressive privatization in the sense of the continuation of "state and people's ownership" for some time until the dangers of immediate privatization are mitigated, was not well articulated then or later in the literature.[56] This implies how much the discourse has been influenced by political-economic ideological differences, rather than tackling the actual problem and the land tenure concerns of peasants and pastoralists. Moreover, the whole deliberation mainly centred on peasants' individual landholding tenure. Pastoralists' communal land tenure was given peripheral treatment. Were it not so, the development and adoption of different forms of land ownership that

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[52] Stephen Devereux, Amdissa Teshome and Rachel Sabates-Wheeler. Too much inequality or too little? Inequality and stagnation in Ethiopian agriculture. (2005) 36 *ids bulletin.* 121–127. P 122. In all national election debates between the political parties, the 2005, 2010 and the 2015, the ruling party has committed to the *status quo* ownership. However, with the coming of the new Prime Minister Abiy Ahmed and his promise to economic liberalization and democratization of the state, a new chapter for re-examination of the constitutional provisions may not be far from being real. (See Alex de Waal. The future of Ethiopia: developmental state or political marketplace? *World Peace Foundation and Conflict Research Programme*, 2018 about the possibility of political-economic policy change in the post-2018 leadership of Ethiopia).

[53] See for instance Gebru Mersha. Privatization of rural land: to protect whose security. (Inaugural Workshop of the Forum for Social Studies. Vol. 18, Addis Ababa), 1998; Muradu Abdo Srur. *State policy and law in relation to land alienation in Ethiopia*. (Doctoral dissertation University of Warwick, UK), 2014.

[54] Crewett and Korf (n 7) p 206. For instance, see Berhanu Abegaz. Escaping Ethiopia's poverty trap: the case for a second agrarian reform. (2004) 42 *The Journal of Modern African Studies*. 313–342; Ethiopian Economic Association/Ethiopian Economic Policy Research Institute. Land tenure and agricultural development in Ethiopia: research report. Addis Ababa. *EEA/EEPRI*, 2002; B. Nega, B. Adenew and S. Gebre Sellasie. 'Current land policy issues in Ethiopia' in Food and Agriculture Organization. Land reform, land settlement and cooperatives. Rome. *FAO Especial Edition Land Reform*, 2003. 103–124; Unity for Democracy and Justice (UDJ) (Kenejete in Amharic) 2005 Pre-election debate on Rural Development Strategy and Land Policy, broadcasted in the National Television. Moreover, majority of the opposition parties have advocated Privatization of land as their policy Stand in the 2010 and 2015 election debates between the political parties. See Ethiopian Political Parties debate for Election 2015 on Agriculture Policy, Broadcasted by, Ethiopian Broadcasting Corporation March 20, 2015 (Part 1).

[55] See the Constitutional Minutes (n 11) debate on Article 40.

[56] Ibid.

can cope with the nature of the landholding systems of the society would have been incorporated. This outlook was not raised as an alternative in the course of the Constitutional Assembly's deliberation.

The two dichotomous ideological views referred to above dominated and influenced the whole deliberation. Both sides presented their respective arguments to justify their version as summarized here below.[57] Those who argued in favour of "state and people's ownership" (the currently prevailing arrangement), presented economic, historical, consequential, applicability, religious, and political justifications. I briefly deal with these in turn.

As economic justification, they pointed to the high agricultural dependence of the population; the underdeveloped nature of the other economic sectors; context difference from the developed countries; the ability to transfer land to needy people and investors; and the economic advantages of peasant agriculture over commercial farming, as defining variables. Accordingly, they argued that the underdeveloped nature of the industrial and service economic sectors of the country and high dependence of the population on agriculture for their livelihood means that privatization of land is not a viable option. More than 85 percent of the Ethiopian population lives in the rural areas and is dependent on subsistence agriculture. These subsistence agriculturalists contribute considerably towards the country's GDP – 50 percent.[58] On the other side, the industrial and service sectors of the country are in their infant stage and their contribution to the national economy is minimal.[59] They argued, on grounds of this situation that letting peasants sell their land and migrate to the urban centres will raise the level of unemployment, as the other economic sectors are not in a position to accommodate the influx of migrants.[60] Moreover, they argued that it is wrong to take the situation of the developed world, for instance the USA and European countries

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[57] The below excerpt on the debate on the land ownership in the Constitutional making is taken from the Constitutional Minutes (n 11) debate on Article 40.

[58] Id pp 7–8. However, the percentage of the agriculture dependent population and contribution to the GDP is not uniform. (See Steven A. Block. Agriculture and economic growth in Ethiopia: growth multipliers from a four-sector simulation model. (1999) 20 *Agricultural Economics*. 241–252. P 241; Bekele Shiferaw and Stein T. Holden. Resource degradation and adoption of land conservation technologies in the Ethiopian highlands: a case study in Andit Tid, North Shewa. (1998) 18 *Agricultural economics*. 233–247. P 234; Ministry of Economic Development and Cooperation. Survey of the Ethiopian economy, Review of post reform developments (1992/1993–1997/1998). Addis Ababa. *Federal Democratic Republic of Ethiopia*, 1999).

[59] During that time the contribution of manufacturing and service sector to the GDP were around 12% and 33% respectively. (See Admasu Shiferaw. Productive Capacity and Economic Growth in Ethiopia. *CDP Background Paper No. 34 ST/ESA/2017/CDP/34*, 2017. P 2).

[60] The Constitutional Minutes (n 11) debate on Article 40.

as examples, because, unlike Ethiopia in those countries the agriculture sector forms only two to five percent of their economy[61] and accommodates only two and a half percent of the population, while the industrial, service and other sectors are very much more advanced.[62] Thus, they continued, the context difference must be taken into account in defining the nature of land ownership.

Furthermore, the economic justification by the forum opting to maintain "state and people's ownership" was that a large portion of land in the country was uncultivated and unoccupied, and the future demand for land with the population increment can be ensured if land is not privatised. Thus, by retaining power over the land, the government will have the opportunity to let investors cultivate the virgin areas and the benefits that would be reaped will overshadow the impairment that would ensue from the eviction of peasants selling their land. In addition, since land is a limited resource by nature, they argued that the retention of "state and people's ownership" enables the state to achieve social justice and equity by granting land to a new needy claimer through distribution and redistribution.[63]

Finally, they elaborated the economic justifications from the perspective of economic efficiency. They argued that privatization of land will lead to the transfer of peasants' land to investors for large-scale commercial farming. However, the previously prevailing conception of the superior economic efficiency of large-scale farming as against peasantry small scale farming has recently been overturned. "State and people's ownership," so they argued, ensures also economic efficiency by prohibiting transfer of small-scale farming to large-scale farming.[64]

From the historical perspective, the proponents of "state and people's ownership" justified their position from the perspective of peasant rebellions and the "Land to the Tiller" Ethiopian Student Movement (ESM) in the past political regime.[65] They argued that the peasant rebellions and the

[61] Belachew Mekuria. 'Human rights approach to land rights in Ethiopia' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 49–94. P 66.
[62] The Constitutional Minutes (n 11) debate on Article 40.
[63] Ibid.
[64] Ibid.
[65] See Gebru Tareke. *Ethiopia: power and protest: peasant revolts in the twentieth century*. New York. Cambridge University Press, 1991 for the details on the peasant rebellions; Bahru Zewede (ed.). *Documenting the Ethiopian student movement: an exercise in oral history.* Addis Ababa. Forum for Social Studies, 2010 for the Ethiopian Students Movement.

“Land to the Tiller” ESM were intended to secure land rights and entitle peasants to be the beneficiaries of their products. To put it differently, the entire revolution was to ensure peasants’ access to land, prohibitions against eviction and that peasants be the beneficiaries of the products of their labor. It was aimed at ending the historical injustice of arbitrary eviction of peasants from their land and robbing of peasants’ products by the state and landlords.[66] It was not designed for privatization of land, they argued.[67]

They supplemented the historical justification with a consequential argument: privatization would mean the restoration of the historical injustice which millions had sacrificed so much to end, because privatization of land will in effect result in restoration of the historical abuse of peasants and the tenant-landlord relationship by letting peasants engage in coerced sales of land to the urban bourgeoisies.[68]

Proponents of this view also argued from the viewpoint of the impossibility of a nationwide uniformity of private ownership form. This is because of the prevalence of a communal landholding system in the pastoralists’ area. They alleged that in the case of pastoralists, who are nomadic and continuously searching for seasonally varying water sources and pasture and utilize land communally, it is not possible to introduce and apply private ownership that presupposes an individualistic landholding system. Moreover, it goes against their lifestyle and way of life. Accordingly, the adoption of “state and people’s ownership” provides the platform to have a nationwide uniformly applying land policy that matches with all forms of land holding and utilization.[69]

The proponents of “state and people’s ownership” also argued from religious perspectives, advancing the opinion that in both Christianity and Islam, the two dominant religions in the country, God/Allah gave the land to people to use in common, with nobody born owning it.[70] Thus, putting land under “state and people’s ownership” ensures common utilization of what the people do not own in the beginning.

[66] The Constitutional Minutes (n 11) debate on Article 40.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Ibid.

Finally, they argued for "state and people's ownership" from a political angle. Here the view was that allowing sale and free transfer of land rights would have the effect of destroying the ethnic identity of some minorities within the country, as the identity of some groups is attached to their land. In addition, sale and transfer of their land, will force them to migrate from their locality and as a result, they may lose their identity or it may be extinguished.[71]

The members of the Constitutional Assembly that advocated privatization of land also presented their arguments in opposition to "state and people's ownership." Also, their arguments focused on issues of human rights and the democratic system, economic growth, policy consistency, and the history of the land question. On the issue of human rights and the democratic system, they argued that the private ownership of land must be considered a human rights question as provided under the Universal Declaration of Human Rights (UDHR) to which Ethiopia is a signatory;[72] and that it would also be very difficult to establish a democratic society and state if private ownership of land was not guaranteed.[73] They claimed that "state and people's ownership" in effect mean "state ownership" and results in deprivation of those land rights people have acquired through their labour and capital, violating Article 17 of the UDHR.[74] Moreover, a strong basis for a democratic state and society can be established through strong protection for private property rights, including land rights, where the state is entitled to deprive these rights only exceptionally, under due process of law, for a public purpose and upon payment of compensation at the market value of the property.[75]

In addition, private property makes the freedom to engage in one's desired economic activity effective. Further, without detailed explanation they noted that lack of respect for property rights results in the violation of political rights. However, to make a calculated guess, they might either have assumed that the violation of political rights in the past political regimes was made with the state use of land as a political weapon or regarded economic freedom as a basis for political

[71] Ibid.
[72] Ethiopia has voted in favour of UDHR. But it neither signed nor state party to it. However, in the constitutional making the group arguing for privatization of land assumed Ethiopia as a signatory state. I just put the word used in the debate.
[73] The Constitutional Minutes (n 11) debate on Article 40.
[74] Ibid; see also UN General Assembly. Universal declaration of human rights. UDHR res 217A (III) 10 December. 1948. Article 17.
[75] The Constitutional Minutes (n 11) debate on Article 40.

freedom, as Amartya Sen argues.[76] Consequently, so they argued, leaving land under "state and people's ownership" empowers the state to deprives land rights arbitrarily and limits the freedom of individuals to engage in their desired economic activity. This would in effect result in the abridgement of political rights as well. Finally, they asserted that peasants should be given the option to remain on the land or alienate it and engage in other economic activities. Refusing this right would to them be tantamount to saying "as you are born a farmer so should you remain in the rural area without education and betterment of life."[77]

From the economic growth and development perspective too, the proponents of land privatization argued based on productivity, and peasants' strong attachment to their land. The productive and efficient use of land depends upon an individual's desire to invest his/her labour and capital. This desire results from the absence of fear of loss and a development of a sense of belonging on the land he/she farms (land tenure security). This would happen if peasants were guaranteed private ownership in the Constitution.[78] They argued that many countries have experienced the benefits of private ownership of land. American farmers, for example (three percent of the population) have been producing agricultural products not only for domestic consumption but also for aid to the developing world. The reason for their success, *inter alia*, is according to the proponents of private property that they developed a sense of belonging on their land as they are guaranteed with private ownership.[79] Moreover, the proponents of privatisation claimed that the opposition's argument of a possible ramification of private property being a macro-economic problem of unemployment due to an unprecedented influx of rural people to urban centres due to the sale of land when land is privatized, doesn't consider the special relation and attachment the Ethiopian peasants have developed towards their landholdings. They stated that those peasants who have both economic and deep-rooted socio-cultural and psychological linkage with their landholdings would not sell it and migrate to urban centres as long as the relevant infrastructures was provided.[80]

Policy-wise, the proponents of the later view argued the inconsistency between the adopted free market economy principle and "state and people's ownership" of land. They argued that "state and

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[76] Amartya Sen. *Development as freedom*. New York. Alfred A. Knopf, 1999.
[77] Ibid; see also Mekuria (n 61) p 67.
[78] The Constitutional Minutes (n 11) debate on Article 40.
[79] Ibid.
[80] Ibid; see also Mekuria (n 61) p 68.

people's ownership" of land, which is a socialist conception, is utterly incompatible with the capitalist principle of a free market economy that demands private ownership of land.[81] Besides, they also claimed that a socialist conception had ultimately proved to be ineffective for most of the former socialist countries, where policy shifts with regard to land ownership had been effected.[82]

They also substantiated their view with reference to the history of the land question in the country. According to them, the mid-20th century struggle of the Land to The Tiller ESM can adequately be answered if private ownership is guaranteed. The call, it was argued, was meant to liberate the tenant from tenancy and the landlord's control and not to replace the landlord by another landlord-government.[83] Any land tenure system other than private ownership would not for them meet the objectives of the revolution. Thus, they believed that the incorporation of "state and people's ownership" is a means to control peasants and would finally result in state-landlordism.[84]

Besides the above two dominant streams of thought, a third option, that demands the progressive privatization of land was also forwarded. The basic assumption of this view was that the arguments raised in favour of "state and people's ownership" were less in principle than out of fear of the political, social and economic consequences were land to be privatised immediately, at the time of the constitution making.[85] Hence, this view argued for the provision of future privatization after a certain grace period within which the land would be under "state and people's ownership." This option was a novel and middle approach that had the aim of the giving a compromise solution that could satisfy the two extreme blocks. Nonetheless, not much attention was given to this view, since the deliberation was much influenced by the socialist versus capitalist political-economic debate.

Following all these debates, the Constitutional Assembly's decision of 8 December 1994 voted for the approval of "state and people's ownership."[86] Nevertheless, the question has not been settled and, despite the passing of the Constitution, the debate over land ownership has continued. Still, the academic and political discourse on the issue has mainly revolved around the form of land

[81] The Constitutional Minutes (n 11) debate on Article 40.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid. Mainly the argument was about the ramification of endless land conflicts and litigation. But the other concerns are also temporary.
[86] See FDRE Constitution (n 1) Article 40(3) and the preamble.

ownership and its effect.[87] The ruling party and some scholars persistently argued for maintaining the *status quo*, whereas the opposition political parties, international agencies and international independent researchers argued for its change.[88] The proponents of the *status quo*, who criticized privatization, presented their arguments on three general foundations: egalitarianism/social equity, land tenure security, and political stability considerations. The justification on the basis of social equity or fairness as an egalitarian paradigm asserts that "state and people's ownership" enables the state to grant the needy with a means of livelihood. Privatization, on the other hand, leads to the accumulation of land in the hands of a few with the majority being landless and without means of livelihood. To avoid this problem and to ensure equal access to land for all the needy, maintaining the "state and people's ownership" of land is the only way forward.[89] Otherwise, privatization of land will not allow the state to grant land for the new needy claimers through distribution and redistribution.

The land tenure security consideration, on the other hand, justify maintenance of the *status quo* from the perspective of the negative effects of market forces if land is privatized. The argument is that privatization of land leads to the subsequent eviction and undesirable rural to urban migration of landless peasants, and a resurgence of the exploitative tenancy of the monarchical-feudalist regime.[90] Privatization in this view is regarded as a call for revival of historical injustices and a negation of the positive output of *Derg* regime's rural land tenure reform. In a sense, privatization that enables mortgaging and sale of land exposes peasants to the grabbing hands of the urban bourgeoisie and rural elites.[91] This anti-privatization tale puts the capitalist farmers to be created in the privatization of land on par with the landlords of monarchical-feudalist regime. Gebru, for instance, argues that:

> "[…] the proposed agenda of privatization […] will indeed open the floodgate for a massive eviction of peasants and displacement of pastoralists. [...] Moreover, the [monarchical-feudalist regime] land lords, who battened on the meagre "surplus" produced

[87] Adal (n 46) p 27. However, Rahmato claimed for shift of the discourse towards the issue of land tenure security. (See Rahmato Searching (n 24) pp 34–35). In addition, Mekuria has argued to see the issue of the land from a human rights-based approach stating that it is a neutral approach and nothing to do with the form of ownership. (See Mekuria (n 61)).
[88] Crewett and Korf (n 7) pp 204–206.
[89] Id p 205; Adal (n 46) p 27; Dessalegn Searching (n 24) p 10.
[90] Adal (n 46) p 27.
[91] Rahmato Searching (n 24) pp 10–11; Crewett and Korf (n 7) p 205.

> by peasants, mostly tenants, will now be replaced by “capitalist” farmers who will alienate small peasants from their land.”[92]

Finally, this position is also justified in terms of the political consequence the privatization of land. Particularly, the government argues that privatization of land would result in political unrest.[93] The argument presupposes that peasants would immediately sell off their land and remain without a means of livelihood, as the other economic sectors – service and manufacturing – are not sufficiently expanded to accommodate the influx. This can then result in the unemployed labour and those who lost their means of livelihood because of privatization rebelling.[94] Thus, the government claims that the non-privatization of land is aimed at preventing the occurrence of the political unrest.

The oppositions and the critics of the *status quo*, on the other side, who mostly propagate privatization, have also provided three lines of justifications to support their arguments. These are economic efficiency, land tenure security, and historical control considerations. The economic efficiency justification, which philosophically builds on neo-classical economic theories of property rights, states that full-scale land productivity can be realised only if there is private ownership of land.[95] This is because it promotes the emergence of a dynamic rural land market that allows entrepreneurial agents to access credit and land, encourages peasants on marginal land to out-migrate and to engage in non-farming activities to derive additional income, and to enhance investment to improve the utilization of land in a sustainable manner through the income derived from the off-farming activities.[96] The status quo disincentivized peasants of productive use and investment of their labour to enhance economic efficiency as land doesn’t belong to them and the government can take it away at any time.[97]

On the justification of land tenure security as the pre-condition for enhancement of investment and sustainable utilization of land, the advocates of privatization argue that achieving such security by

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[92] Mersha (n 53) p 9.
[93] Crewett and Korf (n 7) p 205.
[94] See Ministry of Information. Rural and agricultural development policies and strategies. Addis Ababa. *Federal Democratic Republic of Ethiopia*, 2001. Pp 72–100.
[95] Harold Demsetz. Toward a theory of property rights. (1967) 57 *American Economic Review*. 347–359; Yoram Barzel. *Economic analysis of property rights*. New York. Cambridge University Press, 1997.
[96] Crewett and Korf (n 7) p 206.
[97] Mesfin Woldemariam. Land and development in Ethiopia. (1999) 12 *EEA Economic Focus.* 12–13. (Translation mine).

outlawing the legacies of the *Derg* regime's redistribution programmes requires changing the form of land ownership to private.[98] Moreover, they argue that land tenure security could be realized if peasants are given the right to decide on their land and privatisation is the only way to ensure peasants' freedom to decide on their land.[99] They even equate prohibition or inhibition of the power to decide on one's landholding with a violation of human rights.[100]

Finally, the historical control justification focuses on the relationship between the state and peasants in conjunction with land rights in the previous political regimes. The pro-privatisation group argues that in the past political regimes, the state had used land rights as a means to exercise state control and power over peasants by putting land under public/state ownership. The historical injustices that peasants experienced during the monarchical-feudalist regime and the socialist *Derg* regime I discuss in Chapter 2 will continue, so they say, since the *status quo* ownership makes of peasants "tenants of the state."[101]

The cogency of the arguments on both sides of this divide is questionable, particularly in the context of legal land tenure security.[102] Both sides rely on land tenure security considerations in support of their respective positions. The proponents of the *status quo* argue from the side of the land tenure insecurity and restoration of historical injustices that would occur because of coerced sale if land were privatized. In addition, they claim that "state and people's ownership" safeguards peasants from the possibility of tenure insecurity caused by eviction. Nonetheless, unlike the past in case of privatization, the sale of land is conducted upon the willing buyer and willing seller principle. Privatization doesn't force peasants to sell their land. Additionally, the sale of land is done for consideration determined by the market forces. Therefore, peasants can engage in and invest in other economic activities they desire to in order to sustain their and their families' livelihood. The implicit assumption that peasants would automatically sell their land on a large

[98] Crewett and Korf (n 7) p 206.
[99] The 2005 National Election Debate on Rural Development Policy, the view reflected by the Unity for Democracy and Justice (UDJ) party; Broadcasted by the Ethiopian National Television.
[100] Wibke Crewett and Bendikt Korf (n 47) p 207.
[101] Ibid; Woldemariam (n 97); Adal (n 46) p 27.
[102] Ascertaining the tenability of all justifications for the feasible land policy and law is important but not necessary, and whether the current land policy and laws are in line to and framed t in a way to realize the justifications forwarded in support of the status quo land ownership during the Constitutional Making need detail research.

scale in case of privatisation is not tenable, although, as some empirical research has indicated,[103] there will be some selling of land. For one thing, for Ethiopian peasants' land has more than economic value and is also a source of pride and social status.[104] Thus, sale of land means loss of that pride and the social status in the rural community and it is a sign of economic anguish that affects the reputation of the peasant. Besides, since sale of land contradicts the deeply rooted Ethiopian tradition of communal ownership, in which land is used in an "inter-generational manner," peasants will not engage in permanent transfer of the land beyond the family line.[105] Furthermore, empirical surveys have also implied that the majority of peasants would not sell their land if they were legally authorized. Instead, they preferred ensuring their land tenure security.[106] Historically, even at the time of the famine, the majority preferred to be hungry rather than losing their land through sale. Thus, the land tenure security considerations to justify "state and people's ownership" as a means to protect peasants' eviction resulting from the market forces, is not sound.

The critics of "state and people's ownership," on the other hand, put forward that the form of the ownership at hand perpetuates the land tenure insecurity of peasants through the continuation of the *Derg* regime's redistribution programmes and through enhancing state control and the power of peasants. The way forward, they propose, is change of the land ownership form, mainly to private ownership. However, in the opinion of this writer their proposition is not a solution for tenure insecurity problems. As argued in Chapter 1, the mere adoption of private ownership of land doesn't result in automatic incorporation of the all constructs of the legal land tenure security. Even in private ownership, some of the elements of legal land tenure security may not be

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[103] Rahmato Searching (n 24). For instance, peasants have sold land during the *Derg* regime. (See Sandra Joireman. *Property rights and political development in Ethiopia and Eritrea 1941–1974*. Athens. Ohio University Press, 2000). There is no reason to deny that currently certain peasants may engage in selling if it is legalized given that the recent empirical evidence indicates that few are still willing to sale if allowed. (See EEA/EEPRI (n 54); John W. Bruce *et al* (n 2)).

[104] Hussien Jemma. The politics of land tenure in Ethiopian history. (XI World Congress on Rural Sociology, Trondheim, Norway), 2004. P 3. The special value of land for the Ethiopian peasants can also be inferred from the Amharic Proverb "to be landless is to be sub-human" (Paul Brietzke. Land reform in revolutionary Ethiopia. (1976) 14 *The Journal of Modern African Studies*. 637–660. P 637; the declaration "a person's right, honour, status and standard of living is determined by his relation to the land…" in the *Derg* regime rural land law (see Ethiopia. A proclamation to provide for the public ownership of rural lands proclamation No. 31/1975. *Neg. Gaz.* Year 34 No. 26. 1975. The Preamble); the debate in the constitutional making (see The Constitutional Minutes (n 11) debate on Article 40; Mekuria (n 61) p 68)).

[105] Dessalegn Rahmato. The land question and reform policy: Issues for debate. (1992) 1 *Dialogue*. 43. P 53; Nahum (n 43) p 95.

[106] EEA/EEPRI (n 54). Well this research report is a survey of around 8500 peasants, and it may not reflect the actual feature but it has an implication.

guaranteed to the landowner. In addition, the difference between private and other forms of land ownership is, at least legally speaking, not much, as I argue in terms of equalization in Chapter 1 Section B, because the only difference is with regard to the right to sell land. While in private ownership the landowner has the right to sell land, in other ownership forms the landholder has no right. Furthermore, the causes of land tenure insecurity they mentioned – redistribution and state control and power over peasants - can be redressed without the need to change land ownership form. This can also be achieved through outlawing the redistribution of land and limiting state interference with the land rights of peasants. These protections are incorporated in the FDRE Constitution as I discuss in the subsequent sections. However, the question still remains and is explored in the next Chapters (Chapter 4 to 8) whether those constitutional protections have been translated into detailed land laws.

In addition, the two sides, during the making of the Constitution and thereafter haven't given due consideration to pastoralists' land rights while debating on the nature of land ownership. That is why the debates are considered as more ideological than pragmatic. Given that 40% of the country's land is held by pastoralist communities that constitute 10% of the total population, failure to consider their interest in the debate is still a manifestation of social, economic and political marginalization.[107] That is why their constitutional right to free access to land I explain in the

[107] Johan Helland. Pastoral land tenure in Ethiopia. (Colloque international "Les frontières de la question foncière – At the frontier of land issues", Montpellier), 2006. P 5. There is no unanimity on the population of and land size held by the pastoralists. Some regards that they constitute 12% of the country's total population and held 60% of the land. (See for instance PFE, IIRR and DF (n 31) p vii; Mohammed Mussa. A comparative study of pastoralist parliamentary groups: Case study on the pastoral affairs standing committee of Ethiopia. *DFID, AU-IBAR, NRI and PENHA,* 2004). Nevertheless, one thing to be sure is that their population and land is expected to be decreased given that their landholding is taken away for commercial farming and environmental protection and the government has engaged in transforming them to sedenteraization.

Institutional wise, there are improvements made with respect to providing special considerations for pastoralist communities in the post-1991 government of Ethiopia. The self-determination rights incorporated in TGE Charter and later on the FDRE Constitution (see TGE Charter (n 2) Article 2 and FDRE Constitution (n 1) Article 39 respectively); formation of the Pastoral Affairs Standing Committee (PASC) within the Parliament in 2002 to represent the pastoralists' interest through legislative, oversight and advocacy (see Sara Pavanello. Pastoralists' vulnerability in the Horn of Africa: Exploring political marginalisation, donors' policies and cross-border issues–Literature review. London. *Humanitarian Policy Group (HPG) Overseas Development Institute,* 2009. P 7); the establishment of the Ministry of Federal and Pastoralist Development Affairs in 2015 with the mandate to initiate policies and laws concerning the pastoralists, which merged under Ministry of Agriculture 2018(See Federal Democratic Republic of Ethiopia. Definition of powers and duties of the executive organs of the federal democratic republic of Ethiopia proclamation No. 916/2015. *Fed. Neg. Gaz.* Year 22 No.12. 2015. Article 9(2), 10(1) and 14; Federal Democratic Republic of Ethiopia. Definition of powers and duties of the executive organs of the federal democratic republic of Ethiopia proclamation No.___/2018. *Fed. Neg. Gaz.* Year _ No._. 2018); are some of the progresses made towards

above section, and the right to immunity against displacement I discuss in the next section are incorporated into the FDRE Constitution in the later stage of constitution making.[108] Also after the promulgation of the Constitution, the proponents of 'state and people's ownership' have persistently treated pastoralists' communal land as 'state holdings'[109] and tried to transform them to a sedentary way of life through villagization programmes and to transfer huge tracts of their *de facto* land to commercial farming.[110] As against that, also the critics of 'state and people's ownership' haven't come up with different land ownership forms that are compatible with the landholding systems of the different communities. They have consistently argued and are still arguing for the privatization of land, which may operate to the advantage of peasant communities, but not for pastoralists, as they hold and utilize land communally at clan and tribe level.[111]

Furthermore, neither of the sides to the debate on land ownership has clearly established the exact essence of 'state and people's ownership' and the power of the state in relation to land.[112] Its critics assume that, as it empowers the state, it entails state power to control peasants and pastoralists.[113] Its proponents, in turn, claim that it gives the state the power to play a protective role as a big brother/patrimonial to peasants and pastoralists, and to determine the manner of utilization and

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the pastoralists concerns at least institution wise. In fact, the doubt here is whether the personnel in those institutional set-ups are from the pastoralist communities who are aware of their interests.

Nevertheless, the social and economic marginalization, particularly, regarding their land tenure and utilization is prevailing. This inferred from the current government's perception of the pastoralists land as a "unused," "vacant" (see Jon Abbink. 'Land to the foreigners': economic, legal, and socio-cultural aspects of new land acquisition schemes in Ethiopia. (2011) 29 *Journal of Contemporary African Studies*. 513–535. P 517), "unutilized" and "unoccupied" (see GTP II (n 31) p 26) and the tendency to let them to live the sedentary life (see Mohammud Abdulahi. The legal status of the communal land holding system in Ethiopia: the case of pastoral communities. (2007) 14 *International Journal on Minority and Group Rights*. 85–125).

[108] The pastoralists' land issue was not incorporated in the initial draft of the Constitution approved by the Constituent Assembly. However, later it was incorporated and presented for the approval of the Constitutional Assembly by property and economic rights' standing committee of the Assembly. (See the Constitutional Minutes (n 11) debate on Article 40).

[109] Proc. No.456/2005 (n 38) Article 5(3). However, as I argue later pastoralist communal holding should not be treated in the context of this provision. The provision should refer to the "communal land" in the peasantry area where the peasants utilize such land in common besides their private holdings.

[110] See Rahmato Land to Investors (n 39); Stebek (n 39).

[111] The associative form of ownership still advocates for sale of land which may not be feasible in the pastoral community.

[112] About different line of defining the "state and people's ownership of land" see Mellese Damite. 'Land ownership and its relation to sustainable development' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 31–38; Daniel Weldegebriel. The new land lease proclamation: changes, implications. (Reporter Nov. 12 2011).

[113] Crewett and Korf (n 7) pp 204–205; Rahmato Searching (n 24) p 10 and 16; Adal (n 46) p 27.

deprivation of the land as a trustee.[114] Both conceptions are wrong and emanate from a misunderstanding of the nature of the land ownership.

Currently, the 'state and people's ownership' of land is understood in three different approaches about the relation between the community and individuals' land rights and the state power that result in different legal consequences. Some regard it as public or people's ownership,[115] some others as state ownership,[116] and the rest as joint/common ownership of state and people.[117] In literature there is a tendency to consider public and state ownership as the same and simply an alternative way naming property ownership than private and communal ownership.[118] However, I am of the opinion that the concept of 'public/people's ownership' and 'state/government ownership'[119] have different essences and legal consequences, which 'state ownership' nor 'public ownership' as descriptions of Ethiopian 'state and people's ownership' capture.[120] I choose to understand the denominations in their literary meaning and in the historical context of land ownership in the country.

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[114] Crewett and Korf (n 7) p 206.

[115] Srur (n 53); Gebreselassie (n 3); Mekuria (n 61).

[116] Rahmato Land to Investors (n 39); Bereket Kebede. Land tenure and common pool resources in rural Ethiopia: a study based on fifteen sites. (2002) 14 *African Development Review*. 113–149; Tesfaye Teklu. Rural land, emerging rental land markets and public policy in Ethiopia. (2004) 16 *African Development Review*. 169–202; Wibke Crewett, Ayalneh Bogale, and Benedikt Korf. *Land tenure in Ethiopia: Continuity and change, shifting rulers, and the quest for state control*. Washington Dc. International food policy research Institute (IFPRI), 2008; Berhanu Abegaz. Escaping Ethiopia's poverty trap: the case for a second agrarian reform. (2004) 42 *The Journal of Modern African Studies*. 313–342.

[117] Stebek (n 39); Daniel W. Ambaye. *Land rights and expropriation in Ethiopia*. Switzerland. Springer, 2015; Damite (n 111).

[118] See Alison Clarke and Paul Kohler. *Property law: commentary and materials*. New York. Cambridge University Press, 2005. P 35; Armen A. Alchian and Harold Demsetz. The property right paradigm. (1973) 33 *The journal of economic history*. 16–27. P 18.

[119] State ownership equated with government ownership. (See Carl F. Brown. A Criteria for Public Land Ownership. (1953) 35 *Journal of Farm Economics*. 291–295).

[120] If the contextual and working definition is not provided, the public and state ownerships are different. For me the basic distinction between the two forms of ownership relies on the nature of rights they assign to the state. In case of state ownership, state has both actual/ substantive property rights and regulatory right over the thing. It is not required to be guided by the peoples need and wish in dealing with the property. It can either exercise the actual property rights by its own or assign to the community or individuals. In contrast, in case of public ownership, the state does have only the regulatory right over the property not an actual property right and it employs the property for the best interest of the people. Here the actual property rights are exercised by individuals or the community, but they won't have ownership over the thing. Ambaye has also looked into the difference but failed to provide this practical difference and he concluded that there is no any practical difference between the two ownership forms. (See Ambaye (n 117) p 34).

Both a 'public ownership' and 'state ownership' of land conception in Ethiopia are based on the assumption that there is no distinction between people and state and that they are identical.[121] Both sides to the debate assume that the two concepts are identical and do not have any practical differences in their legal effect.[122] In addition, those debating these terms have rightly perceived that private ownership of land is outlawed in the Constitution.[123]

As a result, for those who call it "public ownership," land is the property of the people of the country. The logical legal consequence of this conception is that the state as a "guardian" plays regulatory roles only, like allocation of land to people, registration and defining the nature of property rights of individuals and communities (something less than ownership) and the limitation and restriction thereof in accordance with the Constitution.[124] An obvious legal problem with this conception is that it conflicts with the clear stipulation of the Constitution that ownership of land vests in "the state' and 'the peoples."[125] Besides, it may entail the continuation of the *Derg* regime's land ownership form and state control of and power over peasants and pastoralists, as feared by the critics of the status quo, as the *Derg's* land ownership form was precisely public ownership.[126] This has led some critics to argue that the post-1991 regime has simply reaffirmed the *Derg* regime's land ownership form.[127]

On the other hand, those who regard the land ownership adopted in the FDRE Constitution as "state ownership," in effect imply that the government is the exclusive owner: a system that gives complete ownership of land to the state. In this conception the state, as owner of the land, either personally utilizes it or parcels it out to citizens through use rights. Unlike public ownership, in this case the state has actual/substantive land rights and regulatory power and holds and owns land on its own behalf, not on behalf of the people. This gives the government a stronger hold and

[121] Damite (n 112) p 32.
[122] Ambaye (n 117) pp 34–35.
[123] The debate in the Constitutional Making (see the Constitutional Minutes (n 11) debate on Article 40) and FDRE Constitution's prohibition of land Sale and exchange (see Constitution (n 1) Article 40(3)) proves that private ownership of land has no place in Ethiopia.
[124] Ibid; and see also Weldegebriel (n 112).
[125] Damite (n 112) p 32.
[126] Proc.No.31/1975 (n 104) Article 3(1); The Constitution of the Peoples' Democratic Republic of Ethiopia (PDRE). Proclamation No. 1/1987. *Neg. Gaz.* Vol. 47 No. 1. 1987. Article 13. However, in the later stage in 1987, the Constitution changed the public ownership of rural land introduced in 1975 to the state ownership and it used the two ownership forms interchangeably as the same thing.
[127] Gebreselassie (n 3) p 1; Adal (n 46) p 22; Crewett *et al* (n 116) p 1; Kebede (n 116) p 129.

power over defining the land tenure system and people's relation to land, compared with public ownership in a literal sense. Additionally, this way of interpreting "state and people's ownership" in the FDRE Constitution not only derogates from the clear stipulation, but also devalues the stronger position given in the Constitution to the people in the ownership of land. When one goes through the provisions of the Constitution, there are stipulations that show an emphasis on people's ownership. For instance, the second paragraph of Article 40(3) excludes the state from the ownership of land through providing that "[....] land is a common property of the Nations, Nationalities and Peoples of Ethiopia […]".[128] The same kind of exclusion of the state is also made in the provision that empowers the state to transfer land for investors. It states that "[w]ithout prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land […]".[129] Hence, it can be implied that the Constitution is aimed at giving the peoples a better position than the state in relation to the land ownership. In this light, the conception of the *status quo* as state ownership goes against the spirt of the Constitution.

The third understanding is consideration of the "state and people's ownership" as joint ownership. This approach assumes that the Constitution reflects and understanding of the people and the state as distinct entities, so that land is the joint property of these two entities.[130] On this basis it is then argued that the people will have stronger rights to land than simple use or lease rights – ownership rights.[131] However, I argue that this is not result of the nature of the land ownership itself. As argue below, it is because the Constitution makers provided so, as can be inferred from the different provisions of the Constitution. Moreover, the views in this category fail specifically to imply the right of the state as an owner. It simply regards that the state has only a regulatory role in holding

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[128] FDRE Constitution (n 1) Article 40(3).
[129] Id Article 40(6).
[130] Damite (n 112) p 32. In the making of the Constitution, there was a contradicting way of understanding the 'state and people's ownership'. Those who were arguing for privatization regarded it as a 'state ownership' and indicated that it will worsen the productivity of the land taking what had happened when the Derg regime transformed the land ownership from public in 1975–1987 to state in 1987. (See the Constitutional Minutes (n 11) debate on Article 40). Whereas, the pro-state and people's ownership Constitutional Assembly members assumed state and people are identical and they argued that the land being under state ownership would not cause any danger if the people hold the sovereign power. (*Id*).

There is a rumour that in the initial draft Constitution the ownership of land was stipulated as a state ownership. It was only later when the representatives from the pastoralist's communities begin to challenge it stating that state could not be land giver and taker and land belongs to the people that the term the people inserted.
[131] Weldegebriel (n 112).

land on behalf of the people.[132] In this way, it just equates joint ownership with the public ownership conception I discuss above, without indicating any legal difference. Thus, it makes the constitutional incorporation of the "state" in the land ownership conception senseless, just as the "public ownership" conception does.

Moreover, given that the country adopts a federal system, the third view fails to indicate which level of government – the federal or regional government[133] - has the ownership right with the people. This failure is exacerbated by the absence of a definition clause in the Constitution. Nonetheless, the state constitutions conceived "state and people's ownership" in a localized manner, referring to regional state and people.[134] This has led to an argument that the state and people are to be constructed to refer the regional state and the peoples of the region respectively.[135] It also opened the door for regional state law makers to stipulate residence of the regional state as a requirement for access to free rural land, disregarding the principle of nationality emphasized by the FDRE Constitution makers (as is discussed in Chapter 4 below).[136] The conception has resulted

[132] Ambaye (n 117) p 37. The 'state and people's ownership' is different from the 'public ownership' and from the 'joint ownership' effect wise. This was implied in the making of the Constitution too. (See the Constitutional Minutes (n 11) debate on Article 40).

[133] FDRE Constitution (n 1) Article 1 and 50(1).

[134] Afar Regional State. The revised constitution of Afar regional state. July 2002. Article 38(3); Amhara National Regional State. The revised Amhara national regional constitution proclamation No. 59/2001. *Zikre Hig* No. 2 Year 7. 2001. Article 40(3); Benishangul Gumuz Regional State. The revised constitution of Benishangul Gumuz regional state. December 2002. Article 40(3); Gambella Regional State. The revised constitution of Gambella peoples' national regional state. December 2002. Article 40(3); Oromia Regional State. The revised constitution of Oromia regional state. October 2001. Article 40(3); Ethiopian Somali Regional State. The revised constitution of Somali regional state. May 2002. Article 40(3); Southern Nations, Nationalities and Peoples' Regional State (SNNP). Constitution of the Southern Nations, Nationalities and Peoples' regional state proclamation No. 1/1995. *Debub Neg. Gaz*. Year 1 No. 1. 1995. Article 40(3); Tigray National Regional State. Constitution of the Tigray national regional state proclamation No. 1/1995. 1995. Article 40(3). The Harari State Constitution has only employed the national wide understanding of "state" and "people" in the same fashion with the federal constitution. (See Harari Regional State. 2004. The revised constitution of the Harari People's regional state. October. Article 40(3)).

[135] Husen Ahmed Tura. Land rights and land grabbing in Oromia, Ethiopia. (2018) 70 *Land Use Policy*. 247–255. P 250.

[136] To access rural land for free in a particular region most of the regional land laws have stipulated the residency requirement. (See for instance, Amhara National Regional State. Revised rural land administration and use proclamation No. 252/2017. 2017. Article 10(1); Gambella Peoples' National Regional State. Rural land administration and use proclamation No. 52/2007. *Neg. Gaz.* Year 13 No. 22. 2007. Article 6(1); Oromia National Regional State. Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of Oromia rural land use and administration proclamation No. 130/2007. *Megelata Oromia*. Year 15 No. 12. 2007. Article 5(1); Southern Nations, Nationalities and Peoples Regional State. Rural land administration and utilization proclamation No. 110/2007. *Debub Neg. Gaz.* Year 13 No. 10. 2007. Article 5(2); Tigray National Regional State. Revised Tigray national regional state rural land administration and use proclamation No. 239/2014. *Tigray Neg. Gaz.* Year 21 No. 1. 2014. Article 8(1) though it simply states that rural local resident). However, the constitution makers have emphasized on the nationality as a defining factor to the right to free access to land. (See the Constitutional Minutes (n 11) debate on Article 40).

in some regional states' eviction of peasants from other regions/states without compensation,[137] and the 2015/6 protests in the Oromia regional state against the Addis Ababa master plan.[138]

In fact, however, it may not accord with the spirt of the constitution and the intention of the Constitution makers to understand "state and people's ownership" to mean peoples in a particular region and regional state respectively. Moreover, the role of the insertion of the "state" in the "state and people's ownership" comes in here: it rather seems to mean the peoples of the country as a whole and the national/central state. This idea is derived from the commitments the country's people have made in relation to building up common interests, serving their common destiny by further promoting their shared interests and to live as one economic community for collective promotion of their interests in the FDRE Constitution.[139] I refer here, among others, to the common economic interests of the country's people, realized if other constitutional rights, like freedom of movement and the liberty to choose one's residence, [140] and the right to engage freely in economic activity and to pursue a livelihood of choice anywhere within the national territory,[141] are operationalised. Accordingly, for instance, these rights of Ethiopian nationals from the regional state of Tigray who wish to live in the rural area of Oromia National regional state, engaging in agriculture as his/her livelihood can be made effective only if the form of land ownership is understood in the latter way. Furthermore, the Constitution's provision of "[....] land is a common property of *the Nations, Nationalities and Peoples of Ethiopia* […]"[142] and "[w]ithout prejudice to

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[137] For instance, in recent time particularly in 2012 and 2013 peasants who originally from Amhara State had lived and cultivated land in Southern Nations, Nationalities and Peoples' and Benishangul Gumuz States were officially forcefully evicted and ordered to return back to the State they came from. (See Ambaye (n 117) p 69; Daniel Berhane. *Benishangul, Guraferda evictions deliberate: opposition party*. (Horn Affairs, May 14, 2013); The Ethiopia Observatory. HRC confirms abuses against expelled Amharas in Benishangul-Gumuz. (Dec. 12, 2013).

[138] The Oromo protest from the Oromia National Regional state against the Addis Ababa Integrated Master Plan (see Addis Ababa and Addis Ababa Zuria Oromia Special Zone Integrated Development Plan Project Office. Addis Ababa and Addis Ababa Zuria Oromia Special Zone integrated development plan (2006 – 2030 E.C). Bela Printing Press, nd. (Amharic document; translation mine)) with the argument that it violates the federalism and affects the land tenure security of the peasants is the implication of the understanding that land belongs to the people of the region and the regional state. The same reflection was also inferred from the Amhara National State peoples' protest claiming that its territory is given to the Tigray National State. (See Jon Abbink. *Ethiopia's unrest sparked by unequal development record*. (Global Observatory, Sept. 13 2016); Abdi Latif Dahir. Ethiopia's crisis is a result of decades of land disputes and ethnic power battles. (Quartz Africa, Oct. 30, 2016); BBC Africa. What is behind Ethiopia's wave of protests*?* (Aug. 22, 2016); The Guardian. Violent clashes in Ethiopia over 'Master Plan' to expand Addis. (Dec. 11, 2015).

[139] FDRE Constitution (n 1) the preamble.

[140] Id Article 32.

[141] Id Article 41.

[142] Id Article 40(3)

the right of *Ethiopian Nations, Nationalities, and Peoples* to the ownership of land"[143] indicate that it is the country's people as whole, not a particular regional state's people, that bears land ownership. For a similar reason, the "state" in the "state and people's ownership of land" implies the central government that represents and governs the peoples of the country.

Moreover, the insertion of the "state" in the land ownership is intentional and it as inserted for a political reason rather than a legal one. It relates to the main feature of the FDRE Constitution – compromise of claims.[144] This is due to the situation and the time the FDRE Constitution was adopted. The FDRE Constitution comes into picture after prolonged civil war between the then Ethiopian governments and the liberation fronts that were formed on an ethnic base.[145] It was the political, economic and cultural marginalization, domination by a certain ethnic group, and absence of democratic culture that lead them to guerrilla fighting; and they initially fought for self-determination and secession, to establish an independent country.[146] The FDRE Constitution that comes after this bloody struggle should provide what they fought for, to keep the country from disintegration and to mitigate ethnic conflicts. Accordingly, at least on paper, it adopts an ethnic-federalism by which states were guaranteed the right to self-determination, to secession and to a democratic system of government.[147]

Consequently, leaving land ownership as "people's/public ownership" creates the impression that the land belongs to the peoples of the region or a particular ethnicity in the territory as part of their economic self-determination and taking into account the initial aim of the guerrilla fighters.[148] In

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[143] Id Article 40(6).
[144] The FDRE Constitution basically full of compromise between competing features. For instance, between individuals vs. group rights, Nationalism vs. Regionalism, Self-determination vs. Territorial Integration, and Diversity vs. Unity.
[145] Among the twenty-seven parties attended the national conference for the formation of the transitional government in Ethiopia in 1991 after the down fall of *Derg* nineteen were ethnic base. (See Herbert S. Lewis. 'Ethnicity in Ethiopia: the view from below (and the south, east and west) in Crowford Young (ed.). *The rising tide of cultural pluralism: the nation-state at bay?* Wisconsin. University of Wisconsin Press, 1993. 158–178. P 158.
[146] Kristin Henrard and Stefaan Smis. Recent experiences in South Africa and Ethiopia to accommodate cultural diversity: a regained interest in the right of self-determination. (2000) 44 *J. Afr. L.* 17–51. P 41.
[147] FDRE Constitution (n 1) Article 39. And the entire Constitutional rules reflect the features of democratic state like rule of law, protection of human rights, formation of government through free and fair election, multi-party system, separation of power and etc. However, in practical term, Lovise argued that the country lacked both. (See Lovise Aalen. Ethnic federalism and self-determination for nationalities in a semi-authoritarian state: the case of Ethiopia. (2006) 13 *Int'l J. on Minority & Group Rts*. 243–261).
[148] Hans Morten Haugen. 2007. The right to self-determination and natural resources: the case of Western Sahara. (2007) 3 *Law Env't & Dev. J.* 70–81. Nevertheless, Zewdie argues that the FDRE Constitution denied the economic self-determination. (See Fasil A. Zewdie. Right to self-determination and land rights in Ethiopia: analysis

addition, this in turn creates an economic and political disintegration of the regional states and peoples, going against the constitutional aim and the promise of the people to "live in one economic community" and to build "[one] political community."[149] Therefore, incorporation of the "state," the national level, in the land ownership is aimed at ensuring the territorial unity of the country, realizing the peoples' constitutional promise and the constitutional rights mentioned above. Moreover, the "state" has not only the regulatory role as claimed by those who regards "state and people's ownership" as public and joint ownership (both agree on the legal consequence); but it has also the above political role in relation to land.

The understanding of the *status quo* ownership of land in the FDRE Constitution as a "joint/common ownership of state and people" also puts the state on the same level as the people. I believe that the Constitution has instead put the state in an inferior position to the people, in particular with reference to rural land, although it is not the outcome or the legal consequence of the nature of the ownership. This argument can be substantiated with the conditions attached to the state transfer/provision of land, the liberty of the state to define the nature of the land rights and protections, and the capacity under which the state holds and deploys land. As seen in Section A, peasants and pastoralists as part of their ownership right are entitled to free access to land. And the state that is obliged to satisfy the land claims of peasants and pastoralists is not at full liberty to transfer rural land for non-peasant or pastoralist persons. Rather, the Constitution has required the state to observe three additional conditions to transfer rural land for non-peasant or non-pastoralist society. First, it has to make sure that the land claims of peasants and pastoralists are satisfied. Second, it can transfer to the outsiders if they need land for an investment. In other words, the state is not at liberty to transfer rural land for non-peasant and non-pastoralists for other purposes than investment. Finally, unlike in the case of transfer to the rural peoples, the state is required to transfer land to outsiders for consideration.[150] The state is not at liberty to transfer land for investment for free, as an investment incentive to attract investors, for instance.

Moreover, the state's inferior position in relation to rural land can also be inferred from the constitutional guidelines for the state's authority to define the land rights of and protections

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of the adequacy of the legal framework to address dispossession. (2013) 1 *Law, Social Justice & Global Development Journal (LGD)*. 1–26).

[149] FDRE Constitution (n 1) the preamble.

[150] Id Article 40(6).

afforded to peasants and pastoralists. Given the historically inferior position the society held and the state's strong control over the society and use of land rights as a means (see Chapter 2), the constitution makers had thought to end such injustices. Consequently, rather than leaving defining the land rights and protections entirely to the state, the Constitution has put forward limitations on the state's involvement in peasants' and pastoralists' land rights through defining the nature of the land rights and protections afforded. These limits, which are intended to promote the land tenure security of peasants and pastoralists and puts the state in an inferior position to the people in relation to land are discussed in the subsequent sections of the Chapter.

Finally, the state's inferior position with respect to rural land rights can also be deduced from the national economic policy objectives mentioned in the Constitution.[151] Particularly, in relation to land, the Constitution provides for two principles that imply the state's inferior position.[152] The state holds land not as an owner, but as an agent and trustee, on behalf of the people. This agency role of the state with regard to land further implies the inferior position of the state. Moreover, the same provision also requires the state to consider only the common benefit and development of the people, not its own, in the deployment of land.[153] It implies that the guiding foundation for determining the allocation and utilization of land is the best interest of the people. In line with this, the state doesn't have the right to decide how to deploy the land without consulting the interest of people considering themselves as owners of that land.

Therefore, the Constitution has put the state in an inferior position to peasants and pastoralists in defining their relation with respect to land rights. This is with the view to end the tactic historically employed by the state of using land as a political, strategic asset to control and exercise power over the rural people, that constitute almost 84 percent of the total population (as I discuss in Chapter 2). Labelling "state and people's ownership" as state, public or joint ownership in current scholarship, without considering the constitutional protections and rights afforded to peasants and pastoralists and the power of the state as defined, is a constitutionally unintended empowerment of the state over peasants and the pastoralists. In addition, the academic world itself is guaranteeing

[151] Id Article 89.
[152] Id Article 89(5).
[153] Ibid.

the state with the power to use land as a political, strategic asset like its predecessors did, disregarding constitutional rule.

ii. Rights in Land of Peasants and Pastoralists

Generally, it is seen in Chapter 1 that the legal essence of property can be understood either in terms of exclusion, bundle of rights, decision making authority or the combination of all. I have argued that for the sake of realizing legal land tenure security, the combined or the "holistic" understanding is necessary and required. The FDRE Constitution, uncommon to other constitutions, provides its own conception of property in terms of its genesis and legal sense. Particularly, it defines "private property" as:

> […] any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.[154]

This definition doesn't strictly define the essence of private property. It rather provides the genesis of private property. Specifically, it implies that the foundation for private property in the context of the Constitution's right to property is the Lockean labour theory.[155] Thus, the constitutional protection for the "private property" in Ethiopia is afforded only to those things which are the result of one's labour, creativity, enterprise or capital.[156] This conception has its own significant legal consequences, one of which is related to the freely acquired peasants' and pastoralists' land rights, that is discussed in Section C below.

However, while dealing with the concept of ownership of private property, the Constitution tacitly defines the actual legal essence of property. It adopts a Hohfeldian bundle of rights metaphor in defining property *per se*. Accordingly, as a container of the various rights, it conceives ownership of private property as a bundle of rights that grants the owner the rights to acquire, to use, to

[154] Id Article 40(2). This definition in fact applies for the purpose of Article 40 only.
[155] John Locke. 1988. Locke*: Two treatises of government student edition*. Cambridge University press.
[156] This Constitutional stipulation raises the question whether the Constitutional protection enshrined under Article 40 of the FDRE Constitution are not extendable to the other non-private property rights and the private property that acquired by other means other than labour, creativity, enterprise or capital.

dispose or to transfer it.[157] It further indicates that it is only possible to restrict these rights in the public interest and upon prescription by law.[158]

In the same fashion, while providing a general framework to the nature of rights in land, the Constitution adopts the bundle of rights approach. Nevertheless, the rights are not mentioned in a direct list. Rather, they can be inferred from the "*a contrario sensu*" of the excluded rights and the provisions dealing with women's right to property. The FDRE Constitution, in establishing "state and people's ownership" of land, implies the excluded rights among the bundle the holders are legally entitled to assume. It states that "… [l]and is a common property of the Nations, Nationalities and peoples of Ethiopia and *shall not be subject to sale or other means of exchange*."[159] This the *exclusion of rights approach* adopted to define the nature of the bundle of rights assigned to the landholders requires us specifically to determine constitutionally assigned rights in land and what is in the exclusion.

Being the reflection of the nature of ownership and common to all forms of land holdings and tenure systems, the exclusions touches the rights of peasants and pastoralists, investors and urban landholders. However, the question still is which rights of the bundle is/are excluded. The prohibition of "sale or other means of exchange" of land indicates that the constitution has restricted only the transfer rights. However, it is not the entire transfer right that is prohibited. The prohibition here implies that the constitution limits the transfer rights in two paths. One is with respect to the nature of the property right to be transferred. Since the ownership of the land is state and people's property, individual or community landholders are not entitled to transfer the land itself. However, the Constitution has not prohibited the transfer of the *right over the land* in a clear manner.[160] This line of understanding of the constitutional provision helps the state to adopt *a*

[157] FDRE Constitution (n 1) Article 40(1).
[158] Ibid.
[159] Id Article 40(3).
[160] Rahmato has also argued for differentiating the ownership of land from ownership of rights in land. He argued that Sale of land and Sale of rights over land were not appreciated. (See Rahmato Searching (n 24) p 21). The same view seems to be adopted by the legislature while enacting the urban land lease law. (See Federal Democratic Republic of Ethiopia. Urban lands lease holding proclamation No. 721/2011. *Fed. Neg. Gaz.* Year 18 No. 4. 2011. Article 24). However, when the ruling party alleges that even mortgaging let alone selling of property rights over rural land of the peasants and the pastoralists is constitutionally outlawed, it is employing a double standard though the Constitutional Prohibition applies for both the urban and rural land. See FDRE Constitution (n 1) Article 40(3).

policy-based interpretation rather than *the historical interpretation*[161] that enables the constitution to fit into changing circumstances, without going through constitutional amendment for each constitutional issue.[162] In addition, it helps to limit the right for some time until the changing circumstances allow its application in future. Whether this approach has been adopted by constitutional interpreters is seen in Section E of Chapter 4, through case-law analysis.

Second, the constitutional limit on the right to transfer is limited to transfers through the means of sale or other means of exchange.[163] The phrase "*other means of exchange*" is, however, not clear and open for interpretation. From the canon of interpretation that dictates that rights are to be interpreted widely and exceptions and limitations narrowly,[164] I argue that this phrase prohibits the permanent transfer of land rights through means that have the same nature and effect as sale. Moreover, the nature and the effect tests are cumulative requirements, because the way the provisions are arranged is in a *reductionist approach*. After defining the bundle of rights of private property ownership, the Constitution turns to indicating the nature of land ownership and the excluded rights in land. As the exclusions are the exception for the land rights, they must be interpreted narrowly. Naturally, sale as a means of transfer presupposes reciprocity and is carried out for consideration. In a sense, the parties in the transaction are expected to discharge their respective obligations of transfer of the object of the transaction and payment of the price. Thus, the "other means of exchange" in the Constitution is meant to incorporate all similar means of

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[161] Policy Based Interpretation is the approach to constitutional interpretation that based itself on the changes in the justice, social, economic, cultural and political values of the society. Whereas, the Historical Interpretation refers to the constitutional interpretation approach that looks into the historical meaning and context of the constitutional enactment and the intent of the constitution makers. One of the fears that can be resulted from the adoption of Policy Based Interpretation is that there won't be a constraint on the constitutional interpreters, their interpretation may be influenced by their appointers and it may abolish the idea of constitutional amendment. Nevertheless, the general assumption of judicial independence, and the situation where constitutional interpretation demanded (in case of unclarity and absurdity of the constitution only) mitigate the fear. About the different approaches in constitutional interpretation see Richard H Fallon Jr. A Constructivist Coherence Theory of Constitutional Interpretation. (1987) 100 *Harv. L. Rev.* 1189–1286; R. Randall Kelso. Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History. (1994) 29 *Val. UL Rev.* 121–233.

[162] In Ethiopia, the constitutional interpreter – The House of Federations – is assumed to the representative of the 'owners of the Constitution' – peoples. See the Constitutional Minutes (n 11) debate on Articles 61-62; Assefa Fiseha. Constitutional adjudication in Ethiopia: Exploring the experience of the House of Federation (HoF). (2007) 1 *Mizan Law Review.* 1–32. P 10. Then the above fear of Policy Based Interpretation may not happen in this case. However, this would be true if the state exercises a true democracy, and domination of the executive branch and political party loyalty are absent.

[163] FDRE Constitution (n 1) Article 40(3).

[164] Francis G. Morrisey Omi. Strict interpretation helps avoid Harshness. (2012) *Health Progress.* 71–73. About legal interpretation in general see Antonin Scalia and Bryan A. Garner. *Reading law: the interpretation of legal texts.* St. Paul. Thomson/West, 2012.

transfer that impose obligations on both parties. It may, among others, include bartering and it doesn't relate to transfer through inheritance and donation. Effect wise too, the "other means of exchange" should be interpreted to imply those means of transfer that permanently extinguishes the property rights of the pervious holder and establishes those rights for the one to whom it is transferred, like in the case of sale. It doesn't include temporary means of transfer like lease and those means that are not aimed at transferring property rights, like a mortgage.

Moreover, the right to property of women stipulated under Article 35(7) of the FDRE Constitution supports the claim that the Constitution provides a principle for defining nature of rights in land.[165] In particular the second paragraph of the provision provides "… [women] have equal rights with men with respect to *use, transfer,* administration and control of *land*."[166] The incorporation of this stipulation is intended to address the historical discrimination and injustice against rural women in the previous political regimes.[167] The provision indicates that the rights in land that have to be clearly defined in other detailed law should require incorporating not only use rights but also the transfer rights. However, the transfer rights should be defined with the observance of the exclusion stipulated under Article 40(3) as I discuss above.

Nevertheless, the definition of the transfer rights of land must be contextualized and should take into account the nature of the landholding system and its utilization. In a sense, the constitutional provision of land transfer rights that can be deduced through the negative-implication canon[168] does not automatically guarantee landholders with transfer rights. However, as I argue, it leaves it to the legislative organ to determine the scope of the transfer rights to be assigned to landholders, depending on the nature of the landholding systems; and at the same time to enable the constitutional interpreter – the House of Federations (HOF) and Council of Constitutional Inquiry (CCI)[169] - to check the legislature's power of law making to go with socio-economic progression of the society in defining the transfer rights.[170]

[165] FDRE Constitution (n 1) Article 35(7).
[166] Ibid.
[167] The Constitutional Minutes (n 11) debate on Article 40.
[168] Negative-implication canon refers to the expression of one thing in legislation implies exclusion of others. (See Scalia and Garner (n 164)).
[169] FDRE Constitution Article 62(1) and Article 82–84.
[170] About the different arguments of constitutional interpretation see Fallon (n 161); and Kelso (n 161).

Therefore, in my context, concerning pastoralists' land rights, in which communal holding and utilization of land in a clan or tribe are prevalent, the transfer rights should be constructed based on the prevailing customary land tenure system. However, if there are customary rules that go against the constitutional rules, they should not be given effect. In the case of peasants, where private holding and utilization of land dominates, the transfer right should incorporate all means except sale or other means of exchange as prohibited in the Constitution, since it is not a necessary element to enhance the legal land tenure security.[171] In this way, the FDRE Constitution incorporates the Bakerian "sovereign function" of property.

With respect to the use rights, the Constitution defines a different stipulation with respect to peasants' land rights and pastoralists' land rights. While it defines the purpose for which pastoralists are authorized to use their landholdings – for *grazing and cultivation*[172] - the FDRE Constitution remains silent about peasants' land. This leads to the question whether peasants are entitled to use their land holdings for any economic activities that enable them to derive income for their livelihood. The constitutional stipulation can be interpreted in two competing ways. On one side, taking the nomenclature the Constitution employed – *peasants* and its literal meaning - it is possible to argue that peasants are entitled to use the land for agricultural purposes only and are not entitled to transform it to the other economic service.[173] In addition, the mentioning of the purpose for which pastoralists use land is to indicate the addition of the other purpose – cultivation,[174] because, historically, it is assumed that pastoralists are nomadic peoples whose

[171] Klaus Deininger. *Land policies for growth and poverty reduction*. Washington DC. The World Bank, 2003. P 7. And given that the majority of the Ethiopian peasants are not willing engage in sale even if it is legalized (see EEA/EEPRI (n 54)) it is not necessary to argue for constitutional amendment to incorporate the right to sale land to enhance Legal land tenure security.

[172] FDRE Constitution (n 1) Article 40(5).

[173] The term "peasant" may have different definition depending on the context. (For instance, see Marc Edelman. *What is a peasant? What are peasantries? A briefing paper on issues of definition*. (The first session of the Intergovernmental Working Group on a United Nations Declaration on the Rights of peasants and Other People Working in Rural Areas, Geneva), 2013)). However, in Ethiopia when one looks into the Amharic version of Article 40(3) of the FDRE Constitution the peasants are named by the combination of two terms – *Arso* and *Adere*. *Arso* means farming, whereas *Adere* means live. Hence, the literary meaning of the combination of the two terms gives as "the one who lives in farming" and the definition is in terms of the economic activity they carry out. The federal rural land proclamation provides somehow a different meaning that indicates that the peasant may employ the land for other purpose. It states that: "[p]easant means a member of a rural community who has been given rural landholding right and, the livelihood of his family and himself is based on *the income from the land*." (See Proc. No.456/2005 (n 38) Article 2(7)).

[174] FDRE Constitution (n 1) Article 40(5). The Amharic version of used term "*zelanochi*" which literary mean "nomads" not "pastoralists." The naming is somehow derogatory in the Ethiopian Context. Nevertheless, detail investigation is required to determine the basic rationales and the implications of the naming. Nevertheless, the later

economic activity is considered as herding of animals and who need land for grazing purposes only. The Constitution is intended to challenge this misconception and to confirm that pastoralist can also engage in cultivation and need land for that purpose.

The contrary view interprets the silence of the Constitution as implying that peasants can transform the purpose of their land holdings to other economic activities. This line of argument is justified on the basis of the Constitution's silence with respect to peasants, while mentioning the purposes for which pastoralist landholdings may be employed; the nature of the land utilization; and the country's demand for economic growth and transformation.[175] The predefinition of the purpose for which pastoralists can use land is related to the manner of their landholding and utilization. As repeatedly mention that in Ethiopia pastoralists hold and utilize land in a communal manner at clan or tribe level. This community level holding and utilization of land doesn't allow the easy transformation of the use purpose of land since divergent interest may be reflected among the members. That means that the constitution-makers' intention and aim with respect to pastoralists land was to ensure that pastoralists would employ the land for the purpose with which they did so from time immemorial – grazing and cultivation. Allowing them to employ it for any economic purpose may negatively affect their social set up and peaceful co-existence, because it will result in a conflict of interest. Some of the members may want the conversion of land utilization for other economic activities, whereas the rest may desire to keep the *status quo*. However, in the case of peasants, since the land is held and utilized on an individual basis, determination of the purpose for which land can be utilized doesn't result in any form of conflict of interests. Moreover, from the country's objective of an economic growth policy too, it is required not to limit the use of peasants' land to agricultural purposes. Especially in a transforming and developing economy like Ethiopia, where the majority of the population depends on income from rural land and poverty is prevalent, limiting peasants' land for agricultural use only prohibits employment of the land for

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legal instruments prefer to employ "Arbito Adere" in Amharic. (See Proc. No.456/2005 (n 38) Article 2(8)). *Arbito* means herding and *Adere* means live. Hence, it refers to "the one lives in herding."

[175] It is with this view the rural land laws of the country authorize the rural landholders to use their rural land rights as a contribution for joint investment with investors for development activity without specifying it as agriculture. (See Proc. No.456/2005 (n 38) Article 8(3)).

better and more productive economic activities. In turn, it affects the economic transformation of the country from an agrarian economy to a manufacturing and service economy.[176]

Therefore, determination of the purpose of peasants' land has to be seen from the perspective of enhancing sustainable development. To put it in other words, if peasants' use of land for non-agricultural purposes enhances the income derived from it in environmentally friendly ways, there is no logical reason to prohibit the transformation.[177] Moreover, the constitutional stipulation of the purpose for which pastoralists land should be used, should be understood and interpreted according to a policy-oriented approach. This means that, upon the mutual consent and decision of the community, it should be possible to convert pastoralists' land to transform to other economic activities. The guiding principle for the conversion should be whether the conversion results in better economic, social and environmental progression. In that way, peasants' and pastoralists' freedom to decide the purpose for which the land use right is employed can be realized to ensure their legal land tenure security and the Bakerian use value function of property.

C. Immunity Against Eviction and Displacement

The FDRE Constitution, to address the historically prevailing legal land tenure insecurity that resulted from state control over peasants and pastoralists, and to ensure the Bakerian protective function of property, guarantees peasants and pastoralists with the right to immunity against eviction and immunity against displacement respectively.[178] As noted, in the making of the Constitution, the basic land tenure security threat for peasants and pastoralists in the previous political regimes was the prevalence of arbitrary eviction and displacement.[179] Moreover, the constitution-makers assumed that the protection of peasants' and pastoralists' land rights from the

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[176] The government has framed the development policy of the country on the foundation of "Agricultural Development Led to Industrialization." (See Rural and agricultural development policies and strategies (n 94)).

[177] One may argue that the person loss his/her peasantry nature if he/she transform the land for other economic purpose. But, for one thing being peasant is required just for the sake of accessing land for free– social security and absence of other means of livelihood. Moreover, the term peasant should be understood as people who use rural land for his/her livelihood. It should not necessarily require to be understood as the tiller for the whole time. This is also inferred from the Constitution's employment of the term peasant and Farmer in different context. The FDRE Constitution under Article 41(8) regarding the right to fair price for products, it is seen in section E below, employed the term 'farmer' instead of "peasant." The term "farmer" is employed in this provision intentionally to refer to the one who employed the land for farming and produced agricultural products, implying the possibility of transforming the land for a better economic activity.

[178] FDRE Constitution (n 1) Article 40(4) and (5).

[179] The Constitutional Minutes (n 11) debate on Article 40.

act of eviction and displacement is a high and priority concern. No doubt, this is because of the ambition to avoid historical state control over peasants, in particular by using land rights as a means. In addition, this is inferred from the consequential justifications provided for non-privatization of land as I note in Section B above.

However, from this constitutional protection of land rights it is unclear why the constitution uses different terminologies – eviction and displacement – and the extent of the protection guaranteed under these rights. The reason why the constitution-makers left some things unclear under the Article dealing with the 'land issue' is probably because they were mainly interested in the debate on the nature of land ownership, instead of other land rights and protection issues.

While the Constitution guarantees for peasants the *right to immunity against eviction* from their land,[180] it entitles pastoralists with the *right to immunity against displacement*.[181] The puzzle here then is whether the constitutional protection afforded in these rights is similar in effect for peasants' and pastoralists' land rights and there is merely a terminological difference; or whether there is a substantive difference. This terminological difference may be also the result of the time difference in drafting the two provisions. The provision dealing with pastoralists' land rights was not mentioned in the initial draft of the Constitution and was incorporated in the course of deliberation. This indicates that pastoralists' land issue was given peripheral consideration also in the post-1991 land tenure system.

The ordinary legal meaning of the two terms are completely different and in effect, they result in different outcomes. The legal dictionary meaning of 'eviction' is "[t]he act or process of legally dispossessing a person of land",[182] whereas 'displacement' refers to "[r]emoval from a proper place or position".[183] Thus, the plain protection afforded to peasants in this right is protection against even legal dispossession let alone an illegal act or process of dispossession. In the same fashion, the Constitution provides pastoralists with protection against removal from their land and placing them in another place or position, which is not the one they culturally and socially attached with. Accordingly, from a literal interpretation, the Constitution treats the protection against

[180] FDRE Constitution (n 1) Article 40(4).
[181] Id Article 40(5).
[182] Bryan A. Garner (ed.). *Black's Law Dictionary*. St. Paul. West Group (7th ed), 1999. P 575.
[183] Id p 484.

eviction and displacement of peasants' and pastoralists' land rights differently. The Constitution incorporates the Bakerian personhood function of property in the case of pastoralists, because, it has assumed that pastoralists with their landholdings not only have an economic attachment but also, their entire socio-cultural life is attached with land they have used and transferring from generation to generation, since time immemorial. Because the identity of pastoralists is intertwined with their land holdings, the FDRE Constitution aims at granting special protection to their land rights. Thus, it is not a mere terminology difference, but the legal consequences are also different. However, whether the special protection of pastoralists' land rights that can serve the Bakerian personhood function of property is reflected in the other land laws is assessed in Chapter 6.

Moreover, the FDRE Constitution is vague and ambiguous in establishing the extent of the protection afforded to peasants and pastoralists under their right to immunity against eviction and displacement respectively. In other countries' constitutional norms and human rights instruments the extent of this property right protection is modified with certain adjectives or terms like "arbitrary" and "limited for public interest."[184] In those norms, it is common to find two modifications for the property right: the general protection for arbitrary deprivation as a rule and exceptional lawful deprivation for greater societal interest. Nevertheless, the way the protection of peasants' and pastoralists' land rights is framed and stipulated in the FDRE Constitution implies that theirs are absolute rights, not subject to any limit and exception. Additionally, it indicates that the protection is afforded against any type of eviction and displacement, since there is no modifier associated with it. The provisions state that "*Ethiopian peasants have right to…the protection against eviction from their possession…*"[185] and "*Ethiopian pastoralists' have… the right not to be displaced from their own lands…*".[186] The question that persists in this juncture is whether these protections extend to the lawful eviction and displacement for the greater societal interest – expropriation.

[184] For instance, See UDHR (n 79) Article 17(2); AU/OAU. African (Banjul) charter on human and peoples' rights. Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986. Article 14. In addition, most constitutions of the world States, except some for instance Canada and New Zealand, the protection for property rights with the restrictions thereof are dealt. (See Gregory S. Alexander. 'Property rights' in Vikram David Amar and Mark V. Tushnet (eds.). *Global perspectives on constitutional law*. Oxford. Oxford University Press, 2009. 59–72. P 59).
[185] FDRE Constitution (n 1) Article 40(4).
[186] Id Article 40(5).

In fact, the review of the deliberations in the constitution making reveals that one of the guiding principles recognised in defining the human rights Chapter in the Constitution was to make rights as unrestricted as possible.[187] However, different provisions in the same Chapter provide for limitations and restrictions to different rights, which by their nature are not absolute rights.[188] On this basis, the constitution-makers would have had no reasons to make the right to immunity against eviction and displacement absolute rights, as the right to property is not an absolute right by its nature. For one thing, expropriation as a limit to property rights is adopted and practiced in those countries that have adopted even the "most individualistic system" of and strongest protection for property rights.[189] Those countries' constitutions incorporate a legal limit for a greater societal function of land, implying that the land rights can be deprived through the act and process of expropriation upon the satisfaction of the public purpose, due process, compensation and participation of the affected parties requirements.[190] Thus, the FDRE Constitution that even adopts the slightest individualistic system of rights in land, should be no different.

Moreover, in the same article that guarantees peasants and pastoralists the right to immunity against eviction and displacement respectively, another paragraph implies the possibility of termination of rights in land for all landholders in a general manner. It states that "[e]very Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital…This right shall include…where the *right of use expires [the Amharic version employed the term "terminates"]* to

[187] See the Constitutional Minutes (n 11) debate on Article 40; Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 3, Nov. 17–22/1994 Addis Ababa), 1994. Debate on Article 39 (Amharic document, Translation is mine).

[188] For instance the right to life is deprived for serious crimes as a punishment (FDRE Constitution (n 1) Article 15); the right to liberty is deprived for a grounds defined by law (Id Article 17); Right to Privacy is limited for the purpose of "safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others."(Id Article 26); Freedom to express or manifest one's religion or belief is also restricted to "to protect public safety, peace, health, education, public morality or the fundamental rights and freedoms of others, and to ensure the independence of the state from religion" (Id Article 27); and Right of Thought, Opinion and Expression and the right to Assembly, Demonstration and petition can be limited for the protestation of " the well-being of the youth, and the honor and reputation of individuals; [and} any propaganda for war as well as the public expression of opinion intended to injure human dignity" is also stipulated as a limitation. (Id Article 29 and 30). In fact, in the provisions dealing with the peasants and pastoralists right to immunity against eviction and displacement respectively, there is a deferral which states "the implementation of this provision shall be specified by law". (See *id* Article 40(4) and (5)). However, it perhaps become absurd if one claims that the provision states a limitation to the right. Rather, the provision empowers the state to take legislative measures to realize the right rather than to stipulate limitations.

[189] Deininger (n 171) p 28. Their constitutional provisions on the property rights also indicates this fact.

[190] Id pp 28–29.

remove his property, transfer his title, or claim compensation for it."[191] Even though the main tenet of the provision is to *define the nature of property rights over things built and permanent improvements made on land,* it (the prevailing Amharic version) has also incidentally regulated the probability of termination of land rights.[192] In addition, it is not possible to argue and limit its application to landholders other than peasants and pastoralists, since there is no separate provision that defines the nature of the property rights peasants and pastoralists do have over the things built and permanent improvements made on land.

However, this provision doesn't list the grounds upon which land rights may be terminated. The Constitution has left the particulars to be determined by other laws. Nevertheless, one thing to be sure here is that the grounds of termination for peasants and pastoralists land rights on one hand, and investors and urban land rights may not necessarily be similar, because the unique right to immunity against eviction and displacement constitutionally guaranteed to peasants and pastoralists implies that the probability of terminating peasants and pastoralists land rights should be the least. Accordingly, to create the situation for the application of the 'land rights termination rule' of the Constitution to peasants' and pastoralists' land rights, recognition of expropriation as the only ground does make sense and ensures their legal land tenure security.

Furthermore, the Constitution's stipulation of expropriation of *private property* for public purposes upon advance payment of compensation indicates the application of this limit to peasants' and pastoralists' land rights *a fortiori*. Article 40(8) of the FDRE Constitution provides a limit to private property. It states that the private property, that grants the owner with complete/full property rights and which is produced by the owner's labour, creativity, enterprise or capital, is subjected to expropriation for a social function.[193] Then, for a stronger reason, peasants' and pastoralists' land, which is received for free and on which the holders have incomplete property rights is to be subjected for expropriation. However, the puzzle here is whether the expropriating organ is expected to pay compensation for the loss of the land rights to peasants and pastoralists. The subsequent section, that also implies the limit to peasants' and pastoralists' land rights, explores the constitutional stand on this issue.

[191] FDRE Constitution (n 1) Article 40(7).
[192] Id Article 106 indicates that the Amharic version has the final legal authority.
[193]See *id* Article 40(2) and (8).

Finally, the constitutional recognition of the people's right to sustainable development and national economic and social policy objectives indicates that the constitution makers have presupposed the expropriation of peasants' and pastoralists land rights. The constitution grants the people with right to improved living standards and to sustainable development.[194] As a result, it has imposed the duty to fulfil, respect, and protect the right on the state. Besides, the economic and social policy objectives in the Constitution demand the state to protect and promote the health, welfare and living standards of the citizens by ensuring all the people, including peasants and pastoralists, enjoy access to public health and education, clean water, housing, food and social security.[195] On the other side, the realization of this right and the policy objectives demands the government to have access to the rural land which is necessary to carry out the necessary infrastructural development and environmental protection where and when needed, first. Moreover, the land under state possession may not be sufficient or convenient to implement the projects that are necessary for the realization of the right and the policy goals stated above. Therefore, unless expropriation of peasants' and pastoralists' land existed as a limit, the state will not be in a position to discharge these obligations, given that even the purchase of land is not possible as the Constitution outlaws sale of land. This shows that the constitution makers were of the view of limiting the land rights of peasants and pastoralists through expropriation.

D. The Right to Compensation and Relocation

It has been repeatedly mentioned that land rights are a means of livelihood for the Ethiopian peasants and pastoralists, not to mention its socio-cultural significance. In a sense that the means that a peasant's or pastoralist's livelihood for himself/herself and his/her family is derived from the income gathered from land rights. Thus, any adverse effect on their land rights automatically and directly affects their and their families' existence and livelihood. In addition, as a mechanism to address this problem and to ensure their legal land tenure security the FDRE Constitution takes rights-based and policy-based measures, depending on the sources and causes of the problem.

The adverse effect on the land rights can emanate either from man-made and natural disasters or from the legitimate acts of the state itself. In cases where the land rights of peasants and pastoralists

[194] Id Article 43.
[195] Id Article 89(9) and Article 90.

are affected due to man-made or natural disasters, the Constitution has stipulated a policy-based measure to be taken by the state. The policy-based measures are in the form of prevention of disasters and in case of the occurrence, provision of "timely assistance."[196] Being a policy-based measure and stipulating it as an "assistance," results in a different legal consequence from being a right-based measure and a compensation and reinstatement. As a policy objective, it will not impose a direct obligation on the state to satisfy it. Rather, it requires the government to act and aspire towards its realization in the long run. Furthermore, since it takes a form of "assistance" again, it depends upon the choice, willingness, and capacity of the state. The state provides it in the form of support to the extent it can; not to the extent of the damage sustained by the land right holders.

The legitimate acts of the state may also negatively affect the land rights of peasants and pastoralists. Among others, the limit to the land rights through expropriation for the carrying out of the state programmes is one of the legitimate acts of the state. To remedy the adverse socio-economic effects the expropriation cause to the livelihood of peasants and pastoralists – to their land rights - the Constitution adopts rights-based measures of compensation and relocation. The FDRE Constitution under Article 44(2) determines that "[a]ll persons who have been *displaced or whose livelihoods have been adversely affected* as a result of *state programmes* have the *right to commensurate or alternative means of compensation, including relocation* with adequate state assistance".[197] The Constitution wrongly places this provision under the caption of "Environmental Rights" – a substantive right. In fact, it is true that the state may affect land rights for environmental protection. However, the state programmes are not limited to that. They are broader and include social, economic and cultural concerns as well.

Moreover, the placing and incorporation of this right to compensation and relocation under the "Environmental Right" caption raises the question of justiciability. As can be inferred from the constitution-making process, the makers did not have the intention to make the "Environmental Right" a justiciable right. Rather, they intended it to be realized progressively with the economic capability of the country and with the improvement of the living standard of the society.[198]

[196] Id Article 89(3).
[197] Id Article 44(2).
[198] The Constitutional Minutes (n 30) debate on Article 44. The issue of justiciability with respect to socio-economic rights in the debate was raised with respect to the right to a clean and healthy environment. Therefore, it is possible

However, with regard to the right to compensation and relocation, they implied the applicability of Article 40 that deals with the right to property by cross-reference.[199] In this way it is also made a justiciable right.

Again, however, Article 40 of the FDRE Constitution doesn't expressly indicate the payment of compensation for the loss of peasants' and pastoralists' land rights. Especially when one looks at the way the Constitution defines the concept of "private property" and regulated expropriation as I discuss in the above section, the constitutional silence is clear on this matter. Due to this, it presents two lines of dissenting interpretation. The first side may argue that the Constitution has not made peasants' and pastoralists' land rights compensable interests.[200] It is because while making built things and improvement made on land compensable, the FDRE Constitution is tacitly excluding land rights from being compensable interests.[201] Since the Article deals with the issue of the right to property, it would have expressly provided had it intended to make the land rights compensable interests. Moreover, given that the state is the "owner" of the land, with the people, one way through which the state manifests its ownership right is expropriating land for state programs and societal interests without being required to pay compensation.

Contrarily, an opposite claim can be made that the silence of the Constitution about the compensable nature of the loss of peasants' and pastoralists' land rights doesn't guarantee the state to expropriate their land for free.[202] Rather, the deep-rooted historical land related problems the constitution makers thought to address and the nature of the protection afforded to peasants' and pastoralists' land rights, urge the payment of compensation for the loss of land rights. Especially with respect to peasants' land rights, the constitution makers were of the opinion that in the previous political regimes, arbitrary evictions of peasants were common, and their land rights were unsecured. Besides, the supporters of the *status quo* land ownership indicated privatization would lead to the eviction of peasants and restoration of the historical injustices. Accordingly, they were

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to conclude that the other socio-economic rights in FDRE Constitution were intended to be justiciable by the constitution makers.

[199] Id p 5.

[200] Srur (n 53) p 154; Muradu Abdo. Reforming Ethiopia's expropriation law. (2015) 9 *Mizan Law Review.* 301–340. P 311.

[201] Ibid.

[202] Daniel Weldegebriel. Land valuation for expropriation in Ethiopia: valuation methods and adequacy of compensation. (7th FIG Regional Conference Spatial Data Serving People: Land Governance and the Environment – Building the Capacity Hanoi, Vietnam), 2009. P 1; Ambaye (n 117) pp 214–216.

aimed at guaranteeing peasants' land rights from the restoration of historical injustices. In addition, allowing the state to take their land rights without compensation in effect defeats the basic rationale for the current land tenure system.[203]

Moreover, the two constitutional protections afforded to peasants and pastoralists, the one discussed above and the other below, also presuppose compensation to be paid for the loss of land rights for a greater societal interest. The right to immunity against eviction and displacement I explain above indicate that this protection protects peasants and pastoralists not only from individuals but also from acts of the state. From a human rights perspective, the state, besides being the protector and fulfiller of the right, is required to respect – refrain from violating - it. Accordingly, the state's legislative and administrative measures should not abridge this constitutional right. However, the state is also required to act on behalf of the public's need for the land at the same time. It is required to keep the balance, then, between these competing interests and one of the ways to do so is taking the land rights of peasants and pastoralists upon payment of compensation,[204] because the economic and social justice purposes of compensation I note in Chapter 1, necessitate its payment. Besides, peasants' and pastoralists' right to an improved living standard also establishes the constitutional aim of the compensable nature of their land rights. Since the land rights are a means of livelihood for peasants and pastoralists, the act of expropriation without compensation, means denial of their means of survival without a substitute and it will impoverish their lives, undermining their right to improved living standards. This right also imposes on the state at least not to impoverish the living standard of peasants and pastoralists while expropriating their land rights.[205] Therefore, to maintain peasants' and pastoralists' standard of living at the time of expropriation, the state is required to compensate for what is taken.

The latter line of argument is sound and persuasive for me. Not only payment of compensation for the loss of the land rights: The Constitution further provides peasants and pastoralists with the right to be relocated with the assistance of the state.[206] The right to relocation with state assistance is a

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[203] Ibid.

[204] See Food and Agriculture Organization. Compulsory acquisition of land and compensation. Rome. *FAO Land Tenure Studies 10,* 2008; Bin Cheng. The Rationale of Compensation for Expropriation. (1958) 44 *Transactions of the Grotius Society*. 267–310.

[205] The improvement aspect is not required to be satisfied immediately as it is a socio-economic right it can be realized progressively. However, it still with immediate realization of the "minimum core obligations."

[206] FDRE Constitution (n 1) Article 44(2).

progressive right, that depends on the level of development of the country. It requires the state to extend support for peasants and pastoralists in the process of their relocation, in addition to paying compensation for the loss of property rights including the land rights. It is with the view to tackle the social inconvenience peasants and pastoralists face in the time between taking of their land and their settlement in the new location. In general, the spirit of the right to compensation and relocation is that the programs of the state should not result in the impoverishment of the citizens, in particular peasants and pastoralists. Rather, they should be aimed at realizing improved living standards for all.

E. The Right to Consultation and Participation and a Fair Price for Products

It is noted above that the national development programs of a state could adversely affect the land rights of its citizens due to expropriation. However, to minimize the side effects and to enhance legal land tenure security, it is claimed that the legislation should afford legal protection for the legal constructs of land tenure security I discuss in Chapter 1. Specifically, the constitutional norms should incorporate the five Bakerian functions of property, although the extent of specificity is not well defined. To ensure the protective function, however, the FDRE Constitution also incorporates requirements that citizens be allowed to participate and be consulted in the development projects that affect them.[207] The development projects may demand the expropriation of peasants' and pastoralists' land rights as the early step.[208] In which case the participation and consultation of the community affected by the project including the peasants and pastoralists whose land is expropriated renders the effective implementation of the project and ensure the land tenure security of the affected peasants and pastoralists.[209] Because, as highlighted in Chapter 1 during the process of expropriation the participation and consultation of the affected community and individuals is needed in all four phases to insure legal land tenure security. Accordingly, this constitutional stipulation paves the way for the development activities to be carried out upon the peoples' need

[207] Id Article 43(3).
[208] FAO Compulsory (204) p 1.
[209] Food and Agriculture Organization. Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security. Rome. *FAO Council,* 2012. Para 3B.6, 8.7and 16.2; Linlin Li Adoption of the international model of a well-governed land expropriation system in China —problems and the way forward. (2015 World Bank Conference on Land and Poverty, Washington DC), 2015.

and provides the opportunity for the affected community or individuals to take part in the entire process.

Moreover, the FDRE Constitution has entitled the "farmers" (the provision used instead of peasants) and pastoralists with the right to receive a fair price for their products.[210] This constitutional guarantee is aimed at ensuring peasants' and pastoralists' freedom in their products and to secure the non-recurrence of the price fixing and grain acquisition of the *Derg* regime in particular. In Chapter 2, it was established that peasants in particular did not have the autonomy to decide on their products in the previous two political regimes. In the feudal-monarchical regime the lion's share of their products were taken away by the landlords and the state. The same tradition had continued in the subsequent *Derg* regime wherein peasants were required to submit certain fixed quotas of their products to the state marketing cooperation at fixed official prices, which were much less than the actual price. In order to address this historical injustice, the Constitution has awarded peasants and pastoralists with the right to a fair price for their products.

The right is basically intended to outlaw the past state grain acquisition at official fixed price rate and to impose a duty on the state to formulate economic, social and development policies that ensure peasants' and pastoralists' right to fair prices for their products.[211] It further indicates how the fairness of the price is to be determined, stating that the price should be paid "…that would lead to improvement in their conditions of life" and equitable with their cost of production (English version says, "[t]o enable them to obtain an equitable share of the national wealth commensurate with their contribution").[212] This stipulation seems to intervene in the price determination of the 'farmers' and pastoralists' products. In any market economy, in principle, the price of any product is determined by market forces. Ethiopia having adopted a market economy since the transitional government, the expectation would be that the Constitution would have left price determination for the market. Moreover, the FDRE Constitution has correctly imposed the duty to create the market access for peasants' and pastoralists' products on the state. This is inferred when the same constitutional provision requires the state to be guided by this right in formulating socio-economic

[210] FDRE Constitution (n 1) Article 41(8).
[211] Ibid.
[212] Ibid.

and development policies.[213] Hence, the state is duty bounded to take action on creation of market access for peasants' and pastoralists' products.

F. Conclusion

In Ethiopian constitutional law history, the broadest regulation of the issue of land rights is done in the FDRE Constitution. It is not only that it was one of the most hotly debated and deliberated matters, particularly ownership, in the process of constitution-making. The ideological differences among the constitution-makers confined the entire debate to the private- "state and people's" ownership dichotomy. In addition, the same debate and dichotomy has continued even after the constitution-makers' decision in favour of the "state and people's" ownership, among academics and the political parties. The discourses have still centred on the nature of the land ownership and both sides have presented the issue of land tenure security to support their view.

However, the discourses and the proposals for change haven't produced in-depth analyses of what constitutional protections are provided for peasants' and pastoralists' legal land tenure security and how historical injustices are to be rectified. The defect begins with the misunderstanding of the nature of the land ownership adopted and equating it with either public or state ownership. This conception has the tendency to empower and legitimize the state to have strong power and control over peasants and pastoralists in relation to land rights as it was in the past political systems. Nevertheless, examination of the constitutional rules imply that peasants and pastoralists are afforded legal protection that liberate them from state control and ensures legal land tenure security. In particular, it has entitled them with the right to free access to land, immunity against eviction and displacement, compensation and relocation, participation and consultation and fair price for their product. Moreover, it also provides a framework for defining the nature of rights in land. These human rights-based stipulations that incorporate the six Bakerian property functions, burden the state with the duties to respect, protect and fulfil them.

Nevertheless, the Constitution also adopts some inconsistent policy determinations, particular in relation to 'free access to land for all' and security of land tenure. Above that, it has enshrined vague and silent provision on certain matters, which beg for a policy-based interpretative approach.

[213] Ibid.

To mention a few, for instance, the nature of rights in land of peasants and pastoralists, the purpose for which the land is used, the deprivation of the land rights for greater societal interests, and the compensability of the loss of the land rights were defined absurdly.

Chapter 4

Rights in Land of Peasants and Pastoralists under the Land Law of Ethiopia

The nature, duration, registration and certification of rights in land are among the legal constructs of land tenure security. The way the rights in land are defined and the constituting bundle of rights, their duration, registration and certification affect, either way, land tenure security as argued in Chapter 1 Section C. As I argued the rights in land should be delineated and explained in a holistic approach to understand property and in consideration to the nature of the landholding and utilization system. Guaranteeing of the right to transfer land through sale is not a necessary right in land to establish the legal element of nature of rights in land of land tenure security. About the duration of land rights, I claim that a separate formulation should be made about the general and specific bundle of rights. The general duration of land rights should be defined and its sufficiency determined in terms of the purpose it acquired, while the duration of specific bundles of rights need to be defined by mutual agreement of the parties involved in transaction. On top of this, inclusive, participatory and accountable registration and certification of land rights, being the exclusive means to establish and prove the legitimate possession of a land right is required to realize legal land tenure security. Furthermore, the nature and duration of rights in land should consider and give effect to the use-value, welfare, and sovereign constitutional property functions. And for a country like Ethiopia, where the issue of land played a central role in a struggle to change a political regime, a better nature and duration of rights in land from the previous regime is required to secure land tenure in the post-revolution period.

On this foundation, in this Chapter I assess Ethiopia's rural land legislation regarding rights in land that are required to secure land tenure security of peasants and the pastoralists. Particularly, I examine how the legal construct of the nature and duration of rights in land, and registration and certification of land rights defined in Chapter 1, the expected betterments from the historically granted duration and nature of property rights seen in Chapter 2, and the constitutional principles provided in Chapter 3, are reflected and incorporated in rural land legislation about the peasants' and the pastoralists' land rights. The legal restrictions attached to those land rights are reserved to discuss in the subsequent Chapter.

The premise is that the Ethiopian rural land legislation has defined the nature of rights in land in accordance with the bundle of rights approach without considering the nature of the land holding and utilization system of the peasants and the pastoralists. It entitles them with all bundle of rights except sale and mortgaging claiming that the latter two bundle of rights are constitutionally prohibited. This is without disregarding the 2017 Amhara State rural land law exception in recognition of the right to mortgage land rights to peasants.[1] The revisionists claimed the adoption of the right to mortgaging to widen the bundle without questioning the basis for its prohibition first.[2] Moreover, the duration of the general land rights is unlimited, whereas it adopts a fixed duration for specific land rights. Furthermore, the country's rural land legislation has confined the purpose for which the peasants and the pastoralists use the land for agriculture and other natural resource development activities. And coupled with the ethnic-federalism adopted the legislation attached very subjective standards for acquiring land that opens a space for discrimination and deprivation of the land rights. The legislation, in general, undermines the use-value, welfare and sovereign functions of property and fails to bring a basic change in terms of the bundle of rights though somehow broadened, and duration of the land rights introduced in the final age of the *Derg* period that has been seen in Chapter 2. Meanwhile, it incorporates the registration and certification of land rights to enhance land tenure security. However, provision of a legal basis for registration and certification of land rights of some peasants and failure to do so for others and failure to define the evidentiary weight and the role of the registration and certification in case of dispute on land undermine the intended objective – securing land tenure.

The Chapter begins with the question what the land legislation implies for land tenure security, while defining the purpose for which the peasants and the pastoralists employ the land and the

[1] Amhara National Regional State. Revised rural land administration and use proclamation No. 252/2017. 2017. Article 19. This newly enacted the 2017 Amhara State's rural land law allows any rural landholders, including peasants and semi-pastoralists, to mortgage their rural land rights. Although it is a move to broaden the breadth of land rights, as I discuss in Section E below and Chapter 8, it raises constitutionality questions.

[2] Solomon Fikre Lemma. *The challenges of land law reform: smallholder agricultural productivity and poverty in Ethiopia*. (Doctoral dissertation University of Warwick, UK), 2015; Getnet Alemu. *The challenges of land tenure reform to structural transformation of the economy: lessons from country experiences*. (In proceedings of the 16th international conference of Ethiopian studies (Svein Ege, Harald Aspen, Birhanu Teferra and Shiferaw Bekele (eds.)) Trondheim, Norway), 2009; Gudeta Seifu. 'Rural land tenure security in the Oromia National Regional State' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 109–146. The revisionists are those scholars who argue for the improvement of the post-1991 statutory land tenure system to secure the land tenure without changing the nature of the land ownership basically.

prerequisites for accessing the land rights. It is followed by the section that analyses the nature of rights in land granted to them and their practicability. Next how the legislation defined both the general and specific duration of land rights is discussed. The subsequent section excavates the manner and legal effect of registration and certification of land rights. Then follows a section that deals with the Constitutional implication of the excluded bundle of rights in land and the approaches adopted in constitutional interpretation in this regard. The Chapter winds up with conclusion.

A. Requirements for Free Access to Rural Land Rights

The constitutional grant of the right to free access to rural land to the Ethiopian peasants and pastoralists to realize the welfare function of property is not automatic and without condition. Since the FDRE Constitution reserved the *implementation of the provision to be specified by law*,[3] the federal government as well as the states have enacted rules that provide requirements or conditions to be satisfied to get free rural land. Even though the federal, Gambella, Oromia and Southern nations nationalities and peoples (SNNP) States' land legislation define the conditions for "free access to rural land" for both the peasants and the pastoralists,[4] the other legislation of those other states in which both peasant and pastoralist communities reside seem to stipulate the conditions only for peasants and pastoralists who wish to engage in sedentary farming.[5] However, given that

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[3] Constitution of Federal Democratic Republic of Ethiopia (FDRE). Proclamation No.1/1995. *Fed. Neg. Gaz*. Year 1 No.1. 1995. Article 40(4) and (5). The FDRE Constitution provides two ways of referral in relation to land rights. It used the phrases "the implementation shall be specified by law" and "particulars shall be determined by law." However, the difference between the two phrases is not clear and their essences is not provided. Even though it needs further study, I argue that the former referral is restrictive than the later. In a sense that the law maker is only required to legislate the rules which make the right effective and operational. Whereas in the later referral the law maker is more empowered even to define the nature of the right itself.

[4] Federal Democratic Republic of Ethiopia. Rural land administration and land use proclamation No. 456/2005. *Fed. Neg. Gaz.* Year 11 No. 44. 2005. Article 5; Gambella Peoples' National Regional State. Rural land administration and use proclamation No. 52/2007. *Neg. Gaz*. Year 13 No. 22. 2007. Article 6; Oromia National Regional State. Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of Oromia rural land use and administration proclamation No. 130/2007. *Megelata Oromia*. Year 15 No. 12. 2007. Article 5; Southern Nations, Nationalities and Peoples Regional State. Rural land administration and utilization proclamation No. 110/2007. *Debub Neg. Gaz.* Year 13 No. 10. 2007. Article 5. In fact, in these laws the conditions are stipulated in a form of access land for free, and in the form of granting the right to use of rural land.

[5] In Ethiopia pastoralists live and reside in seven states excepting Amhara and Tigray States. Afar National Regional State. Rural land administration and use proclamation No. 49/2009. 2009. Article 5(5); Benishangul Gumuz National Regional State. Rural land administration and use proclamation No. 85/2010. 2010. Article 6 which even failed to recognize the existence of the pastoralists community due to wrong legal transplantation from the Amhara State which doesn't have pastoralists; Ethiopian Somali Regional State. Rural land administration and use proclamation No. 128/2013. *Dhool Gaz*. 2013. Article 5 and Article 9(3).

the national perception of pastoralists' way of life and land utilization and the country's policy direction of voluntary sedentarization and villagization, the federal legislation and the legislation of the above named three States *de facto* do not differ from the rest.[6] For the pastoralists, they seem to grant the "*right to use land for free"* as can be inferred from the law that imposes the duty on the peasants to pay a land use payment, which is discussed in detail in Chapter 5.[7] And their right to free access to land can be claimed only if they want to engage in sedentary farming and grazing activities.[8]

For me, the "right to free access to land" and the "right to use land for free" are two related but different concepts in breadth. The right to free access to land is a broader concept that includes the right to claim new land and use of the same for free. However, the right to use land for free presupposes the already possessed land and it doesn't establish the right to claim new land. Consequently, the land laws narrow the constitutionally given rights of the pastoralists, because they establish the assumption that the pastoralists won't be granted new land, but their right to use land they already occupied for free is maintained. This stipulation goes against the Constitutional rule that equally guarantees pastoralists the right to free access to land with the peasants.[9] The policy and legislation makers' discriminatory stance toward pastoralists is a clear manifestation of the state's conception of the pastoralists' way of life and land use as primitive and uneconomical and the sedentary and peasantry way of life and land utilization as better. That is why rather than expanding pastoralism through granting new land, they adopted the policy option of converting pastoralists to a sedentary peasant way of life through the villagization program.

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[6] National Planning Commission. Growth and transformation plan II (2015/16–2019/20). Addis Ababa. *Federal Democratic Republic of Ethiopia*, 2016. P 27; the federal legislation stands of conversion of communal landholdings to private holdings in anytime (see Proc. No. 456/2005 (n 4) Article 5(3)); Fiona Flintan. Sitting at the table: securing benefits for pastoral women from land tenure reform in Ethiopia. (2010) 4 *Journal of Eastern African Studies*. 153–178. P 156. Even sometimes it is claimed that the villagization and sedentartion have been implemented forcefully. (See for instance, Human Rights Watch. "Waiting Here for Death": Displacement and "Villagization" in Ethiopia's Gambella region. *HRW*, 2012; Wendy Liu, G. Alex Sinha, and Rikki Stern. Unheard voices the human rights impact of land investments on indigenous communities in Gambella. *The Oakland Institute*, 2013.

[7] Southern Nation, Nationalities and Peoples' Regional State. Rural land use rent and agricultural activities income tax proclamation No. 4/1996. *Debub Neg. Gaz.* Year 1 No. 5. 1996; Oromia National Regional State. Revised rural land use payment and agricultural income tax proclamation No. 131/2007 issued to amend the previous proclamation No. 99/2005, and rural land use payment and activities income tax amendment proclamation No. 99/2005. 2007.

[8] See for instance Proc. No. 49/2009 (n 5) Article 5(5); Proc. No. 128/2013 (n 5) Article 5(6).

[9] FDRE Constitution (n 3) Article 40(4) and (5).

For the implementation of what ought to be the peasants' right to free access to land the federal as well as state laws incorporate certain common and unique conditions.[10] Nevertheless, before analysing the nature of the requirements it is logical and legitimate to ask whether the phrase in the constitution, "*the implementation shall be specified by law*", empowers the federal government and states to proclaim requirements to be satisfied and if so, what those requirements should be.[11] Unlike most other constitutional rights which provide deferral to define limitations to the rights in legislation, the constitutional deferral at hand mandates the legislature to enact and determine the conditions which operationalises the right to free access to land.[12] Also, unlike most other constitutional mandates to enact legislation, which include general principles and objectives according to which the legislation in question must be enacted, this mandate shows no such guidance.[13] This makes it imperative to deliberate on what legislative measures the state has to take to operationalize this right.

In absence of any constitutional guideline about how the implementation of the right to access to free land is to be done, one should look into the central rationale for the recognition of the right itself. As mentioned in Chapter 3, the basic rationale for the adoption of the "right to free land for all" in the FDRE Constitution is the socialist egalitarian conception of securing "means of livelihood for all." Therefore, the implementing legislation should be framed with the aim of enabling those who are not dependent on others and do not have other means of livelihood to

[10] The conditions are applicable for Agro-pastoralists in the context of Ethiopian Somali state law, the pastoralists who wish to engage in sedentary farming in case of Afar State law, and semi-pastoralists in the Amhara and Benishangul Gumuz States' law.

[11] FDRE Constitution (n 3) Article 40(4). The question of which level of government – the federal or States, have the constitutional authority to define the conditions is discussed in Chapter 8.

[12] For instance, limitation to the right to life, liberty, privacy, freedom of religion, the right to thought, opinion and expression, the right of assembly, demonstration and petition, freedom of association, and the right to private property. See FDRE Constitution (n 3) Article 15, 17(1), 26(3), 27(5), 29(6), 30(2), 31, and 40(1) respectively. Some other constitutional referral can be made for to determine the beneficiaries of the rights. For instance, see the right to nationality for foreigners (*id* Article 33(4)) and the right of labour (*id* Article 42(1(c)). Still the rest are stipulated for defining the nature of protections to be afforded. For example, about women's right (*id* Article 35(5)), child rights (*id* Article 34(1), and investor's land rights (*id* Article 40(6)).

[13] For example in case of limitation for the right to life the referral demanded that the right to life is restricted for a punishment for serious crimes (*id* Article 15); in case of the right to privacy for "…safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others" (*id* Article 26(3)); in case of freedom of religion for "…are necessary to protect public safety, peace, health, education, public morality or the fundamental rights and freedoms of others, and to ensure the independence of the state from religion" (*id* Article 27(5)).

access rural land for livelihood purposes. Below I investigate whether the requirements to access rural land defined in the implementing legislation are framed accordingly.

The assessment of the rural land laws of the federal and state governments reveal that there are two requirements common to all the laws and one unique to State laws.[14] These requirements are cumulative and they are required to be satisfied at the same time. The first one is the desire to engage in agriculture for a living and as the only or main profession to derive one's means of livelihood.[15] This requirement by itself presupposes two things. The claimant must be someone who doesn't have livelihood means or whose livelihood means are insufficient *and* he/she must also be someone who desires to engage in agriculture and utilize the land for agricultural purposes. To put it clearly, the mere lack or insufficiency of other means of livelihood doesn't make the claimer eligible to the right to free land. He/she also has to have the intention to use the land for agricultural purpose only and engage in agriculture as his/her profession.

The irony here is that those who do not possess a means of livelihood cannot access rural land for free unless they engage in agriculture and intend to utilize the land for agricultural purposes. This requirement for free access to land conflicts with the very rationale for why the "right to free land" is granted to Ethiopian citizens in the Constitution. As is noted above, the central aim of this right is to ensure every citizen a means of living. Predefining the purpose for which the land is to be utilized excludes those who are needy and have no means of living, but who want the land for other economic purposes than agriculture to sustain their livelihood. To fit into the rationale for the incorporation of the right in the Constitution, this requirement would have to be defined such that the livelihood of the claimer and his/her family is based simply on the income derived from the land, without limiting the manner in which that income is generated form the land, to agriculture. Otherwise the first requirement for the implementation of the right to free land will work not to implement the right, but to exclude some from its benefit.

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[14] The federal and Benishangul Gumuz State's laws do not provide the conditions directly as requirements to access land for free. They simply have stipulated the requirements as conditions for the right to use rural land.

[15] Proc. No. 456/2005 (n 4) Article 5(1(b)); Proc. No. 52/2007 (n 4) Article 6(1); Proc. No. 130/2007 (n 4) Article 5(1); Proc. No. 110/2007 (n 4) Article 5(2); Proc. No. 49/2009 (n 5) Article 5(5); Proc. No. 85/2010 (n 5) Article 6(1(b)); Proc. No. 128/2013 (n 5) Article 5(6); Proc. No. 252/2017 (n 1) Article 10; Tigray National Regional State. Revised Tigray national regional state rural land administration and use proclamation No. 239/2014. *Tigray Neg. Gaz.* Year 21 No. 1. 2014. Article 8.

The second common requirement is an age requirement. In relation to age the implementing laws make two kinds of stipulation – a principle and, seemingly, an exception. The principle is that to acquire rural land for free a person has to have attained the age of 18 years or above.[16] The legislature's selection of 18 years as a benchmark is not a random selection. It is, rather, the age at which natural persons attain majority and begin to engage in juridical acts independently.[17] It is also based on the assumption that at this age citizens begin to emancipate from their family dependence and start to earn their own bread. Nevertheless, the laws incorporate an exception to this. They imply that minors who haven't attained the age of 18 may exceptionally access rural land for free in cases where they have lost their parents. In such cases they may acquire the right to use rural land through legal guardians.[18] However, the exception, which is incorporated in the federal as well as the states' laws (except Gambella State's) is defined in two different ways that cause different legal consequences. In the Amhara and Benishangul Gumuz State laws the exception is formulated in a way to grant minors the right to access and claim new land,[19] while in the federal and the other state laws the exception doesn't enable the claiming of new land by minors. Instead, it seems to be intended to ensure the continuity of land rights inherited from family. This is inferred while the legislation stipulate and speaks about the right of minors who lost one/both parent/s to have the right to use rural land through legal guardians rather than expressly providing and governing their free access to land.[20] The latter way of regulating the exception presupposes the existence of valid land rights of the parents of the minors. This poses the question of the constitutionality of excluding under 18's from claiming new rural land if they do not have a means of living or a family, or family inheritance to depend on. When one looks at the human rights portion of FDRE Constitution, where it imposes an age restriction on access to a right, it either sets a particular limit explicitly, as in the case of the right to vote, or it explicitly

[16] Ibid.
[17] The Civil Code of the Empire of Ethiopia. Proclamation No. 165/1960. *Neg. Gaz.* Extraordinary Year 19 No. 2. 1960. Article 198.
[18] Proc. No. 456/2005 (n 4) Article 5(1(b)); Proc. No. 110/2007 (n 4) Article 5(8); Proc. No. 49/2009 (n 5) Article 5(10); Proc. No. 85/2010 (n 5) Article 6(1(b)); Proc. No. 128/2013 (n 5) Article 9(9); Proc. No. 252/2017 (n 1) Article 10(2); Proc. No.239/2014 (n 15) Article 8(6). The Oromia State's law doesn't provide it clearly, but from the term "orphans" it has employed we can infer its incorporation of the right of minors to use land rights through representatives. (See Proc. No. 130/2007 (n 4) Article 6(14)).
[19] See Proc. No. 252/2017 (n 1) Article 10(2); Proc. No. 85/2010 (n 5) Article 6(1(b)) respectively.
[20] Proc. No. 456/2005 (n 4) Article 5(1(b)); Proc. No. 110/2007 (n 4) Article 5(8); Proc. No. 49/2009 (n 5) Article 5(10); Proc. No. 128/2013 (n 5) Article 9(9); Proc. No.239/2014 (n 15) Article 8(6); Proc. No. 130/2007 (n 4) Article 6(14).

leaves the determination of the age limit to other laws through referrals, as in the case of the right to marry.[21] Neither of these options apply to the right to free access to rural land, so that the statutory exclusion citizens under 18 years of from this right amounts to a denial of the constitutional right and discrimination based on age.

Besides the above two cumulative, common requirements, states' rural land laws incorporate a third requirement to access land for free. Save for the federal, the states' laws stipulate a residency requirement to access land for free. Accordingly, in addition to satisfying the above two requirements a person must establish that he/she is a resident of the State where he/she claims land for free.[22] In lieu of this requirement, the Ethiopian Somali and Afar State's laws demand the person to be a "pastoralist" to acquire free land for sedentary agriculture.[23] This is also a reflection of a residency requirement, although it excludes non-pastoralists who need land for livelihood and reside in the State concerned.

Nevertheless, those States' laws do not provide an objective standard according to which to determine whether a person is a resident of a state or not. That is, there is no definition of the criteria, conditions and duration of stay that would qualify a person as a resident of a given State. This results in subjectivity and opens space for administrative abuses. Moreover, the residency requirement overlays another question and land tenure insecurity issue related to the ethnic federalism adopted in the country. Basically, the States in the country are formulated and demarcated along ethnic lines.[24] Accordingly, the incorporation of the residency requirement to access land opens the door to discrimination against persons from the ethnic groups of other

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[21] See FDRE Constitution (n 3), Article 38(1(b)) and Article 34(1) respectively.

[22] Proc. No. 252/2017 (n 1) Article 10(1) and 11; Proc. No. 130/2007 (n 4) Article 5(1); Proc. No. 110/2007 (n 4) Article 5(2). The Benishangul Gumuz State's law Amharic version, which is the prevailing in facts, seems to not to incorporate the residency requirement. But the English version clear enough to incorporate it. (See Proc. No. 85/2010 (n 5) Article 6(1(b)). The Gambella State's law goes much far in defining the residency requirement and it refers to the rural residents of the State. (See Proc. No. 52/2007 (n 4) Article 6(1)). The Tigray State law adopts this requirement by requiring the claimer be the resident of the rural kebele/local administration which was not there in its previous rural land law. (See Proc. No.239/2014 (n 15) Article 8(1).

[23] See Proc. No. 128/2013 (n 5) Article 5(6); and Proc. No. 49/2009 (n 5) Article 5(5) respectively. In the English version of Ethiopian Somali State's law, we cannot find the residency requirement/being pastoralist/ to access rural land for free. But in the Amharic and Somali versions it is provided.

[24] FDRE Constitution (n 3) Article 46(2). For more on Ethiopian ethnic federalism see Assefa Fiseha. *Federalism and the accommodation of diversity in Ethiopia: A comparative study*. Tilburg. Wolf Legal, 2006.

States.[25] Furthermore, it leads to States evicting settlers from other States.[26] This is not mere speculation - it has in fact happened in recent years. As seen in section B(i) of Chapter 3, the eviction of members of Amhara ethnic group from the Amhara State settled in the Benishangul Gumuz, Oromia and SNNP States is caused by this requirement and incorrect perceptions about the form of land ownership of the country. It is on the basis of such residency requirement that the State Constitutions defined the concept of "people" in the "state and people's ownership of land." In all states' constitutions except that of the Harari State, the "people" means "*the peoples' of the concerned state*."[27] This, in effect, derogates the Constitutional rights of freedom of movement and the right to engage in any economic activity of one's desire in any place in the country.[28]

Furthermore, this requirement also raises a question of constitutionality. As I note in Chapter 3 section A, the FDRE Constitution secured the right to have access to free land for all Ethiopian peasants and pastoralists. The Constitution, under article 40(4) and (5) states that the "*Ethiopian Peasants*..." and the "*Ethiopian Pastoralists*..." have the right to access to free land. And the

[25] It is common and obvious to find a person belonging to another ethnic group in another State residing in a different States. (See Assefa Fiseha. 'Theory versus practice in the implementation of Ethiopia's ethnic federalism' in David Turton (ed). *Ethnic federalism: the Ethiopian experience in comparative perspective*. Oxford. James Currey Ltd, 2006. 131–164).

[26] The tension among the States on the territorial claim is happening. For instance, the Oromia-Ethiopian Somali States and the Tigray-Amhara States recent times are showing how much regionalism and isolationism among the States in Ethiopia is being intensified. (See William Davison. Ethnic tensions in Gondar reflect the toxic nature of Ethiopian politics. (The Guardian, Dec. 22, 2016); Tom Gardner. Uneasy peace and simmering conflict: the Ethiopian town where three flags fly. (The Guardian, May 16, 2017); Jon Abbink. Ethnic-based federalism and ethnicity in Ethiopia: reassessing the experiment after 20 years. (2011) 5 *Journal of Eastern African Studies*. 596–618).

[27] Afar Regional State. The revised constitution of Afar regional state. July 2002. Article 38(3); Amhara National Regional State. The revised Amhara national regional constitution proclamation No. 59/2001. *Zikre Hig* No. 2 Year 7. 2001. Article 40(3); Benishangul Gumuz Regional State. The revised constitution of Benishangul Gumuz regional state. December 2002. Article 40(3); Gambella Regional State. The revised constitution of Gambella peoples' national regional state. December 2002. Article 40(3); Oromia Regional State. The revised constitution of Oromia regional state. October 2001. Article 40(3); Ethiopian Somali Regional State. The revised constitution of Somali regional state. May 2002. Article 40(3); Southern Nations, Nationalities and Peoples' Regional State (SNNP). Constitution of the Southern Nations, Nationalities and Peoples' regional state proclamation No. 1/1995. *Debub Neg. Gaz.* Year 1 No. 1. 1995. Article 40(3); Tigray National Regional State. Constitution of the Tigray national regional state proclamation No. 1/1995. 1995. Article 40(3).

The Harari State's Constitution, contrary employed the generic term "peoples" without modifying it as the peoples of the State. (See Harari Regional State. 2004. The revised constitution of the Harari People's regional state. October. Article 40(3)).

The subsequent provisions of all the states' constitutions have clearly provided that the constitutional protections and rights with respect to land rights afforded to the peasants and the pastoralists apply only to the residents of the states. For instance, new claimer of land from another State does not have the right to exercises those rights until he/she establishes the residency requirement which is not legally defined.

[28] FDRE Constitution (n 3), Article 32(1) and Article 41(1) respectively.

Constitutional Minutes also indicate that it is the nationality/citizenship that should be considered to implement the right to free access to land.[29] The regionalism in the form of a state residency requirement was not intended by the constitution makers, because, while incorporating this right in the Constitution they were of the assumption that in some States there is a shortage of land, whereas in others there is an abundance.[30] Unless the movement of peoples from a land-scarce State to a land-abundant state to acquire land for a living is allowed, this constitutional right will not be operationalized and ethnic exclusionism will be reinforced. Hence, the incorporation of the residency requirement in the legislation to access land for free inhibits the implementation of the constitutional right to free access to land.[31]

B. "Holding Rights" as Rights in Land of Peasants and Pastoralists and Their Practicability

In Chapter 1 Section C it is established that to realize legal land tenure security, the land tenure system should *inter alia* grant landholders and users certain key broader and practicable rights in land. This broader range of right, nonetheless, is not necessarily required to incorporate the right to sell the land. In the post-1991 Ethiopian context the statutory land tenure system has created for peasants and pastoralists a right in land that is uncommon in property law jurisprudence – *a holding right*.[32] Because its constituent elements are not yet well-articulated and the nomenclature itself is uncommon, scholars have named it differently, as a use right, a possession right or a usufruct right,

[29] Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 4, Nov. 23–29/1994, Addis Ababa), 1994. Deliberation on Article 40. (Amharic document, translation mine).

[30] Ibid.

[31] The state constitutions incorporate the residency requirement to access rural land for free which is not mentioned in the FDRE Constitution. The contradiction between the state constitutions and the FDRE Constitution requires to delineate the juridical relation of them. This is discussed in Chapter 8. However, the appraisal of the state constitutions has revealed that they haven't utilized fully the autonomy offer to reflect in. (See Christophe Van der Beken. Subnational Constitutional Autonomy and the Accommodation of Diversity in Ethiopia. (2015) 68 *Rutgers UL Rev.* 1535–1571). Nevertheless, the derogation of national/federal constitution by the state constitutions and the legality thereof is not well studied. In Chapter 8 an attempt is made to address this issue in relation to the land rights of the peasants and the pastoralists.

[32] See Proc. No. 456/2005 (n 4) Article 2(4); Proc. No. 52/2007 (n 4) Article 2(4); Proc. No. 130/2007 (n 4) Article 2(7); Proc. No. 110/2007 (n 4) Article 2(6); Proc. No. 49/2009 (n 5) Article 2(6); Proc. No. 128/2013 (n 5) Article 2(4); Proc. No. 85/2010 (n 5) Article 2(4); Proc. No. 252/2017 (n 1) Article 2(24). The Amharic version of all legislation except the Tigray State have employed the same terminology though we can find variations in the English one. The Tigray State law doesn't provide a nomenclature and definitional clause to it; whereas, the Oromia and Benishangul Gumuz State's laws English version called it as possession right.

while others prefer to call it what it is.[33] For the sake of my own clarity of conception and to clearly demarcate the place of the holding right in the scheme of rights in land, let us regard the two broader categorizations of land rights in a contextualized manner. One is the categorization of property rights that developed in accordance with the classic Roman law and Blackstonian conception of private property, and the other is one which was developed by Schlager and Ostrom.

The classic Roman law and Blackstonian conception of private property – ownership - is the amalgamation of the right to *usus*, *fructus* and *abusus*.[34] The legal regime that defines the rights in land may grant a person with either all the three corpuses of rights (ownership right), *usus* right only (use right), *usus* and *fructus* rights (possession rights) or *usus* and *fructus* and limited *abusus* rights together (usufruct rights).[35] In breadth of rights terms, the classic Roman law / Blackstonian

[33] For use right see Tesfaye Teklu. Rural land, emerging rental land markets and public policy in Ethiopia. (2004) 16 *African Development Review*. 169–202. P 171 calls it as use right but equated it usufruct right; and Dessalegn Rahmato. *Searching for tenure security? The land system and new policy initiatives in Ethiopia.* Addis Ababa. Forum for Social Studies, 2004. P 2; for possession right see Belachew Mekuria. 'Human rights approach to land rights in Ethiopia' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 49–94. P 91; for usufruct right see Wibke Crewett, Ayalneh Bogale, and Benedikt Korf. *Land tenure in Ethiopia: Continuity and change, shifting rulers, and the quest for state control*. Washington Dc. International food policy research Institute (IFPRI), 2008. P 16; for holding right see Daniel Weldegebriel. Land rights in Ethiopia: Ownership, equity, and liberty in land use rights. Rome. *FIG Working Week*, 2012. P 10.

[34] See Shael Herman. The uses and abuses of Roman law texts. (1981) 29 *The American Journal of Comparative Law*. 671–690. Footnote 15; William Blackstone. *Commentaries on the laws of England*. (WM. Hardcastle Browne, A.M., ed) West Publishing Co. St. Paul, 1897. P 43.

[35] The freedom and bundle of rights in each corpus may vary from jurisdiction to jurisdiction and even with the change the world social order in every spectrum the scopes of them may widen through time to time. Moreover, the rights may be timely limited or unbounded one. In the use right, a person or a community who holds it is entitled to personally use the resource without cause substantial physical change to it. (See Oran R. Young. Rights, rules, and common pools: solving problems arising in human/environment relations. (2007) 47 *Natural Resources Journal*. 1–16. P 6; Herman (n 34)). In case of possession right the holder in addition to use right, is entitled to collect the fruits, i.e. the incomes and benefits derived from the resource without permanently losing the right over the resource. (See Gerard C ipar isse (ed). *Multilingual thesaurus on land tenure*. Rome. FAO, 2003. P 24.) He/she can collect and enjoy the fruits of the resource by letting it to be used by others like by renting or by collateralizing the right over the thing. Well other jurists considered these bundles of rights as part of alienation/*abusus* rights. However, I do not consider them as part of right to *abusus*. Because, the right to *abusus* presupposes transfer/loss of the entire entitlement on the resources. But in case of leasing/renting and mortgaging a holder's entitlement on the resource is not totally transferred and these rights are not aimed at disposing of the rights but to make benefit of them. He/she has still the right to reclaim the resource in some point. The usufruct right grants the right holder with the *usus* and *fructus* rights as defined above and limited *abusus* rights. As part of *abusus* right, it grants the holder with right to alienate in any form the rights in the resource but with a duty of preservation for the owner or without affect the interest of the owner. (See *id* p 32). Though it mostly ends up with the death of the holder, some jurisdictions make it transferable to successors. (See *id* p 38). In case of ownership, which is considered as the complete and the widest property right, besides the use right, *fructus* right and usufruct right (he/she may assign these rights to others), the owner has the right to permanently dispose/alienate the resource in any form. (See *id* p 17) Here what is disposed is not only the right over the resources but also the resource itself. And the disposal/alienation right is carried out either permanently transferring the ownership itself or by destroying the resource if it does not cause a damage to public. (See *id* p 5).

understanding of private property gives rise to these four categories of property rights. However, the bundle of rights, particularly in the possession right and usufruct right may vary from legal system to legal system and time to time.

Schlager and Ostrom, on the other hand, have developed five levels of bundles of rights over resources. Even though they initially developed this for common resources, it can also be applied to individually held resources. These are access rights, withdrawal rights, management rights, exclusion rights and alienation rights.[36] The access right defines "the right to enter a defined physical property" (thing/resource).[37] In their conception the access right provides a person or a community with the right to acquire the thing against which rights are to be exercised. Accordingly, it may not provide the right holder with specific bundle of property rights and it may not be considered as one type of property right, strictly. That is why it is redefined to add the right to "enjoy non-subtractive benefits" into it.[38] The withdrawal right grants the holder with the "right to obtain the products of the resource" without making improvement and changes to it.[39] It presuppose the holding of access right. The management right, on the other hand, gives a broader right than the withdrawal right in that it empowers the holder with the right to determine the internal use-patterns and to transform the resource by making improvements.[40] It further empowers the holder with the right to define when, how and where the obtaining of products of the resource is to be carried out and whether and how the structure of the resource is transformed.[41] Unlike the withdrawal right that limits the extraction of products of the resource to extraction in its natural state, the management right entitles the holder with the right to transform and make improvements in the way and manner of extracting products and employing the resource into use. Their fourth type of property right is the exclusion right. The holder of the exclusion right may assign the above rights to others. That is, he has the right to define who can exercise the above rights and how they

[36] Edella Schlager and Elinor Ostrom. Property rights regimes and natural resources: a conceptual analysis. (1992) 68 *Land Economics*. 249–262. They categorized these five types of property rights to two broader categories as operational level rights – exercising rights (include access and withdrawal rights) and collective choice rights – involvement in demarcation of future rights to be exercised (include management, exclusion and alienation rights).
[37] Id p 250.
[38] Elinor Ostrom and Charlotte Hess. *Private and common property rights*. Encyclopaedia of Law & Economics. Northampton. Edward Elgar, 2008. P 11; see also Crewett *et al* (n 33) p 4.
[39] Schlager and Ostrom (n 36) p 250.
[40] Id p 251.
[41] Ibid.

can be transferred.[42] This right gives the freedom of determining the manner of transfer of the access, withdrawal or management rights and the transferee thereof. Finally, the alienation right, which is the last and the widest right, entitles the holder with authority to transfer all or part of the management and exclusion right, against which the former holder loses his/her property rights.[43] It incorporates the right to sell or lease the management and exclusion rights.[44]

Therefore, it becomes paramount to determine to which category of right in the above two categorizations the rights in land of peasants and pastoralists in Ethiopia fall. This is so, because lack of clarity and ambiguity about the nature of the rights a given person possesses by itself has a negative implication on the tenure security.[45] To put the holding rights in the above two categorizations, we should go through how it is defined in the definitional clause and what the main part provides for. With slight variation in the federal as well as the States laws, except for Tigray, Benishangul Gumuz and Amhara States' laws, a holding right is defined as "the right of any peasant farmer…and pastoralist… to use rural land for the purpose of agriculture and natural resource development, lease and bequeath to members 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 sell, exchange and bequeath same."[46] While the Tigray State law fails to define a holding right, the Benishangul Gumuz and Amhara State laws define it more broadly than other states. They state that a holding right is "…a right of any farmer or semi pastoralist or *any other body vested with*

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[42] Ibid.
[43] Ibid.
[44] Ibid. However, Schlager and Ostrom property right categorization does not examined the possible bundles of rights to be incorporated in each category particularly in the collective choice rights. Because of this, different persons with different bundle of property rights may be categorized in the same type according to them, though the breadth of bundle of rights in two were different. For instance, we can take the possession, usufruct and ownership rights defined above in accordance with the classic Roman law and Blackstonian conception. Though scope and nature of varies, the ownership, usufruct, possession rights have an alienation right in their understanding (As I argued above lease and mortgage are not part of *abusus* right). (See footnote 35). Therefore, in their analysis these three categories of property rights can be categorized all together in one, i.e. alienation right, they have differences in the breadth of property rights and implication of tenure security.
[45] Klaus Deininger. *Land policies for growth and poverty reduction*. Washington DC. The World Bank, 2003. P 36; The World Bank. Liberia insecurity of land tenure, land law and land registration in Liberia. *Report No. 46134-LR*, 2008. P 1; Frank Place, Michael Roth, and Peter Hazell. 'Land tenure security and agricultural performance in Africa: Overview of research methodology' in John Bruce and Shem E. Migot-Adholla (eds.). *Searching for land tenure security in Africa*. Washington DC. The World Bank,1994. 15–40. P 15.
[46] Proc. No. 456/2005 (n 4) Article 2(4); Proc. No. 52/2007 (n 4) Article 2(4); Proc. No. 130/2007 (n 4) Article 2(7); Proc. No. 110/2007 (n 4) Article 2(6); Proc. No. 49/2009 (n 5) Article 2(6); Proc. No. 128/2013 (n 5) Article 2(4). However, the substantive part of the laws of those States' that constitutes pastoralist community, the lease/rent rights is defined only for the private holdings and the agro/semi pastoralists.

rights on it in accordance with this proclamation to be the holder of land, to create all assets on the land, to transfer an asset he created, not to be displaced from his holding, *to use his land for agricultural and natural resource development and other activities*, to rent land, to bequeath same, to *transfer it as a gift and [other similar rights].*"[47]

Leaving aside the difference between the two definitional clauses with respect to whom the right may be held by and the breadth and exhaustiveness of the rights, from these conceptions of holding right it can be inferred that the Ethiopian legal regime entitles peasants and pastoralists with two categorical property rights.[48] These are the rights in the land and the rights over the things produced on the land. In relation to the rights in the land, which is the concern of this thesis, the laws articulate all three of the traditional aspects of property rights – *usus*, *fructus* and *abusus* – in a restrictive manner. Accordingly, they grant peasants and the pastoralists with restricted usufruct rights and alienation rights in the classic Roman law and Blackstonian and Schlager and Ostrom categorization respectively.

However, what is reflected in the definitional clause doesn't exactly describe the constituting element of the holding right as it can be inferred from the main and substantive body of the laws. And summing up the holding right as guaranteeing to peasants and pastoralists the use, lease and bequeath bundles of rights in land besides the complete rights over the products of land, is wrong and *de facto* narrows the bundle of rights. Moreover, the lack of clarity and ambiguity with the nature of property in land of peasants and pastoralists results in confusion, which in effect derogates from land tenure security.

The definitional clause of the holding right also confines landholders' *usus* right to only use for agricultural and natural resource development purposes. It clearly implies that peasants and pastoralists are not allowed to change the purpose for which the land is to be utilized even in the long run, except for Benishangul Gumuz and Amhara State's laws, because the latter State's laws,

[47] See Proc. No. 85/2010 (n 5) Article 2(4); Proc. No. 252/2017 (n 1) Article 2(24). These laws go further in defining the nature of the property right to incorporate the other legal constructs afforded to secure the land tenure.

[48] With respect to products over land the Constitution and the rural land laws give a complete property right. However, the Oromia state law prohibited sale of fixed assets. (See Proc. No. 130/2007 (n 4) Article 6(2)). The legality and the legal consequence of which requires a further study. Because both the FDRE and the Oromia State's Constitutions have not stipulated such restriction on the property rights over even immovable things built on land. (See FDRE Constitution (n 3) Article 40(7); Oromia state Constitution (n 27) Article 40(7)).

as stated above, imply that it can be employed for other activities. This in effect limits the freedom of peasants and pastoralists to determine the purpose for which they can use the land.

However, the laws fail to describe the legal consequence of changing the purpose for which land is utilised away from agriculture to sustain livelihood. This by itself opens space for administrative abuses as it allows administrators to take any measures, they think necessary in their own discretion.

A question that arises here is whether the purpose for which the land is used can be changed if the peasants or the pastoralists agree to undertake a development activity jointly with an investor. Except for the Gambella, and Tigray States' laws, the federal as well as the rest States' laws incorporate the right to use the land as a contribution for a *development activity* jointly with an investor.[49] The laws in this case do not specify the purposes for which the land can be utilized. They simply use a general term – development activity – to indicate a permitted purpose broader than agriculture and natural resource development. This implies that the laws have broadened the purpose for which the land may be used when it is a contribution for a joint investment.

In relation to the right to *fructus*, the definitional clause provides for two basic ways of getting fruits of the land. One is with respect to the products of the land, on which the laws establish complete ownership rights. The other is the fruits collected by letting others use the land for agricultural purposes, through a lease arrangement. A contrary reading would indicate that it doesn't allow deriving of fruits of the land through other means, for instance using the land rights as contribution to an investment with others, and as collateral for borrowing (except the 2017 Amhara State rural land law). However, as seen above, when one goes through the substantive part of the federal and some state laws, the peasants and the pastoralists are entitled to other bundles of rights in the corpus of the right to *fructus*.[50] That is, they have the right to use the land right as a contribution for a joint development activity with an investor. Accordingly, the substantive part of

[49] Proc. No. 456/2005 (n 4) Article 8(3); Proc. No. 128/2013 (n 5) Article 13 (1); Proc. No. 130/2007 (n 4) Article 10(8); Proc. No. 110/2007 (n 4) Article 8(3); Proc. No. 85/2010 (n 5) Article 19(13); Proc. No. 49/2009 (n 5) Article 14(1). The Ethiopian Somali State's law English version seems to limit the joint development with investor only to agriculture, but the Amharic version has not confined to it. The Gambella and Tigray State laws are totally silent in this regard. It creates a variation in the bundle of rights. The Amhara State law incorporates it as a right only in its 2017 rural land law. (See Proc. No. 252/2017 (n 1) Article 18)).

[50] The Gambella State's law even fails to regulate the right to lease in the substantive part of the law by which it is required to address the extent of the land to be leased out and the duration thereof.

the laws has broadened the breadth of the rights in this respect. However, all the laws remain silent about the other key right of this corpus – the right to use the land rights as collateral with the exception to the 2017 Amhara State law. And all the *revisionists* and the ruling party were of the view that it is constitutionally prohibited, which is not true, as I argued in Chapter 3 section B(ii).

This is so, because, had it been prohibited constitutionally the prohibition should have been applied to all landholders, including investors, as constitutional prohibitions are framed in a general manner for all landholders.[51] This assumption would therefore make the law allowing investors to use their land rights as collateral incompatible with constitutional rule. It also puts a doubt about from where the Amhara State law gets authority to grant the peasants with the right to mortgage their land rights.[52] As result, it narrows the freedom of landholders to determine the modes by which they can derive fruits of the land.

About the right to *abusus* as well, the definitional clause provides only one of the bundles of rights – the right to bequeath. However, the Benishangul Gumuz and Amhara State laws additionally incorporate the right to donate land rights and stipulate the right to *abusus* in an illustrative way. Although it is not necessary to include the right to sell the land, the corpus of the right to *abusus* must be broad enough to secure land tenure by granting the landholders the rest of the bundle. Unlike the definitional clause, the substantive part of the rural land legislation of the federal government and States other than Oromia, Benishangul Gumuz and Amhara entitle peasants and pastoralists with other elements of the *abusus* right that are not ordinarily rights that accrue to peasants and pastoralists. For instance, the substantive parts of those laws impliedly incorporate the right to donate, while defining the sources from which a peasant or a pastoralist can get rural land.[53] While the Oromia, Amhara and the Benishangul Gumuz State laws entitle peasants and pastoralists with the right to donate their land rights directly as one element of the *abusus* right,[54]

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[51] The Oromia State's law does not allow even the investor to use his land rights as a collateral. It authorizes only collateralization of assets on the land. (See Proc. No. 130/2007 (n 3) Article 15(15)).

[52] Whether the federating States in Ethiopia has the power to define the rights in land is discussed in detail in Chapter 8 Section D.

[53]Proc. No. 456/2005 (n 4) Article 5(2); Proc. No. 128/2013 (n 5) Article 9 (12); Proc. No. 130/2007 (n 4) Article 10(8); Proc. No. 110/2007 (n 4) Article 5(11); Proc. No. 49/2009 (n 5) Article 9(13); Proc. No. 52/2007 (n 4) Article 7(3); Proc. No.239/2014 (n 15) Article 8(10). The Afar and Ethiopian Somali State's laws deal about semi-pastoralists not about pastoralists. So, they in effect dealing with individually held land rights.

[54] Proc. No. 130/2007 (n 4) Article 9(5); Proc. No. 252/2017 (n 1) Article 16(1); Proc. No. 85/2010 (n 5) Article 18(1). Though the Oromia State's law adopts donating land in a right base, it is not any different from the other State's laws that do not adopted this approach in defining the freedom of the landholder in selecting the donee.

the federal and other States' laws enshrine it as a means of acquiring rural land. The recognition in the two approaches of the right to donate will have different results in relation to peasants' and pastoralists' freedom. The approach in the Amhara and Benishangul Gumuz States' laws provide better liberty for the landholders in deciding to whom they can donate the land rights. The other laws, by contrast, limit freedom by defining who can get land through donation. This differential treatment can also clearly be inferred from how the two categories of laws regulate the issue of donation, as is seen in Chapter 5.

The other land right in the *abusus* corpus granted to the peasants and the pastoralists in the substantive part of the rural land laws is the right to consolidate and exchange plots of land. The right to consolidate land and exchange land for land is stipulated in two forms in the legislation. The Amhara and Tigray State rural land laws frame it as a right of landholders;[55] whereas the other laws under the study treat it as a policy goal to be encouraged and worked towards.[56] The legal consequence of regarding it as a policy direction is that consolidation and exchange is dependent on authorization of an administrative body and that there is no capacity to take legal action to make it effective in case of the unjustified refusal of the implementer. However, to limit bureaucratic abuse, the legislation in this approach provides that exchange and consolidation must be carried out voluntarily, with the full consent and participation of the concerned landholders. On the other hand, regarding it as a right limits the state's role to facilitate consolidation or exchange and the discretion to exchange and consolidate the land remains with the landholders.

[55] Proc. No. 252/2017 (n 1) Article 20; Amhara National Regional State. Rural land administration and use system implementation Council of Regional Government regulation No. 51/2007. *Zikre Hig.* Year 12 No. 14. 2007. Article 8 and 10; Proc. No.239/2014 (n 15) Article 16. Initially the previous in Amhara State's law, the right to exchange and consolidate land is provided in the regulation which is hierarchically below proclamation. Then it raised the question whether it is legally possible to define a right in a lower implementing law which is not incorporated in the higher primary law. However, the 2017 rural land law of the State expressly incorporates them and recognizes the application of the regulation enacted under the previous proclamation until a new regulation is enacted. (Proc. No. 252/2017 (n 1) Article 61).

[56] Proc. No. 456/2005 (n 3) Article 11(5) deals about land consolidation as an objective to be achieved in the settlement and villagization program and it does not talk about exchange of land for land; Proc. No. 128/2013 (n 5) Article 12(4-6); Proc. No. 130/2007 (n 4) Article 8; Proc. No. 110/2007 (n 4) Article 11(4); Proc. No. 49/2009 (n 5) Article 13(5 and 6); Proc. No. 85/2010 (n 5) Article 28(4 and 6); Proc. No. 52/2007 (n 4) Article 9(8) and Article 16(5). However, the extent land consolidation and exchange allowed also raises a question particularly with the federalism adopted. About land consolidation and exchange within an administrative set up will not cause a problem. However, it causes a problem when it is done across States or zonal administration in some States where the administrative demarcation is made based on the ethnicity. Only the Tigray State's law confines the exchange in kebele/village/ and woreda/district/ levels.

An issue does arise, however, with the constitutionality of allowance for land consolidation and exchange, because, as seen in Chapter 3 Section B(ii), sale and exchange of land by any means is prohibited in the FDRE Constitution. The statutory authorisation for peasants and the pastoralists to consolidate or exchange may be read as in violation of this constitutional limitation. However, given that, as I argue in the same section, constitutional prohibitions are supposed to be constructed restrictively and interpreted through a policy-directed approach; and that this exclusion refers only to sale and other modes of exchange which have the same effect and nature as sale, I would argue that the consolidation and exchange of land is not constitutionally prohibited. Even if one interprets the constitutional prohibition from a historic-purpose approach, one can infer that these means of exchange are permitted, since the constitutional exclusion of sale and exchange of land is aimed at protecting peasants and pastoralists against being placed in exploitative tenancy arrangements with the bourgeoisie after distress sale of land. Consolidation and exchange of land among peasants and pastoralists themselves doesn't result in this.

The above analysis of the nature of land rights defined in the legislation implies that the legislatures mainly presupposed the individualized peasants' and agro-pastoralists' landholdings. They haven't supposed the possible practicability challenges to be faced in the implementation of some of the rights to *usus, fructus* and *abusus* in pastoralists' communities, where communal landholding at clan and tribe level is prevalent. Particularly the federal legislation, which is supposed to be framework legislation by which the states are to be guided in fashioning their own legislation, has not made any separate determination of the nature of the rights in land of the peasants and the pastoralists considering the way of land holding and of the utilization system.[57]

In fact, these laws demand the consent of all the members of the community to exercise those specific land rights like leasing and contributing land rights as an investment contribution.[58] However, this stipulation, that wrongly assumes the role of land for pastoralists as economic only, supposes the possibility of getting the consent of each of the members of the community to make effective those individualistic rights. For pastoralist communities, including agro/semi-

[57] The only exception in this regard is the Afar, Somali and Oromia State's laws limiting of the right to lease land only to private holdings. In other words, these laws deny the pastoralists from leasing their communal landholdings.
[58] For instance, about leasing see Proc. No. 456/2005 (n 4) Article 8(2); Proc. No. 49/2009 (n 5) Article 11(2); Proc. No. 252/2017 (n 1) Article 15(5); Proc. No. 85/2010 (n 5) Article 19(7); Proc. No. 128/2013 (n 5) Article 11(3); Proc. No. 130/2007 (n 4) Article 10(6); Proc. No. 110/2007 (n 4) Article 8(2).

pastoralists, pastoralism is more than an economic activity and source of income. It is instead part of their way of life, cultural manifestation and social and ecological interaction.[59] Therefore, rather than defining the nature of their rights in land in accordance with the prevailing customary tenure system with the observance of human rights, the introduction of a statutory tenure system that introduces individualized rights would impede the overall ecological, social and cultural interaction of the pastoralist community. It would also result in conflicts of interest among the members, since they may decide to exercise completely different rights at the same time. Some may consent to lease out the land, whereas others may decide to use the land. In such cases, rather than enhancing tenure security, the introduction of such individualised rights may become a new, legally introduced source of conflict. For such a system of rights to work in that context would require a total socio-cultural transformation of the pastoralist community, which must happen naturally and not through state imposition.[60] Nevertheless, it is clear that coercive transformation is being carried out by the state to convert pastoralists to a sedentary agrarian society, requiring them to adapt to the statutorily defined tenure system rather than adapting the tenure system to their customary land tenure arrangement.[61]

C. Duration of Land Rights

The duration of land rights (whether general or specific), the other legal construct of land tenure security should be defined based on the purpose for which land is acquired and should be long enough to garner the expected benefits. The duration of specific rights should be defined not in the legislation, but in the agreement between the specific parties. Moreover, as I note in Chapter 1

[59] Michele Nori and Jonathan Davies. Change of wind or wind of change: Climate change, adaptation and pastoralism. Nairobi. *WISP, IUCN*, 2007; Yohannes Aberra and Mahmmud Abdulahi (eds). *The intricate road to development: Government development strategies in the pastoral areas of the Horn of Africa*. Addis Ababa. Institute for Peace and Security Studies, 2015. P 2.

[60] However, nowadays pastoralism by itself is in crisis and basic factor is the external one including the state policy. (See Lemessa Demie Anbessa. 'Ethiopian pastoralist policy at the crossroads: further marginalization or revitalization?' in Yohannes Aberra and Mahmmud Abdulahi (eds). *The intricate road to development: Government development strategies in the pastoral areas of the Horn of Africa*. Addis Ababa. Institute for Peace and Security Studies, 2015. 16–71; Boku Tache. *Pastoralism under stress: resources, institutions and poverty among the Borana Oromo in southern Ethiopia* (Doctoral dissertation, Norwegian University of Life Sciences), 2008; Ayalew Gebre. *Pastoralism under pressure*: *Land alienation and pastoral transformations among the Karrayu of eastern Ethiopia, 1941 to the present*. Maastricht. Shaker Publishing, 2001.

[61] See for instance, Bekele Hundie and Martina Padmanabhan. The transformation of the Afar commons in Ethiopia: State coercion, diversification and property rights change among pastoralist*s* (No. 87). *International Food Policy Research Institute (IFPRI),* 2008.

Section C(iii), if the land is acquired for livelihood purposes, the duration of the right should be defined as for a lifetime, to secure land tenure for that purpose.

Unlike elsewhere, as I discuss in Section A above, in Ethiopia peasants and pastoralists access land for a livelihood – they do so to make their living from an income derived from the land they possess. For pastoralists, land is also acquired to exercise their way of life, culture and social interactions. This in turn requires the duration of the general land rights to be for a lifetime. In line with this, the rural land laws of Ethiopia guarantee peasants and pastoralists with life-long land rights. In the same fashion as the various State laws, the federal law states that "[t]he [r]ural land use right of peasant farmers, semi-pastoralists and pastoralists shall have no time limit."[62]

However, some scholars have criticized the legislation as it failed to define the duration of rights. This they regard as a cause for perpetuation of land tenure insecurity.[63] They argue that the failure to set a fixed, definite time period is a serious omission that eventually leaves land tenure security unclear.[64] Their assumption is that it puts the landholders in uncertainty about for how long their land rights are legally valid and they recommended the introduction of renewable fixed long-term lease periods, like that of the China and Vietnam model.[65] I argue instead that the legislation has taken the right path in framing the general duration of the rights, that is compatible with the purpose for which peasants and pastoralists acquire land rights. Accordingly, they have satisfied the legal construct of land tenure security in this respect, because, for one thing, the period is defined in terms of the life span of the landholder rather than numerically, in fixed duration. And the maximum duration a given landholder whose livelihood depends on land demands to secure land

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[62] Proc. No. 456/2005 (n 4) Article 7(1). The same stipulation is made under state laws. (See Proc. No. 128/2013 (n 5) Article 5 (1) and 9(4); Proc. No. 130/2007 (n 4) Article 6(1); Proc. No. 110/2007 (n 4) Article 7(1); Proc. No. 49/2009 (n 5) Article 5(1) but it doesn't define the duration of the land rights of semi-pastoralists especially on their farming land; Proc. No. 52/2007 (n 4) Article 8(1); Proc. No.239/2014 (n 15) Article 8(2); Proc. No. 252/2017 (n 1) Article 5(3); Proc. No. 85/2010 (n 5) Article 5(4).

[63] See for instance, Crewett *et al* (n 33) p 16.

[64] Ibid.

[65] Samuel Gebreselassie. Land, land policy and smallholder agriculture in Ethiopia: options and scenarios. (The Future Agricultures Consortium, the Institute of Development Studies), 2006. For more on Vietnam land law see Ha Noi. Improving land acquisition and voluntary land conversion in Vietnam. *The World Bank Policy Note*, 2009; and on China see Peter Ho. *Institutions in transition: land ownership, property rights, and social conflict in China*. New York. Oxford University Press, 2005; Thomas Vendryes. Land rights in rural China since 1978: Reforms, successes, and shortcomings. (2010) 84 *China perspectives*. 87–99; Margo Rosato-Stevens. Peasant land tenure security in China's transitional economy. (2008) 26 *BU Int'l LJ*. 97–141.

tenure is for his/her lifetime. The Ethiopian rural land laws guarantee the peasants and the pastoralists with such lifetime duration.

In the meantime, in relation to the specific duration of land rights the laws adopt two approaches. For instance, regarding leasing/renting, the laws adopt a numerically fixed and predefined approach to delimit the duration. The federal legislation implies that the period should be determined by the state's legislation. [66] Accordingly, the state's laws fix the duration for the lease/rent period. This is not uniform throughout the country. As I discuss in detail in Chapter 5 section B(i), the predefined lease or rent period in the legislation varies from state to state and even depending on the nature of the activities for which the land is rented or leased out.[67] This legislative intervention on the landholders' freedom to determine the specific duration of land rights has the implication of perpetuating the land tenure insecurity. Moreover, the regional variation also creates the sense of favoured and disfavoured among the peasants for the sole reason that they are living in different states. The peasants residing in the state that defined the shortest specific duration of land rights may feel as if they are discriminated against and that preferential treatment is afforded to the peasants in the other states.[68]

The second approach is silence about the specific land rights duration. This approach is deduced from the failure to delimit the duration of temporary gifting of the land rights. As seen in Section B above, the Ethiopian laws empower the peasants and pastoralists with the right to donate land rights. Donation/gift can take two forms in relation to period – permanent or temporal. And here the issue of specific duration comes onto the scene, when the landholders opt to donate the land use right temporarily. However, it is only the Amhara and Benishangul Gumuz State's laws that regulate the idea of temporary donation.[69] The other states' and the federal laws do not provide such classifications. In those two State's laws also, the permitted duration of the temporary donation is not predefined. The legislatures seem to leave its determination to the landholder donor

[66] Proc. No. 456/2005 (n 4) Article 8(1).
[67] See Proc. No. 128/2013 (n 5) Article 11 (2); Proc. No. 130/2007 (n 4) Article 10(2); Proc. No. 110/2007 (n 4) Article 8(1); Proc. No. 49/2009 (n 5) Article 11(2); Proc. No.239/2014 (n 15) Article 9(4); Proc. No. 252/2017 (n 1) Article 15(9); Proc. No. 85/2010 (n 4 above) Article 20(1(d)).
[68] The difference among the States' law in defining the specific duration is the result of the federal government's delegation of the States to fix the lease period. However, it poses the question that whose power is it to define the duration – the federal or state government and whether it is a delegable power. The detail discussion on this point is made in Chapter 8.
[69] Proc. No. 252/2017 (n 1) Article) 16(5); Proc. No. 85/2010 (n 4) Article 18(2)

although a contrary reading may be advanced, that the duration fixed for leasing/renting will be *mutatis mutandis* applicable to temporal donation. The two state laws' silence doesn't realise the required freedom of the landholder for satisfaction of the legal construct of duration of land rights.

D. Registration and Certification of Land Rights

In Chapter 1 I show that in the adoption of a holistic approach – putting all the legal constructs of land tenure security together – registration and certification of land rights can play an important role to enhance land tenure security.[70] It does so by making some bundles of rights practicable and by being a means to prove entitlements. The realization of these benefits of registration and certification of land rights basically depends on the inclusive, cheap, participatory, impartial and accountable nature of the process, and its legal status.[71] The registration and certification must be done for all landholders and landholdings in a least cost manner, which the landholders can afford. Moreover, the process itself must unfold in a manner that enables the public to participate in the identification of the true landholders and the boundary thereof.[72] It should also be carried out in an impartial way and the violation of such impartiality should result in a liability. Finally, the evidentiary role of the registration and certification must be conclusive, unless it, itself is contested. Its absence, particularly in Ethiopia would create the perception of vacant and unoccupied land on the side of the state.[73]

These principles of the registration and certification of land rights are required to be predefined in the legislation to enhance legal land tenure security, first. Accordingly, below I examine the Ethiopian legal framework in establishing the legal construct of registration and certification of land rights to perpetuate land tenure security. In relation to inclusiveness, the federal as well as States' legislation, except for Gambella State determine that the registration and certification of

[70] In particular see section A(i), B and C of Chapter 1.
[71] Klaus Deininger and Gershon Feder. Land registration, governance, and development: Evidence and implications for policy. (2009) 24 *The World Bank Research Observer*. 233–266. Deininger and Feder argued that the role of land registration in enhancing land tenure security depends up on the coverage, cost-effectiveness and the quality of service provision.
[72] Gershon Feder and Akihiko Nishio. The benefits of land registration and titling: economic and social Perspectives. (1999) 15 *Land Use Policy*. 25–43. Feder and Nishio have claimed that the prerequires for the land registration to be effective in securing tenure are the economic viability and social acceptability of the process by itself. Particularly, I argue that the social acceptability of land registration can be realized when the public is participated in the process and affected parties are given the chance to challenge it.
[73] Jon Abbink. 'Land to the foreigners': economic, legal, and socio-cultural aspects of new land acquisition schemes in Ethiopia. (2011) 29 *Journal of Contemporary African Studies*. 513–535. P 517; GTP II (n 6) p 26.

land rights be carried out for all landholding types.[74] The Gambella State's law requires land registration and certification for peasants' private and communal holdings, but is silent with respect to pastoralists' holdings.[75] The certificate to be issued is supposed to indicate the size of the land, land use type and cover, level of fertility and borders, as well as the obligations and rights of the holder.[76] Moreover, the federal legislation, here also framed such as to favour peasants' mode of land utilization against the pastoralists' communalism, requires that the certificate be issued in the name of all the joint holders, if it is jointly held.[77] However, it doesn't mention on whose name the registration and certification is to be done with respect to communal land held by the pastoralist community. Some states' laws indicate that the certificate with respect to the pastoralists' communal land rights be issued in the name of the cooperative associations or the beneficiary community.[78] In the meantime, even for private holdings, the Amhara and Benishangul Gumuz State's laws introduce an exclusion to registration and certification of land rights in terms of the size of the landholding. Hence, "[t]he land which is less than the minimum limit of holding shall not be registered alone in the book of land holding certificate."[79] The discrimination against the landholders whose holdings are less than the minimum limit and the pastoralist communal holdings in certain states stated above doesn't have any rationality. Instead, it limits them from consummating the intended benefits of registration and certification of land rights towards land tenure security.

About the extent and coverage of the cost of registration and certification of land rights, the laws are silent. The already conducted registration and certification processes indicate that the costs are

[74] Proc. No. 456/2005 (n 4) Article 6; Proc. No. 128/2013 (n 5) Article 6 and 10; Proc. No. 130/2007 (n 4) Article 15; Proc. No. 110/2007 (n 4) Article 6; Proc. No. 49/2009 (n 5) Article 6 and 10; Proc. No.239/2014 (n 15) Article 27; Proc. No. 252/2017 (n 1) Article 33-35; Proc. No. 85/2010 (n 5) Article 25-27.

[75] Proc. No. 52/2007 (n 4) Article 9.

[76] Proc. No. 456/2005 (n 4) Article 6(3); Proc. No. 128/2013 (n 5) Article 10(3) but regarding the content of the land holding certificate of pastoralists the law is silent; Proc. No. 130/2007 (n 4) Article 15(4); Proc. No. 110/2007 (n 4) Article 6(3); Proc. No. 49/2009 (n 5) Article 10(3) but the content of the pastoralists holding certificate is not defined in the law; Proc. No. 252/2017 (n 1) Article 34(2); Proc. No. 85/2010 (n 5) Article 27(1).

[77] Proc. No. 456/2005 (n 3) Article 6(4).

[78] Proc. No. 128/2013 (n 5) Article 6(1); Proc. No. 130/2007 (n 4) Article 15(16); Proc. No. 110/2007 (n 4) Article 6(12); Proc. No. 49/2009 (n 5) Article 6(2) and 10(9). However, arguing to the mobility nature of the pastoralist communities, their land holdings are not yet demarcated, and certificate is yet issued. (See John Medendorp, Gerhardus Schultink, John Bonnell, Mengistu Woube, Alehegn Dagnew, and Raul Pitoro. Ethiopia land administration and nurture (land) project: Ethiopian land administration professional educational demand assessment, and basic curricula and institutional capacity review. *USAID and TETRA TECH ARD,* 2015).

[79] Proc. No. 252/2017 (n 1) Article 35(7) though the proclamation has left this matter to be addressed in the regulation, the previous regulation that is applicable until the new one is promulgated has failed to regulate it; Proc. No. 85/2010 (n 5) Article 27(6).

to be covered by the State and donor agencies.[80] The landholders pay a fee only to receive the certificate.[81] However, the future direction is uncertain and no clear stipulation is made about the cost to get a substitute certificate of holding in case the former is lost or the size and the landholders' name is changed. About the second-stage land certification, the government is expecting that the landholders to share the cost, as it is going to be costlier than the first one.[82] Nevertheless, the rural land laws do not impose an obligation on the landholders to share the cost of registration and certification of land rights. Instead, they regulate it as a state obligation and program that must carried out to enhance the land tenure security of the landholders, among others.[83]

With respect to the process of registration and certification of land rights, the statutory frameworks haven't given full direction. Given that it is a process of confirming and legalizing rights in land, it must be carried out in an impartial, participatory and accountable manner. And it is the legislation that should define these procedural requirements to make the registration and certification process consistent. Otherwise, leaving it to the bureaucratic discretion creates room for abuse and results in the perpetuation of land tenure insecurity. That is why Chinigo in his case study reveals that the registration and certification of land rights in Ethiopia "... strengthens the capacity of the local administrative structures to exercise political power and thereby serves to further extend the power of the state in the rural milieu."[84]

However, some states' laws introduce to some extent the elements of impartiality, community participation and accountability to be followed in the process of registration and certification of

[80] Dessalegn Rahmato. 'Land rights and tenure security: rural land registration in Ethiopia' in André J Hoekema, Janine M Ubink, and Willem J Assies (eds.). *Legalising Land Rights Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*. Leiden. Leiden University Press, 2009. 59–96.
[81] Sosina Bezu and Stein Holden. Demand for second-stage land certification in Ethiopia: Evidence from household panel data. (2014) 41 *Land Use Policy*. 193–205. P 193; Klaus Deininger, Jaap Zevenbergen and Daniel Ayalew Ali. Assessing the certification process of Ethiopia's rural Lands. (Colloque international "Les frontières de la question foncière – At the frontier of land issues, Montpellier), 2006; Klaus Deininger Daniel Ayalew Ali, Stein Holden, and Jaap Zevenbergen. Rural land certification in Ethiopia: Process, initial impact, and implications for other African countries. (2007) 36 *World Development*. 1786–1812**.**
[82] Bezu and Holden (n 81) pp 193–194.
[83] Ibid; Dessalegn Rahmato. 'Peasants and agrarian reforms: the unfinished quest for secure land rights in Ethiopia' in André J Hoekema, Janine M Ubink, and Willem J Assies (eds.). *Legalising Land Rights Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*. Leiden. Leiden University Press, 2009. 33–58. P 51.
[84] Davide Chinigò. The politics of land registration in Ethiopia: territorialising state power in the rural milieu. (2015) 42(144) *Review of African Political Economy*. 174–189. P 174.

land rights. For instance, the Amhara State law, to ensure impartiality and local community participation in the process requires that the demarcation of boundaries be conducted with the agreement of the adjacent parties and in the absence of agreement, with the recommendation of the local elders.[85] Moreover, to make proper and fair registration and certification, it introduces a liability clause and a right to appeal to a higher administrative authority to be discharged thereof.[86] Any landholder who is aggrieved with the land measurement and delineation is entitled to complain to the next higher administrative authority for reconsideration of the case. Although it was not mentioned in the previous law, the 2017 Amhara State's rural land law also entitles the aggrieved party to appeal and demand judicial review in a court of law.[87] Furthermore, before the enactment of this law, the Federal Supreme Court (FSC) cassation decision in the case of *Tilahun Gobeze vs Mekete Hailu and Aweke Muchie* ruled that it is legally allowed to bring a legal appeal for judicial review over a grievance in relation to registration and certification of land rights.[88] Additionally, if the landholder sustains damages due to the fault of the registration and certification process, the law establishes civil liability for the government body at fault and authorises court action to claim the compensation. This institutional accountability element of the registration and certification of land rights has the tendency to protect landholders from the illegal deprivation of their land rights in the process itself and the fear of exercising of political authority by local administrators.

Finally, regarding the evidentiary role of the registration and certification of land rights, the federal as well as most states' laws remain silent. While the main significance of the registration and certification in relation to land tenure security is in its role in proving the legal land right holder, failure to provide legal recognition to that effect undermines its contribution to securing land

[85] See Proc. No. 252/2017 (n 1) Article 33(4) and 37 in conjunction with Reg. No. 51/2007 (n 55) Article 19(5); Amhara National Regional State. Rural land administration and use system implementation Council of Regional Government regulation No.159/2018. *Zikre Hig.* Year 23 No. 4. 2018. Article 24. Benishangul Gumuz State's law also demands the demarcation to be done in the participation of the affected parties. (See Proc. No. 85/2010 (n 5) Article 25(2)).

[86] Proc. No. 252/2017 (n 1) Article 33(5), 34(6 and 7), and 38. See Proc. No. 85/2010 (n 4) Article 26(7 and 8) and Article 25(3) about the situation in Benishangul Gumuz State's law.

[87] Proc. No. 252/2017 (n 1) Article 38(3).

[88] *Tilahun Gobeze vs Mekete Hailu and Aweke Muchie*, file No.69821 (27January 2011) the Federal Supreme Court Cassation Decisions, Vol.13 (Addis Ababa, Federal Supreme Court of Federal Democratic Republic of Ethiopia, November 2011) p 430ff. In Ethiopia, the approach of legal interpretation adopted by the Federal Supreme Court has a binding effect over all the lower courts. (See Federal Democratic Republic of Ethiopia. Federal courts proclamation reamendment proclamation No. 454/2005. *Fed. Neg. Gaz.* Year 11 No. 42. 2005. Article 2(1)).

tenure security. Moreover, it opens the door to interpretation and discretion by a court of law in giving evidentiary weight to it. This will result in diversification in the judicial practice with some courts regarding it as conclusive evidence, others only as collaborative evidence and others still not attaching any evidentiary role to it.

Nevertheless, two states' laws – Amhara and Beneshangul Gumuz – provide properly for the evidentiary role of land registration and certification. Both state that "[t]he person who is granted the land holding certificate in his name shall, unless a contradictory written document is submitted, be considered legal holder of the land."[89] This stipulation indicates that until the registration and certification of the land right by itself is contested, it can be considered as the exclusive evidence to prove the entitlement. However, if any other written document that goes against the registration and certification of land rights is produced, then registration and the land holding certificate will not serve to establish the entitlement. This is because, in the laws it is provided that the registration and certification conducted on inaccurate information shall have no legal effect.[90] Contrary to this, the FSC cassation decision implies that registration and certification of land rights should not be conclusive evidence in any circumstance.[91] This way of interpretation totally denies the importance of registration and certification. When the entitlement itself is not contested the use of the registration and certification as conclusive evidence to prove the entitlement is proper. It should be only at the time when the entitlement is contested that the rebuttable presumption of entitlement must be taken in favour of the one in whose name the registration and certification of land rights is conducted. The other contesting party must shoulder the burden of proof to rebut the legal presumption.

Nonetheless, the above rule itself also undermines the importance of the registration and certification of land rights. For one thing, it implies that the rebuttal of the entitlement can be done by producing any other contrary document. Such other document can be of any kind and is equated

[89] Proc. No. 252/2017 (n 1) Article 35(2 and 5); Proc. No. 85/2010 (n 4) Article 27(5). The Amhara State's law requires the judiciary to consider the land certificate prior to any other evidence and states the admissibility of only strong and more convincing documentary evidence to establish the legal holder of the land.

[90] Proc. No. 252/2017 (n 1) Article 34(5); Proc. No. 85/2010 (n 4) Article 26(5).

[91] *Tilahun Gobeze vs Mekete Hailu and Aweke Muchie* case (n 88) p 431. It goes against what is provided in the law and abuse of power by the court. The court's power in Ethiopia is to make an interpretation of the law not creating the law and it is the way of interpretation that abides the other courts. Nevertheless, in the case at hand, the FSC, disregarding the legal rule, has required both parties to produce evidence equally without considering the legal presumption.

with the land registration and certification document. For another, it doesn't indicate whether the production of such a contrary document totally rebuts the registration and certification of the land rights or only shifts the burden of proof to the holder of the land holding certificate. This ambiguity should be interpreted in favour of the holder of the land holding certificate, as imposing the burden of proof on the other party who produced other documents than the registration and certification of land rights. This is to promote the land tenure security of the holder of a land holding certificate by making his/her document more credible than the others. However, when both parties produce the same document of registration and certification of land rights, the process of production of evidence and burden of proof should follow the ordinary rule in civil litigation. That is, the one who alleged the fact has to start first and both parties must prove their respective claims equally. One positive contribution of the provision is that it indicates that a land holding entitlement established through the registration and certification can be contested only by producing documentary evidence. Nevertheless, the FSC cassation decision seems to go against this rule by reasoning that unless an express exceptional rule of evidence for the production of a particular type of evidence is stipulated in the law, the civil litigation can be proved by any type of evidences.[92] However, the law here has clearly indicated the type of evidence – documentary evidence – to be produced to contest the entitlement.

E. The Constitutionality of Excluded Land Rights and the Approach in Constitutional Interpretation

It is pointed out in Chapter 3 Section B(ii) that the FDRE Constitution stipulates an exclusionary rule that prohibits landholders from selling or exchanging their land in any other means. However, it is not clearly stipulated as to what form of exchange is prohibited in the Constitution. Hence, I argue that the exclusion must apply only to transactions that have the same features and effects as sale; and the constitutional interpretation to be adopted must be policy-based, not the historical approach. This interpretation enables the broadening of the bundle of rights part of legal land tenure security, without engaging in constitutional amendment. In this section, I show how the excluded rights in land of peasants and pastoralists can be rendered in the constitutional phrase

[92] Ibid.

"… *land…shall not be subjected … to other means of exchange*"[93] and the constitutional interpretation approach that should be adopted thereto.

The rights in the corpus of the *fructus* bundle of rights that is potentially disavowed through the constitutional interpretation of the above phrase is the right to use the land as collateral to access credit, because in the federal as well as states' legislation except the 2017 Amhara State's law,[94] there is no express outlawing of the mortgaging of land rights. Especially considering the federal legislation that entitles investors who acquired rural land use rights to use their land use rights as collateral without making a distinction on the source from which they acquired the land, one can interpret the silence as permission. [95] Theoretically, according to the legislation, investors can get rural land use rights either from the government or peasants and pastoralists through lease agreements.[96] As the federal legislation stands it doesn't make a distinction about which investors' land – that acquired from the government or peasants and pastoralists – is subjected to collateralization, hence, literally read, investors can use both as collateral. Therefore, if the lessee-investors are entitled to mortgage the land use rights leased from peasants, one may argue that for strong reasons the lessor-peasants can mortgage their land rights. However, the states' laws, on the other hand, limit the investor's right to use the land he/she/it leases from the government to use only as collateral.[97] They also do not permit the use of the land rented from the peasant as a collateral. This prohibition also clicks up the question about whether the state governments have the mandate to regulate this matter, which is dealt with in Chapter 8.

Nevertheless, the House of Federation (HOF)[98] has resolved this contradiction in favour of the states' laws while interpreting the constitution as that it prohibits peasants from using their land

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[93] FDRE Constitution (n 3) Article 40(3). The same kind of stipulation is mentioned on all state constitutions except the Tigray State Constitution. The Tigray State Constitution excludes the other means of exchange aspect and it only prohibits sale of land. (See Tigray State Constitution (n 27) Article 40(3)).

[94] The new Amhara State's rural land law guarantees peasants with the right to mortgage their land rights. (See Proc. No. 252/2017 (n 1) Article 19).

[95] Proc. No. 456/2005 (n 4) Article 8(4). The Tigray State's law also adopts the same approach. (See Proc. No.239/2014 (n 15) Article 24(4)).

[96] Proc. No. 456/2005 (n 4) 8(1) and 5(4); Proc. No.239/2014 (n 15) Article 9(1) and 19.

[97] Proc. No. 128/2013 (n 5) Article 15 (3); Proc. No. 110/2007 (n 4) Article 8(4); Proc. No. 49/2009 (n 5) Article 16(3); Proc. No. 252/2017 (n 1) Article 24; Proc. No. 85/2010 (n 5) Article 19(15). These laws authorize an investor who leased out land from the government, not the one he/she rented from peasants, to use as a collateral. The Oromia and Gambella States' laws do not regulate the issue of mortgaging of land rights entirely.

[98] HOF is the second house of the federal government of Ethiopia that entrusted with the power of constitutional interpretation. (See FDRE Constitution (n 5) Articles 53 and 62). However, as I argue in Chapter 7 Section D(ii), the power of constitutional interpretation is a joint power of HOF and Council of Constitutional Inquiry.

rights as a collateral. The HOF's interpretation of the constitution in this regard is based on the historic-purposive/originalist approach and the equalization of effect. Accordingly, the HOF, for instance, in the case between *Emohay Banchiamlake Dersolegn vs Abebew Molla* has indicated the constitutional prohibition of the right to mortgage the land rights of peasants, equating it with the land sale according to its effects.[99] In the view of the HOF, allowing the peasants to mortgage their land rights is indirectly allowing sale of land under the guise of collateralization and consequently it causes their eviction, which is prohibited in the constitution.[100] Moreover, in *Kelebe Tesfu vs Ayelegn Derebew* case the HOF claimed that the prohibition "… land … shall not be subject to sale or to other means of exchange" should be understood in a way to give effect to the peasants' right to immunity against eviction.[101] It has argued that collateralization of peasants' land rights is an indirect way of sale of land and it in effect results in the eviction of the peasants.[102] Thus, in the view of HOF the right to mortgage land is constitutionally prohibited since it is indirect way of sale of land and it results in the eviction of the peasants. On the other side, this line of constitutional interpretation makes the 2017 Amhara State rural land law that allows peasants to mortgage their land rights contradictory to the FDRE Constitution.

However, I argue that the HOF's interpretation of and approach to the constitution with regard to peasants' right to mortgage their land rights as constitutionally prohibited doesn't sustain for two basic reasons. First, had its' equalization effect of mortgaging to sale been right, it would also have made the rule of the rural land legislation that allows investors to use their land lease rights as collateral unconstitutional. This is because the constitutional prohibition of sale of land is not only limited to the peasants, but also applies to all landholders, including the investors. Hence, if mortgaging of land is an indirect way of sale of land, as the HOF has claimed in the above two cases, then the prohibition would have to be extended to the investors as well. Otherwise it becomes a double-standard and the constitutional interpretation becomes subject-based, not principle based. It amounts to saying that in the case of peasants mortgaging their land rights it is an indirect sale of land, whereas in the case of investors, it is not.

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[99] *Emohay Banchiamlake Dersolegn vs Abebew Molla* Federal Democratic Republic of Ethiopia House of Federation 5th parliamentary round, 1st year, 2nd regular meeting, (13 March 2016).
[100] Ibid.
[101] *Kelebe Tesfu vs Ayelegn Derebew* Federal Democratic Republic of Ethiopia House of Federation 4th parliamentary round, 5th year, 2nd regular meeting, (10 June 2015).
[102] Ibid.

Second, the HOF's equating mortgaging with sale of land is wrong effect-wise also. The two rights fall in a different domain of the property rights corpus. While the right to mortgage is in the corpus of the right to *fructus*, the right to sale is part of the right to *abusus* corpus in my categorization. The constitutional restriction is aimed at putting a limitation on the right to *abusus*, but not on the right to *fructus*, because, in principle collateralization is a means to access credit that enables a person to invest more on the land without losing it, and which in effect enhances the person's capacity to pay back the debt. Besides, a failure to pay back the debt and the creditor's claim against the mortgaged right come about only in an exceptional situation. In those exceptional situations too, the claim against the mortgaged land rights can be effected still without causing a permanent eviction of the peasants and in the same fashion with the right to leasing. That is through enabling the creditor just to exercise the *usus* or the *fructus* right (excluding the right to mortgage) for a certain predefined period defined by the mutual agreement with the landholder and the creditor.[103]

Therefore, the HOF's approach and constitutional interpretation to exclude the peasants' right to mortgage the land rights is not a creative way and puts itself in the historical context. It narrows the bundle of rights in land of the peasants by denying one of the key property rights. Besides negatively affecting land tenure security, it has made possible the incorporation of the right into the bundle with the possible process of constitutional amendment unless the policy-based interpretation approach is adopted henceforth.

F. Conclusion

Unlike what critics say, the post-1991 land tenure system of Ethiopia has broadened the rights in land of peasants and pastoralists to a greater extent than did its predecessor, to enhance land tenure security. Besides, in the same fashion as the predecessor, it provided peasants and pastoralists with unbounded general duration of land rights and propounded a base for the registration and certification of their land rights with a view to perpetuate security of tenure.

Nevertheless, the statutory limitation that the land may be employed for agriculture and natural resource development activities only and the incorporation of the "residency of the state

[103] The 2017 Amhara State's rural land law adopts the same approach. (See Proc. No. 252/2017 (n 1) Article 19). The possible practicable challenges and the way forwards do need a further study.

requirement” to access the land, have paved the way for depriving the land rights of those peasants and pastoralists who use the land for other economic purposes and who are from another State. In addition to legally limiting the duration of the specific land rights, the statutory land tenure system and the constitutional interpretation that is based on the historic interpretation approach have excluded another basic land right – the right to mortgage, except the 2017 Amhara State law. Moreover, it has not developed a statutory foundation for the process of registration and certification of land rights to be carried out in an impartial, participatory and accountable manner, except for the Amhara and Benishangul Gumuz States’ law. Furthermore, save for these two states’ laws, it has failed to define its evidentiary role explicitly. Finally, the statutory definition of the rights in land of peasants and pastoralists has not considered the fundamental differences in the land holding and utilization system between peasants and pastoralists. It has rather stated the nature of the rights in land of both as a *holding right* that involves rights which cannot be practicable in a communal land holding and utilization system of the pastoralist community, unless fundamental socio-cultural transformation is made.

All these defects in effect negatively affect the nature of the rights in land, the duration of land rights and the registration and certification of land rights legal constructs of land tenure security. The variations between the federal and States’ laws and the States’ law among themselves that are identified in the Chapter also raises the question of legality and the judicial relation between them which is addressed in Chapter 8. Moreover, whether the peasants and the pastoralists have the freedom and autonomy even in exercising their rights in land under the umbrella of a holding right, must be examined to understand the complete feature of the duration and the nature of rights in land constructs. I analyse this in the next Chapter.

Chapter 5

Legal Restrictions on Rights in land of Peasants and Pastoralists

To realize the nature of rights in land required for securing the land tenure, the bundle of rights evaluation made in Chapter 4 doesn't suffice. As I argue in Chapter 1, to guarantee and preserve a landholder's freedom in exercising land rights, a holistic approach to understanding property rights must be applied, because, it enables the landholder to exercise the rights freely, without the intervention of anybody, but while observing the public interest in maintaining the land. However, the introduction of legal restrictions that cannot be justified economically, socially and environmentally would impede land tenure security. In addition, the legal introduction of different grounds for depriving land rights, apart from expropriation (which is dealt with in Chapter 6) also doesn't serve any socio-economic and environmental end. Instead, it derogates from the legal construct of assurance of land tenure security rights.

Against this background, in this Chapter I interrogate the post-1991 statutory land tenure system of Ethiopia and ask whether it has introduced restrictions that may derogate from the legal constructs of land tenure security of peasants and pastoralists. Additionally, I explore the implications of those legal restrictions introduced on the constitutional protection of free and non-deprivable utilization of land rights afforded to peasants and pastoralists.

The post-1991 statutory land tenure system of Ethiopia has introduced a few legal restrictions on exercising specific land rights and additional grounds for their taking, that are neither economically, socially nor environmentally justified. These restrictions and grounds pave the way for exercise of discretionary bureaucratic authority over peasants and pastoralists. It also strengthens the historical continuation of the use of rural land rights as a mechanism of political control. Above all, it disregards the constitutional aspiration of guaranteeing peasants and pastoralists free and secured utilization of their land rights.

Following this introduction, the Chapter consists of a section on the legality of a land use payment imposed on peasants. Next is a section in which I address the different legal restrictions imposed on the exercise of specific *fructus* and *abusus* rights granted to peasants and pastoralists and their implications for the legal constructs of land tenure security rights. Then follows a discussion of

the grounds for deprivation of the land rights of peasants and pastoralists other than expropriation that are attributed to the acts of peasants and pastoralists. After examining the other grounds of deprivation of land rights which are out of the control of peasants and pastoralists, I summarise and conclude.

A. The Duty to Pay for Land Use

One of the revenue sources for local governments to enhance the development of rural infrastructure and livelihood is income from land use.[1] This is especially so in developing countries and transitional economies like Ethiopia, where the majority of the population depends on land and other natural resources and revenue from land and natural resources utilization is essential. This is so, because, technically and administratively it is easy to introduce, cheap to administer, difficult to avoid and easily achievable. It is also transparent as the basis of assessment can easily be understood, it is usually only marginally progressive, and it considers the ability to pay.[2] Nevertheless, these advantages can only be realized if there is a correctly and properly designed legal foundation to regulate it.

In the absence of such, as the monarchical-feudalist and *Derg* regimes of Ethiopia I discuss in Chapter 2 have indicated, land use payment of whatever kind may become a source of abuse and a means of political control over the landholders that can lead to political protest and rebellion.[3] The post-1991 statutory land tenure system of Ethiopia, that was promulgated precisely to address these historical injustices, among others, constitutionally entitles peasants and pastoralists to free access to land.[4] Moreover, the section on the power of taxation in the FDRE Constitution doesn't explicitly provide for the state's power to impose and collect land tax or payment for peasants'

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[1] R. W. Lindholm. Land taxation and economic development. (1965) 41 *Land economics*. 121–130; Jonathan Skinner. If agricultural land taxation is so efficient, why is it so rarely used? (1991) 5 *The World Bank Economic Review*. 113–133; Food and Agriculture Organization. Rural property tax systems in central and eastern Europe. Rome. *FAO Land Tenure Studies 5*, 2002. The government revenue from land can take two forms. Either in the form of tax as it is introduced with respect to peasants' and pastoralists' land rights in the rural land law of Afar, Benishangul Gumuz, and Somali States of Ethiopia. Or it can be imposed as land use payment as the case in investors as imposed by the Constitution of Ethiopia.

[2] Food and Agriculture Organization. Decentralization and rural property taxation. Rome. *FAO Land Tenure Studies 7*, 2004. P 20. On general justification of tax see Agustin Jose Menendez. *Justifying taxes: some elements for a general theory of democratic tax law.* Dordrecht. Springer, 2001.

[3] It may also affect the freedom of the landholders by defining the land use planning process. (See Barry A. Currier. Exploring the Role of Taxation in the Land Use Planning Process. (1975) 51 *Ind. LJ*. 27–90).

[4] Constitution of Federal Democratic Republic of Ethiopia (FDRE). Proclamation No.1/1995. *Fed. Neg. Gaz*. Year 1 No.1. 1995. Article 40(4) and (5).

and pastoralists' land use. Instead, it only mentions the states' power to determine and collect payment/fees for land use by investors, who are guaranteed land use rights only upon a payment arrangement.[5] In spite of this, some of the federating states proclaim laws that impose "*land use payments*"[6] or "*rental payments*"[7] on peasants, excluding pastoralists; and some others proclaim a duty to pay "land use tax" on both peasants and pastoralists, leaving the details to regulations yet to be enacted.[8] All these issues - the imposition of "land use payment or rental payment" on peasants; the exclusion of pastoralists in certain state laws; and the introduction of the idea of "land use tax" in other state laws - demand critical inquiry as to their legality. More precisely, the constitutionality of the extent of application of the constitutional stipulation of states' power to determine and collect fees for land utilization, and the adoption of the notion of "land tax" in state laws requires scrutiny.

As I discuss in Chapters 3 and 4, the FDRE Constitution as well as state constitutions recognize the right to free access to rural land for peasants and pastoralists. The FDRE Constitution and all state constitutions, except Harari State's, go to the extent of specifying the *free utilization right* of pastoralists.[9] To determine the legality of the "land use payment or rental payment" imposed on peasants, the following questions must be addressed: "What is the essence of the constitutional

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[5] *Id* Article 40(6) in conjunction with Article 97(2).

[6] See for instance Oromia National Regional State. Revised rural land use payment and agricultural income tax proclamation No. 131/2007 issued to amend the previous proclamation No. 99/2005, and rural land use payment and activities income tax amendment proclamation No. 99/2005. 2007*;* Amhara National Regional State. Rural land use payment and agricultural activities income tax proclamation No. 161/2008. 2008.; Tigray National Regional State. Revised agriculture income tax and land use payment proclamation No. 137/2007 issued to amend the previous proclamation No. 96/2005. *Tigray Neg. Gaz.* Year 16 No. 2. 2007.

[7] See for instance, Southern Nation, Nationalities and Peoples' Regional State. Rural land use rent and agricultural activities income tax proclamation No. 4/1996. *Debub Neg. Gaz.* Year 1 No. 5. 1996.

[8] Benishangul Gumuz National Regional State. Rural land administration and use proclamation No. 85/2010. 2010. Article 19(16 and 17); Ethiopian Somali Regional State. Rural land administration and use proclamation No. 128/2013. *Dhool Gaz*. 2013. Article 17(1); Afar National Regional State. Rural land administration and use proclamation No. 49/2009. 2009. Article 18(1).

[9] See FDRE Constitution (n 4) Article 40(4 and 5); Afar Regional State. The revised constitution of Afar regional state. July 2002. Article 38(4 and 5); Amhara National Regional State. The revised Amhara national regional constitution proclamation No. 59/2001. *Zikre Hig* No. 2 Year 7. 2001. Article 40(4 and 5); Benishangul Gumuz Regional State. The revised constitution of Benishangul Gumuz regional state. December 2002. Article 40(4 and 5); Gambella Regional State. The revised constitution of Gambella peoples' national regional state. December 2002. Article 40(4 and 5); Oromia Regional State. The revised constitution of Oromia regional state. October 2001. Article 40(4 and 5); Ethiopian Somali Regional State. The revised constitution of Somali regional state. May 2002. Article 40(4 and 5); Southern Nations, Nationalities and Peoples' Regional State (SNNP). Constitution of the Southern Nations, Nationalities and Peoples' regional state proclamation No. 1/1995. *Debub Neg. Gaz.* Year 1 No. 1. 1995. Article 40(4 and 5); Tigray National Regional State. Constitution of the Tigray national regional state proclamation No. 1/1995. 1995. Article 40(4 and 5). In state constitutions, the right to free utilization is also extended to semi-pastoralists or peasants in relation to grazing land.

"right to obtain land without payment"?;" "Is there any logical reason to adopt differential treatment between peasants and pastoralists in this regard?;" and "What does the "land use payment or rental payment" entail?."[10] Addressing these questions demands that one to look into the historical context necessitating the recognition of this right and the essence of the terms and establishment of the constitutional provision of the states' power to determine and collect fees from land use.[11]

One of the reasons for introduction of the post-1991 land tenure system, after the military overthrow of the *Derg* political regime (which by itself came into power through a *coup de 'eat* on the basis of the issue of rural land rights as a cause, among others) was its failure to address the land question of peasants in particular. Mainly, peasants were deprived of the fruits of their labour either by the means of taxation and tribute in the monarchical-feudalist regime or grain acquisition and other forms of contribution during the *Derg* regime. Accordingly, it is with the view to address this historical injustice that the post-1991 land tenure system guaranteed peasants with the right to free access to land. Nonetheless, the imposition of land use fees on peasants' land utilization for a livelihood, paves the way for the re-emergence of the historical injustice and defeats the very aim of the incorporation of the "right to obtain land without payment" in the Constitution. In addition, it becomes senseless to say that you can get the land for free, but you have to pay for its use your entire life. To put it in other terms, it is postponing the payment from the date of access to the future utilization period that goes against the constitutional right to obtain land for free.

In literal terms, the very essence of "the right to obtain land without payment" implies the use of the land for free, as argued in Chapter 4. If this is not understood so, the constitutional distinction between peasants' and investors' access to land loses its meaning. The FDRE Constitution and state constitutions incorporate the investors right to access land in accordance with payment arrangements to be introduced by law.[12] Depending on the desire of the government, such land use

[10] I am not concerned about the issue of income tax and property tax, if any, levied on peasants and the pastoralists.
[11] FDRE Constitution (n 4) Article 97(2).
[12] *Id* Article 40(6); Tigray State Constitution (n 9) Article 40(6); SNNP State Constitution (n 9) Article; Ethiopian Somali State Constitution (n 9) Article; Oromia state Constitution (n 9) Article; Afar State Constitution (n 9) Article 38(6); Amhara State Constitution (n 9) Article 40(6); Benishangul Gumuz State Constitution (n 9) Article 40(6); Gambella State Constitution (n 9) Article 40(6); Harari Regional State. 2004. The revised constitution of the Harari People's regional state. October. Article 40(5). All state constitutions except the Harari entrusted the state government with the power to transfer land use right to investors. The Harari Constitution like the federal Constitution doesn't specified the government.

payment may be demanded at the time of acquiring the land or it may be paid on an annual basis throughout the utilization period. If peasants are to be made to pay for their land use, then there will no longer be any difference between peasants and investors in their right to access to land. A meaningful difference between the two can only be achieved if we interpret the Constitution as entitling peasants to the free use of land and the introduction of the land use fees as going against the Constitution.

Furthermore, on this point the Constitution displays no intent to treat peasants and pastoralists differently. Given that both of them acquire land for a livelihood and experience poverty in the same fashion, there is no logical reason to demand that peasants use land upon payment, while exempting pastoralists from a legalistic and theoretical perspective. However, the exemption of pastoralists may be justified from an implementation difficulty perspective, given the communalist and itinerant nature of pastoralists' land use. The paradox is that while the state laws require land use fees from peasants, they fail to do so from pastoralists, although both acquire and utilize the land for the same purpose – for instance cultivation. In fact, in relation to pastoralists, the Constitution clearly states that they have the right to acquire and utilize land for free for grazing and cultivation. If a pastoralist begins to conduct sedentary agriculture and live as a peasant, is he/she going to be subjected to pay land use fees? Therefore, the constitutional stipulation about peasants' right to obtain land for free should be understood to be the same as that with respect to pastoralists' right. It also has to be interpreted as the right to utilize land for free, since there is no logical reason to treat peasants differently from pastoralists in this respect.

Does the Constitution, one might ask, contemplate charging land uses fees in any context? There are indeed two situations in which the application of the land use fees is constitutionally visible. One is with respect to urban land use in general and the other is in case of investors' use of rural land. In relation to the urban land tenure system the FDRE Constitution is silent, except for indicating the nature of ownership and forbidding rights in land. Thus, similar to rural land I discuss in Chapter 3 and 4, the Constitution puts urban land under "state and people's ownership" and prohibits "sale and exchange by other means."[13] However, unlike in the case of rural land, it remains silent about the mechanism of accessing land for and the nature of protections to be

[13] FDRE Constitution (n 4) Article 40(3).

afforded to urban landholders. A constitutional silence such as this, regulating some but remaining silent on other aspects, can be understood in two, mutually exclusive ways.[14] On the one hand, it can be read as leaving it to the lawmakers to define them in future; on the other, it can be considered as indicating adoption of the rules prevailing about the matters at the time of enactment of the constitution.[15]

There are unfortunately no clear-cut yardsticks to determine which approach the constitution makers intended. Critical examination of the constitution making process and the problematic nature of the issue in the course of constitution making can to some extent indicate the desired approach. That is, if the given matter is a serious problem at that time and was raised in the constitution making process, but agreement is yet to be reach on it, constitutional silence in such situations implies that the constitution-makers desired it to be decided by the lawmakers in the future. By contrast, if the matter was not deliberated on or raised in the constitution making process, such silence might mean that the intention was to recognize the prevailing rule about the matter. On this basis, when one looks into the FDRE Constitution making process on the land issue, the critical problem prevailing before the drafters and the most hotly debated issue was the rural land matter, particularly the issue of peasants. Except for the debate on the form of land ownership, the issue of urban land was not on the table for debate. This might have been based on the assumption that the 1993 urban land law, enacted by the transitional government of Ethiopia has addressed the question of urban land, so that the constitution makers had impliedly endorsed that law.[16]

In terms of the 1993 urban land law, access and utilization of urban land, particularly for dwelling purposes, is based on two kinds of urban land use fees. The one is based on annual land use rent fees. It is stipulated as a land use tax imposed on urban dwellers after getting resident land for free.[17] This applies to land acquired before enactment of the 1993 law.[18] The other is access to

[14] Failure to deal on the issue entirely may be the indication the constitution makers may not have anticipated the issue or may no idea about who should decide it.
[15] Rosalind Dixon and Tom Ginsburg. Deciding not to decide: Deferral in constitutional design. (2011) 9 *International Journal of Constitutional Law*. 636–672. P 640.
[16] Transitional Government of Ethiopia. Urban lands lease holding proclamation No. 80/1993. 1993.
[17] Ethiopia. A proclamation to provide for government ownership of urban lands and extra houses proclamation No. 47/1975. *Neg. Gaz*. No. 41. 1975. Article 5(1) and 9.
[18] Proc. No.80/1993 (n 16) Article 8.

urban land for consideration, which applies to land acquired after enactment of the 1993 law.[19] In this case, urban land is not granted for free but upon lease payment. Thus, constitutionally speaking urban land rights acquired before the coming into effect of the 1993 law, are still, supposed to be governed by the previous annual land use rent fees introduced in the *Derg* regime unless it "…is transferred to another person in any manner other than inheritance…"[20]

Regarding rural land, the Constitution stipulates of land use fees in one context only. This is in the situation of an investor accessing land, as defined in the FDRE Constitution itself. The constitution under Article 40(6) expressly stipulates that private investors can access and utilize land - urban or rural - based on payment arrangements to be determined by law. Hence, any reference to land use fees in the Constitution is to the way in which the land use rights of investors are ensured.

Therefore, the land use fees imposed on peasants through state laws do not have constitutional backing. Instead, they open a loophole for the state to exercise political control over peasants as witnessed in the past political history of the country – the kind of political control that the FDRE Constitution intends to curtail. This is so, since the assumption that peasants are required to pay in the form of "land use payment" enables the state to take into account the use value of the land and the demand for it in fixing the fees.[21] This in turn may enable the state to determine a random amount that undermines the very essence of the right to free access to rural land rights of peasants.

However, the question that remains unanswered is about some state laws' imposition and incorporation of "land tax." Distinct from the "land use payments" I discuss above, certain state laws impose on peasants and pastoralists the burden of "land tax." Unlike the land use payments which create the assumption that the land rights are for consideration and acquired in transactions, imposition of land tax doesn't necessarily imply the land access and use is for consideration. It rather creates the impression that it is part of the civic responsibility of peasants and pastoralists to make a contribution for the government's cost of provision of social services to the public. This difference about the nature of dues imposed on the peasants and pastoralists in relation to their

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[19] *Id* Article 5 and 8(3).
[20] See *Id* Article 3; Proc. No. 47/1975 (n 17) Article 9.
[21] Even in property taxation, it is the value-based approach that guides the amount of tax. (See Riël Franzsen and William J. McCluskey. 'Value-based approaches to property taxation' in William J. McCluskey, Gary C. Cornia, Lawrence C. Walters (eds.). *A primer on property tax*. West Sussex. Blackwell Publishing Ltd, 2013. 41–68).

land rights among the state laws is the result of the absence of clear constitutional determination on the issue.

The FDRE Constitution in the section that defines both the federal and state governments' power of taxation and levy of fees doesn't specifically designate the power of rural land taxation on both or either level of government.[22] The idea of "land tax" is not mentioned anywhere in the Constitution. Instead, all that is mentioned are the "land use fees" as I discuss above. This situation in turn invites us to address two fundamental issues. These are what the constitutional basis of the "land tax" is; and how this power of taxation is designated or going to be designated. Article 98 of the FDRE Constitution, through mandating the joint session of the two houses – House of Peoples' Representatives and House of Federation – to allocate powers of taxation and levying of fees that are not expressly and specifically provided in the constitution, indicates that the bases for taxes and fees are not exhaustively outlined in the constitution.[23] The constitution makers were of the opinion that new powers of taxation and charging of fees may emerge in the future. As a result, I argue that the introduction of "land tax" has constitutional backing, even though it is not expressly provided in the constitution. In fact, one may question consistency of this argument in light of the constitutional right to free access to land for peasants and pastoralists. I am of the opinion that imposition of a tax burden using land rights as a base doesn't entail that peasants' and pastoralists' access to and utilization of land is made for consideration going against the constitutional stipulation. Rather, it is with the view of imposing a social obligation to make a contribution to the development of local social services for their own consumption.

Nonetheless, the authority of the two federal houses to assign undesignated powers of taxation in the presence of the constitutional stipulation that leaves the prerogative of land administration to the states, creates some confusion.[24] As I discuss in Chapter 8, the FDRE Constitution, while apportioning power between the central government and states in relation to land in particular, assigns the power to enact laws about "land utilization and conservation" to the federal government and administration of the same to states.[25] Although definitional clauses are not provided foe the

[22] FDRE Constitution (n 4) Article 96 – 100. The captions wrongly stated as power of taxation, but the provisions deal with both taxation and fees.
[23] Id Article 99.
[24] Id Article 52(2(d)).
[25] Ibid and see also Article 51(5).

terms "land utilization and conservation" and "land administration" in the Constitution, the literal understanding implies that the power of land valuation for taxation falls within the ambit land administration.[26] If this is so, then one can argue that the imposition of land tax by states through their laws is in accordance with their constitutional power. Conversely, some may claim that this form of tax is an undesignated power of taxation and the assignment of such power to both or either levels of government is dependent on a two-third majority vote of the joint session of the two houses.[27]

To resolve the paradox, one may rely on the rule of interpretation that dictates the prevalence of the special/specific rule over general.[28] However, this approach depends on how we categorize the power of land taxation to determine the general and the special rule. Still there is a possibility to perceive the land taxation power in both ways. On one hand, by looking at the issue of land taxation from the land administration angle one may consider it as an aspect of land administration - a constitutional rule of land administration as a special rule rather than a constitutional rule of undesignated power of taxation. This line of thought regards the constitutional rule of undesignated power of taxation as a general rule that empowers the government to introduce any new taxes that were not defined and incorporated in the constitution during the constitution making. When we come to the land taxation power, this line of view assumes that this taxation power is already incorporated in the constitution while assigning the power of land administration to federating states,[29] since land valuation for taxation is part of the land administration power and function. The rule of undesignated power of taxation does apply for other new sources of taxes but not to land taxation, because with regard to the issue of land taxation the constitutional rule of land administration is the specific one.

On the other hand, a counter argument can also be framed considering land taxation from the power of taxation angle. This view perceives that about the issue of taxation it is the constitutional rule of taxation that is specific. Here the assumption is that the notion of land administration is broad and encompasses the issue of land use planning and enforcement, dispute resolution,

[26] Food and Agriculture Organization. Access to rural land and land administration after violent conflicts. Rome. *FAO Land Tenure Studies 8*, 2005. Pp 23–24; Tony Burns and Kate Dalrymple (eds.). *Land administration: indicators of success, future challenges.* Wollongong, Land Equity International Pty Ltd, 2006. Pp 13–14.
[27] FDRE Constitution (n 4) Article 98.
[28] Antonin Scalia and Bryan A. Garner. *Reading law: the interpretation of legal texts.* St. Paul. Thomson/West, 2012.
[29] FDRE Constitution (n 4) Article 52(2(d)).

allocation of rights, delineation of boundaries between parcels, transfer of land rights, and land valuation and taxation.[30] Among the components of land administration, this line of thought claims that the issue of land taxation is separately governed in the constitutional rule of power of taxation under the FDRE Constitution.[31] Hence, regarding the issue of land taxation the constitutional provision about undesignated power of taxation is a special one and prevails over the general stipulation of land administration.[32]

However, I argue that we should see the paradox as beyond either of the two arguments related above. Mainly, the issue should be examined from the perspective of the division of power between the two levels of government adopted in the Constitution, in particular the land-related power division (which I discuss in Chapter 8); and the question which organ that has the power to decide on undesignated powers of taxation. The approach to power division adopted in the FDRE Constitution is an exhaustive listing of the federal government's and the common powers, leaving the residual to state.[33] In principle, the approach demands that any power which is neither assigned explicitly to the federal government nor concurrently as a shared power of federal government and the states, is to be reserved for the states. In addition, whenever an exception to the rule is provided for, it should be construed restrictively. In our case, the idea of an "undesignated power of taxation" is an exception provided for from the general rule of power division.[34] Thus, it must be interpreted narrowly, in a manner observing all the already existing power divisions, like land related powers.

Moreover, as the paradox at hand is also an issue of competition for power and economic benefit – the power of land taxation - the neutrality of the institution that decides on the matter has to be taken into account in defining what falls under "undesignated power of taxation." The power competition is between the central government and the states. Accordingly, logic would dictate that the institution empowered to decide on such a power claim must be an independent organ, which belongs to neither the central government nor to the states. Nevertheless, the Constitution assigned this decision-making authority to the two federal houses.[35] There is an unavoidable

[30] See FAO. Access to rural land (n 26); Burns and Dalrymple (n 26).
[31] FDRE Constitution (n 4) Article 96-100.
[32] Id Article 99.
[33] Id Article 51 and 52.
[34] Id Article 99.
[35] Ibid and Article 53.

impression – even if only an impression - that the federal houses are more likely to decide in favor of the federal government, to which they belong. One way in which to limit the possibility of such institutional bias is by restricting closely the issues that fall within the ambit of "undesignated power of taxation." *Inter alia,* the narrowing of the matters falling in the scope of "undesignated power of taxation" can be achieved when we argue for paradoxes of this nature in a way fall under state power.

B. Right to Transfer

In the post-1991 statutory land tenure system of Ethiopia, as is discussed in Chapter 4, one of the land rights guaranteed to peasants and pastoralists as an aspect of both *fructus* and *abusus* is the right to transfer land rights in part or entirely. This includes the right to transfer through lease/rent as part of the *fructus* right; and the right to transfer permanently, via inheritance and donation, being elements of the *abusus* right. However, as I argue in Chapter 1, the satisfaction of the legal construct land tenure security demands not only breadth of the land rights. It also requires the freedom guaranteed to the landholder to carry out the given rights in land. Were this is not so, unjustified restrictions and interventions from the state in the exercise of any given land right has the implication of impairing the legal construct of the nature of rights in land required to satisfy the legal security of land tenure. On this basis, below follows an exploration of what the post-1991 Ethiopian legal instruments defining the land tenure system of peasants and pastoralists holds for the above mentioned two forms of transfer rights.

i. Lease/Rent

In a country like Ethiopia, where the sale of land rights and private land ownership itself is legally outlawed[36] and economic policy and the livelihoods of the majority of the population are based on agriculture,[37] the prevalence of the rural land rental/lease market can play various roles. First, it can play a key role by allowing those who are productive, but are either landless or own little land, to access land and contribute to the national economy by producing more than the landholder.[38]

[36] FDRE Constitution (n 4) Article 40(3).
[37] The World Bank. Options for strengthening land administration Federal Democratic Republic of Ethiopia. *The World Bank Document, Report No: 61631-ET*, nd. P 17; Ministry of Information. Rural and agricultural development policies and strategies. Addis Ababa. *Federal Democratic Republic of Ethiopia*, 2001. Pp 72–100.
[38] Klaus Deininger. *Land policies for growth and poverty reduction*. Washington DC. The World Bank, 2003. P xxix.

This is because lease has a tendency to facilitate easy reallocation of land toward more efficient users than the current holders, especially if the latter are elderly, are non-cultivating heirs, or are urban beneficiaries of restitutions, and so on.[39]

Second, the land lease and rental market is also significant in enabling less skilled agricultural producers' participation in the non-farm economy by serving as alternative source of initial capital.[40] This is so, as landholders with low agricultural skills are likely to be able to obtain higher incomes from off-farm employment than from farming, and will thus be better off if they rent out some or all of their land for others to cultivate.[41] In effect, in situations where households' agricultural abilities differ, it will enhance the economic growth of the state concerned by increasing incomes for everybody.[42]

Finally, the existence of a land rental market can also possibly avoid idling of land by landholders, who are unable or unwilling to personally utilize their land but wish to employ wage laborers, in case of market failure in hired labor.[43] Further, also in terms of income derived, for large landowners to rent out land is more profitable than working it using hired labour, because self-employed labor has higher productivity than hired labor.[44]

However, these all-round advantages of a land lease and rental market can only be realized when the landholder is guaranteed with two basic legal protections. These are: the freedom in the exercise of the right and the possibility to recover the land rights upon the expire of the lease/rent duration without any further challenges and difficulties.[45] Otherwise, restrictions on the right and any doubt about post-lease recovery threatens the land tenure security of the landholder and the land market.[46]

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[39] Id p.85; Klaus Deininger and Gershon Feder. 'Land institutions and land markets' in Bruce L. Gardner and Gordon C. Rausser (eds.). *Handbook of agricultural economics*. Vol. I, Part 1. Amsterdam. North-Holland, 2001. 228–331.

[40] Stein T. Holden, Klaus Deininger, and Hosaena Ghebru. Tenure insecurity, gender, low-cost land certification and land rental market participation in Ethiopia. (2011) 47 *The Journal of Development Studies*. 31–47.

[41] Deininger (n 38) p 86.

[42] Ibid.

[43] Id p 85 and 87.

[44] Id p 88.

[45] UN-HABITAT and Global Land Tools Network. Secured land rights for all. Nairobi. *UN-Habitat,* 2008. P 7.

[46] Empirical research on the functioning of land rental market has noted further conducting of research on the legislative restrictions introduced on rural land rental market to indicate its implications on security of land tenure. (see Klaus Deininger Daniel Ayalew Ali Tekie Alemu. *Assessing the functioning of land rental markets in Ethiopia*. (Policy research working paper, 4442, The World Bank), 2007. P 19). However, there is also a claim that land rental

In fact, inherently land lease presupposes a predefined duration of lease and payment thereof.[47] Such determination should be left for the contracting parties to ensure the landholder's freedom in excising the right, guided by market forces. To make legislative provision for such terms does nothing other than restricting the freedom of the landholder, so damaging land tenure security. In regulating peasants' and pastoralists' right to lease their land rights, the Ethiopian legal framework has gone beyond defining the duration and the extent of the land holding to be leased/rented out.[48] It has also introduced differential stipulations as to who can lease/rent out his/her holdings and a place for state intervention in the due course. Moreover, it has specified the purposes for which they can lease and rent their land rights.

To begin with the differential stipulations, the rural land legislation has introduced two grounds of differentiation among peasants and pastoralists in relation to land lease and rent. The first, common to the federal and all state's rural land laws, except for Amhara, Gambella and Oromia State's laws is differentiation against non-land certificate holders.[49] The laws have the implication that the right to lease and rent land is granted to peasants and pastoralists who are given only a holding certificate,[50] because the *a contrario* reading of the same provision implies that the landholders who are not given holding certificates are not entitled to lease and rent their holdings. Indeed, one can argue that this provision presupposes the issue of the holding certificate for all landholdings of peasants and pastoralists and doesn't aim to differentiate against non-certificate holders.

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is constitutionally prohibited, which is wrong in my view. (see Tesfaye Teklu. Rural land, emerging rental land markets and public policy in Ethiopia. (2004) 16 *African Development Review*. 169–202. P 171).

[47] SH Goo. *Sourcebook on land law*. London. Cavendish Publishing Ltd (3rd ed), 2002. P 371.

[48] I use the terminology peasants, pastoralists and semi-pastoralists here all together as it is used in the laws. It is without setting aside my claim about the non-applicability this individualistic land rights over communal land holdings. Nevertheless, if the pastoralists have private or common holdings, the individualistic rights apply for them.

[49] While the Amhara and Oromia State's laws do not make such distinction (see Amhara National Regional State. Revised rural land administration and use proclamation No. 252/2017. 2017. Article 15(1); Oromia National Regional State. Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of Oromia rural land use and administration proclamation No. 130/2007. *Megelata Oromia*. Year 15 No. 12. 2007. Article 10(1) respectively), the Gambella State's law totally fails to regulate the issue of peasant's and pastoralist's land rental and lease.

[50] Federal Democratic Republic of Ethiopia. Rural land administration and land use proclamation No. 456/2005. *Fed. Neg. Gaz.* Year 11 No. 44. 2005. Article 8(1); Southern Nations, Nationalities and Peoples Regional State. Rural land administration and utilization proclamation No. 110/2007. *Debub Neg. Gaz.* Year 13 No. 10. 2007. Article 8(1); Tigray National Regional State. Revised Tigray national regional state rural land administration and use proclamation No. 239/2014. *Tigray Neg. Gaz.* Year 21 No. 1. 2014. Article 9(1); Afar National Regional State. Rural land administration and use proclamation No. 49/2009. 2009. Article 11(1); Benishangul Gumuz National Regional State. Rural land administration and use proclamation No. 85/2010. 2010. Article 16(2); Ethiopian Somali Regional State. Rural land administration and use proclamation No. 128/2013. *Dhool Gaz*. 2013. Article 11(1).

However, this kind of stipulation gives leeway for an administrative intervention against the non-certificate holder's right to lease and rent, for instance, by refusal to register the land lease and rent agreement. In addition, the non-incorporation of such differences in the Amhara and Oromia States' laws imply the probable desire of the federal and the other states' laws in fact to differentiate. Otherwise, if the federal and the other states' laws have no intention of differentiation, they would have followed the same model as the Amhara and Oromia States' laws, which are enacted at least after the federal law.

The second differential provision in regard to land lease and rent legislatively introduced is about land size a landholder may possess. The rural land law of Ethiopia has introduced the concept of "minimum size holding – the size of the rural land the productivity of which ensure the food security of a peasant, semi-pastoralists and pastoralists family."[51] This minimum size of land is the least that may be allocated to peasants and pastoralists. Its introduction is aimed at fighting land fragmentation and degradation in terms of productivity. However, this minimum has resulted in a distinction between those peasants and pastoralists who hold land in excess of the minimum and those who have only the minimum or less than it. While leasing and renting land peasants and pastoralists are required to observe the minimum size holding requirement. In particular, both the portion of land left in the hands of the lessee and the portion leased out should not be below the minimum holding size. This differentiation can be deduced from the concept of the "minimum size holding," also expressly provided for in the Oromia State's law.[52] Therefore, if the leasing and renting of land results in land fragmentation, as defined above, in effect those peasants and pastoralists whose land holding is less than or equivalent to the minimum size holding, are *de facto* denied the right to lease and rent their land.

However, this happens only when there is legislative restriction on the amount of land to lease and rent. In this regard, an examination of the legislation reveals that four different approaches are adopted to determine the amount of rentable and leasable land. The federal, SNNP and the 2017 Amhara State legislation demand that the land rent and lease be done "… in a manner that shall

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[51] Proc. No. 456/2005 (n 50) Article 2(10). The same kind of definitional clause is provided in all state laws except Oromia and Tigray states law.
[52] Proc. No. 130/2007 (n 49) Article 10(1) and Article 7(1).

not displace … [peasants and pastoralists]”. [53] This vague and general stipulation doesn’t provide the exact amount of land peasants and pastoralists are entitled to rent and lease. Some state laws, on the other hand, in addition to the above vague and general conditions, provide for the maximum amount of land they can rent and lease.[54] Such laws require the landholders to observe both requirements while renting and leasing their landholdings. Although it is amended now, the previous Amhara State law, by contrast, opts to remain silent, while certain remaining state laws expressly stipulate the maximum amount of land peasants and pastoralists can lease and rent without demanding the condition of observance of the requirement of non-displacement. They entitle them to lease and rent up to half of the portion of their land holdings.[55]

From the legal land tenure perspective and particularly for the legal construct of the nature of rights in land, all the above approaches have negative implications. The vagueness of general terms such as “in a manner that shall not displace” and/or statutory silence, opens a door for administrative abuse and political control, because such subjective terms give a discretionary power to the state to harass peasants and pastoralists. However, one has to question how this phrase and/or the silence can be understood. Both the above phrase and/or the silence approach can be interpreted in two different ways. The phrase “in a manner that shall not displace” in the SNNP State’s law is understood as requiring retention of land holding that is sufficient to produce annual food for the particular peasant’s or pastoralist’s family’s consumption.[56] Moreover, in cases when peasants and pastoralists have any other alternative means of living, the law on this reading permits them to rent and lease out the whole holdings.[57] However, given that the productivity of land depends not only on the size of the land holding, but also the manner and techniques of farming and the natural

[53] See Proc. No. 456/2005 (n 50) Article 8(1); Proc. No. 110/2007 (n 50) Article 8(1); Proc. No. 252/2017 (n 49) Article 15(1). With different phrasing - “…without affecting [peasant’s] food security” and leaving the details to be determined by regulation the Benishangul Gumuz state law adopts the same approach. (See Proc. No. 85/2010 (n 50) Article 16(2).

[54] Proc. No. 128/2013 (n 50) Article 11(1); Proc. No. 49/2009 (n 50) Article 11(1). The Ethiopian Somali and Afar State’s laws additionally require that the maximum land the Agro-pastoralists can lease and rent out is half of their holdings. The two state laws further require that the land lease and rent happen when compelling circumstances occur.

[55] Proc. No. 130/2007 (n 49) Article 10(1); Proc. No.239/2014 (n 50) Article 9(1). However, an empirical study conducted in Tigray State reveals that peasants are not observing this restriction. (See Stein T. Holden and Hosaena Ghebru. Land rental market legal restrictions in Northern Ethiopia. (2016) 55 *Land Use Policy*. 212–221).

[56] Southern Nations, Nationalities and Peoples Regional State. Rural land administration and use regulation No. 66/2007. Year 13 No. 66. 2007. Article 8(1(b)).

[57] Id Article 8(1(c)).

conditions, this understanding is again tenuous and contingent. It still gives the option of determining the amount of the land to be leased and rented to administrative bureaucratic agency.

The other way of understanding the phrase is on the basis of the type of land in question and whether leasing and renting would actually force the peasants and pastoralists to leave the locality where they reside. As one can understand from the definitional clause of a "minimum size holding," the rural land rights given to peasants and pastoralists are not only for economic activities, but also for residence and garden purposes. Therefore, this phrase serves to mean that peasants and pastoralists can lease and rent all their holdings, but excluding the holdings they use for residence and garden purposes. But such understanding makes the limit on the amount of land to be leased and rented introduced in certain state laws incompatible with the stated objective of the minimum.

At the same time, the silent approach of the previous Amhara State's law is also open for interpretation. It may be regarded as that the determination of the size/amount of land peasants and the semi-pastoralists can lease and rent is left to be delineated by the administrative authority that is in charge of land administration. The other way to interpret the silence is that it allows the landholders to lease and rent their entire land holding. The latter view can also be conceived as allowing leasing and renting of all the land holdings, either including or excluding those for residence and garden purpose. These various ways of understanding a single concept result in practical application differences and it requires one to interrogate whether it must match with the notion as in the federal legislation.[58]

On the top of the differential stipulations and restrictions on the amount of land to be leased and rented, the Ethiopian rural land laws also predefine the lease and rent period. Specifically, in defining the ceiling duration of the lease and rent period, the laws deprive the peasants and pastoralists, with the other contracting parties of the freedom of contract. As demanded by the federal legislation, all state land laws stipulate the maximum duration of land lease and rent.[59] Even though it is predictable to get the variations among the states in specifying the lease duration,

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[58] Identifying the practical differences in the application of the concept needs to investigate the practices in a further research. Moreover, whether the state laws are required to be in line with the federal counter part is addressed in Chapter 8.
[59] Proc. No. 456/2005 (n 50) Article 8(1).

almost all state's laws, except the previous Amhara State's law until changed in 2017, stipulate different types of duration on the same peasants and pastoralists land leasing rights.

While, the previous Amhara State law stipulated a renewable maximum period of twenty-five years[60] which later changed to thirty years for permanent fruit or some selected trees and ten years for other crop production,[61] the other states' laws come up with varieties of periods depending on different factors. Some other states' laws employ the nature of the farming system to stipulate different lease and rent periods. The widely used division is traditional vis-a-vis mechanized farming. Even though they fail to give a contextual essence of both farming systems, longer lease durations are provided for mechanized farming. Thus, in the Benishangul Gumuz and Oromia, and Tigray States' laws the maximum durations for the traditional farming is 2 and 3 years and for mechanized farming it is ten and twenty years respectively.[62] In relation to renewability of the contract, only Benishangul Gumuz State's law explicitly indicates the absence of any restriction on the renewability of the contract.[63]

A second approach is found in the Afar, SNNP and Ethiopian Somaliland State's laws that employ a combination of factors in defining different land lease and rent durations. They commonly use the nature of the lessee and rentee, and the crop to be produced to define the various lease durations. These state laws provide for three types of lease periods on the basis of these criteria. Accordingly, when the lessee and rentee is a fellow peasant or semi-pastoralists the landholder can lease and rent his/her holding up to 5 years.[64] A longer duration of lease and rent, which again depends upon the nature of the crop to be produced, is provided in case the lessee is an investor. To produce annual crops, the ceiling is ten years in all three state laws, whereas it varies between twenty-five

[60] It has imposed the renewable twenty-five years ceiling without making any variation on the nature of farming and lessee. (Amhara National Regional State. The revised rural land administration and use proclamation No. 133/2006. *Zikre Hig*. Year 11 No. 18. 2006. Article 18(6)).
[61] Proc. No. 252/2017 (n 49) Article 15(9).
[62] Proc. No. 85/2010 (n 50) Article 20(1(f)); Proc. No. 130/2007 (n 49) Article 10(2); Proc. No.239/2014 (n 50) Article 9(4).
[63] Proc. No. 85/2010 (n 50) Article 19(9).
[64] Proc. No. 49/2009 (n 50) Article 11(2(a)); Proc. No. 110/2007 (n 50) Article 8(1(a)); Proc. No. 128/2013 (n 50) Article 11(2(a)).

and twenty years for perennial crop production.[65] Moreover, these laws remain silent about the renewability of the contract and subjected it to the say of the administrative authority.

One has to question whether there are any legal justifications, not to mention economic and scientific justifications for fixing the duration of lease other than it simply being a legislative intervention in peasants' and semi-pastoralists' freedom. In fact, the variation between the traditional versus mechanized farming, and fellow peasants and semi-pastoralists versus investors makes this plain. That is, the lawmakers were simply of the opinion that mechanized farming and investors are more productive than traditional farming and than peasants and semi-pastoralists. By providing a longer duration to lease and rent to investors and for mechanized farming, they encourage and prefer peasants and semi-pastoralists to lease and rent their holdings to investors and for the mechanized farming. In addition, the legislative failure to define mechanized/modern technology use and traditional farming gives the power to the land administration authority to involve itself in categorization of farming to determine the applicable lease duration. This, further subjects the landholders to administrative bureaucratic agency.

In the case of *Alemitu Gebre vs Chanie Dessalegn* the House of Federations' decision has impliedly formulated the legal justification for legislative fixing of the land lease and rent duration.[66] The House's decision indicates that fixing the duration is associated with the constitutional protection of immunity against eviction and displacement afforded to peasants and pastoralists I explain in Chapter 3. According to this decision, leasing and renting of peasants and pastoralists' land rights beyond the legislatively defined duration *de facto* amounts to their eviction and displacement.[67]

However, the House's reasoning is not sustainable for me. This is first, because it doesn't consider the fundamental features of the concept of land lease and rent, and eviction and displacement. While the idea of land lease and rent is a contract that requires to be formed the free will of peasants and pastoralists, eviction and displacement on the other hand is an involuntary situation. Instead, it would have made sense to decide the case on the basis of unlawfulness of the object of the

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[65] Proc. No. 110/2007 (n 50) Article 8(1(b and c)); Proc. No. 49/2009(n 50) Article 11(2(b and c)); Proc. No. 128/2013 (n 50) Article 11(2(b and c)).

[66] *Alemitu Gebre vs Chanie Dessalegn* Federal Democratic Republic of Ethiopia House of Federation 5th parliamentary round, 1st year, 2nd regular meeting, (14 March 2016).

[67] Id p 3.

contract, given that the contract period goes beyond the legal limit. Second, given that different lease and rent periods are provided in different state laws depending on the nature of the lessee and rentee, the farming system and the nature of crops to be cultivated, as I note above, taking the legislative limit on the rent and lease period to define the constitutional protection against eviction and displacement causes certain paradoxes. For instance, according to the House's assumption, in the SNNP state law renting of land to fellow peasants for a duration of ten years is regarded as in violation of the constitutional immunity against eviction, while doing the same to an investor is not. One should also look at the duration difference among state laws. While renting and leasing of land for thirty years in Amhara State law is valid and not considered as in violation of constitutional immunity against eviction, it is regarded as an infringement of the same constitutional protection under the Tigray State law. In this light, regarding the legislative restriction about the rent and lease duration as a mechanism to uphold and give effect to the constitutional protection afforded to peasants and pastoralists doesn't make any sense. It can only be view in terms of defect in the formation of the contract – unlawful object of contract.

In defining the lease and rent durations, the laws also apparently specify the purpose for which peasants and pastoralists can lease and rent their land rights. This is so especially for those state laws that adopted the nature of farming and the crop to be produced as a yardstick to define the different lease and rent durations – they indirectly present the purpose for which they can lease and rent their land holdings. All state laws, except the Amhara State's, impliedly indicate that peasants and pastoralist can lease and rent their holding for the purpose of cultivation or farming. They are not clear whether it is possible to lease and rent for another agricultural activity, not to mention any other economic activities. Such statutory silence puts peasants' and pastoralists' right to lease and rent land for other purposes than farming at the discretion of bureaucrats and limits their autonomy. On the other hand, the 2017 Amhara State's law takes an extreme position by expressly outlawing leasing and renting of their land for other than agricultural purpose.[68]

Above all the fundamental restrictions that legislatively open a door for administrative abuse is the need of administrative approval of the land lease and rent agreement. Except for the Amhara, Gambella and Tigray State laws, all the other state laws require approval of the appropriate state

[68] Proc. No. 252/2017 (n 49) Article 15(2).

authority as a validity requirement for land lease and rent agreements.[69] This type of requirement is uncommon to other forms of private contracts in the country. As a result, it forces one to examine whether such condition is adopted for the best interest of peasants and pastoralists or as a mechanism for political control.

One can assume that the validity requirement of administrative approval of land lease and rent contract is aimed at protecting the interest of peasants' and pastoralists' who lease and rent their land rights, on the belief that they have a lesser/weaker bargaining power as opposed to the lessee and rentee.[70] However, this won't always be true and it also happens in other contractual engagements. For one thing, in the majority of cases peasants and pastoralists lease and rent their landholdings to fellow peasants and pastoralists and other private individuals, who can be assumed to have equal bargaining power. Leasing and renting to the investors, who may be supposed to have stronger negotiating power, occurs seldom, since investors can access the required amount of land from the government more easily. For another, the general contract rules of the country enshrine the conditions and requirements that can address the injustice that would happen due to imbalance of bargaining power between the contracting parties.[71] Hence, the assumed benefits of administrative approval of land lease and rent contract, can be realized through the general rule of contract of the country. Administrative approval seems good for nothing other than interference with the freedom peasants and pastoralists enjoy in relation to their land rights.

Generally, in country like Ethiopia where the sale of land is outlawed, the land lease and rental market is the best substitute to ensure the benefits that otherwise would be derived from land sale. However, this becomes true only when landholders have freedom in deciding about leasing and renting their landholdings. Legislative stipulations of either one or more of the restrictions I discuss above impede the lease and rental market and affect the legal constructs of nature and duration of rights in land and of land tenure security I discuss in Chapter 1. The obstruction of these legal constructs extends from narrowing the bundle of land rights – practical exclusion of the land

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[69] Proc. No. 85/2010 (n 50) Article 19(7) seems to apply for jointly held land; Proc. No. 130/2007 (n 49) Article 10(3); Proc. No. 49/2009 (n 50) Article 11(3); Proc. No. 110/2007 (n 50) Article 8(2); Proc. No. 128/2013 (n 50) Article 11(3).

[70] If it is supposed for other reason, like to ensure the observation of the law, there is no need of empowering of the administrative approval here. Rather we can apply the contract rules about requirements for valid contract and the remedies available for non-observation thereto. (See The Civil Code of the Empire of Ethiopia. Proclamation No. 165/1960. *Neg. Gaz.* Extraordinary Year 19 No. 2. 1960. Article 1676-1818).

[71] Ibid.

leasing and renting right through the stipulation of restrictions on the amount of land, the duration of lease and rent, the purpose for which land lease and rent is allowed and by subjecting the transaction to the decision of administrative authorities. This is not even to mention the variations among the state laws, the legality which examine in Chapter 8.

ii. Inheritance and Donation

The post-1991 statutory land tenure system of Ethiopia also incorporates legislative restrictions on peasants and pastoralists right to transfer their land rights through inheritance and donation. The basic restriction in this regard is on the landholders' freedom of selection of the inheritor and donee. As established in Chapter 1, the legal construct of the nature of rights in land of land tenure security, besides being broad enough to incorporate the basic bundle of property rights, must through legislation ensure the landholders' freedom to exercise the rights. Fundamentally, in countries like Ethiopia, where rural land rights have more than economic importance and transfer of the same in the generational line is crucial, legislative imposition of such restrictions has huge implications for land tenure security.[72]

Unlike the country's general law of inheritance and contract of donation that grant the level of autonomy needed, the land laws restrain peasants' and pastoralists' freedom in selecting beneficiaries.[73] In-depth examination of the land laws reveal that three different approaches are adopted to define peasants' and pastoralists' freedom of selecting the inheritors and the donees. The family member approach, which is adopted in the federal and most state laws, entails that peasants' and pastoralists' have the right to bequeath and donate their land rights to those persons who permanently live with them, sharing their livelihood.[74] Unlike the family and succession laws,

[72] Fasil Nahum. Ethiopia: Constitutions for a Nation of Nations. (1998) 60 *ICJ Rev.* 91–101. P 95.
[73] See The Civil Code (n 70) Article 826-1125 for the law of succession and the only restriction is that the inheritor is not disinherit the descendants without providing a reason to that effect. (*id* Article 938). About donation (*id* Article 2427–2470). Basically, introduction of this form of restriction may aimed at realizing some sort of policy goals like land fragmentation and incentivize potential heirs. (See for instance, Matthew Baker and Thomas J. Miceli. Land inheritance rules: theory and cross-cultural analysis. (2005) 56 *Journal of Economic Behavior & Organization*. 77–102).
[74] Proc. No. 456/2005 (n 50) Article 5(2) and 2(5); Proc. No. 130/2007 (n 49) Article 9(1 and 5) and Article 2(16) the Oromia state law defined family members slightly differing as "children of land holder or dependents who do not have other income for their livelihood" but do not necessary required to live with landholder (*id* Article 2(16)); Proc. No. 49/2009 (n 50) Article 9(13) and 2(7) but the Afar State law with respect to inheritance it adopts a different approach – children and legal heirs to determine the inheritors (*id* Article 5(4)); Proc. No. 110/2007 (n 50) Article 5(11), 8(2), and 2(7); Proc. No. 128/2013 (n 50) Article 9(12) and 2(5) but the Ethiopian Somali state law also incorporates

which define the family members in terms of consanguine relationship mainly, the land laws understanding of it is based on the residency and dependency conceptions.[75] This approach, beside limiting peasants' and pastoralists' autonomy of selection, also contradicts the constitutional aim to and the societal belief of reserving land rights in the family generational line,[76] because they can bequeath and donate their land rights to only a person who satisfies the above two cumulative requirements, irrespective of any sibling relationship. Inversely, they cannot bequeath and donate to the one they wish to and relate in blood or marriage if the such a person fails to satisfy the two cumulative requirements.

The extremely restricted bloodline approach adopted in the Tigray State law is the second approach to determine peasants' autonomy to select the inheritors and donees of their land rights. Even though this approach to some extent maintains the land rights in the family generational line, it seriously restricts the demarcation of the inheritors and donees. Accordingly, peasants have the right to inherit land rights to their landless children above the age of eighteen or in their absence to their landless parents or grandchildren.[77] It further states that peasants are not authorized to bequeath land rights beyond the second-degree relationship and to their children residing in urban centers.[78] Moreover, in contrast to the above approach and the federal law, the Tigray State law grants those persons who permanently reside with the deceased, sharing his/her livelihood with prioritization to acquire the deceased's heirless land in the distribution.[79] Also in case of donation, given that, as I note in Chapter 4, the legal recognition of peasants' right to donate their land rights is indirectly inferred from the methods of accessing rural land rights defined in the legislation, it is only landless children who attained the age of eighteen and parents who can access rural land rights through donation.[80]

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inheriting of land rights to children and other legal heirs (*id* Article 5(5); Gambella Peoples' National Regional State. Rural land administration and use proclamation No. 52/2007. *Neg. Gaz.* Year 13 No. 22. 2007. Article 7(2) and 2(5).

[75] See The Civil Code (n 70) Article 842 – 856 about intestate succession; Federal Democratic Republic of Ethiopia. The revised family code proclamation No. 213/2000. *Fed. Neg. Gaz.* Extraordinary Issue Year 6 No.1. 2000.

[76] See Nahum (n 72) p 95.

[77] Proc. No.239/2014 (n 50) Article 14(1 and 2).

[78] Id Article 14(2 and 4). The succession law of the country adopts four degree of relationships of intestate succession not to mention succession by representation. (See The Civil Code (n 70) Article 842 – 856).

[79] Proc. No.239/2014 (n 50) Article 14(9).

[80] Id Article 8(10 and 11).

A somewhat liberalized approach, adopted in the Amhara and Benishangul Gumuz State laws, on the other hand, acquaints peasants and pastoralists with better autonomy to select beneficiaries compared to the above two approaches. These laws employ different yardsticks in defining the beneficiaries of inheritance and donation. Unlike the above approaches, that *de facto* recognizes the intestate succession of peasants' and pastoralists' land rights only, these two state laws incorporate both testate and intestate succession, *de jure* and *de facto*. In broadening the landholders' freedom of choosing the inheritors, both laws authorize landholders to bequeath their land rights to any peasants engaged in or likely to engage in agriculture works via will.[81] The inheritors can even be those who reside in town and "engaged in small income activities to support their lives."[82] The only restriction imposed on the testators is that they have to make sure that the will doesn't result in disinheriting their minor children and their family; and doesn't harm their spouses.[83]

In the absence of a valid will, peasants' and pastoralists' land holding is transferred to their legal heirs. Unlike the first approach, in this approach the determination of inheritors doesn't primarily rely on residency and dependency requirements. Nevertheless, in 2017 Amhara State law priority is given to the children of the deceased, in their absence to the parents of the deceased, and then to the other family members who engage in or would like to engage in agriculture.[84] In Benishangul Gumuz and previous Amhara State's laws in the absence of children priority is given to family members who fulfil the residency and dependency requirements.[85] In contrast to the first approach, here the deceased's children, and also parents in Amhara State law are not expected to establish the residency and dependency requirements to inherit. It is the other persons who are required to show that they are permanently living with the deceased sharing the latter's livelihood.[86] Thus, in lieu of the deceased's children or other family members engaged in or desiring to engage in agriculture residing in the state, his/her parents who are residents of the state engaged in or desiring

[81] Proc. No. 252/2017 (n 49) Article 17(1); Proc. No. 85/2010 (n 50) Article 17(1).
[82] Id Article 17(11); and Article 17(4) respectively.
[83] Id Article 17(3); and Article 17(5) respectively.
[84] Id Article 17(5); and Article 17(7) respectively.
[85] Proc. No. 133/2006 (n 60) Article 16(5 and 6); Proc. No. 85/2010 (n 50) Article 17 (5 and 6).
[86] Proc. No. 252/2017 (n 49) Article 17(5) and 2(9); Proc. No. 85/2010 (n 50) Article 17(7) and 2(5) respectively.

to engage in agricultural work and hold land less than the maximum holding amount may inherit the deceased's land holding in the Benishangul Gumuz and previous Amhara State's laws.[87]

While the Amhara and Benishangul Gumuz State laws also follow a different approach in defining the persons to whom peasants and pastoralists can donate their land rights,[88] they further, in addition to the family members as per the first approach, broaden peasants' and pastoralists' freedom of selecting the donee for permanent donations in two ways. First, they entitle them to donate their land rights to their children, or grandchildren or other family members, provided that they are landless or till land that they rent because they have insufficient land,[89] are resident in the state and are engaged in or desiring to be engaged in.[90] In addition, the State laws also authorize the landholders to donate their land rights to any resident of the respective state who for 3 consecutive years before the donation is undertaken has stayed on and freely cared for and tilled the land of the donor or worked for her/him in another way.[91] However, the 2017 Amhara State law leaves out the three consecutive year period from the validity requirement of the land donation.[92]

In general, the post-1991 statutory land tenure system of Ethiopia has not totally left the selection or presumed selection of the beneficiaries of the inheritance and donation to peasants and pastoralists. With fundamental differences among the state laws, it is legislatively demarcated to whom they may bequeath or donate their land rights. The delineation in turn has a negative implication for the landholders' freedom of exercising these specific land rights. To an extent it also derogates from the deeply-implanted societal perception and outlook of keeping the landholdings in the family generational line.[93]

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[87] Proc. No. 133/2006 (n 60) Article 16(6); Proc. No. 85/2010 (n 50) Article 17(8) respectively. Nevertheless, the two State laws do not provide the maximum landholding to be granted yet.

[88] The two State laws, unlike, the federal and other state laws, adopt the notion of temporal donation and inheritance for certain period of time. (See Proc. No. 252/2017 (n 49) Article 16(5) and Article 17(2); Proc. No. 85/2010 (n 50) Article 17(6) and Article 18(2)).

[89] This condition is excluded in the 2017 Amhara State law. (See Proc. No. 252/2017 (n 49) Article 16(1(a)); Proc. No. 133/2006 (n 60) Article 17(1(a))).

[90] Proc. No. 252/2017 (n 49) Article 16(1(a)); Proc. No. 85/2010 (n 50) Article 18(1(a)) respectively.

[91] Proc. No. 133/2006 (n 60) Article 17(1(b)); Proc. No. 252/2017 (n 49) Article 17(1(b)); Proc. No. 85/2010 (n 50) Article 18(1(b)).

[92] Proc. No. 252/2017 (n 49) Article 17(1(b)).

[93] The intestate succession rule of "*paterna paternis materna maternis*" adopted in the succession law of Ethiopia that aimed at preserving immovable property within a family and generational line is the only succession rule adopted

The justifications for those restrictions may rely on the two rationales provided by the ruling government for maintaining "state and people's ownership" of land – the social security and equity paradigms.[94] The social security paradigm justifies the restrictions as aimed at protection of peasants and pastoralists from the disguised sale of land on the pre-text of inheritance and donation. In this view unless the autonomy of selection of beneficiaries is limited, peasants and pastoralists will be exposed to the urban bourgeoisie, who may persuade them to conduct a *de facto* sale of land under cover of inheritance or donation. The social equity perspective, on the other hand, holds that rural land rights in Ethiopia are instruments to provide the needy with a livelihood. Legislative specification of the beneficiaries of peasants' and pastoralists' donation and inheritance of land rights on this view is aimed at ensuring that transfer of land rights in these ways is made to needy persons and not simply the one the landholder prefers. This may be because of the assumption that peasants and pastoralists got the land rights for free, and thus should not get to decide to whom it has to be transferred through donation and inheritance. In addition, it can be assumed that it is attached with the very justification for adoption of "state and people's ownership" of land and the recognition of the egalitarian principle to define access to rural land.[95]

However, from the legal land tenure perspective such restrictions have negative implications and the justifications forwarded for them are to me not persuasive. For one thing, the assumption of granting land for all the needy to sustain their livelihood through the donation and inheritance of land rights, is not tenable. In the face of forty-three percent landlessness in the rural community, it is unrealistic that transfer of land rights through donations and inheritance can secure livelihoods for the needy.[96] It may be still persistently argued that one should at least attempt to keep this resource, limited as it is, at the disposal of those who most need it. Nevertheless, this argument goes against the constitutional assumption taken in adopting "state and people's ownership" of land about the long-standing experience of Ethiopia. Fasil Nahum, one of the legal scholars who

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from the country's custom. (See The Civil Code (n 70) Article 849; George Krzeczunowicz, Code and custom in Ethiopia. (1965) 2 *J. Ethiopian L.* 425–439. P 432).

[94] Wibke Crewett and Bendikt Korf. Ethiopia: Reforming land tenure. (2008) 35(116) *Review of African Political Economy*. 203–220. Pp 204-206; Dessalegn Rahmato. *Searching for tenure security? The land system and new policy initiatives in Ethiopia.* Addis Ababa. Forum for Social Studies, 2004. P 10; Yigremew Adal. Review of landholding systems and policies in Ethiopia under the different regimes. Addis Ababa. *Ethiopian Economic Policy Research Institute working paper 5,* 2002. P 27.

[95] See detail discussion in Chapter 4 Section A.

[96] Peter Bodurtha, Justin Caron, Jote Chemeda, Dinara Shakhmetova, and Long Vo. Land reform in Ethiopia: Recommendations for reform. *Solidarity Movement for a New Ethiopia*, 2011 P 1.

was actively involved in the making of the FDRE Constitution, states that the nature of ownership of land adopted is meant to reflect the societal perception of land in an inter-generational manner.[97] He mentions that one of the reason for the adoption of "state and people's ownership" of land in Ethiopia is to reflect the long-standing Ethiopian experience that land "… *having belonged to one's parents, grandparents, great-grandparents and will belong to one's children, grandchildren, great-grandchildren; [b]eyond-that, land is also seen as the common property of the extended family, the clan, the tribe, etc*."[98] Thus, defining and limiting the landholders' selection of donees and inheritor on the basis of need disregards this constitutional assumption. It also has the implication to discourage them from making investment on land in their old age, since their land right may be transferred to another person than the one they prefer.

Instead, it dictates formulation of an alternative socio-economic policy and a legal mechanism to address the problem of securing livelihoods for needy than relying on land from donation and inheritance. For the other, the fear of social insecurity that emanates from the sale of land in the guise of donation and inheritance, if any, can be controlled by other mechanisms than through limiting peasants' and pastoralists' freedom in this respect. At least, through enabling landholders to bequeath and donate their land rights to the actual family generational line and for social purposes, it is possible to curtail the perceived danger of land sale. Otherwise, such forms of legislative restrictions serve only to affect landholders' freedom in exercising the legally granted specific land rights that in turn has the implication of undermining the legal construct of the nature of rights in land of land tenure security.

C. Deprivation of Land Rights

As I note in Chapter 1 to fulfil the legal construct of assurance of land rights for land tenure security, the ways in which landholders may lose their land rights must be through properly and narrowly defined processes, such as land expropriation, among others. Since it is an exceptional limit to land rights, it is supposed to be regulated in a manner that balances the public need for land and the protection and land tenure security of the landholders, as is seen in the subsequent Chapter, illustrating the post-1991 Ethiopian statutory land tenure system. Nevertheless, the

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[97] Nahum (n 72) p 95.

[98] Ibid.

tendency to adopt other mechanisms to deprive land rights will have a negative bearing on security of land tenure. Accordingly, a critical examination of the post-1991 statutory land tenure system of Ethiopia indicates a legislative movement to deprive peasants' and pastoralists' land rights in other ways and for others reasons than apply under expropriation. These take two forms. The one, I discuss directly below, results the actions of peasants and pastoralists, either in the form of commission or omission. The other, I address in Section D below, is due to factors beyond the control of the landholders. The existence of a legal remedy to demand judicial review of such decisions is explained in Chapter 7.

i. Engagement in Non-Agricultural Activity

Justifications repeatedly mentioned in Ethiopia for peasants' and pastoralists' rural land rights are that they are a means of livelihood, not to mention the social and cultural roles these rights play. Their right to free access to rural land also depends on their intent to engage in agriculture as a livelihood in the post-1991 statutory land tenure system. As the country's economic policy dictates – agricultural development leads to industrialization[99] – peasants and pastoralists may engage in other non-agricultural economic activities for the betterment of their living condition. This in turn enhances the economic development and eradication of poverty in the country since most of the population on or under the poverty line are peasants and pastoralists.

However, the realization of the national goal and the improvement of the lives of peasants and pastoralists, at least in the economic terms stated above, depends upon the guarantees they have for their land rights. It means that the land tenure system must ensure that their engagement in off-farm activities should not result in them being deprived of their land rights. Any minimal threat of depriving their land rights if they sustain their livelihood from non-agricultural activity may discourage them from diversifying their means of living. Then rural poverty will persist and the national economic goal would face a challenge, because the threat of deprivation prevents poor peasants and pastoralists from engaging in non-agricultural activities to supplement their income and discourages agricultural households from transforming themselves from subsistence to

[99] Ministry of Finance and Economic Development. Rural development policy and strategies. Addis Ababa. *The Federal Democratic Republic of Ethiopia*, 2003; Ministry of Information. Rural and agricultural development policies and strategies. Addis Ababa. *Federal Democratic Republic of Ethiopia*, 2001.

commercial agriculture, as the economic opportunity to use the extra money generated is very limited.[100]

An examination of the post-1991 statutory land tenure system of Ethiopia reveals the adoption of three approaches to the matter. The federal, Oromia, Gambella, Afar and Ethiopian Somali State's laws are silent, while the SNNP State's law tacitly outlaws it.[101] By contrast, the Amhara, Benishangul Gumuz and Tigray State's laws expressly indicate and recognize it as an additional ground to deprive the land rights of peasants and pastoralists.[102] The approach of statutory silence about engagement in non-agricultural activity also puts peasants and pastoralists in a dilemma, because they cannot be sure what would happen to their land rights if they engage in another economic activity to supplement and transform their agricultural livelihood. Moreover, it opens the space for bureaucratic decisions on the issue.

The tacit permission adopted in the SNNP State's law is that peasants' and pastoralists' involvement in activities other than agriculture to earn their livelihood doesn't constitute a ground to deprive their land rights This fact can be inferred from the stipulation of the law that has permitted a peasant and pastoralist, who has "…any other alternatives such as working as labourers, being hired by investors, or to make business or any other better job opportunity, can rent all of [his/her land] holding."[103] Nevertheless, this approach is not formulated as a right and in a way to enable and encourage peasants and pastoralists to engage in non-agricultural activities to diversify their means of living. Instead, it is provided for incidentally while regulating the right to lease and rent land rights.

At its worst, the recognition of engagement of peasants and pastoralists in non-agricultural activity as a ground to deprive their land rights in some state laws is a great threat to the legal construct of the assurance of the land rights for land tenure security. Besides, it discourages them from diversifying their means of living and living an improved life. The assumed justification for this is the belief that they got the land for free and they now have an alternative livelihood, while there

[100] Solomon Bekure, Abebe Mulatu, Gizachew Abebe, and R. Michael. *Removing limitations of current Ethiopian rural land policy and land administration*. (Workshop on land policies & legal empowerment of the poor, Washington DC), 2006. P 9.
[101] Reg. No.66/2007 (n 56) Article 8(1(c)).
[102] Proc. No. 252/2017 (n 49) Article 21(1(a)); Proc. No. 85/2010 (n 50) Article 13(1(a)); Proc. No.239/2014 (n 50) Article 13(5).
[103] Reg. No.66/2007 (n 56) Article 8(1(c)).

are many others who have no means of living and need land. The argument is, that to ensure social equity, rather than giving land rights to someone who has other means of living, it is better to give it to those who have none. However, this justification is criticised as distribution of poverty rather than ensuring livelihoods for all – equality of poverty.[104]

The state laws' variations in providing the standards to define the engagement in off-agricultural activities also complements the above criticism. The state laws employ different standards in specifying the circumstances in which peasants and pastoralists are deprived of their land rights for the reason of engaging in non-agricultural activity to earn their livelihood. For instance, the previous Amhara State law employs two alternative standards: being employed in a permanent job earning an average income of not less than the minimum wage determined by the government; and engagement in other taxable activities than agriculture.[105] Irrespective of the amount of income derived and except for pensioners and those assigned to national service, peasants' and pastoralists' engagement in either of the above activities authorizes the state to deprive their land rights.[106] However, the 2017 rural land law of the state changes and slightly improves the standards by making the restriction to apply on those who get employed in private, government or non-governmental organizations and earn more than the minimum starting monthly salary, or on those who have been employed for jobs deemed low-grade, like security-guard, cleaner, postman, and office boy/girl.[107] Besides recognising the non-application of the restriction on pensioners, the 2017 Amhara State law also indicates its non-application on the peasant who has transformed to an investor by producing additional wealth through his/her effort.[108] By contrast, the Tigray state law adopts solely employment in governmental or non-governmental organizations as a yardstick to deprive the land rights. It provides that irrespective of the nature of the employment (permanent

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[104] Rahmato Searching (n 94) p 12.
[105] Amhara National Regional State. Rural land administration and use system implementation Council of Regional Government regulation No. 51/2007. *Zikre Hig*. Year 12 No. 14. 2007. *Zikre Hig*. Year 12 No.14. Article 14(1(a and b)). The 2017 rural land law of the Amhara State expressly authorizes the application of this regulation provided that it doesn't go against and contradict with it. (See Proc. No. 252/2017 (n 49) Article 61). However, since the two laws are contradictory to each other in defining the standards for engagement of off-farming activity, the 2017 law of the State prevails.
[106] Reg. No.51/2007 (n 105) Article 14(1(a and b) and 14(2).
[107] Proc. No. 252/2017 (n 49) Article 21(1(a)) and 7(2).
[108] Id Article 21(3); Amhara National Regional State. Rural land administration and use system implementation Council of Regional Government regulation No.159/2018. *Zikre Hig*. Year 23 No. 4. 2018. Article 11. However, one still question from where a peasant and a pastoralist get an initial capital to transform to investor unless he/she is initially authorized to engage in off-farming activities.

or temporary) and the amount of wage, so-employed persons lose their land rights.[109] However, the law also implies that some exclusions will be made in the further enactment against whom the restriction is not applied, irrespective of their involvement in off-farming activities.[110]

In sum, the analysis of the federal and states rural land laws of the post-1991 Ethiopia reveal that there is no uniform stand about the effect of peasant's and pastoralist's engagement in non-agricultural activity for livelihood. The laws differ in two ways. One is in terms of considering whether it serves as a ground to deprive land rights. While the federal and certain state laws are silent about it, some other states' laws recognise it as a ground to deprive land rights and the rest tacitly indicate that it doesn't serve as a ground to deprive. In those state laws where it is considered a ground of deprivation, the standards set to define what constitutes engagement in non-agricultural activity are also different. Accordingly, what constitutes engagement in non-agricultural activity to deprive land rights in state may not be the case in other state. These differences among the laws leads to question if there is any policy goal this restriction is going to achieve. Instead, I claim that the legislative incorporation of it as a ground to deprive peasants' and pastoralists' land rights undermines their livelihood improvement and betterment, and threatens their land tenure security.

ii. Failure to Observe Residency Requirements

Inter alia, the continuity and preservation of the land rights of peasants and pastoralists in the post-1991 land tenure system of Ethiopia depends upon their satisfaction of residency requirements stipulated in law. In short, their failure to reside in the particular locality where their land rights apply, causes the deprivation of those land rights.[111] Also, here, the approaches adopted in the different laws defining the post-1991 land tenure system are different.

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[109] Proc. No.239/2014(n 50) Article 13(5).

[110] Ibid. The exclusion may be similar with those peasants who engage in off-farming activities mentioned for sake of defining against whom the requirement of residency doesn't apply. (See *id* Article 11(5)). Particularly, in this provision two basis of exclusions, such as nature of employment and the nature of the peasants may apply for the same reason. Accordingly, this restriction may not apply on the active or retired members of defense force, federal or state police force, and the previous disabled-Tigrayan insurgent who are employee of government or non-government organization living in the country. (see *id* Article 11(5(a, b and e)).

[111] Getnet Alemu Zewdu and Mehrab Malek. Implications of land policies for rural-urban linkages and rural transformation in Ethiopia. *Development Strategy and Governance Division, International Food Policy Research Institute (IFPRI). Ethiopia Strategy Support Program 2*, 2010. P 9; Tesfaye Teklu. Rural Land Rights and Security in

Four different approaches can be distinguished in the federal and state rural land laws. These are: the direct imposition as a residency duty and failure of observation of which results in automatic deprivation; using the residency requirement as a source of land for distribution to landless persons; expressly excluding the residency requirement as a ground for deprivation of land rights; and statutory silence.

The direct duty approach to the residence requirement, adopted in the Amhara, Benishangul Gumuz and Tigray State laws entails that peasants' and pastoralists' disappearance from the locality for a certain period empowers the state to deprive their land rights.[112] However, these three state laws are different in terms of required period of absence and the other conditions imposed. With regard to the period of absence, the three laws require absence of the landholder for more than 5, 3 or 2 consecutive years respectively as grounds for deprivation of the land rights.[113]

The conditions attached to deprivation of land rights on this ground also vary among these state laws. The Amhara and Benishangul Gumuz State laws provide two additional cumulative conditions to deprive land rights for absence. Absence counts only if the landholder's whereabouts are unknown and the landholder did not lease his land or assign a representative to administer the land.[114] The Tigray State law in turn, attaches no conditions, but determines that the residency requirement doesn't apply to all landholders, by creating exceptions.[115] Accordingly, in the Tigray State, even where peasants have left the locality but their whereabouts are known, or they are leasing the land or have appointed administrators, their absence for more than two consecutive years will automatically empower the state to deprive the land rights, unless the landholder falls

Cultivated Highland Ethiopia: Incremental Reform but Persistent Uncertainty. (2014) 2 *International Journal of African Development*. 101–113. P 102.

[112] Proc. No. 252/2017 (n 49) Article 21(1(b)); Proc. No. 85/2010 (n 50) Article 13(1(b)); Proc. No.239/2014(n 50) Article 13(1).

[113] Ibid.

[114] Proc. No. 252/2017 (n 49) Article 21(1(b)); Proc. No. 85/2010 (n 50) Article 13(1(b)).

[115] Proc. No.239/2014(n 50) Article 11(1 and 5). The exceptions are framed in terms leaving the area due to marriage (*id* Article 11(4)); assumption of public office, joining of defense and police force (*id* Article 11(5(h, a and b)), education (*id* Article 11(d)); health problems and disability (*id* Article 11(5(f, g, i and l); loss of parents (*id* Article 11(5(j)). Moreover, the law also incorporates an exception in terms of the nature of landholder. Specifically, it provides that it does not apply on the family of the martyr who died in the insurgency fight with the *Derg* regime (*id* Article 11(5(c)) and the disabled-insurgents who are moved the area as a result of employment and other reasons but live within the country (*id* Article 11(5(e)). Finally, the law provides the inapplicability of this restriction on those who have got rural land in distribution of land while they were living in urban or rural area other than where their land is located. (See *id* Article 11(5(k)).

under the exception provided for. Neither of these three laws say anything about the reason for which a landholder might have left his land as influencing the application of the requirement.

The second approach – using the requirement as a source of land for distribution – entails that peasants' and pastoralists' wilful absence empowers the state to distribute their land to the landless or to those holding inadequate land.[116] In this approach, absence results in loss of land rights only if in the relevant area there is landlessness or inadequacy of land and so a demand for land; and if the landholders have left of their own free will. Where there is no demand for but an abundance of land, and/or where the landholders' absence is due to some coercive force, it is deemed that the state will not deprive peasants' and pastoralists' land rights for the mere fact they left the locality for a certain period. At least theoretically, compared to the first approach, this approach narrows the probability of deprivation of land rights for absence. However, the problem with those state laws that adopt this approach, is that they fail to set the period of absence required, although the federal law leaves this determination to the state laws.[117] This legislative failure empowers administrative authorities to randomly select any period of absence to deprive land rights.

The silent approach followed in those states with large pastoralist populations – the Afar and Ethiopian Somaliland States – simply doesn't indicate whether pastoralists' absence from their land for any period results in deprivation of their land rights. This leaves uncertainty for pastoralist landholders and also implicitly empowers regulatory authorities to decide on the matter. This creates the possibility of variation in decision and opens the way for abuse of authority, so as to threaten land tenure security.[118]

Finally, in the Oromia State law, absence is specifically excluded as a ground for deprivation of land rights. This law provides that a change of residential area doesn't affect land rights.[119] More specifically, the provision deals with spouses who have rural land rights, either as peasants or pastoralists. The land rights of a husband or a wife, or both cannot be affected by the mere fact of them failing to reside on their land. The question is whether this protection can be extended to

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[116] This approach is adopted in the federal, and Gambella and SNNP state laws. (See Proc. No. 456/2005 (n 50) Article 9(1); Proc. No. 52/2007(n 74) Article 10(1); Proc. No. 110/2007 (n 50) Article 9(1)).

[117] Proc. No. 456/2005 (n 50) Article 9(1).

[118] One would ask why such approach is adopted in the pastoralist's community? Does it have any link with the nature of land utilization? But in those communities, there are privately held land rights as well.

[119] Proc. No. 130/2007(n 49) Article 15(10).

unmarried/separated peasants and pastoralists. In my opinion, in this regard the lawmakers have assumed that marriage would inevitably entail the change of residential areas of spouses and it is not with the intention to give special protection to their land rights. Therefore, analogically we can apply this protection to the non-spouse peasants and pastoralists.

To summarise, besides the question of legality of the above variations (I explain in Chapter 8) and its incorporation in legislation affecting the legal construct of assurance of land rights of the land tenure security, I couldn't find any rationale for the incorporation of the residency requirement to deprive the land rights of peasants and pastoralists. Instead, it means "as you are born a peasant/pastoralist so should you remain without education and betterment of life style"[120] and it threatens peasants' and pastoralists' constitutional rights to freedom of movement and choice of residence.[121]

iii. Failure to Conserve Land

Environmental protection has taken on great importance nowadays, because the environmental crisis is considered as a threat to the decent existence of all species, including human beings. To address it international, regional and national efforts have mostly taken a command and control approach.[122] Ethiopia as a nation has employed different policy and legal measures to address the environmental problems.[123] Besides separate environmental policy and laws, it also incorporates the issue of environmental protection in the statutes that define the land tenure system of the

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[120] It is one of the criticisms raised against the adoption the *status quo* land ownership in the FDRE Constitutional making. See (Belachew Mekuria. 'Human rights approach to land rights in Ethiopia' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 49–94; Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 4, Nov. 23–29/1994, Addis Ababa), 1994. Deliberation on Article 40. (Amharic document, translation mine)).

[121] FDRE Constitution (n 4) Article 32(1).

[122] The command and control approach to environmental protection is considered as a traditional way and recommendation is made to integrate it with an alternative approach of economic incentives. (see Robert W. Hahn and Robert N. Stavins. Economic incentives for environmental protection: integrating theory and practice. (1992) 82 *The American Economic Review*. 464–468; Daniel H. Cole and Peter Z. Grossman. When is Command-and-Control Efficient? Institutions, Technology and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection. (1999) *Wis. L. Rev*. 887–938).

[123] Ethiopia has ratified most international environmental treaties. It has recognized the distinct right to clear and healthy environment in its constitution. It has also promulgated its own environmental protection policy and enacted different environmental laws. (for general overview on Ethiopian Environmental law see for instance, Mellese Damtie. 'Legal and institutional issues for environment in Ethiopia in 2008' in Sue Edwards (ed). *Ethiopian environment review*. Addis Ababa. Forum for Environment, 2010. 1–22; Mellese Damtie and Mesfin Bayou. 2008. *Overview of environmental impact assessment in Ethiopia: gaps and challenges.* MELCA Mahiber, Addis Ababa; Girma Hailu. *Environmental law Ethiopia*. International Encyclopaedia of Laws. Leuven. Kulwer Law International, 2000).

country.[124] Particularly, regarding peasants' and pastoralists' land rights the post -1991 statutory land tenure system incorporates environmental standards that peasants and pastoralists must observe in utilizing their land holdings. It also provides that failure to observe these environmental standards and requirements leads to deprivation of land rights.[125]

However, from the point of view of land tenure security, the issue of environmental protection should be examined from the vantage point of whether there is an alternative and a better approach to deal it, and whether the environmental standards/obligations are clearly defined and uniform over the country.[126] In defining the environmental standards or environmental obligations of peasants and pastoralists towards the land rights, the post-1991 Ethiopian legal system adopts a command and control approach. As I discuss below, it imposes both directory and prohibitory obligations, with their respective liabilities, including dispossession of land rights. The incorporation of liability clause and deprivation of land rights for failure to observe the environmental standards in relation to land use imply that the legislature has assumed the prevalence of land tenure insecurity. This is because, for one thing, as I note in Chapter 1 Section A(ii) the prevalence of land tenure security incentives for peasants and pastoralists to take self-initiated environmental protection measures and for another, there wouldn't be any other reason than tenure insecurity that forces them to expose the land they possess to degradation or damage.[127] Therefore, an incentivized environmental protection approach would be a better option to make peasants and pastoralists employ environmentally friendly land utilization mechanisms.

Nevertheless, in a system that adopts the command and control approach to environmental protection, environmental standards and requirements are required to be clearly defined and

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[124] Damtie and Bayou (n 123) pp 25–26.

[125] Proc. No. 456/2005 (n 50) Article 10(1); Proc. No. 252/2017 (n 49) Article 21(1(d)); Proc. No. 85/2010 (n 50) Article 13(1(d)); Proc. No. 110/2007 (n 50) Article 10(1); Proc. No.239/2014 (n 50) Article 13(2); Proc. No. 130/2007 (n 49) Article 6(16); Proc. No. 49/2009(n 50) Article 18(2); Proc. No. 128/2013 (n 50) Article 17(2); Proc. No. 52/2007(n 74) Article 11(1). In fact, the deprivation of land on the ground of failure to conserve land is not automatic. Although it varies from state to state, there are other administrative measure a competent authority takes against the landholder who fails conserve his/her/their land possession before resorting to deprive it.

[126] In federal system of government, the issue of which level of government should regulate the matter of environmental protection – environmental federalism is a point of debate and academic discourse. (See for instance, Daniel C. Esty. Revitalizing environmental federalism. (1996) 95 *Michigan Law Review*. 570–653; William Wade Buzbee. Brownfields, environmental federalism, and institutional determinism. (1997) 21 *Wm. & Mary. Envtl. L. & Pol'y Rev.* 1–61).

[127] Samuel Gebreselassie. Land, land policy and smallholder agriculture in Ethiopia: options and scenarios. (The Future Agricultures Consortium, the Institute of Development Studies), 2006. P 11.

understandable to the landholders. Otherwise, the standards are open for interpretation and susceptible to abuse and the landholders may not be aware what is required of them, particularly if technical concepts incorporated in the standards and requirements. This will negatively affect the legal construct of the assurance of the land rights for land tenure security.

In Ethiopia, the environmental standards in relation to land are defined mainly depending on the nature of the slope of land. This is a technical issue that it is difficult for peasants and pastoralists to understand.[128] Moreover, the environmental obligations imposed on peasants and pastoralists in the state laws are subjective and open for interpretation and entrust the regulatory authority with unnecessary discretionary power in determining whether the landholder has observed the environmental obligations or not. The subjective phrases like "neglecting conserving/proper management and conservation";[129] "appropriate soil and water conservation measures"[130]; "favorable soil conservation";[131] "suitable soil conservation practices"[132] are open to interpretation and abuse.[133]

Furthermore, there is no uniformity among the laws under study in setting environmental standards and obligations. Besides differences in categorization of the slope of the land, with the different requirements of utilization and protection that flow from that, some state laws incorporate

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[128] The federal, the Oromia, the Amhara, the SNNP, Afar and Ethiopian Somaliland State's laws require the management of rural lands the slope of which is less than 30% to follow the strategy of soil conservation and water harvesting; and restricts the use of lands for annual crops on lands that have slopes between 31-60% only after bench terraces are built. Further, it provides tree production, perennial crops and forage production to be undertaken on rural lands that have slopes of more than 60%; and such lands not be used for farming and free grazing. The law furthermore stipulates that rural lands whatever slopes they may be; if highly degraded shall be enclosed and shall be protected from human and animal interference till they recover. (see Proc. No. 456/2005 (n 50) Article 13(4-6); Proc. No. 130/2005(n 49) Article 18(4-6); Proc. No. 252/2017 (n 49) Article 27(4-6); Proc. No. 110/2007 (n 50) Article 13(4-6); Proc. No. 49/2009 (n 50) Article 20(4-6); Proc. No. 128/2013 (n 50) Article 19(4-6) respectively). While the Gambella State law provides the same rule about the lands that have the slopes of more than 60% as the above, it doesn't mention anything about the other land slopes. (see Proc. No. 52/2007(n 74) Article 18(3)). The Tigray State doesn't employ the type of land slopes to determine the environmental obligations towards land possession. The Benishangul Gumuz State law adopts a different category of land slopes. (see Proc. No. 85/2010 (n 50 above) Article 22(1(c-d))).

[129] Proc. No. 130/2007 (n 49) Article 6(16) and 19(1).

[130] Reg. No.66/2007 (n 56) Article 13(1).

[131] This phrase was incorporated in the previous rural land law of Amhara State. (see Proc. No. 133/2006 (n 60) Article 20(1(d)).

[132] Proc. No. 85/2010 (n 50) Article 22(1(d)).

[133] Brightman Gebremichael. *The role of Ethiopian rural land policy and laws in promoting the land tenure security of peasants: a holistic comparative legal analysis*. (Master's Thesis, Bahir Dar University), 2013. P 115.

additional obligations.[134] About the slopes of land categorization, while the SNNP and Benishangul Gumuz State laws adopt different degrees in classification of land for environmental protection,[135] the Tigray and Gambella State laws impose environmental protection obligations without making any classification of land according to slope.[136]

In sum: Generally, the Ethiopian post-1991 land tenure system adopts a command and control approach to protect the environment and land from damage. Moreover, it employs the technical concept of slope to categorize land for purposes of different kinds of environmental protection. In addition to state variations,[137] the different laws also employ subjective phrases to define the obligations peasants and pastoralists have towards conservation and protection of the land. Such stipulations subject peasants and pastoralists to administrative authority abuse in dispossessing their land rights on the pretext of failure to conserve the land from damage. The command and control approach further imply the absence of a place for an incentivized environmental protection approach, i.e. securing land tenure for environmental protection; which in turn affects the legal construct of assurance of land rights for land tenure security.

iv. Leaving Land Unused for Certain Period

[134] Beside incorporating environmental obligations in relation to use of gullies and wetlands, some state laws have imposed another additional obligation. For instance, uncommon to the other state laws the Gambella, Benishangul Gumuz and Amhara State's laws demand the landholders to protect the wild animals and birds sheltered in their land holdings. (See Proc. No. 52/2007(n 74) Article 12(3); Proc. No. 85/2010 (n 50) Article22(1(h); Proc. No. 252/2017 (n 49) Article 27(1(h)). The 2017 Amhara State's rural land law also comes up with longlist of additional environmental obligation. (See Proc. No. 252/2017 (n 49) Article 27).

[135] The Benishangul Gumuz State law demands making bench terraces and other suitable soil conservation practices to develop annual crops on land the slopes of which ranges between 31-45%; undertaking tree production, perennial crops and forage production on rural lands that have slopes of more than 45%. (Proc. No. 85/2010 (n 50 above) Article 22(1(c-d)). The SNNP State law on the other hand requires to: "cultivate lands that have undulating slopes (3-10%) using appropriate soil and water conservation measures;" apply appropriate conservation measures in planting annual crops on lands with a slope of 11-15%; apply appropriate conservation measures to plant annual and row crops on steep slopes having 15-30% slope, with shallow soil depth, low soil fertility, and being exposed to soil erosion.

[136] Obligations include conserving soil and water and planting trees in one's farmland; and refraining from planting tree species that damage soil fertility on farmland. (See Proc. No. 52/2007(n 74) Article 12; Proc. No.239/2014 (n 50) Article 35). These obligations are also enshrined in the Amhara, Benishangul Gumuz, and Oromia State's laws. (See Proc. No. 252/2017 (n 49) Article 27(1(a-c); Proc. No. 85/2010 (n 50 above) Article 22(1(a and b) and 4); Proc. No. 130/2007 (n 49) Article 19(3 and 4). In the federal and remaining state laws specific reference to duty to plant trees and refrain from planting tree species that damage soil fertility is not made.

[137] The variations in the environmental standard in the country demands one to critically examine the idea of environmental federalism in Ethiopia. Some attempts are already made; see for instance, Yosef Alemu Gebreegziabher. *Ethiopia's environmental federalism: problems and prospects an analysis in comparative perspective*. (Master's Thesis, University of Western Cape), 2009. The variations among the state laws also includes the nature of measures to be taken before the dispossession of the land rights.

The final ground for deprivation of land rights that results from the action of peasants and pastoralists is failure to use the land for a certain period –in short, idling. Save the federal and Gambella State laws, all the state laws under study incorporate idling of land as one ground of deprivation of land rights.[138] The logical justification for this restriction is to discourage wastage of land resource and to satisfy the demand of the needy. Since the great portion of the country's GDP is still dependent on agriculture, failure to use land for a certain time directly affects the economic growth of the country. Moreover, in the prevalence of landlessness and inadequacy, and immense demand for it, failure to utilize land is intolerable given the state's obligation to ensure land for all needy. So, to maintain the national interest and to pass land to the needy, such restriction is inevitable. However, this justification becomes true only when it applies to all landholders and considers the individual's situation while idling the land.

In Ethiopia, legally speaking, this restriction doesn't apply to investors, who are known for idling of land after leasing it from the government particularly. It is common to see fenced investor land holdings which is even taken from peasants and pastoralists, but put for a long time not used.[139] In some cases, the investors use only part of the land and leave the other parts unused.[140] To redress such wastage, recently the government of Ethiopia cancelled the allotment land of the Indian company Karaturi before the expiry of the lease period.[141] However, such action of the government raises the question of legality, in the absence of any legal obligation not to leave the land idle.

Moreover, one must appreciate the situation when peasants and pastoralists leave their holdings unused. Given that they acquired the land rights for livelihood purposes and engagement in non-

[138] Proc. No. 252/2017 (n 49) Article 21(1(d)); Proc. No. 85/2010 (n 50) Article 13(1(c)); Proc. No. 110/2007 (n 50) Article 13(13); Proc. No.239/2014 (n 50) Article 28(8); Proc. No. 130/2007 (n 50) Article 6(16); Proc. No. 49/2009(n 50) Article 19(3); Proc. No. 128/2013 (n 50) Article 18(3). There is no express provision that authorizes deprivation of land for idling it in the federal, Tigray and Gambella state laws. But in Tigray state law with respect to irrigable land, the state law provides the possibility of deprivation if the landholder fails to cultivate the land with the irrigation for 2 or more years. (See Proc. No.239/2014 (n 50) Article 28(8)).

[139] Dessalegn Rahmato. *Land to investors: Large-scale land transfers in Ethiopia* (No. 1). Addis Ababa. Forum for Social Studies, 2011. P 12; Dessalegn Rahmato. The perils of development from above: land deals in Ethiopia. (2014) 12 *African Identities*. 26–44. Pp 28ff; Tsegaye Moreda and Max Spoor. The politics of large-scale land acquisitions in Ethiopia: state and corporate elites and subaltern villagers. (2015) 36 *Canadian Journal of Development Studies/Revue canadienne d'études du développement*. 224–240. Well in the lease contract a clause about termination of the contract on the ground of idling of land may be inserted.

[140] For instance, the study conducted by the government itself reveals that in Gambella State among the 630 thousand hectares of land transferred to investors, it has been only 76 thousand hectares utilized. (See Yohannes Amberebere. Agricultural investment of Gambella engulfed with challenges. (Report Amharic, Dec. 21 2016).

[141] Nizar Manek. Karuturi demands compensation from Ethiopia for failed land deal. (Bloomberg, Sept. 21 2017).

agricultural activity results in deprivation of their land rights, it very seldom that they would leave their land unused unless for *force majeure*. Unless they are incapable to hire labour or personally utilize it or unable to find a tenant, there are few other reasons that would lead them to leave their holdings idle. In other scenarios, if they fail to utilize their land holdings, it means that they want to abandon it. Therefore, the adoption of the failure to use land to deprive land rights is more intended for political control of and intervention in peasants' and pastoralists' land rights.

The state laws that incorporate land idling as a ground of deprivation vary in defining the offending duration of idling; the conditions under which the power of deprivation would be exercised; and the extent of application of the requirement. In designing the impermissible duration of idling, the state laws set different periods and allow different authorities to define it. While the Amhara, Tigray, Oromia and Benishangul Gumuz State's laws leave determination of the duration to the legislature,[142] the Afar, Ethiopian Somali and SNNP State's laws leave this to the executive or state administration, stating simply: "…fallow beyond the time limit stipulated by the appropriate authority."[143] Leaving the authority to the legislature limits the discretion of administrative authorities to fix its own period to deprive the land rights of peasants and pastoralists, ensuring a legislative check and balance of the power of the administrative authorities.

With respect to fixing the duration, two approaches can be identified from the state laws. Some state laws, like Oromia, Afar, Amhara, and SNNP's employ a general duration: if the landholder leaves land unused for 2 years or more in Oromia and SNNP, and 3 years or more in Amhara and Afar, the state authority is entitled to deprive the land rights.[144] In the Benishangul Gumuz State's law the duration instead varies, depending on the nature of the land. In the case of irrigable land 2

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[142] Proc. No. 252/2017 (n 49) Article 21(1(d)); Proc. No.239/2014 (n 50) Article 28(8); Proc. No. 130/2007 (n 49) Article 6(16); Proc. No. 85/2010 (n 50) Article 13(1(c)). The Tigray state law is only about irrigable land and failure to cultivate with the irrigation.

[143] Proc. No. 110/2007 (n 50) Article 13(13); Proc. No. 49/2009(n 50) Article 19(3); Proc. No. 128/2013 (n 50) Article 18(3).

[144] Proc. No. 130/2007 (n 49) Article 6(16); Proc. No. 252/2017 (n 49) Article 21(1(d)). In the Afar and SNNP States, the administrative councils have issued the regulation to fix the duration. (See Reg. No.66/2007 (n 56) Article 13(5); Afar National Regional State. Rural land administration and use regulation No. 4/2011. 2011. Article 24(1(b))).

years or more suffice.[145] For other land types three or more years of idling can cause dispossession of the landholders.[146]

Moreover, the state laws still differ in terms the conditions they attach to deprivation of peasants' and pastoralists' land rights on this ground. Most of the state laws attach the absence of 'good/sufficient cause' for idling as a condition for deprivation.[147] In other words, if there is any good/sufficient cause for idling of the land, the state authority has no power to deprive it. What good/sufficient cause is, is not defined in a clear manner although some state laws illustratively list its constituting elements.[148] The absence of clear provision, coupled with the limits on demand judicial review (I discuss in Chapter 7) paves a way for bureaucratic abuse that in effect affects the legal construct of assurance of land rights for land tenure security. By contrast, the stand taken by the Oromia and Tigray State laws, which fail to require absence of good cause for deprivation of land rights, broadens the possibility of deprivation and further threatens legal land tenure security.

Furthermore, the extent of application of this restriction over peasants' and pastoralists' land rights also varies from state law to state law. In certain state laws, the application of the restriction is limited to irrigable land, whereas in other state laws the limit applies to all land held by peasants and pastoralists, irrespective of the nature of the land. For instance, in the Tigray State law, loss of land for idling applies only to irrigable land.[149] Conversely, this restriction may not apply to non-irrigable land holdings of peasants. In other state laws, we cannot find such exclusions in the application of this restriction. The only variation in such state laws is about the duration, as seen above.

[145] Proc. No. 85/2010 (n 50) Article 13(1(c)). The same approach was adopted in the previous Amhara State law. (See Proc. No. 133/2006 (n 60) Article 12(1(c))).

[146] Proc. No. 85/2010 (n 50) Article 13(1(c)). The productivity difference between irrigable and non-irrigable land is the reason for stipulating different duration of impressible idling. The shorter duration is provided to irrigable land as it is more productive than the non-irrigable one.

[147] Proc. No. 252/2017 (n 49) Article 21(1(d)); Proc. No. 85/2010 (n 50) Article 13(1(c)); Proc. No. 110/2007 (n 50) Article 13(13); Proc. No. 49/2009(n 50) Article 19(3); Proc. No. 128/2013 (n 50) Article 18(3). The sufficient cause concept incorporated here presupposes the personal utilization of the land. The law is not clear what would happen the landholder has leased out the land and the lessee failed to use the land.

[148] For instance, in the SNNP state regulation the following are provided as a sufficient cause: sickness or imprisonment of the landholder, absence of till due to death of family member, occurrence of natural catastrophes like drought, flooding, and any other problem faced by the land user that has accepted the kebele (local) administration. (See Reg. No.66/2007 (n 56) Article 13(5)).

[149] Proc. No.239/2014 (n 50) Article 28(8).

In general, I argue that the incorporation of the failure to utilize the land rights as a ground to deprive the land rights of peasants and pastoralists doesn't serve any good purpose. Instead, it has the implication of threatening legal land tenure security by undermining the legal construct of assurance of land rights through widening the ground for loss of land rights. The variations among the laws in terms of inclusion, duration and condition imply that it is a random provision, the legality of which also raises a question (I show in Chapter 8). Further, and most importantly, the legislation wrongly empowered the state for this reason to deprive the land rights only of peasants and pastoralists, for whom land right is a livelihood and if unused but only for the factor beyond their control and not of investors, who most often are guilty of idling land.

D. Redistribution and Conversion of Land Rights

The post-1991 statutory land tenure system of Ethiopia has introduced two additional grounds to deprive peasants' and pastoralists' land rights outside of expropriation, neither related to the conduct of the landholding peasants or pastoralists. Forced redistribution and the conversion of communal land holdings to the private landholdings are not totally outlawed. Some may argue that, to enhance the land tenure security of peasants and pastoralists, one of the measures taken by the post-1991 statutory land tenure system of Ethiopia is abolishment of forced redistribution.[150] However, the national policy declarations do not indicate that it may not happen and with ther exception of some state laws there is no explicit prohibition in law on forced redistribution.

One justification for redistribution is that it will serve to solve the problem of landlessness and the government's concern to minimize the number of landless people in the country – consequently, the previous holders will also lose their rights.[151] The legal documents I explain below scale down the incidence of redistribution and impose stricter rules defining when and where redistribution may take place, but they do not totally outlaw it. Even irrespective of such legal measures in a

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[150] Voluntary redistribution is expressly allowed and as it is done by the consent of the landholders it does not threaten the security of land tenure. Moreover, the only circumstance the laws expressly allow forced redistribution is in relation to irrigable land except for Afar and Ethiopian Somali State laws. Under Afar and Ethiopian Somali State laws forced redistribution on other land types is legally allowed. (See Proc. No. 456/2005 (n 50) Article 9; Proc. No. 252/2017 (n 49) Article 13; Proc. No. 85/2010 (n 50) Article 9 and 15; Proc. No. 110/2007 (n 50) Article 9; Proc. No.239/2014 (n 50) Article 18 and 28; Proc. No. 130/2007 (n 49) Article 14; Proc. No. 49/2009 (n 50) Article 19; Proc. No. 128/2013 (n 50) Article 9(15); Proc. No. 52/2007(n 74) Article 10(2-4).

[151] USAID. Ethiopian land policy and administration assessment. *Final Report with Appendices*, 2004. Appendix E. P A-11; Rahmato Searching (n 94) p 3.

number of rural areas, empirical studies suggests that many peasants expect redistribution to take place in the near future, and the promise of fresh redistribution is raised by local authorities from time to time to win votes and political support.[152] Moreover, peasants and pastoralists, seeing the growing number of landless people in rural areas, are suspicious that government could resort to redistribution to address the problem of unemployment in rural areas.[153] Hence, concerns regarding possible future redistributions haven't been fully eliminated.[154]

One of the causes of peasants' and pastoralists' fear of forced redistribution of their land holdings is the how the idea itself is governed in legal and policy documents. The policy documents have taken a temporal or time-bound stand against forced redistribution. For instance, when one goes through the 2002 poverty reduction strategy of the country, it is bluntly provided that the protection against redistribution of land is for the time being. The policy document states that "… a guarantee may be given to the effect that land will not be re-divided for a period ranging from 20-30 years." [155] Therefore, the *a contrario* reading of the policy stipulation indicates policy makers are with the view that after 20 to 30 years the government can engage in the forced redistribution of peasants' and pastoralists' land holdings.

The legislative measures, on the other hand, take three different approaches about forced redistribution of peasants' and pastoralists' land. While all the federal and state laws expressly legalize forced redistribution of irrigable land, for other types of land some prefer silence and some others expressly outlaw it. In relation to irrigable land, the laws incorporate two scenarios for forced redistribution. To ensure proper and equitable utilization of land peasants' landholding that later become cultivable in irrigation; and to compensate peasants who are evicted and whose holdings are taken for constructing the irrigation structure, the state can forcibly redistribute the landholdings of the beneficiaries of irrigation.[156] This presupposes that the building of the

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[152] Rahmato Searching (n 94) p 16.

[153] Ethiopian Civil Society Network on Climate Change (ECSNCC). A review and analysis of land administration & use legislation and applications of the Federal Democratic Republic Ethiopia and the Four regional states of Amhara, Oromia, SNNP and Tigrai. Addis Ababa. *ECSNCC*, 2011. P 47.

[154] The World Bank. Options for strengthening land administration Federal Democratic Republic of Ethiopia. *The World Bank Document, Report No: 61631-ET*, nd. P 21.

[155] Federal Democratic Republic of Ethiopia. 2002. *Poverty reduction strategy*. Addis Ababa. P 23. One can even infer that this protection is given to peasants only and it does not talk about the pastoralists' land rights.

[156] See Proc. No. 456/2005 (n 50) Article 9(2 and 4); Proc. No. 252/2017 (n 49) Article 13(2 and 3); Proc. No. 85/2010 (n 50) Article 15(1 and 5); Proc. No. 110/2007 (n 50) Article 9(2 and 3); Proc. No.239/2014 (n 50) Article 28; Proc.

irrigation is to be carried out at the cost of the state and its costs and benefits are to be equitably distributed to the community.

However, regarding other land types, the laws take three dissenting approaches. While the federal and some state laws remain silent about forced redistribution,[157] the Afar and the Ethiopian Somali State's laws expressly indicate the authority of the state to carry out forced redistribution of land holdings.[158] In opposition to this, the Oromia, Benishangul Gumuz and Amhara State's laws expressly outlaw any further forced redistribution of land holdings.[159] Setting aside its legality, in this regard the Oromia, Benishangul Gumuz and Amhara State's laws provide peasants and pastoralists with better protection to assure their land rights than other laws. The silent approach adopted by federal and some state rural land laws, coupled with the national policy declaration of temporary prohibition on redistribution, indicates the possibility of forced redistribution of peasants' and pastoralists' landholding upon the expiration of the time.

Related to forced redistribution, the post-1991 statutory land tenure system of Ethiopia incorporates the state's authority to convert communal land holdings to private landholdings, to deprive communal land rights. With some variations in the conditions for it, the federal and all state laws, except for the Oromia state, recognize the power of the government to convert communal holdings into private holdings.[160] The Oromia state law doesn't stipulate any specific rule that empowers the state to convert it.

The assumption in legislative authorization of the state to convert communal holdings is that communal holdings allow for limited open access on which the users have only the privilege of utilization but not the right. Moreover, it is also as a result of the historical and current assumption that any land not held privately is deemed to be state domain.[161] As reflection of this assumption,

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No. 130/2007 (n 49) Article 14(4); Proc. No. 49/2009(n 50) Article 12(3); Proc. No. 128/2013 (n 50) Article 9(14); Proc. No. 52/2007(n 74) Article 10(2 and 4).

[157] The Gambella, Tigray and SNNP State's laws remains silent on this matter.

[158] Proc. No. 49/2009(n 50) Article 12(1); Proc. No. 128/2013 (n 50) Article 9(14).

[159] Proc. No. 130/2007 (n 49) Article 14(1); Proc. No. 85/2010 (n 50) Article 9(4); Proc. No. 252/2017 (n 49) Article 13(1).

[160] See Proc. No. 456/2005 (n 50) Article 5(3); Proc. No. 252/2017 (n 49) Article 50(1(d)); Proc. No. 85/2010 (n 50) Article 29(1) and 32(1(d)); Proc. No. 110/2007 (n 50) Article 5(14); Proc. No.239/2014 (n 50) Article 17(3); Proc. No. 49/2009(n 50) Article 5(8 and 9); Proc. No. 128/2013 (n 50) Article 5(9 and 10); Proc. No. 52/2007(n 74) Article 7(5).

[161] Muradu Srur. Rural commons and the Ethiopian state. (2013) 1 *Law, Social Justice & Global Development*. 1–49.

laws declare that the government is the owner of communal land.[162] To validate the state claim, arguments are advanced to legalize such conception of the state on the basis of "long standing historical thinking".[163] However, I claim such state mentality has to come to an end in the post-1991 land tenure system of the country. Particularly, I am motivated here by the constitutional protection afforded in the FDRE Constitution to the land rights of peasants and pastoralists, irrespective of the nature of the landholding.[164] The constitutional protections are not framed to address the object of the law, on the basis of the nature of the landholdings – private or communal. Instead, it is formulated emphasizing the subjects of the law and based on the nature of the landholders – peasants and pastoralists. Irrespective of the nature of the land holding system, the constitutional protection is applicable if the landholders are peasants and pastoralists.

However, the variations in the laws can be deduced from the conditions attached to the process of conversion. Even though the federal and some state laws authorize the state to convert communal holdings to private holdings as it thinks necessary,[165] the Afar, Amhara, Benishangul Gumuz and Ethiopian Somali State's laws require that the conversion can be effected only if the landholder community so wishes and has decided in favor of conversion.[166] Such legislative measures to demand the participation and the decision of the affecting community minimizes the possibility of conversion and protects communal land rights.

In general, the legal stand taken against land redistribution and conversion in the post-1991 land tenure system of Ethiopia, has the implication of perpetuating the land tenure insecurity through undermining the legal construct of assurance of the land rights of peasants and pastoralists. This

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[162] Proc. No. 456/2005 (n 50) Article 5(3); Proc. No. 110/2007 (n 50) Article 5(14); Proc. No. 49/2009(n 50) Article 5(9); Proc. No. 128/2013 (n 50) Article 5(10); Proc. No. 52/2007(n 74) Article 7(5). We cannot find the phrase "the government being the owner of land…" in the Tigray, Amhara and Benishangul Gumuz State laws though they empower the state to convert communal landholdings to private.

[163] Srur (n 161).

[164] See Chapter 3 Section C about constitutional protection against eviction and displacement. The constitutional recognition of communal land rights from the human rights of indigenous communities' land rights perspective is argued and claimed. (See for instance, Mohammud Abdulahi. The legal status of the communal land holding system in Ethiopia: the case of pastoral communities. (2007) 14 *International Journal on Minority and Group Rights*. 85–125).

[165] Proc. No. 456/2005 (n 50) Article 5(3); Proc. No. 110/2007 (n 50) Article 5(14); Proc. No.239/2014 (n 50) Article 17(3); Proc. No. 52/2007(n 74) Article 7(5).

[166] Proc. No. 252/2017 (n 49) Article 50(1(d)); Proc. No. 85/2010 (n 50) Article 29(1) and 32(1(d)); Proc. No. 49/2009(n 50) Article 5(8 and 9); Proc. No. 128/2013 (n 50) Article 5(9 and 10). The Amhara and Benishangul Gumuz State's laws put an exception about the community consent. When the conversion is for public use it is not required to sustain consent of the community.

is due to the failure to consider the constitutional protections afforded to peasants' and pastoralists' land rights. I say this, not without appreciating some state laws' approach to outlawing and minimizing such probability. Nevertheless, such state laws' approach raises the issue of legality (I explain in Chapter 8).

E. Payment of Compensation

The legislative recognition of compensation schemes in time of deprivation of peasants' and pastoralists' land rights on the above grounds (in section C and D) has the effect of compromising/minimizing the perpetuation of land tenure insecurity, because it demands of the state to make economically rational choices rather than being arbitrary; and gives the affected parties an option to look for alternative livelihood. Without such scheme, the state authority may have an immense power to deprive land rights arbitrarily and put the affected parties in worse economic, social and political impoverishment than before.

To be true, it is necessary to see the nature of the ground of deprivation and the interest affected to argue for and against the need of compensation, particularly when peasants' and pastoralists' land holding is deprived due to failure to conserve the holding from damage, payment of compensation for the loss of the land rights amounts to rewarding for wrongdoing. Nevertheless, with regard to things on land and permanent improvements made to the land compensation has to paid even when the deprivation is caused on these grounds. Regarding other grounds of deprivation, the payment of compensation for the loss of land rights must be the rule.

However, when one goes thoroughly through the post-1991 land laws, the compensation for the loss of land rights on the above grounds is not uniformly regulated. Although the compensable nature of the land rights is discussed in the next Chapter, the compensation scheme provided for dispossession of peasants' and pastoralists' land rights on the above grounds deals only with the improvements made to the land. Moreover, although there is differentiation among the laws in this respect, the laws do not require payment of compensation for dispossession on all these grounds.

The grounds of deprivation for which the payment of compensation is provided varies among the laws defining the rural land tenure system. The federal legislation that incorporated some of the grounds of deprivation stated above fails to define any compensation scheme. Through this

silencing and by providing a compensation scheme for expropriation only, the federal legislation has denied peasants and pastoralists from being compensated for the loss of their land rights, irrespective of the grounds for the loss.[167] By contrast, although they vary in determining the compensable grounds of deprivation, state laws provide for the payment of compensation for the improvements made to the land.

Among the state laws, the Amhara and Benishangul Gumuz State laws are broader in determining the compensable grounds of deprivation. Except for deprivation due to redistribution and conversion, for the other grounds both State laws design compensation schemes for the improvements made to the land.[168] The Tigray State law that incorporates those grounds of deprivation in the same fashion as these two State laws fails to provide any indication of payment of compensation. Likewise, the Oromia, Gambella, Ethiopian Somali and SNNP State's laws that adopt some of the above grounds of deprivation remain silent about compensation. Afar State law, on the other hand makes some grounds of deprivation as compensable whereas others are non-compensable: it requires payment of compensation for permanent improvements when the deprivation is carried out due to absence or idling.[169] However, it doesn't provide for payment of compensation for the other grounds of deprivation it incorporated and that are discussed above.

Therefore, the denial of compensation for the deprivation of the land rights on the above grounds in the federal and most state laws have the implication of broadening the possibility of deprivation of peasants' and pastoralists' land rights, because the deterrent effect of compensation may not be realized. In turn, it impedes the legal construct of assurance of land tenure security. However, this doesn't discount some state laws' incorporation of the compensation scheme to curtail the probability of land deprivation and assurance of land rights. Such state laws' stipulation raises the question of legality, which I discuss in Chapter 8, though.

[167] Proc. No. 456/2005 (n 50) Article 7(3).
[168] Proc. No. 252/2017 (n 49) Article 21(2); Proc. No. 85/2010 (n 36 above) Article 13(4) and 23(2(b)). A paradox within Benishangul Gumuz State law is inferred about whether compensation is awarded for the deprivation done on the ground of failure to conserve land. In the section that defines the grounds for deprivation of land rights, it is expressly stipulated about the payment of compensation. Whereas, the section that defines the obligations of the landholders implies that the deprivation can be done without payment of any compensation.
[169] Reg. No.4/2011 (n 144) Article 24(1 and 4).

F. Conclusion

The realization of the legal constructs of the nature and the duration of rights in land for land tenure security depend not only on legislative provision for robust/broad land rights and longer duration of land rights. They further require granting of autonomy in exercising specific land rights and determining the duration of the same to the landholder. Moreover, the legal construct of assurance of those land rights depends upon limiting the grounds of deprivation to expropriation. Even legislative measures, while regulating the issue of land expropriation is required to incorporate the principles defined in Chapter 1.

However, a thorough review of the post-1991 statutory land tenure system of Ethiopia in this Chapter reveals that the legislative measures are designed so as to limit peasants' and pastoralists' autonomy in the exercise of the specific land rights and pave the way for state intervention. Such restrictions and state interventions were incorporated in relation to land use payments and the right to transfer the land rights. It further broadened the grounds to dispossess land rights through the incorporation of additional grounds of deprivation without compensation. It has authorized the state to deprive peasants' and pastoralists' land rights for engagement in non-agricultural activity, failure to conserve land, failure to observe the residency requirement, failure to utilize land, and for redistribution and conversion of land rights.

These constructions of law put the constitutional protections afforded to peasants' and pastoralists' land rights I explain in Chapter 3 at stake. Particularly, the legislative demand of land use payment from peasants goes against peasants' and pastoralists' right to free access to land. Besides, the legislative incorporation of those additional grounds to deprive their land rights are in conflict with their constitutional right to immunity against eviction and displacement. It opens the space for the state to exercise political control against peasants and pastoralists that the FDRE Constitution makers intended to limit, if not avoid.

Nevertheless, the federal and the state laws are not uniform in adopting and defining land use payments, restrictions on the transfer rights and grounds for deprivation of land rights and compensation schemes for deprivation. From the land tenure security angle, such differences may imply and create a variation in the prevalence of the land tenure security of peasants and pastoralists for the mere fact that they reside in different states. Moreover, it creates a dilemma

and put peasants and pastoralists in doubt about the prevailing legislation, especially when the paradox is identified between the federal and state laws. The reason for this and the legal way out is discussed in Chapter 8.

Chapter 6

Compulsory Acquisition of Peasants' and Pastoralists' Land Rights in Ethiopia

Compulsory acquisition, also known as "expropriation," "eminent domain," "compulsory purchase," "taking," "land acquisition and resumption," is one of the fundamental land tenure issues that involve and seek balancing of competing interests and determining the overriding one. The contradiction here is between the public demand for land and the landholder's need for the protection and securing of their land rights.[1] Because of the centrality of the issue scholars give much attention to regulation of compulsory acquisition, equating perpetuation of land tenure insecurity with arbitrary eviction of the landholder as seen in Chapter 1 Section A(i).[2] Although the land tenure security implication of how the compulsory acquisition of land rights regulated in the legal instruments is important, it is not the only aspect, as I explain in the above Chapters (Chapter 1 to 5). Rather, it is one aspect of the legal construct of assurance of land rights for legal land tenure security.

As highlighted in Chapter 1, the implication of the legal regime regulating the idea of compulsory acquisition on the legal construct of assurance of land rights depends on the following: how it defines the concept itself; the nature of institution it entitles to effect it; its determination of the reason for, the time and the manner in which it is to be conducted; the compensation it awards; and its demand for participation of the affected parties in the process and restitution of the land rights when the land is not required anymore for the initial purpose. Consequently, this Chapter is aimed at analytically apprising the assurance of the land rights of peasants and pastoralists as defined in the post-1991 statutory land tenure system of Ethiopia against these legal constructions.

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[1] Jones J. Walter. Expropriation in Roman Law. (1929) 45 *LQ Rev.* 512–527; William B. Stoebuck. A general theory of eminent domain. (1972) 47 *Wash. L. Rev.* 553–608; Food and Agriculture Organization. Compulsory acquisition of land and compensation. Rome. *FAO Land Tenure Studies 10,* 2008; Daniel W. Ambaye. *Land rights and expropriation in Ethiopia*. Switzerland. Springer, 2015.

[2] For instance, in providing the standard bundle of property rights the ownership encompasses A.M. Honore has regarded right to security as immunity from expropriation. (See A.M. Honore. 1961. Ownership. In A.G. Guest (ed.). *Oxford Essays in Jurisprudence* 107 as cited in Stephen R. Munzer. *A theory of property*. Cambridge. Cambridge University Press, 1990. P 22; Michael A. Heller. The tragedy of the anticommons: property in the transition from Marx to markets. (1998) 111 *Harv. L. Rev.* 621–688. P 663). I argue that the right to security to land tenure is a broader idea that has to be examined separately from the notion of Ownership and comprises additional legal constructs other than protection against arbitrary eviction.

I argue that post-1991 statutory land tenure system of Ethiopia has failed where it has succeeded. Among other things, its conception of the idea of compulsory acquisition as the "power of state" and the absence of an explicit constitutional rule on it, implies for the state to assume wider discretionary powers to effect it. Besides this, the entitlement of local authorities to expropriate without the supervision of a higher organ; broader and vague provisions of the purpose for which expropriation may be conducted; and failure to demand that expropriation be carried out at a convenient time to the landholder with a sufficient notice period, exposes peasants and pastoralists to power abuse. Moreover, the delineation of compensable interests, the modes and extent of and the valuation method and the valuer for compensation defined in the legislation are not framed in such a way as to limit the state's arbitrary deprivation and adequately compensate the affected parties. Furthermore, the legislative failure to force the state to let the affected parties participate and be heard in the process of expropriation and provide legal foundation for the restitution of land when the purpose for which it is taken is expired or not realizable, indicates the legislatures' lack of concern about land tenure security of peasants and pastoralists. I argue that these defects are all to some extent attributable to the legislature's failure to rely on the appropriate constitutional provision to provide the constitutional foundation for the expropriation law.

This Chapter is organized in five sections. In the first section I examine the legal basis for and how the concept of compulsory acquisition of peasants' and pastoralists' land rights is understood under the Ethiopian legal system. This is followed by a section that deals with the nature of the authorities designated with the task of land expropriation. In the next section I examine how the conditions for land expropriation are governed and defined in the country's law. I critically analyse the notion of public purpose, compensation and procedural protections from the view point of security of land tenure of peasants and pastoralists. Then, before the conclusion section, the last substantive section addresses how the restitution of the land rights is regulated in the post-1991 statutory land tenure system of Ethiopia.

A. The Legal Foundation of Compulsory Acquisition

I note and argue in Chapter 1 that the legal basis for compulsory acquisition of property rights in general must be derived from a constitutional norm.[3] Since it is an encroachment on individuals' or communities' property rights, it must be enshrined in the constitutional law that among other things regulates the state-society relationship.[4] In such a way it limits the possibility of abridgment of property rights through law making.[5] Moreover, in the same Chapter I claim that the traditional understanding of compulsory acquisition as the "power" or the "right" of state must be transformed to regard it as "limit to right." Its description in law is has the purpose of limiting the state's exercise and to enhance the legal protection and security of property rights of the society.

Four different approaches are observed from Constitutions of different nations in enshrining the rules of expropriation. The first approach is that in some countries, the constitution simply asserts the power to compulsorily acquire private property in general and land rights in particular as the single exception to fully protected private property rights (whether it is ownership, usufruct or use right). An example of this approach is the revised Constitution of Rwanda. Rwanda's constitution states: "Private property, whether individual or collective, shall be inviolable. The right to property shall not be encroached upon except in public interest and in accordance with the provisions of the law."[6] The second approach is the one followed by the constitution of the United States of America. In this approach, besides recognising expropriation of property as a single exception to property rights, the constitutions extend to mention general principles to be undertaken in the compulsorily acquisition like due process of law, public use and just compensation. For example, the constitution of the United States of America mandates that: "No person...shall be deprived of...property, without due process of law; nor shall private property be taken for public use without just compensation."[7]

[3] The legal basis that puts expropriation for public use as an exceptional limit to property rights is not necessarily required to be enshrined in the written constitution. What is required is to regard that the source of the limit to property rights should be a higher normative principle other than ordinary law enacted by the legislative organ. For instance, the case in point the experience of Canada and New Zealand reveal that there is no recognition of property rights with its limitation in the Constitution. (See Gregory S. Alexander. 'Property rights' in Vikram David Amar and Mark V. Tushnet (eds.). *Global perspectives on constitutional law*. Oxford. Oxford University Press, 2009. 59–72).
[4] Barry Barton. Notes of cases: the queen in right of British Columbia v Tener. (1987) 66 *Canadian Bar Review*. 145–177.
[5] Edwin Baker. Property and its relation to constitutionally protected liberty. (1986) 134 *U. Pal. L. Rev.* 741–816.
[6] The Constitution of the Republic of Rwanda of 2003 Revised. *Official Gazette* No. Special of 24/12/2015. 2015. Chapter IV, Article 34 and 35.
[7] The Constitution of United State of America. Fifth Amendment. Passed by the Congress in Sep. 1789, ratified in Dec. 1791.

In some other countries, the constitutional frameworks, in addition to incorporating the general principles of due process of law and payment of adequate compensation, go to the extent of defining and specifically listing the purposes for which land rights may be acquired as the third approach. A good instance for this approach is the constitution of Ghana. Ghana's constitution includes provisions detailing exactly what kinds of projects allow the government to use its power of compulsory acquisition, and specifies that displaced inhabitants should be resettled on suitable alternative land.[8]

Finally, in those countries following the fourth approach constitutions further extend to incorporate a framework for the calculation of compensation, the mechanisms by which the state must pay people who are deprived of their property, and the timing and sequence of possession.[9] Chile's constitution identifies the purposes for which land may be compulsorily acquired, the right of property holders to contest the action in court, a framework for the calculation of compensation, the mechanisms by which the state must pay people who are deprived of their property, and the timing and sequence of possession. [10] Moreover, the Constitution of the Republic of South Africa

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[8] The Constitution of the Republic of Ghana of 1992. Chapter five, Article 20, the article provides as follows:

> (1) No property of any description or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied.
> (a) the taking of possession or acquisition if necessary [,] in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and
> (b) the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.
> (2) Compulsory acquisition of property by the State shall only be made under a law which makes provision for.
> (a) the prompt payment of fair and adequate compensation; and
> (b) a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from other authority, for the determination of his interest or right and the amount of compensation to which he is entitled.
> (3) Where a compulsory acquisition or possession of land effected by the State in accordance with clause (1) of this article involves displacement of any inhabitants, the State shall resettle the displaced inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values.
> .
> .
> (5) Any property compulsorily taken possession of or acquired in the public interest or for a public purpose shall be used only in the public interest or for the public purpose for which it was acquired.
> (6) Where the property is not used in the public interest or for the purpose for which it was acquired, the owner of the property immediately before the compulsory acquisition, shall be given the first option for acquiring the property and shall, on such reacquisition refund the whole or part of the compensation paid to him as provided for by law or such other amount as is commensurate with the value of the property at the time of the reacquisition.

[9] FAO Compulsory (n 1) pp 7-8.

[10] see Chile's Constitution of 1980 with Amendments through 2012. Chapter III, Article 19(24) which states that:

resembles this approach. The South African Constitution details rules on factors taken into account while assessing the compensation, the time and manner of payment to be fair and equitable, and the possibility of a decision of a court of law on the amount, time and manner of payment of compensation in case agreement is not reached with affected peoples.[11]

The right of ownership in its diverse kinds over all classes of corporeal and incorporeal assets.

Only the law can establish the manner to acquire property and to use, enjoy and dispose of it, and the limitations and obligations which derive from its social function. This comprises all which the general interests of the Nation, the national security, public use and health, and the conservation of the environmental patrimony, require.

No one can, in any case, be deprived of his property, of the asset affected or of any of the essential attributions or faculties of ownership, except by virtue of [a] general or [a] special law which authorizes expropriation for reasons of public benefit or of national interest, qualified by the legislator.

The expropriated [party] can protest [reclaimer] the legality of the expropriation act before the ordinary tribunals and, at all times, will have the right to indemnification for patrimonial harm effectively caused, which will be established by mutual agreement or in a sentence pronounced in conformity with law, by said tribunals.

In the absence of an agreement, the indemnification must be paid in cash.

The taking of material possession of the expropriated asset will take place following payment of the total of the indemnification, which, in the absence of an agreement, will be determined provisionally by experts, in the form that the law specifies. In case of protest [concerning] the justifiability of the expropriation, the judge can, on the merit of the information adduced, decide on the suspension of the taking of possession.

[11] Constitution of the Republic of South Africa. Constitution Seventeenth Amendment Act of 2012 – Government Notice 72 in *Government Gazette 36128*, dated 1 February 2013. Commencement date: 23 August 2013 [Proc. No. R35, Gazette No. 36774, dated 22 August 2013]. 1996. Article 25 provides that:

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application –
   a. for a public purpose or in the public interest; and
   b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –
   a. the current use of the property;
   b. the history of the acquisition and use of the property;
   c. the market value of the property;
   d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
   e. the purpose of the expropriation.
4. For the purposes of this section –
   a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
   b. property is not limited to land.

When one looks into the constitutional law of the post-1991 Ethiopia, we cannot find an express provision about expropriation as a limit to peasants' and pastoralists' land rights, as I argue in Chapter 3. Such silence of the constitution can be understood and interpreted in three different ways. On one extreme it can be regarded that the constitution awards peasants and pastoralists with absolute rights in land that cannot be deprived even through expropriation proceedings. On the other extreme, the silence can be treated and interpreted as entitling the state to carry out land expropriation in a manner it thinks appropriate, without considering any construction that guides how expropriation is to be conducted to strike a balance between the public need for land and the landholder's demand for protection and security of property rights. In-between these two extremes is a third way, to understand the silence as the presence of land expropriation as a limit to the land rights of peasants and pastoralists that can be effected upon the satisfaction of the constitutional requirements to expropriate private property.[12]

As I discuss in the following sections, in the making of detailed law the state has tended to depict the constitutional silence in the second extreme way. However, this perception of the state goes against the very constitutional right to immunity against eviction and displacement of peasants and pastoralists dealt with in Chapter 3. Over all, the state's perception and its reflection in legislation is the result of the failure of the constitution to expressly mention expropriation as a limit to peasants' and pastoralists' land rights. In addition, the state's interpretation of the constitutional silence in a manner that undermines the legal construct of assurance of land rights has the implication that the state has not given much attention to the issue of peasants' and pastoralists' actual land tenure security.

When we see the conceptual understanding of the general notion of compulsory acquisition in Ethiopia, one has to begin with the constitutional rule that addresses the expropriation of private property. The FDRE Constitution and the state constitutions simply provide that "[w]thout prejudice to the right to private property, *the government may expropriate* private property…"[13] This optional way of putting the restriction to private property implies that the constitution makers

[12] About private property, the FDRE Constitution mentions that the expropriation is done for public purpose upon advance payment of commensurate compensation. (See Constitution of Federal Democratic Republic of Ethiopia (FDRE). Proclamation No.1/1995. *Fed. Neg. Gaz.* Year 1 No.1. 1995. Article 40(8)). The identical provision is also enshrined in all state constitutions. This implies that the Ethiopian Constitution adopts a similar approach to USA Constitution in regulating the issue of expropriation of private property.
[13] Ibid. The same stipulation is made in all state constitutions.

conceived the idea of expropriation from the side of the state and not from the perspective of property right holders. Such an understanding entails that the Constitution regards expropriation as either "the power" or "the right" of the state. Nevertheless, it is not clear whether the Constitution is referring to the "power approach" or the "right approach" to understanding the notion of expropriation.

I claim that these two ways of understanding the concept of expropriation are not mutually exclusive. They, rather, mean different things in defining the extent of discretion the state has. The power approach demands that the state exercise expropriation for the sole benefit of those one it is assumed for – the people. Accordingly, if the expropriation is not in the societal interest in one way or another, the state is, in effect, prohibited from expropriating. The right approach, in turn indicates the state to enjoy broader discretion in exercising expropriation, since it is not required to observe anyone's particular interest in the expropriation of a property right. The right of state approach leads the state to carry out the expropriation even if it serves only the sole interest of the state itself, but not the public.[14] Such a situation enables state authorities to act arbitrarily and has the implication of strongly impeding the security of property rights. However, both approaches provide the state with strong power compared to "the limit to right" approach.

In relation specifically to land expropriation, since the FDRE Constitution and state constitutions are silent, we have to examine how it is conceived in detailed legislation. The examination of the legislation reveals the adoption of the power approach of understanding expropriation; and it is not as ambiguous as the constitutional stipulation. Particularly, the federal land expropriation law's article 3 in providing in its caption for the "power to expropriate landholdings", clearly implies the adoption the power approach.[15] Moreover, some state land laws, in defining the concept of "expropriating landholdings," implicitly imply the adoption of the power of state approach. For instance, the definition in the Benishangul Gumuz, State law that states: "[e]xpropriating from land holding means taking the rural land from the holder or user…by *the decision of government body*

[14] It is very difficult to distinguish whether the expropriation is done for the societal interest or for the state interest. However, the very conception of expropriation as a right of state provides the state with much freedom compared with the power of state approach to involve in it. At least in the power approach the state is required to exercise the expropriation to the interest of the society for which interest it assumed the power.
[15] Federal Democratic Republic of Ethiopia. Expropriation of landholding for public purposes and payment of compensation proclamation No. 455/2005. *Fed. Neg. Gaz.* Year 11 No. 43. 2005. Article 3.

vested with power"[16], indicates that the lawmakers have perceived the idea of land expropriation from the power of the state perspective.

Therefore, although adoption of the power approach to understand land expropriation tends to minimize the state discretion compared to the right approach, it still it does enable the state to exercise a discretion that has the implication of undermining the land tenure security of peasants and pastoralists; and that would have been avoided by adopting "the limit to right" approach.

B. Authority to Compulsorily Acquire Land Rights

One of the aspects of the process of land expropriation that must be regulated to strike a balance between the public need for land and the landholder's demand for the security of land tenure is how the task of expropriation is designated to authorities in a country. Generally, three fundamental approaches are reflected on determining the authorities to compulsorily acquire land rights, with the assumption of a unitary state structure. These are the centralized, decentralized and mid-path approaches.[17] In the centralized approach the function of land expropriation is assigned to the national level governmental authority. Whenever a public demand for land is created the assigned national level authority carries out the expropriation. This approach is introduced in the draft South African expropriation bill of 2015 and it is treated as a non-delegable function of the central level authority.[18] From the land tenure security perspective, the centralized approach limits the probability of abuse of power and variations in the adoption and implementation of standards.[19] The uniformity in applying standards, utilization of expertise and curtailment of abuse of power are the possible advantages of this approach. However, it is assumed it would affect the timely acquisition of land for the intended purpose.[20]

[16] Benishangul Gumuz National Regional State. Rural land administration and use proclamation No. 85/2010. 2010. Article 2(27). The same stipulation is enshrined in the former Amhara State law. (See Amhara National Regional State. The revised rural land administration and use proclamation No. 133/2006. *Zikre Hig*. Year 11 No. 18. 2006. Article 2(18)). In other state laws we couldn't find any implication about the approach adopted to understand the notion of land expropriation.

[17] FAO Compulsory (n 1) p 13.

[18] Republic of South Africa. Draft Expropriation Bill**.** *Government Gazette* No. 38418 of 26 January 2015. Section 3 and 4(2). In the draft South African expropriation bill the expropriation decision-making is non-delegable function of Minister of public works. Other functions other than those listed in section 3, 22(1), 23(1) and 28.

[19] FAO Compulsory (n 1) p 13.

[20] Ibid.

In the decentralized approach, the function of land expropriation is assigned to the local level authorities. With the purpose of getting the land in the required time, this approach authorizes the local level authorities near to the communities to carry out the expropriation. Nonetheless, as it is the counter-thesis of the centralized approach, the benefits of the centralized approach may not be here. Instead, it opens a space for abuse of power, variations in the applications of standards and random decisions as there will be a shortage of expertise.[21] It ensures the timely acquiring of land, but at the expense of the landholder's security of land tenure.

The middle-path approach, on the other hand, which provides the possibility of acquiring the advantages and redressing the defects of the above two approaches, dictates the assignment of the function of land expropriation for both central level authorities and, with the supervision and approval of the higher authority, to local level authorities. This approach assumes that assigning local authorities the power to carry out the function of land expropriation with the supervision and approval of the higher authority enables the timely acquisition of land without causing insecurity of land tenure,[22] because the presence of the approval and supervision by the higher authority tends to limit the probability of abuse of power and to ensure the uniform application of standards and expert decision making. This can be realized when the law of the concerned country clearly identifies the authorized government bodies.[23]

Before examining the approach adopted in the post-1991 Ethiopian land tenure system it is paramount to see how the function of land expropriation is assigned in a federal system, because unlike the unitary form of government, in a federal system it is not only the issue of decentralization that depends on the willingness of the central government, but also the issue of division of power and functions among the different levels of government. Accordingly, it may be assigned as the exclusive function of the federal or state government or as the concurrent function of both.[24] In the Ethiopian federal system, a clear empowerment of both or either level of government is not provided. However, as I discuss in Chapter 8, determining whose function is land expropriation depends on how the power and functions are apportioned in the Constitution;

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[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] The assignment of the function of expropriation may not be expressly made in the constitutions of federations. The assignment of it to a particular level of government or both/all can be deduced from the close examination of general stipulations made about apportionment of legislative and executive power and functions in the constitutions.

the understanding of the federal government's power of enacting law on "land utilization and conservation";[25] and the states' power of land administration.[26] Since the function of land expropriation is an aspect of the power and function of land administration[27] and residual power and functions are reserved to states,[28] it can be deduced that in Ethiopian federal system the function of land expropriation is constitutionally designated as the exclusive function of the state government.

In the rural land laws of Ethiopia, the manner the function of land expropriation is designated to the state authorities provides a fourth approach. Unlike the above the three approaches, under the Ethiopian rural land law, the function of land expropriation is assigned to the central, state, and local authority without the supervision and approval of the higher authority.[29] The federal/central government's assumption of the function raises an issue of constitutionality. Specifically, in the absence of states' delegation and in the presence of a constitutional prohibition on upward delegation,[30] the federal rural land law's assignment of the function of land expropriation to the federal government violates the constitutional. Moreover, the law doesn't specify a single central authority to carry out land expropriation. Rather it seems to authorize different central government authorities.[31] This situation opens the possibility of still more variations in the application of standards.

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[25] FDRE Constitution (n 12) Article 51(5).
[26] Id Article 52(2(d)).
[27] Food and Agriculture Organization. Access to rural land and land administration after violent conflicts. Rome. *FAO Land Tenure Studies 8*, 2005; Tony Burns and Kate Dalrymple (eds.). *Land administration: indicators of success, future challenges.* Wollongong, Land Equity International Pty Ltd, 2006. Pp 13–14. In fact, the components of land administration may vary from place to place and time to time since it reflects the socio-cultural context in which it being operated. (See Abebe Mulatu. 'Compatibility between rural land tenure and administration policies and implementing laws in Ethiopia' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 1–30. P 5).
[28] FDRE Constitution (n 12) Article 52(1).
[29] Proc.No.455/2005 (n 15) Article 3(1). However, whether the federal legislature have the power to define and list the expropriating authority and confer the federal government with the function of expropriation like this is questionable.
[30] FDRE Constitution (n 12) Article 50(9) while expressly states the federal to state delegation of power and functions (down-ward delegation), it keeps silent about state to federal delegation (upward delegation). In the making of the Constitution, the constitution makers had emphasized on non-delegable nature of state power and functions. Because, they assumed that incorporation of it weakens the state and results in the centralization power and functions. (See Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 4, Nov. 23–29/1994, Addis Ababa), 1994. Deliberation on Article 50. (Amharic document, translation mine)).
[31] Ambaye (n 1) p 152.

The same federal law also grants the state and local authorities the power to conduct land expropriation.[32] The states in their respective state laws assign a single and specific higher state authority – the Environmental Protection, Land Administration and Use Authority (EPLAUA) or Agricultural and Rural Development Bureau - with the task of expropriation decision-making.[33] This avoids the possibility of a multiplication of the higher state authorities conducting expropriation, causing variations in the application of standards. At local level, *woreda* (district) administration is also entitled with making land expropriation decisions, either on its own motion or upon the request of a higher authority.[34] The legislation doesn't require the *woreda* (district) administration's decision of land expropriation to be approved by and carried out upon the supervision of the higher authority. Given that it is a lowest local authority next to the *kebele* (sub-district) administration, enabling it to expropriate land without the supervision and approval of the higher authority creates leeway for abuse of power. In addition, it opens space for random decision making and variations in applying standards as there may not be sufficient expertise in every *woreda* administration.

C. Requirements for Compulsory Acquisition

In addition to the way the notion of compulsory acquisition is perceived, and the assignment of the power to authorities, the regulation of conditions for land expropriation also affects the legal construct of assurance of land rights. Fundamentally, as it indicated in Chapter 1 the way and extent the justification for expropriation – public purpose, the compensation and the procedural due process - are regulated has an implication for the legal aspect of land tenure security. Accordingly, in this section I show how such elements of the legal construct of assurance of land rights are addressed in the rural land laws of Ethiopia in relation to peasants' and pastoralists' land rights.

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[32] Proc.No.455/2005 (n 15) Article 3(1).

[33] For instance, see Proc. No. 85/2010 (n 16) Article 2(19) and 33(1); Oromia National Regional State. Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of Oromia rural land use and administration proclamation No. 130/2007. *Megelata Oromia*. Year 15 No. 12. 2007. Article 26. The 2017 Amhara State law doesn't imply whether the higher state authority is empowered to make land expropriation decision. It simply states that the woreda (district) administration can decide rural land expropriation. (See Amhara National Regional State. Revised rural land administration and use proclamation No. 252/2017. 2017. Article 26).

[34] Proc.No.455/2005 (n 15) Article 3(1).

i. The Justification for Compulsory Acquisition*

The state resorts to land expropriation when the land needed to satisfy the public need for land is neither in its hands nor available in the market as the landholder is unwilling to transfer. The forceful taking of land rights, therefore, presupposes the absence of any alternative option to get the necessary land and the state's prior attempt to acquire the land rights in voluntary negotiation. In the absence of any alternative and when agreement is not reached with the landholder, the state may have recourse to compulsory acquisition.

This situation results in a conflict between the private interest of the land holder (protection and security of land rights) and the public interest (government's demand for land for another purpose on behalf of the public).[35] In such conflictual circumstances, to determine the prevailing interest one has to know for what purpose the state needed land. To apply Grotius' conception that public advantage prevails over private rights and to determine the overriding interest, it is necessary to establish what constitutes public advantage.[36] In generic terms, such purposes are coined as "public purpose," "public good," "public benefit," "public advantage," or "public interest" as seen in Chapter 1, with their respective implication on land tenure security.

Although the requirement of public purpose plays an important role in promotion and protection of secure property rights by limiting the reasons for state involvement and encroachment on property rights, nowadays peripheral consideration is given to it in the legislative and judicial practices. The current trend seems to consider everything is for public purpose and the difficult thing is to establish what is not for public use.[37] Even in those countries like the USA where strong protection is afforded to private property rights, the use of the public purpose clause to protect private property is losing sense. This is so, even in the presence of strong scholarly criticism against such lenient approach to establishing public use.[38] For me the reason for such an approach is the

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*This sub-section is based on an article I published in the Journal of African law volume 60 Issue 2 entitled "Public Purpose as a Justification for Expropriation of Rural Land Rights in Ethiopia" in 2016.

[35] Walter (n 1) pp 526–527.

[36] Hugo Grotius. *De Jure Belli Ac Pacis Libri Tres*. (Francis W Kelsey, Translator 1925). *On the law of war and peace three books*. P 807

[37] Michael M. Berger. 2005. Public Use Goes Valley Girl; Now Means Public Whatever. *Planning & Envtl. L., 57*(9), pp.12-13.

[38] See for instance, Samuel R. Staley. 'The proper uses of eminent domain for urban redevelopment: is eminent domain necessary?' in Bruce L. Benson (ed.). *Property rights: eminent domain and regulatory takings re-examined*. New York. Palgrave Macmillan, 2010. 27–54; and Steven J. Eagle. 'Assembling land for urban redevelopment: the case

regard of property rights from an economic perspective only and the assumption that establishing the strong compensation clause can address all the problems. Even some like Abraham Bell and Gideon Parchomovsky argue that the public use clause has only the role of establishing the duty to pay compensation.[39] They assume that the government, by using land-use regulation and taxation power, can seize private property rights without compensation. However, taking through the public use clause better protects the affected parties as it guarantees them compensation.[40] Therefore, they claim that the broadest possible understanding of public use is in the best interest of the affected parties as it limits the state's resort to property regulation and taxation power.[41] In their view taking on the basis of public use is the lesser of two evils.

The above dissenting views and the current trends in legislation and judicial practice requires us to rethink the role of the public use requirement. Two lines of thinking can be inferred in this respect. The first is that the public use requirement determines when the state can use the eminent domain to deprive property rights of affected parties. This line of thinking regards that the public use requirement serves to protect property right holders from state intervention and abuse of discretionary power.[42] It is similar to the conditions imposed on the power to deprive liberty of the person, which is allowed only in case a certain level of criminal suspicion – public use defines the exceptional cases in which the property right may be deprived. The second line of thinking is that the public use requirement has the role of establishing compensation and nothing more. According to this view, the establishment of public use condition is intended to force the state to go through expropriation to deprive property rights, upon payment of compensation. The failure to establish public use conditions rather than prohibiting the state from depriving the property rights of individuals, forces the state to employ property regulation and taxation power, where no compensation is payable to the affected parties.[43]

I follow the first view, that the role of public use requirement as a distinct condition to deprive property rights has the aim of defining when the state is entitled or prohibited to intervene with the

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for owner participation' in Bruce L. Benson (ed.). *Property rights: eminent domain and regulatory takings re-examined*. New York. Palgrave Macmillan, 2010. 7–26.

[39] Abraham Bell and Gideon Parchomovsky. The uselessness of public use. (2006) 106 *Colum. L. Rev.* 1412–1449.

[40] Ibid.

[41] See more about state power of property regulation and taxation on Richard Allen Epstein. *Takings: private property and the power of eminent domain*. Cambridge, Massachusetts and Landon. Harvard University Press, 1985.

[42] Muradu Abdo. Reforming Ethiopia's expropriation law. (2015) 9 *Mizan Law Review.* 301–340. P 305.

[43] Bell and Parchomovsky (n 39).

private property rights. It indicates the circumstances in which state can have a legitimate authority to deprive the property rights of individuals and communities. Failure to establish the precondition of public use restrains the state from intervening in property rights. This is because the public use clause is meant to justify and define the limit to constitutional property rights.[44] Moreover, on one hand, in a utopian democratic state, it is not assumed that the state's power of property regulation and taxation is used just to serve the public welfare at the expense of individual or community interest. Besides constitutional norms and principles, social justice is meant to shape and guide the exercise of state's power of property regulation and taxation.[45] On the other hand, unlike expropriation, at the time of acquiring property rights, property holders assume the risk of exercise of the state's power of regulation and taxation. Furthermore, compared with expropriation, the social, economic and political impact of the state's power of regulating property and taxation is minimal and they are not often used to take property completely. Therefore, I argue that the public use requirement has an implication of limiting the state's involvement in the land rights of individuals and communities. It is not a descriptive stipulation intended to distinguish those takings that require compensation and those that do not, as Harrington claims.[46] Moreover, it is not an alternative to the power of land use regulation and taxation by which the state resorts to taking land when the public use requirement limits it from taking.[47]

The question that arises at this juncture is that of how the notion of public use requirement is regulated to curtail the state's arbitrary encroachment on land rights so that the security of land tenure of affected parties is assured. The way in which the concept of public purpose is defined; its listed components; and who determines the presence of the components, have direct implications for the legal construct of assurance of land rights for land tenure security. In terms of scope and generality, the notion of public purpose can be understood in different ways. Scope

[44] Frank I. Michelman. Property as a constitutional right. (1981) 28 *Wash. & Lee L. Rev.*1097–1114. Michelman provides that constitutional norms guarantee two sets of rights – direct and derivate rights. The derivative rights protect the direct and actual rights from government impairment. (p 1099).
[45] The constitutional norms provide a guiding and binding principles about the property regulation and taxation power of state. For instance, the FDRE Constitution stipulates economic, social and environmental objectives, among others, that guide every act of the government including the regulation of property (See FDRE Constitution (n 12) Article 89, 90 and 92). It also states basic principle of taxations, like relatedness to the source, proper consideration in determining taxes, and the amount and rate should be commensurate with the service delivered. (Id Article 100).
[46] Matthew P. Harrington. "Public Use" and the Original Understanding of the So-Called "Taking" Clause. (2001) 53 *Hastings LJ*. 1245–1301. P 1299.
[47] In contrast Bell and Parchomovsky presuppose that when the pubic use clause is interpreted or defined restrictively government will resort to land use regulation and taxation to take land. (see Bell and Parchomovsky (n 39)).

wise, there is a *modern* and *traditional* understanding of the concept, depending on the model of political justification undertaken.[48] The *modern* understanding, terminologically properly coined as "public interest" refers to both the direct and indirect benefit the society derives from the proposed project. This understanding is justified by Elazar's *weak rationality model* of political justification.[49] It requires that the taking must be done based on a minimal rational choice; in a sense it demands some minimal relation between a public value and the purpose for which the land is expropriated.[50] That minimal relation can be established when the public either directly benefit by actual use of the project for which the land is compulsorily acquired (when it is used for development of public infrastructure, environmental protection or security) or in indirectly, when the project generates revenue for the state, creates job opportunities, ensures food security, transfers technology and in any way benefits the public better than did the rights of the previous holder.[51] This approach demands that the expropriation should not be conducted just to serve private interests or for " naked preferences for one group over others."[52]

The *traditional* understanding instead confines itself to the direct benefits that society can derive from a given project to determine whether the expropriation is done for the public purpose. This conception of public use is informed by Elazar's *deontological justification* model of political justification for social policy. Contextually, it assumes that a person's property rights can be overridden only by the projects which are necessary and crucial for "political stability or social welfare."[53] Here, the definition of public use to expropriate land rights is not based merely on the calculus of the public value derived if the land is expropriated. The most basic countervailing reasons to ensure political stability or enhance social welfare of the public and guarantees them

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[48] For instance, Daniel and Merrill called them as narrower and broader tests (see Ambaye (n 31) p 173; and Thomas W. Merrill. Economics of public use. (1986) 72 *Cornell L. Rev.* 61–116. Pp 67-68); Lazzarotti called them as narrow and broad approach (Joseph J. Lazzarotti. Public Use or Public Abuse. (1999) 68 *UMKC L. Rev.* 49–76. P 59); whereas Muradu regarded them minimalist and maximalist conceptions (Abdo (n 42) p 305). I coined them as traditional and modern because the essence of the concept has changed through time. In early time the public use is the traditional function of state and the society's direct utilization of the expropriated property. In the modern time the role of state is broadened, and the societal direct use of the expropriated property is not a necessary to establish the public use. The idea of indirect benefits to constitute public use is emerged in modern time.

[49] Micah Elazar. Public Use and the Justification of Takings. (2004) 7 *U. Pa. J. Const. L.* 249–278. P 251.

[50] Ibid.

[51] Bin Cheng. The Rationale of Compensation for Expropriation. (1958) 44 *Transactions of the Grotius Society*. 267–310. P 292; FAO Compulsory (n 1) pp 10- 12.

[52] Elazar (n 48) p 252.

[53] Id p 253.

with the actual right to use and enjoy the project for which land is expropriated, are regarded public use to justify the expropriation.[54]

Each of the above two extreme understandings are subject to criticism and produce their respective drawbacks. The modern conception of public purpose, with its weak rationality standard of justification poses a danger for security of property rights. It empowers the state to deprive property rights as a rule rather than as an exception or as a limit to right, because the "minimal rational choice" yardstick to define public use here, makes almost everything the state does in the public interest.[55] Thus, it opens a space for the haves to influence the decision of expropriation for their own advantages.[56] By contrast, the deontological justification-based traditional understanding has the implication of paralyzing the state machinery. The property right is strongly connected with the dynamic socio-economic conditions of a state. The economic advancement and prosperity needed to create decent living conditions for the public, demand the state's and private individuals' and communities' active engagement in economic activities and provision of social services. The adoption of the traditional concept of public use, therefore, may impede the economic well-being of the state and its inhabitants by deterring the possibility of expropriating the property rights necessary for the implementation of such projects.

In this light, a way of understanding "public purpose" that enables the concept to play its role of limiting state intervention in property rights without paralyzing the process of economic advancement of a nation is needed. The development of such balanced approach to the public purpose requirement begins from considering the foundation of expropriation from the limit to rights approach, as I argue in Chapter 1. As a limitation to the property rights of individuals or communities, it has to be conducted as an exception, on limited grounds. And such grounds – the public purpose requirement - should be understood in a way inclusive of both the interests of the affected parties and Elazar's cost-benefit rationality model.[57] By this I mean that the affected parties' interests must in some way also specifically be advanced by the project that is implemented

[54] Ibid; Jarrett Nobel. Land seizures in the People' s Republic of China: protecting property while encouraging economic development. (2009) 22 *Pac. McGeorge Global Business & Dev. L. J.* 355–377. P 368.
[55] Berger (n 37); David L. Callies. A Requiem for Public Use. (2006) 20 *Prob. & Prop.* 11–13.
[56] Daniel B. Kelly. The public use requirement in eminent domain law: a rationale based on secret purchases and private influence. (2006) 92 *Cornell L. Rev.* 1–66; Jennifer J. Kruckeberg. Can Government Buy Everything: The Takings Clause and the Erosion of the Public Use Requirement. (2002) 87 *Minn. L. Rev.* 543–582.
[57] Elazar (n 49) p 253.

in the first place for a broader public purpose, if possible. So, for example, if the project for which the land rights are expropriated is one aimed at income generation, the public use requirement must be understood so as to make the affected parties a shareholder in the project by considering their land rights as a contribution if they prefer it, rather than totally disregarding them.

In addition, the cost-benefit rationality model requires that the public use requirement must be determined by comparing the overall benefits of the intended project and the negative effect or cost of the deprivation of land rights for the landholder. In other words, particularly in relation to indirect benefits, a comparative determination between the purpose the land will serve and the effect of the deprivation on the landholder should be conducted. If the over-all benefit of the intended project overwhelmingly exceeds the danger of the deprivation of land rights for the landholder, then we can say that it is for a public purpose. Moreover, this analysis should be done by an independent organ.

In the post-1991 Ethiopia, the concept has legislatively been understood in both traditionalist and modernist ways, varying in time and among the laws to expropriate the land rights of peasants and pastoralists. Time wise, pre-2005, public purpose was defined in the traditionalist conception. To expropriate peasants' and pastoralists' land rights pre-2005, the public purpose requirement was defined restrictively for public works projects only. It defined "public works" as:

> "the construction or installation, as appropriate for public use, of highway, power generating plant, building, airport, dam, railway, fuel depot, water and sewerage telephone and electrical works and the carrying out of maintenance and improvement of these and related works and comprises civil, mechanical and electrical works."[58]

By contrast, in the post-2005 period, the prevailing rural land laws depict the concept of public purpose in the two ways, as result of the presence of both federal and state laws on the same issue. The federal legislation defines "public purpose" as:

[58] Federal Democratic Republic of Ethiopia. The appropriation of land for government works and payment of compensation for property proclamation No. 401/2004. *Fed. Neg. Gaz.* Year 10 No. 42. 2004. Article 2(2). However, in the same period, with respect to urban land rights, the modern way of defining the concept of "public interest" was adopted. It was provided as: "…an appropriate body determines as a public interest in conformity with master plan or development plan in order to continuously ensure the direct or indirect usability of land by peoples, and to progressively enhance urban development." (See Federal Democratic Republic of Ethiopia. Re-enactment of urban lands lease holding proclamation No. 272/2002. *Fed. Neg. Gaz.* Year 8 No. 19. 2002. Article 2(7).

> […] the use of land defined as such by the decision of the appropriate body inconformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.[59]

Moreover, the adoption of the modernist conception of public purpose in the federal law can also be inferred from the law's specification of for whose benefit the expropriation may be done. Accordingly, it provides that the expropriation is considered as for a public purpose "… where it believes that it should be used for a better development project to be carried out by public entities, private investors, cooperative societies or other organs."[60]

In opposition to this, some state laws adopt their own unique understanding of public purpose that resembles the traditional view. For instance, the SNNP and Afar State's laws adopt the traditional conception of public use by providing illustrative list of activities from which the public directly benefit. Both laws provide that 'public use' is "public common service obtained from infrastructures such as school, health, road, water, etc."[61] In the Somali State law, the adoption of the traditional conception of public use is inferred from the legislative prohibition on the state transferring communal landholdings to private investors. It states that "[c]ommunal lands that are used communally by pastoralists for grazing, and social services shall not be given/leased to investors."[62] However, the diversion from the federal legislation raises the issue of determining the juridical relation between the laws (I discuss this in Chapter 8).

Also, in terms of generality, the notion of public purpose may be understood in a single way or in multiple ways, depending on the nature of the landholder or the nature of land rights. On a single understanding the idea of public purpose is blind to the nature of the land rights and the landholder. Whatever the nature of the land rights and whosoever the landholders are, the same standard of

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[59] Proc.No.455/2005 (n 15) Article 2(5). The same approach is adopted in Benishangul Gumuz and Amhara State laws. The only difference is terminological difference. The two state laws coin the concept as "public service" (See proc. No. 85/2010 (n 16) Article 2(15) and Proc. No. 252/2017 (n 33) Article 2(34) respectively).

[60] Proc.No.455/2005 (n 15) Article 3(1). With respect to investors' rural land rights, the post-2005 prevailing law adopts the traditional conception of public purpose by limiting the expropriation for the projects implemented by the government. (See Id Article 3(2) in conjunction with Article 8(4) of Federal Democratic Republic of Ethiopia. Rural land administration and land use proclamation No. 456/2005. *Fed. Neg. Gaz.* Year 11 No. 44. 2005).

[61] Southern Nations, Nationalities and Peoples Regional State. Rural land administration and utilization proclamation No. 110/2007. *Debub Neg. Gaz.* Year 13 No. 10. 2007. Article 2(23); Afar National Regional State. Rural land administration and use proclamation No. 49/2009. 2009. Article 2(27).

[62] Ethiopian Somali Regional State. Rural land administration and use proclamation No. 128/2013. *Dhool Gaz*. 2013. Article 5(10). The same prohibition is mentioned in Afar State's law too. (See Proc. No. 49/2009 (n 61) Article 5(9)). However, the prohibition applies only with respect to communal land holdings utilized by pastoralists.

determining the components of public purpose is employed. This approach curtails the possibility of the influence of stronger parties in the decision making of expropriation. It also ensures the uniformity and equal treatment of the affected parties, irrespective of their position and the nature of their land rights. Above all, it establishes the requirement of a general rule needed to curtail expropriation decisions from being made invidiously, at least in determining the grounds of deprivation.[63]

In a multiple approach, the notion of public purpose is defined in various ways on the basis of the nature of the land rights and the landholder. For instance, in the case of rural land rights in Ethiopia, in the federal legislation the idea of public purpose that applies to peasants and pastoralists on one hand, and investors on the other hand is totally different. As mentioned above, to deprive peasants and pastoralists, the legislation adopts the modern approach, while in case of investors' rural land rights, it adopts the traditional approach.[64] It is provided that: "… no land lease holding [an investor accessing rural land rights through lease] may be expropriated unless … the land is required for development works to be undertaken by government."[65] This approach implies that the guiding principle to delineate the public purpose is different for the peasants' and pastoralist' land rights, and investors' land rights. The interpretation of public purpose to expropriate peasants' and pastoralists' land is guided by the principle of making better use of land, while in case of the investors' land the guiding principle is whether the land is required for a project to be carried out by the government. In a sense, although a project for which investors' land is required to be expropriated results in much better use of the land than it employed, public purpose requirement is not met unless the project is a government-run project. Hence, it causes variation on the extent of limit to land rights depending on the nature of landholders.

Moreover, the adoption of the modern conception of public purpose to expropriate peasants' and pastoralists' land rights while adopting the traditional notion for investors under the federal legislation raises an issue of constitutionality. This is because of two FDRE constitutional

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[63] Baker (n 5) p 765.

[64] Proc.No.455/2005 (n 15) Article 3(2) in conjunction with Proc. No.456/2005 (n 60) Article 8(4). It seems that the same approach is adopted in the Benishangul Gumuz and Tigray State laws.

[65] Proc.No.455/2005 (n 15) Article 3(2). Similar difference exists among communal landholdings of pastoralists, and private landholdings peasants or semi-pastoralists in the Afar and Somali State's laws. While it is prohibited to expropriate communal landholdings to transfer to investors, we cannot find the same prohibition with respect to private landholdings. (See Proc. No. 128/2013 (n 62) Article 5(10); Proc. No. 49/2009 (n 61) Article 5(9)).

assumptions and provisions. First, unlike the economic policy of the country, that is based on the free market principle, the constitution defines access to land on the foundation of an egalitarian social equity paradigm, as I explain in Chapter 3 Section A. Particularly, the constitution makers while arguing for the *status quo* state and people's ownership of land, perceived access to rural land rights from the perspective of securing means of livelihood for all needy.[66] Rather than the economic value of land, what mattered most for the constitution makers was to use access to rural land rights to guarantee all needy nationals with the means of living. It is not the prior intention of commercialization and marketization of rural land rights to the efficient and productive users. This will come only after the satisfaction of the rural land claims of peasants and pastoralists. In addition, the protectionist justification, based on a social security paradigm and aimed at protecting peasants and pastoralists from losing their land rights to the urban bourgeoise through sale in distress also strengthens the claim that the legal protection afforded them should not be any less than that of others.[67]

Second, the FDRE Constitution's adoption of the principle of priority to all needy in accessing rural land rights I argue and describe in Chapter 3 Section A also implies that assignment of rural land rights to needy peasants and pastoralists is preferred to transferring it to more productive and efficient users, like investors. However, the adoption of the modern understanding of public purpose entitles the state to expropriate rural land rights of the needy to transfer to an investor that will productively and efficiently use it and create job opportunities and additional sources of revenue to the state. Consequently, it disregards the constitutional principle of priority to the needy in access to land. It also creates the impression that land granted to the needy today can be taken away to transfer to an investor tomorrow.

Lastly, the nature of the authority assigned with the task of defining the components of public purpose also has an implication for the landholder's assurance of land rights. Four different approaches may be identified about specifying the state authority with the task of defining and determining components of public purpose. These are: "administrative decision", "legislative list",

[66] Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 4, Nov. 23-29/1994, Addis Ababa), 1994. Deliberation on Article 40. (Amharic document, translation mine); Wibke Crewett and Bendikt Korf. Ethiopia: Reforming land tenure. (2008) 35(116) *Review of African Political Economy*. 203–220. Pp 204-205.
[67] Ibid.

“judicial interpretation”, and “shared” approaches.[68] The approaches at the same time imply the manner in which the components of public purpose are listed. In the administrative decision approach, which is seldom used, what constitutes the public purpose is determined by a certain administrative authority within a country. Here, neither statutory listing or provision of standards/yardsticks nor judicial review are provided to delineate the constituting elements of public purpose. Accordingly, the constituting elements of public purpose to expropriate land rights is defined by the sole decision of the administrative authority and known only at the time of expropriation. This approach, then, clearly perpetuates the insecurity of land tenure of individuals and communities, by exposing them to unchecked discretionary administrative decision to establish the public purpose requirement and making the grounds unnoticeable and predictable.[69] Nevertheless, it is so that, given that establishing what is for a public purpose is mainly a question of fact (how in fact will the measure benefit the public, directly or indirectly?), compared to the legislature and judiciary, an administrative authority is usually in a better position to assess and prove it.

The legislative list approach, on the other hand, empowers the law-making organ to outline the possible components of public purpose exhaustively. Here to expropriate the land rights the expropriating organ has to check whether the purpose for which will expropriate land falls under the lists provided by the legislative organ in a law. This approach limits the discretion of both the expropriating authority and the courts to add new grounds. It reduces ambiguity by providing a comprehensive, non-negotiable list beyond which the government may not compulsorily acquire land.[70] The assignment of the power to define and list the components of public use to the legislature is a policy choice of letting the majority decide. Nevertheless, given the dynamic nature of the concept of public purpose, the problem with this approach is that it is too rigid to provide for the full range of public needs, because of the legislature’s inability to predict all the possible

[68] The debate to whom the power of defining public use is assigned revolves mainly between the legislative or the judiciary. (see James W. Ely Jr. Can the Despotic Power be Tamed-Reconsidering the Public Use Limitation on Eminent Domain? (2003) 17 *Prob. & Prop.* 31–36. P 36).
[69] Klaus Deininger. *Land policies for growth and poverty reduction*. Washington DC. The World Bank, 2003. P 170.
[70] FAO Compulsory (n 1) p 11.

public needs that may arise in the future.[71] Thus, incorporation of a new possible ground requires legislative amendment and it may cause the problem of *ex post facto law*.[72]

In the case of the judicial interpretation approach, what constitutes public purpose is determined by courts. In this approach a legislative guide about how to delineate the components of public use is non-existing and expropriation is carried out only upon judicial declarator once the expropriating organ has applied to a court of law. Accordingly, the question of public use is a judicial one.[73] The basic assumption for the choice of the judiciary to delineate public use is its presumed independence from the influence of the expropriating authority. It also enables the incorporation of any emerging purposes and projects as a public use at any time, without a need for legislative amendment. However, the adoption of this approach raises the question of legality and constitutionality, particularly in the presence of constitutional deferral that requires the particulars about expropriation to be determined by law,[74] since one of the issues that requires detailed rules in such constitutional deferral is public use. Thus, confining the power to outline the components of public use to the judicial interpretation alone in such cases, is constitutionally unsound.

Finally, in the shared approach the power is jointly held by the legislature and judiciary or the legislature and administrative organ. In this approach the legislature provides an illustrative or open-ended list of public purpose or the general standards and yardsticks for delineation of the components of public use. Then either through judicial review or administrative decision the judiciary or administrative organ respectively includes additional grounds or specifies the grounds upon the legislatively defined criteria.[75] It attempts to realize both the restriction and flexibility required in delineation of constituting elements. It provides the flexibility to expand the inclusion of eligible purposes when required without amending law and at the same time limits the scope for

[71] Ibid.

[72] The ex post facto law is changing the law with the view to affect the legal consequences of actions that were committed before the enactment of the law.

[73] Duncan S. MacAffer. What Constitutes a Public Use. (1959) 23 *Alb. L. Rev.* 386–398. P 387; Laura Mansnerus. Public Use, Private Use, and Judicial Review in Eminent Domain. (1983) 58 *NYUL Rev.* 409–456. P 410.

[74] Rosalind Dixon. Constitutional drafting and distrust. (2015) 13 *International Journal of Constitutional Law*. 819–846. Constitutional deferrals have also an implication of identifying the state organ – legislative, judiciary or/and executive – to decide on the particulars. It will have an implication on which approach is adopted to define the components of public use. Specially, in case the deferral is provided like in the form of “determined by law” it implies that the power to define the particulars is constitutionally entrusted to the law-making organ.

[75] FAO Compulsory (n 1) p 11; A. H. B. Constable. Expropriation of Land for Public Purposes. (1901) 13 *Jurid. Rev.* 164–184. P 165. Constable argues that all system of jurisprudence has agreed that the determination of “public utility” to justify expropriation is reserved for a legislature itself or to a certain body to whom it chooses to delegate.

expansion only to purposes similar in nature to the list of purposes provided or those that meet the standards set.[76] However, the assignment of the expansion of the purposes to the administrative organ still opens the door for administrative abuse of the power and threatens the assurance of land rights, especially when the standards are absurdly defined.

In the post-1991 Ethiopia, the shared approach to delineate the public purpose is adopted to expropriate the land rights of peasants and pastoralists in two different ways. In the federal and some state rural land legislation the appropriate administrative body – the expropriating organ – is empowered to outline the purposes on the basis of the standards defined there. Two cumulative standards are set. These are: whether the purpose is the one that ensures the sustainable socio-economic development by which the public benefits directly or indirectly; and whether it conforms to the urban structure or development plan.[77] Hence, irrespective of the implementer and owner of the project, if the project is assumed to satisfy these standards by the expropriating administrative body, then the public purpose requirement is deemed to be established.[78] Nonetheless, given that the standards are illusive and vague, it provides a wider discretionary power to the administrative authority. Additionally, as I discuss in the next Chapter, the legislative prohibition by omission of taking legal action in a court of law on this ground, has avoided the possibility of judicial oversight to limit the danger of power abuse. It in turn opens a space for administrative abuse and enables the bourgeoisie to influence the decisions in their favour.

The second way is the one adopted under the SNNP and Afar State's rural land laws. As seen above, the SNNP and Afar State's laws define public purpose by way of enumerative listing of some purposes and then adds a word or phrase that implies that the government may expropriate land rights for other similar purposes.[79] The open-ended way of listing the purposes enables the incorporation of additional purposes that have similar features to the listed ones. However, the two state laws are silent about who has the final power to incorporate the additional purposes, although they incorporate community participation in expropriation, which may be of help in defining

[76] FAO Compulsory (n 1) p 11. However, the puzzle here is how far the administrative or judicial practices are legitimately deferring from the legislative determination of public use. (See for instance, Lynda J. Oswald. The Role of Deference in Judicial Review of Public Use Determinations. (2012) 39 *BC Envtl. Aff. L. Rev.* 243–281).
[77] Proc.No.455/2005 (n 15) Article 2(5); Proc. No. 85/2010 Article 2(15); Proc. No. 252/2017 (n 33) Article 2(34).
[78] It is without disregarding the exclusion of transfer to an investor to expropriate communal landholdings in the Afar and Somali State laws.
[79] Proc. No. 110/2007 (n 61) Article 2(23); Proc. No. 49/2009 (n 61) Article 2(27).

public use other than the listed examples. Nevertheless, the failure to expressly entitle the courts to review it still paves the way for bureaucratic abuse.[80]

Generally, the trend to employ the public purpose requirement as a means to limit a state's decision of expropriation of property rights is decreasing. It is inferred from the adoption of the *weak rationality justification* model to define the concept itself and consideration of the concept as a compensation establishing requirement rather than being a limitation clause. As a result, as I discuss in the following sub-section, the compensation requirement is treated as the sole substantive requirement to limit the expropriation.

The experience of post-1991 Ethiopia also reveals that the public purpose requirement is not treated in a way to promote its role of limiting state intervention in peasants' and pastoralists' land rights. The adoption of the most liberal *modernist understanding* of the concept advised by the *weak rationality justification model*, and empowerment of the administrative authority to define its components based on vague and absurd standards and without judicial review has put them at risk of arbitrary loss of their land rights. Moreover, such understanding also disregards the constitutional principle of priority. Although the problem is to some extent mitigated under the Afar, Somali and SNNP State's laws, with the adoption of the traditionalist understanding of public purpose, it raises the question of legality as I discuss in Chapter 8. Moreover, whether the compensation scheme adopted in the Ethiopian legal system has an implication to limit the state's expropriation of peasants' and pastoralists' land rights at least to mitigate the danger caused in the regulation of public purpose requirement, is discussed next.

ii. Compensation

Compensation during expropriation is the second substantive requirement that can establish the legal construct of assurance of land rights. As highlighted in Chapter 1 Section C(iii), the requirement of payment of compensation during land expropriation has the effect of restraining the expropriating authority from making economically unwise decisions and protecting the affected parties from arbitrary loss of their land rights. From the side of the expropriating authority,

[80] Id Article 13(11) and Article 19(1) respectively. The Afar State law's cross reference to the application of the federal law on the matter of compensation implies that the affected parties can take a court action only on grievance on the amount of compensation. (See Afar National Regional State. Rural land administration and use regulation No. 4/2011. 2011. Article 24(2)).

it has the tendency to limit the possibility of recourse to land expropriation;[81] while, from the landholder's viewpoint, it has the capability to avoid the impoverishment and loss of livelihood resulting from the act of expropriation, as it wouldn't be fair and just to benefit the public at the expense of a certain individual or group.[82] Therefore, from both sides – limiting the state decision of expropriation, and protecting against the impoverishment and loss of livelihood of the affected parties – it has the implication of enhancing land tenure security.[83]

The realization of the above benefits of compensation depend upon the extent and modes of compensation to be paid to the affected parties as theoretically established in Chapter 1 Section C(iii). The extent and modes of compensation on the other hand depend on how the legislative measure has defined the compensable interests, the modes of compensation and payment, the valuation method and authority, the basis of compensation and the amount thereof. Hence, in this section I show whether the Ethiopian rural land law regulates the above factors in a way to limit the state from making arbitrary decision of expropriation and to protect peasants and pastoralists from impoverishment and loss of their livelihood resulting from the expropriation of their land rights.

a. Land rights and incidental costs as compensable interests

Basically, the extent of compensation for a loss of land rights in expropriation depends on the extent to which the legislative measures establish the losses as compensable interests, among others. The compensable interest – the damage caused to the affected parties as a result of the recourse to land expropriation that a legal regime considers in fixing the amount of compensation – has its own bearing on the extent of compensation. This is because the legislative inclusion or exclusion of a certain loss that incurred due to the expropriation proceedings inevitable affects the extent of compensation to be awarded.

[81] Paul Niemann and Perry Shapiro. 'Compensation for taking when both equity and efficiency matter' in Bruce L. Benson (ed.). *Property rights: eminent domain and regulatory takings re-examined*. New York. Palgrave Macmillan, 2010. 55–76. P 57.
[82] Ibid; Rachel D. Godsil and David Simunovich. 'Just compensation in an ownership society' in Robin Paul Malloy(ed.). *Private property, community development, and eminent domain*. Aldershot. Ashgate Publishing, 2008. 133–148. P 137.
[83] Constable (n 74) p 166.

In principle, in order to enable the extent of compensation to serve the purpose of social justice and economic justifications, every loss resulting from the act of expropriation should be regarded as a compensable interest. Otherwise, exclusion of certain aspect of such loss impedes the extent of compensation and that in turn affects the realization of the purpose of compensation in protecting the land tenure security of the affected parties. Often, the inclusion or exclusion of a loss from the ambit of compensable interest is done by the legislative measure that regulates the entire expropriation proceedings.

The process of land expropriation in general causes damage to the affected parties in terms of causing the loss of the land rights and improvements made to and property situated on land, creating inconveniences, incurring cost to regain the same kind of land rights, property and improvements, and loss of social establishments and sentimental attachment to the land.[84] Such damage can mostly be assessed in monetary terms and compensated by awarding an equitable amount of compensation, either in kind or in monetary terms or both. Other losses that cannot be expressed in monetary value, which I call "incidental costs" are difficult to put in a value to. As seen in Chapter 1 Section C(iii), such damage can be compensated only by awarding compensation assessed on the principle of equity.[85]

However, the compensability of a given damage depends on the legal recognition and declaration to that effect. In absence of a legal categorization of a damage as compensable, whatever its extent might be and whether or not the affected party has proven it, compensation may not be awarded, because there will not be a legal ground on which to base the claimed compensation. In case of expropriation of the land rights of peasants and pastoralists in Ethiopia, the rural land law tacitly defines the compensable interests while defining the notion and basis of compensation and providing rules on displacement compensation.

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[84] Id p 177.

[85] Some other way of compensating them is just awarding additional certain percent of the market value of the assessable compensation. (See *Ibid*; Godsil and Simunovich (n 81) p 140). However, such way of assessing and awarding compensation is totally random and depends on the value of the measurable compensation not only the damage itself. Furthermore, in case when the compensation takes in-kind form, it is not clear how this compensation is going to be applied. In contrast to this approach a new approach to called "a well-being analysis approach" has been forwarded. (See Maria M. Maciá. Pinning Down Subjective Valuations: A Well-Being-Analysis Approach to Eminent Domain. (2016) *The University of Chicago Law Review*. 945–999).

In the definitional clause, the law defines compensation as "…a payment to be made… to a person for his *property situated on his expropriated landholding*."[86] From this provision it seems that compensable interests in the expropriation of land rights of peasants and pastoralists is only their property situated on their expropriated landholding. Nevertheless, the provision dealing with the basis of compensation incorporates loss of *"permanent improvements"* made to expropriated landholding as another compensable interest.[87] Moreover, the rule on displacement compensation implies that there is another loss that is considered as a compensable interest in the expropriation of the rural land rights of peasants and pastoralists.[88] The problem here is that it is not clear which affected interest the displacement compensation is intended to compensate – the loss of land rights or the incidental costs (the inconvenience and impediments faced until a new social environment and livelihood are established).

Two dissenting views have been forwarded in treating which interest the displacement compensation is intended to compensate. For instance, while Daniel assumes it as a compensation for loss of land,[89] Muradu considers it as a non-compensable interest, but displacement compensation is an exception.[90] Daniel argues that loss of land rights of peasants and pastoralists is a compensable interest, although the way it is compensated is different from loss of "private property."[91] He claims that the FDRE Constitution is silent about compensability of loss of land rights and the compensation established in the legislation is aimed at assisting the rehabilitation of the affected parties against the loss of the perpetual land rights.[92] He fails to establish the constitutional basis of making loss of land rights a compensable interest.

Muradu, on the other hand, claims that what is reflected in the legislation is the constitutional approach of making land rights a non-compensable interest. He states that the FDRE constitution, by adopting the "labour theory" – property rights acquired by one's labour, capital, or enterprise –

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[86] Proc. No. 455/2005 (n 15) Article 2(1).
[87] Id Article 7(1).
[88] Id Article 8.
[89]Ambaye (n 1) pp 214–216; Daniel Weldegebriel. Land valuation for expropriation in Ethiopia: valuation methods and adequacy of compensation. (7th FIG Regional Conference Spatial Data Serving People: Land Governance and the Environment – Building the Capacity Hanoi, Vietnam), 2009. P 1.
[90] Abdo (n 42) p 311; Muradu Abdo Srur. *State policy and law in relation to land alienation in Ethiopia*. (Doctoral dissertation University of Warwick, UK), 2014. P 154.
[91] Ambaye (n 1) pp 215–216.
[92] Ibid.

excludes land rights that peasants and pastoralists acquired for free from the ambit of compensable interest.[93] However, when he deals with the "displacement compensation", he assumes loss of land rights as an exceptionally compensable interest.[94] Nevertheless, I argue that he wrongly relies on the constitutional provision that governs expropriation of "private property" to exclude peasants' and pastoralists' loss of land rights from the ambit of compensable interest.

In contrast to the two authors, I claim that the mentioning of "displacement compensation" has to be regarded as a compensation for incidental costs. It is not to regard the loss of land rights as compensable interest, be it in full extent as Daniel claims or in exceptional scenario according to Muradu, because, for its constitutional backing the law is based on the constitutional rule that defines expropriation of "private property."[95] Neither the law nor the authors establish the constitutional foundation for expropriation of the land rights of peasants and pastoralists. However, in relation to the urban land rights, the same law incorporates displacement compensation as compensation for incidental costs incurred until the affected parties build a house in the new land provided for the loss of land.[96] Therefore, as displacement compensation in both scenarios is implied to compensate the same damage, the only damage not included in the other compensable interests is the incidental costs.

One may wonder how and why the Ethiopian rural land law fails to regard the loss of land rights as compensable interest and whether this is constitutional. The cause for such failure is the law makers' citation of the wrong provision of the FDRE Constitution and neglect of the proper and appropriate provisions on which to establish the constitutional foundation of the law. To some extent the constitution makers also share the blame for the ambiguity they created in drafting the constitutional provisions. The legislature, while enacting the law regulating the land expropriation has based it on the constitutional provision that deals with expropriation of private property.[97] As I argue in Chapter 3 Section C and D the constitutional provision that governs expropriation of private property doesn't apply for expropriation of rural land rights of peasants and pastoralist. Also, Muradu's assumption of the constitutional exclusion of the loss of land rights of peasants

[93] Abdo (n 42) p 311; Srur (n 90) p 154.
[94] Ibid.
[95] Proc. No. 455/2005 (n 15) see preamble.
[96] Id Article 8(4(b)).
[97] Id, see preamble.

and pastoralists from compensable interest based on the provision that governs expropriation of "private property" is wrong, because, on the basis of the definition provided for the idea of private property in the constitution, pastoralists' and peasants' land rights do not fall under the ambit of the notion private property. As a result, the golden rule of interpretation implies that the expropriation rule at hand doesn't apply to the land rights of peasants' and pastoralists' as it is acquired for free and they do not exert their labour, capital or entrepreneurial skills. Therefore, rather than making loss of land rights of peasants and pastoralists a non-compensable interest on this constitutional rule, what is plain is its non-application to expropriate their land rights.

Since an express entitlement of the state to expropriate the land rights of peasants' and pastoralists' is not mentioned in the FDRE Constitution, as seen in Chapter 3[98] it can be established through the canons of interpretation, fundamentally relying on the constitutional protection afforded to their land rights. Typically, the right to immunity against eviction and displacement and the right to compensation and reinstatement constitutionally afforded to peasants and pastoralists fundamentally aim at restraining the state from arbitrary intervention in their land rights.[99] Since the protections are provided for in the Constitution, they not only limit administrative interference, but also legislative encroachment on the rights. Thus, such protections make sense, *inter alia* when the expropriating organ is obliged to pay compensation for the loss of their land rights. And this is realized and implemented first when the loss of their land rights is considered a compensable interest.

In sum, one of the factors that affect the extent of compensation awarded for land expropriation is the scope of the compensable interests. The narrowing of the compensable interests by excluding certain damage/losses sustained due to the land expropriation may result in under-compensation of the affected parties. In case of expropriation of the land rights of peasants and pastoralists in Ethiopia, the rural land law excludes the fundamental interest affected by the land expropriation – loss of land rights – from being a compensable interest. The exclusion is the result of the legislative basing of the determination on the inappropriate constitutional provision and failure to rely on the constitutional protections afforded to peasants' and pastoralists' land rights.

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[98] See Section C and D of Chapter 3.

[99] See FDRE Constitution (n 12) Article 40(4-5) and 44(2).

b. Modes of compensation and payment

For an agrarian society like Ethiopian peasants and pastoralists, in addition to other factors, the modes of compensation and payment adopted in the legislation for land expropriation has an implication for their land tenure security. Accordingly, the form the compensation takes and the manner the payment is effected in the case of monetary compensation clearly defines the future living conditions of the affected parties.[100] This mainly depends on whether peasants and pastoralists have another skill to make a living, other than their agricultural activities, and the ability to manage sum of money.[101] And the acquisition and development of other skills for livelihood and capability to manage sum of money in turn depends on the presence of an enabling environment that encourages them to engage in non-agricultural activities to supplement their livelihood. Otherwise, in the environment that discourages the diversification of means of living of peasants and pastoralists, the preferred way to compensate them becomes the provision of substitute land.[102]

Generally, the modes of compensation can be pecuniary, in-kind (substitute land), provision of other means of living or the combination of all three or some of these. The choice among these alternative modes of compensation should depend on the preference of and what best serves the interest of the affected parties.[103] The preference of the affected parties can be inferred from their participation in the process of land expropriation as I discuss in Chapter 1 Section C(iii), whereas, determination of the mode of compensation that best serves the interest of the affected parties depends on the capability of the affected parties to engage in a particular means of livelihood. The capability of the affected parties depends on the skill, labour force and ability to engage and form a means of living.

Random selection of the modes of compensation, on the other hand, may result in the impoverishment and loss of the social status and bond of the affected parties. For instance, awarding monetary compensation for those who do not have skill to make living other than through agriculture, may led to extravagant spending of money. As they do not know how to manage such

[100] FAO Compulsory (n 1) pp 38–40.
[101] Ibid.
[102] Linlin Li. Adoption of the international model of a well-governed land expropriation system in China —problems and the way forward. (2015 World Bank Conference on Land and Poverty, Washington DC), 2015. P 9.
[103] FAO Compulsory (n 1) p 43.

kind of money, they will end up without means of living in a short period of time. Then they will be impoverished and worse off than before the land expropriation. Consequently, they will lose their social status and bond in the community.[104] This is because for Ethiopian peasants and pastoralists, loss of land rights means loss of livelihoods.[105]

Consequently, especially when the compensation has taken another form than substitute land, the state must provide assistance to the affected parties in the process of establishing new livelihoods. The rehabilitation strategy has to be formulated in a way of imposing an obligation on the state to assist the affected parties in efforts to establish, restore and improve their livelihoods.[106]

Scholars in apprising the rural land law of Ethiopia have identified three forms of compensation. These are monetary compensation, substitute land and a combination of both.[107] However, here two important questions arise over their interpretation of the legislation. These are whether the provision of substitute land is strictly compensation; and whether the forms of compensation are limited to these three modes. As I discuss below the rural land law stipulates solely monetary compensation for the three compensable interests – permanent improvements made, and property situated over expropriated land and incidental costs of displacement.[108] Provision of substitute land is by no means aimed at compensating loss of the three interests. The only possible situation in which one can assume provision of substitute land as a compensation is with respect to loss of land rights.

However, as the law stands, I claim, in opposition to Muradu and Daniel, that provision of substitute land is not a compensation in the strict sense. I instead consider it as an aspect of the constitutional right to free access to land rights of peasants and pastoralists, I discuss in Chapter 3 Section A. This is because, first as argued above, loss of land rights of peasants and pastoralists is not made to be compensable interest in the legislation as it based on the constitutional rule of

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[104] Id p 40.
[105] Ibid. As I discuss in Chapter 4 for Ethiopian peasants and pastoralists land right is a means of living.
[106] Id p 41.
[107] Proc. No. 455/2005 (n 15) Article 7 and 8; Daniel Weldegebriel. 'Compensation during expropriation' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 191–234. Pp 213–221; Muradu Abdo (n 42) pp 314-315; USAID. Assessment of Rural Land Valuation and Compensation Practices in Ethiopia. *Ethiopia–Strengthening Land Administration Program (ELAP)*, 2012. P 60.
[108] Proc.No.455/2005 (n 15) Article 7 and 8.

expropriation of “private property”. Hence, it becomes absurd and self-defeating to regard provision of substitute land as a compensation for loss of land rights.[109] Second, if it is assumed to serve as a compensation it would have been made mandatory, as the same law does with respect to urban land rights, and rural land rights acquired through lease arrangement.[110] The law, even without making an exception, provides for substitute land as a compensation for loss of urban land rights and rural land rights of investors, mandatorily.[111] Nonetheless, for peasants and pastoralists provision of substitute land is not a mandatory provision to compensate loss of land rights. Instead, it is stipulated to ensure the affected peasants’ and pastoralists’ constitutional right to free access to rural land rights again, and to indicate the amount of compensation for incidental costs in such scenario.[112] Finally, the cumulative adoption of the appropriate compensation and provision of substitute land in the SNNP State law supplements my stand, as substitute land is not stipulated as a compensation under the post-1991 Ethiopian statutory land tenure system. The prevailing Amharic version of the state law provides that the affected parties are made to vacate their landholdings after getting *appropriate compensation and substitute land*.[113] The separate regard of provision of substitute land from the general concept of compensation is an indication to separately treat it from the ambit of compensation. And, that separate scenario by which peasants and pastoralists can access rural land rights is through their constitutional right to free access to land.

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[109] Muradu’s assumption of “displacement compensation” as an exceptional way of making loss of land rights as compensable interest is not reasoned out and supported by any canon of interpretation and justification.

[110] Proc. No.455/2005 (n 15) Article 8(4–6). The English version of Article 8(6) seems to limit the provision of substitute land for loss of land rights to urban lease holdings only. Nevertheless, the prevailing Amharic version indicates any lease land rights, which also includes investors rural land rights since they acquire land rights in general through lease system. (see FDRE Constitution (n 12) Article 40(6); Proc. No.456/2005 (n 60) Article 8(4)). The urban land law of the country also makes a cross-reference to the Expropriation Proclamation. (See Federal Democratic Republic of Ethiopia. 2011. Urban lands lease proclamation No. 721/2011. *Fed. Neg. Gaz.* Year 18 No.4. Article 25(1(b)) and (4)).

[111] Unless in case of peasants and pastoralists, with respect to rural land rights of investors and urban land rights the same law mandatorily demands provision of substitute land even without exceptional alternative monetary compensation. It establishes the in-kind compensation even after making good the loss of permanent improvement made and property situated on expropriated land (Proc.No.455/2005 (n 15) Article 7), and incidental costs (*id* Article 8(4(b) and (6)).

[112] Id, Article 8(1-3).

[113] Southern Nations, Nationalities and Peoples Regional State. Rural land administration and use regulation No. 66/2007. Year 13 No. 66. 2007. Article 13(3(a)). The SNNP state law devises a mechanism to provide peasants and the pastoralists with other means of living when getting substitute land is impossible. Accordingly, it demands that in case when there is no substitute land to provide for the affected peasants and pastoralists, an income generation means should be designed in discussion between the beneficiaries and the owner of the project to sustainably lead affected parties’ livelihood.

Hence, the above argument by which the provision of substitute land is excluded from the compensation scheme at the same time narrows the form of compensation in a strict sense. There is only one form/mode of compensation – monetary compensation – that has been adopted for expropriation of the land rights of peasants and pastoralists.[114] The provision of substitute land is not in the compensation scheme. Moreover, the affected peasants and pastoralists can get it on the basis of their right to free access to rural land and depending on the availability of land. Except for the SNNP State law, the federal as well as the other state laws fail to establish an alternative livelihood when substitute land is not available.[115] The SNNP state law demands that an income generation means should be designed in discussion between the beneficiaries and the owner of the project to sustainably lead affected parties' livelihood, although it is not an aspect of compensation scheme.[116] In such a way it tries to mitigate the vulnerability of peasants and pastoralists to impoverishment.

Therefore, in general by looking at the prohibition of engaging in non-agricultural activities as seen in Chapter 5 Section C(i), one may question whether monetary compensation best serves the interest of peasants and pastoralists. Since peasants and pastoralists are not given a chance to engage in other means of livelihood, they may not have acquired a skill to make a living from other livelihood activities by investing the pecuniary compensation awarded. Due to the fear of loss of their land if they engage in non-agricultural activities, as determined in the law as one ground to deprive their land rights, peasants and pastoralists may not get the opportunity to acquire another skill to make livelihood.[117] The best, if not the only, way to maintain their livelihood is awarding of substitute land as a compensation.[118] The monetary compensation in such situation exposes the affected parties to unwise and extravagant spending or being fooled into investing in fraudulent schemes.[119] Then, as FAO concludes "[t]he end result may be people with no land to farm [and

[114] With respect to the urban land rights and investor's rural land rights, both monetary and land-to-land compensations are available.
[115] Although the federal and the Amhara State laws incorporate the rule about the rehabilitation support to the affected peasants and pastoralists, it is not designed as obligatory stipulation. (See Proc. No.455/2005 (n 15) Article 13(1); Proc. No. 252/2017 (n 33) Article 26(9)).
[116] Reg. No. 66/2007 (n 113) Article 13(3(b)).
[117] Solomon Bekure, Abebe Mulatu, Gizachew Abebe, and R. Michael. *Removing limitations of current Ethiopian rural land policy and land administration*. (Workshop on land policies & legal empowerment of the poor, Washington DC), 2006. P 10.
[118] FAO Compulsory (n 1) p 39.
[119] Id p 40.

pasture], no income stream to support themselves, and no job skills to compete in a non-agricultural economy."[120]

This would happen especially when the mode of payment of compensation is a lump sum. Unlike periodical payment, where the compensation is paid in instalment, in case of lump sum mode the sum total of compensation is paid in one time. That creates the possibility of spending the money at one time and puts the affected parties in susceptible livelihood situations.[121] Under the Ethiopian rural land law, a clear stipulation about the mode of payment adopted is not provided. However, from the stipulation made about the time of payment of compensation it is possible to deduce the adopted mode. It is stipulated that the compensation must be paid before the takeover of the expropriated landholding.[122] Even in case of the refusal of the affected parties to receive the monetary compensation the law demands the takeover of the land to be effected after depositing the money in a blocked bank account.[123] This stipulation implies that the mode of payment adopted under the Ethiopian rural land law is the lump sum payment and it exposes peasants and pastoralists to the danger posed by the mode of payment.

In fact, to mitigate this danger the law comes up with the idea of a rehabilitation package. It has imposed the obligation of providing "rehabilitation support to the extent possible"[124] on the *woreda* administration. It is with the assumption the law takes that the purpose of expropriation law is "…not only paying compensation but also to assist displaced persons to restore their livelihoods."[125] Nevertheless, given that the idea of rehabilitation is not well-elaborated to the possible level of implementation,[126] and it has been enshrined as a discretionary duty of the lowest authority, it doesn't enable the affected parties to claim it as of right and to enforce it.

c. Valuation method, valuer and basis of compensation

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[120] Ibid.
[121] Id pp 39-40.
[122] Proc.No.455/2005 (n 15) Article 4(3).
[123] Ibid.
[124] Id Article 13(1)
[125] Federal Democratic Republic of Ethiopia. Payment of compensation for property situated on landholdings expropriated for public purposes Council of Ministers regulation No.135/2007. *Fed. Neg. Gaz.* Year 13 No. 36. 2007. See the preamble.
[126] Srur (n 90) p 159.

In addition to the extent of compensable interest and the modes of compensation and payment adopted as I explain above, the nature of the compensation valuation method and valuer and the foundation of compensation stipulated in a country's legal regime have an implication for the extent of compensation to be awarded for land expropriation. As I discuss in Chapter 1 Section C(iii) the method and basis of assessment of the compensation, and the nature of the valuer defined in a given country's legal framework directly affects the extent of compensation. In order to make the extent of compensation to be the one that can enhance security of land tenure, it has been argued that the valuer must be an independent body that doesn't favour the state.[127] Besides, the basis of assessment of compensation must be the value of the loss sustained by the affected parties.

Nonetheless, determination of the method of valuation of compensation that best serves security of land tenure, is on the other hand dependent on the measurability of loss, the transferability of the land rights, the nature of duration of land rights and the existence of a strong land rights market. In case of non-measurable damage – which is difficult to valuate in monetary terms – the compensation can be assessed through a self-assessment and equity-based approach. With respect to the measurable aspect, depending on the latter three factors, three different valuation approaches are recommended to make the extent of compensation one that enhances assurance of land rights. They apply in a legal system where the loss of land rights is regarded as compensable interests.

Accordingly, it is noted in Chapter 1 Section C(iii) that in a country where land rights, be the ownership or lesser rights, are transferable through sale and a strong land market is prevalent, the preferred compensation valuation method is the purchase substitute approach; while in a situation where transfer of land rights via sale is prohibited or the land market is not strong, and the duration of land rights is predefined, the compensation can be assessed through the income capitalization approach. However, in a circumstance where the duration of land rights is not fixed, self-assessment and an equity-based approach can be utilized to assess the compensation.

In the case of Ethiopian peasants' and pastoralists' land rights, the rural land law doesn't define the valuation method and authority and the basis of compensation in a manner securing their land tenure. Besides excluding the loss of their land rights from the compensable interest domain as seen above, it has authorized state-formed organs to assess the compensation in relation to loss of

[127] FAO Compulsory (n 1) p 25.

property situated on expropriated land, permanent improvements made to land and incurring of incidental costs. It is provided that the valuation of the compensation can be carried out by committee of not more than five experts designated by the *woreda* administration. [128] The law makers, with the assumption of the probability of partiality, have authorized such valuers temporarily until another capable certified private or public institution or individual consultants to conduct the valuation have been created.[129] However, it has not been ascertained yet and the valuation is still conducted by the committees established by the woreda administration, which has at the same time been assigned the task of expropriating peasants' and pastoralists' land rights.[130]

The empowerment of a state-formed committee to assess the value of property situated on expropriated landholding for compensation opens a space for the affected parties to be compensated inadequately,[131] because the neutrality and impartiality of the valuer that is formed by the expropriating organ itself is doubtful. Since the affected parties have no say and are not represented on the valuing committee and the selection and formation of it is totally left to the woreda administration, there is a high probability that the decision of the committee favours the expropriating organ. Moreover, even if we assume that the committee is impartial and just, the very formation and establishment of the committee must be neutral, because the most popular legal quote states that "not only must justice be done; it must also be seen to be done".

Moreover, this committee is assigned to value only property situated on the expropriated landholding. Nevertheless, as I note above, in relation to expropriation of the Ethiopian peasants' and pastoralists' land rights, the compensable interest is not limited to property over the expropriated landholding. The law makes permanent improvements made to the land and incidental costs incurred due to the land expropriation compensable interest. Thus, it is not clearly indicated in the law who is going to value such losses. Such legislative silence enables the expropriating organ to assess it by itself and that in effect makes the compensation to be determined in a way to favour the expropriating organ itself. However, as I discuss in the next Chapter, given that the affected parties are entitled to take their grievance on the amount of compensation to a

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[128] Proc.No.455/2005 (n 15) Article 10(1).
[129] Id Article 9.
[130] Ambaye (n 1) p 212.
[131] The ever-increasing court cases on the ground of inadequacy of the amount of compensation, and vulnerability the valuator to corruption are indications about how the nature of valuator affects the determination on extent of compensation. (Ibid).

court of law, there is a probability of minimizing arbitrariness in fixing the amount of compensation by a presumed independent body.[132]

For the three compensable interests – property situated on expropriated land, permanent improvements made to the land and the incidental costs incurred as a result of land expropriation, the Ethiopian rural land law basically incorporates two different valuation methods. Such a pragmatic approach implies the legislatures' intention to adopt the valuation method that fits into the nature of the interest affected. On this basis, the replacement value approach is adopted to assess compensation for the loss of the former two compensable interests.[133] As per the replacement value approach, the compensation for loss of property situated on expropriated land is valued in terms of the value of the cost to replace the property in the status it was at the time of expropriation.[134] However, to the contrary, the regulation enacted to provide details adopts an "income derived-approach" with respect to crops, trees and protected grass.[135] In the income derived method the compensation is valued in terms of the market value of the amount of yield that would have collected had the land not been expropriated.[136] The basis of compensation in both valuation methods, however, is the market value approach and they do not have any reference to either the loss of the affected parties or the taker gain perspectives.[137]

As against this, the loss of permanent improvements made to the land is assessed in terms of the value that can replace the capital and labour expended on the land.[138] Here, what is taken into account to assess the compensation is not the value or cost of the improvement made to the land. Instead, it is the value of the capital and labour expended to make the improvement that determines the compensation. Unlike in the case of loss of property on expropriated landholding, the law fails to define the basis of compensation in case of loss of permanent improvements. To compensate in

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[132] Proc.No.455/2005 (n 15) Article 11.
[133] Id Article 7(2) and (4).
[134] In case the property is movable that can be relocated and eructed elsewhere and continue serve as before, the amount of compensation paid is equivalent to the cost of removal, transportation and erection. (Id Article 7(5)).
[135] Reg. No. 135/2007 (n 125) Article 5–8.
[136] Ibid. Nevertheless depending on the nature of property on expropriated land the scope of the market taken in valuing the compensation varies. For instance, while the compensation for crops and protected grass is assessed on the basis of current market value, local current market value is adopted to determine the compensation for perennial crops and trees.
[137] The market value basis of compensation is not mentioned with regard to buildings, fence and unripe perennial crops. (See *id* Article 3,4 and 6(1) respectively).
[138] Proc.No.455/2005 (n 15) Article 7(4).

a better way, what has to be taken is at least the market value of the labour and capital at the time of expropriation. Nevertheless, the silence of the law gives the expropriating organ the opportunity to determine the compensation in a manner that imposes a lesser burden on the payer.[139]

The income capitalization approach, on the other hand, is adopted as a valuation method to assess compensation for incidental costs – displacement compensation. As I argue above, the third and the final compensable interest incorporated in the rural land law of Ethiopia in relation to land rights of peasants and pastoralists is the incidental costs incurred due to land expropriation. Even though it is very difficult to assess such damage as I note in Chapter 1 Section C(iii), the Ethiopian law adopts an objective valuation method – the income capitalization approach. Accordingly, it states that the displacement compensation can be assessed by taking "…the average annual income [peasants or pastoralists] secured during the five years preceding the expropriation of the land".[140]

By adopting the income capitalization approach the legislature has presupposed that the rural land rights are utilized for measurable income generating activities. This implies that peripheral attention is given to pastoralists' land rights again, because unlike peasants, pastoralists predominantly utilize their landholdings for grazing purpose. And it is very difficult, if not impossible to convert the grazing into monetary income to assess the displacement compensation for pastoralists. Accordingly, the approach has *de facto* made the incidental costs incurred by pastoralists because of land expropriation a non-compensable interest.[141] This claim is also reinforced by the assertion of the law in defining substitute land provision at the time of land expropriation. It provides for "…substitute land which can be easily *ploughed* and generate

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[139] However, Daniel citing the Amhara State valuation directive (in which I couldn't find the idea) states that the basis of the compensation is the current market cost of the labour and material expended. (see Daniel W. Ambaye (n 1) p 225; Amhara National Regional State. 2011. Directive enacted to determine expropriation of rural landholdings for public purpose and payment of compensation for property Council of Regional Government directive No. 3/2011).

[140] Proc.No.455/2005 (n 15) Article 8(1) and (2). The reason for adoption of the five years average income to define the income capitalization is not clear.

When the land is used for less than five years the determination of the average annual income is done by taking the yield obtained for the actual year the land has used. Moreover, if the land has not begun to give the intended agricultural yields, the yield of similar nature obtained from a similar area of land in the locality for the last five years will be employed to determine the average annual income. (See Reg. No. 135/2007 (n 125) Article 16(3) and 17(3)). These gap filling provisions are not enshrined in the proclamation. Rather they are defined in the regulation enacted to give detail implementing provisions. Such legislative measures on the other hand pauses the question of legality in the law-making process.

[141] There might be payment of "displacement compensation" in the practice. But, as the law stands, the assessment mechanism doesn't fit to the purpose pastoralists' use their land predominantly.

comparable income…”.[142] This stipulation seems to presuppose that the displacement compensation is awarded to the one who ploughs land – in our case peasants. For pastoralists, who utilize land for grazing, it seems to be inapplicable. However, the regulation enacted to provide detailed rules, on the other hand, implies provision of substitute pastoral land.[143] In fact, the provision of substitute land here is also not with the view of compensating the loss of land rights. As I claim above, peasants’ and pastoralists’ loss of land rights is made a non-compensable interest. Hence, it is just an aspect of their right to free access to rural land rights.

Besides, the basis for compensation for incidental costs as defined in the legislation is absurd. Since it is difficult to measure the value of incidental costs incurred, in Chapter 1 Section C(iii) I argue that it has to be assessed on the basis of the affected parties’ loss and the principle of equity, to make the compensation one that satisfies the affected parties. The legislature has made a random selection to define the method of valuation, without ascertaining the basis of compensation.

d. Amount of compensation

The final factor that affects the extent of compensation and the role it plays in the assurance of land rights is the amount. Because of this, scholars and state laws employ different qualifiers like just, appropriate, adequate, fair, equitable, commensurate or full to make the amount of compensation one that serves the purpose of securing land tenure.[144] The general principle about the amount of compensation is equivalent to the loss sustained because of the land expropriation. Accordingly, the amount of compensation paid for expropriation of land rights must be equivalent to the total loss incurred and assessed as per the principles I elaborate in the above sub-sections. However, the adequacy of the amount of compensation should not be viewed in terms of equivalence with the loss sustained only. Particularly, for a peasant and pastoralist society, where

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[142] Proc.No.455/2005 (n 15) Article 8(3). This provision can be understood in two contradicting way. On one hand it may imply that displacement compensation is paid only for those who utilizes land in income generating activities. In contrast, it refers to the substitute land is provided for ploughing purpose only and the pastoralists will be forced to engage in sedentary agriculture. There are also communal landholdings in the peasantry community utilized for grazing purpose.

[143] Reg. No. 135/2007 (n 125) Article 15. In the hierarchy of law such stipulation seems to contradict with the higher law.

[144] Oscar Schachter. Compensation for expropriation. (1984) 78 *American Journal of International Law*. 121–130. Pp 127–129; Constable (n 72); FAO Compulsory (n 1) p 7; FDRE Constitution (n 12) Article 40(8); Constitution of the Republic of South Africa (n 11) Section 25(3). In the adoption of those adjectives there is no uniformity among countries. Moreover, scholars are also not in an agreement about which adjective is the right one. Their difference relies on their difference on the amount of compensation paid in expropriation of private property rights.

the land rights are a means of livelihood, it must be seen from the perspective of sustainability of livelihood too.

In Ethiopia the amount of compensation defined in the legislation various among the three compensable interests. In case of compensation for property situated on expropriated land, the amount is not expressly required to be equivalent to the amount that can replace the thing lost. The law simply requires the amount of compensation to be determined on the replacement value valuation method.[145] Moreover, the regulation that provides details on the assessment of compensation doesn't require satisfaction of the principle of equivalence.[146] This then gives the discretion to the valuer to define the exact amount of the compensation. Given that the valuer is a state-formed committee, it will award a lesser amount with the view to lighten the state's or expropriator's burden. In such cases the only option the affected parties have is to take a court action on the amount of compensation, as I elaborate in Chapter 7.

Furthermore, the amount of compensation for property situated on land is also affected by the scope of the market and the time value taken to assess the compensation. As I note in the immediate above sub-section the basis of compensation for loss of property situated on land is the market value. However, to determine the amount depending on the nature of the lost property the law adopts two types of market values in terms of the scope of market. Scope with the market value is defined in terms of local versus general market value. Accordingly, when the property is an annual crop, and protected grass, the amount of compensation is fixed in terms of general market value;[147] while a local market value-based amount of compensation is awarded in cases of ripe perennial

[145] Proc.No.455/2005 (n 15) Article 7(2).

[146] The regulation while defining assessment of compensation it has categorized property on expropriated land as building, fences, annual crops, perennial crops, trees, and protected grass. For none of these things on the expropriated landholding, the law requires the equivalency of the amount of compensation. For instance for buildings it says the amount of compensation the current value of cost to build comparable building; for fences the value of the cost to construct similar fences; for annual crops the current market price of the yield would have been collected; for perennial crops in case of unripe one the value of that can replace the estimated cost for growing the plant, whereas for ripe perennial crops the local market value of an average annual yield; for trees the value of the local price in its current situation; and for protected grass the value of the current market price of the grass in its current level. (See Reg. No. 135/2007 (n 125) Article 3–8).

[147] Reg. No. 135/2007 (n 125) Article 5(1) and 8(1).

crops and trees.[148] However, with respect to buildings and fences the law doesn't indicate the measuring of the replacement cost in the market value.[149]

The justification/s for such distinction is/are not clear. However, one thing that is clear is that such differentiation can have an implication for the amount of compensation awarded. Even though knowing the one that awards a better amount of compensation among them needs in-depth research, by looking into the wideness of the market one can claim that in general, the general market value of the property is greater than its local market value, and the silence about the value taken also paves the way for abuses. It leads to the assumption that the amount of compensation determined in the general market value is higher and better. Hence, it may be regarded as that, while the legislature takes a progressive measure to compensate the affected parties for the loss of annual crop and protected grass, it fails to do so for loss of ripe perennial crops, trees, buildings and fences.

In terms of time value, the market value amount of compensation may be the current, the previous or the future market value of the property. In the current market value, the amount of compensation is fixed in terms of the market value of the property at the time of expropriation, whereas the previous market value fixes the amount of compensation in terms of the market value of the property at the time of acquiring or establishing it. Lastly, the future market value amount implies the compensation to be equivalent to the reasonable future time market value of the thing. With regard to expropriation of land rights of Ethiopian peasants and pastoralists, regardless of the nature of the property the amount of compensation awarded is the current value amount.[150]

However, regarding ripe perennial crops, the amount of compensation is not the entire current local market value of the yield it gives in its lifespan. Instead, it is limited to the amount of one-year average annual yield on local market value.[151] Neither the future benefit to be derived nor the replacement value to grow the same plant are considered to fix the amount of compensation. It is

[148] Id Article 6(2) and 7(1).
[149] Id Article 3 and 4.
[150] Id Article 3(1), 4, 5, 6(2), 7(1) and 8(1).
[151] Id Article 6(2).

only in case of unripe perennial crops that the estimated cost of growing the plant is paid.[152] As a result, it makes the amount of compensation awarded for such loss inadequate.

About loss of permanent improvements made to land, the Ethiopian law employs the principle of equivalency to define the amount of compensation. It states that the amount of compensation for permanent improvements to land must be equivalent to the replacement value of capital and labour expended.[153] The adoption of the principle of equivalency here, thus limits the discretion of the valuer to determine the amount of compensation, because, unlike in the case of fixing the amount of compensation for loss of property situated on expropriated landholding, in case of permanent improvements on land the valuer of the compensation is strictly required to make sure that the amount of compensation is equivalent to the replacement value of capital and labour expended. However, what is not mentioned in the law is which time value of capital and labour is taken to fix the amount of the compensation.

The amount of compensation for the incidental costs incurred due to land expropriation is also legislatively prefixed rather than through self-assessment and equity. The assumption of this compensation is just to redress the possible social destructions, incontinences and damage to other rights that can happen to the affected parties until they establish another livelihood. As it is stipulated as displacement compensation the amount varies, depending on the duration of the expropriation and the availability of substitute land. In permanent expropriation the amount of compensation is ten times the five years average annual income obtained before the expropriation.[154] When substitute land is available for the affected parties, the amount becomes an average annual income secured during the five years preceding the expropriation of the land.[155] For temporary expropriation the amount is the multiplication of the five years average annual income by the number of years the provisional expropriation lasts. The law further requires that

[152] Id Article 6(1).
[153] Proc.No.455/2005 (n 15) Article 7(4). The English version states that "[c]ompensation for permanent improvement to land shall *be equal to* the value of capital and labour expended on the land."
[154] Id Article 8(1). In case the expropriated land is used for perennial crops the multiplication of the average annual income is required to be done by the number of years required to attain the level of growth of the perennial crop. (See Reg. No. 135/2007 (n 125) Article 16(1(b)). This stipulation is provided in the regulation, but we cannot find it in the proclamation. Here the power of the regulation making authority is questioned taking the nature and purpose of regulations – provision detail rules so as to enable the implementation of proclamations. (Proc.No.455/2005 (n 15) Article 14(1)).
[155] Id Article 8(3).

this amount should not exceed the amount of compensation in permanent expropriation in any case.[156]

Arguing about the adequacy or inadequacy of the legislatively fixed amount of compensation for the incidental costs requires a case by case analysis. Also, given the difficulty of measuring damage and the failure to adopt a self-assessment and equity method to define the extent of compensation, it is not possible to strictly argue on its sufficiency without considering certain non-legal factors. The case by case argument requires one to look into factors like the size of the affected party's family, the time that it takes to establish another livelihood, the level of sentimental attachment to the land and the existence of other skills to make a living. For instance, in a situation where the affected party's family is small, there is no sentimental attachment to the land and they can manage to establish a livelihood immediately or in a short period of time since they have or can easily acquire other skills to make a living from economic activities other than agriculture, it is possible to claim that the amount of compensation is adequate. In contrast, for larger family where it takes longer to establish other means of living and to acquire another skill to make a living, and where there is strong sentimental attachment to the land the predetermined amount of compensation may be regarded as inadequate.

iii. Procedural Due Process

Procedural safeguards also contribute to assure the legal construct of assurance of land rights of land tenure security: in the land expropriation proceedings not only the substantive protections in terms of limiting the grounds for expropriation and payment of compensation I explain above, but also the way it is carried out has an implication for security of land tenure. First, proper procedure avoids arbitrariness with the expropriating organ in the process of deprivation of land rights.[157] For this reason, even where all the substantive conditions for expropriation are satisfied, the process expropriation must not be irregular. This can be realized by requiring the expropriating authority to carry out the expropriation proceedings in accordance with procedures and standards defined in the law. To avoid *ex post facto* law, legislation has to predefine the procedural

[156] Id Article 8(2).

[157] As seen in Chapter 1, some definition of the concept of land tenure security equated it with the protection against arbitrary eviction. (See for instance, Land Tenure and Development Technical Committee. Land governance and security of tenure in developing countries. *White Paper French Development Cooperation*, 2009. P 115).

standards.[158] Such procedural standards and protections include the public and affected parties' participation in the decision-making process, provision of advance notice and sufficient and appropriate time to vacate the land, and capacity for taking legal action against the expropriating organ in the case of violation of substantive and procedural protections.[159] How such procedural protections, except the third (that I discuss in Chapter 7), are regulated under Ethiopian law is discussed below.

Second, the procedural protections also help to enhance land tenure security by assisting the satisfaction of the "public purpose" and "compensation" substantive conditions for land expropriation and even by opening the possibility for voluntary land acquisition before resorting to compulsory acquisition. As I note in Chapter 1 Section C(iii), as an aspect of assurance of land rights, the expropriating organ, before resorting to the compulsory acquisition of land rights, must try to get the land rights concerned through voluntary submission obtained through negotiation with the affected parties. Even though such a process may take time, it avoids possible grievances from affected parties and further disputes and litigation that may take a longer time than the process of negotiation in the voluntary acquisition.[160] Moreover, the affected parties' participation as a procedural requirement, helps to limit the state's land expropriation by determining the indirect benefit components of public purpose as justification for expropriation. As I claim in Chapter 1 Section C(iii), rather than leaving the determination of indirect benefits as an element of public purpose to the administrative bureaucracy, from a land tenure security perspective it is better to entitle the public or the judiciary to define and approve it. Participation by affected parties also better enables determination of compensation for non-measurable aspects of damage – incidental costs.

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[158] Lorenzo Cotula, Giedre Jokubauskaite, Mamadou Fall, Mark Kakraba-Ampeh, Pierre-Etienne Kenfack, Moustapha Ngaido, Samuel Nguiffo, Téodyl Nkuintchua and Eric Yeboah. *Land investments, accountability and the law: Lessons from West Africa*. London. IIED, 2016. P 3.

[159] Mostly scholarly analysis about procedural due process is limited about the judicial review and public hearing and consultation. (See Srur (n 90) p 159–162; FAO Compulsory (n 1) pp 5, 20–21 and 45-47; D. Zachary Hudson. Eminent domain due process. (2010) *The Yale Law Journal*. 1280–1327).

[160] Cost wise too, rather than resorting to expropriation it would be better to acquire the land in voluntary acquisition. Because in case of expropriation other than cost of compensation, state is going to incur cost of procedural guarantees like public hearing and consultation, cost of appraising of compensation, and cost of litigation. (See Chenglin Liu. The Chinese takings law from a comparative perspective. (2008) 26 *Wash. UJL & Pol'y*. 301–351. Pp 302–303). So additional administrative costs can be avoided when the land taking is done through negotiation.

Finally, procedural protections have the tendency to enhance land tenure security by subjecting the recourse to land expropriation to a check and balance system. That is when procedural guarantees exist with respect to public participation in the process and judicial review. Public participation, for instance, in determining the indirect benefits of public purpose stated above, assists determination whether the expropriation occurs for a legitimate cause. At the same time, judicial review, I discuss in detail in Chapter 7, also establishes inter-institutional control of the administrative function, upholding the rule of law. This in turn, provides the way for the realization of one of the legal constructs of land tenure security – enforceability of land rights. Reserving the procedural protection of judicial review for Chapter 7, below I discuss how the other two procedural protections are regulated under the Ethiopian law to ensure the legal land tenure security of peasants and pastoralists.

a. Participation of the affected parties

The participation of affected parties in the process of land expropriation has multifaceted importance. On one side, it enhances the realization of land tenure security of the affected parties as mentioned above and also seen below. On the other side, in conjunction with the other components it provides a social base for and acceptance of the project to be implemented on the expropriated landholding. This procedural guarantee enables the project to be socially feasible and enables the community to develop a positive outlook towards it - they may even suggest the best place for implementing such projects. In its absence, as witnessed with the 2015/16's Oromo state people's protest, society may develop antagonism toward the expropriation-related project and even destroy it.[161]

[161] In such protest the Oromia state peoples has opposed the implementation of the master plan and destructed around dozens of investments that has implemented on the land expropriated from peasants. One of the causes for such destruction and opposition is that the decision was made without ensuring the participation of the public including the affected parties and the compensation paid were inadequate. Furthermore, the Master Plan was also drafted and tried to be implement without any public participation. (See for instance, Aaron Maasho. Ethiopian protesters attack factories in Africa's rising economic star. (Reuters, Oct. 7 2016); Human Rights Watch. "Such a brutal crackdown": killings and arrests in response to Ethiopia's Oromo protests. *HRW*, 2016). Because of this in 2017 the government has tried to promulgate post fact compensation scheme, to enable the evicted peasants since 1995 to be compensated and resettled adequately. (See Wudeneh Zenebe. 309 million Ethiopian Dollar has been approved for resettlement of evicted peasants. (Reporter Amharic, Sept. 3 2017).

Participation also results in a development model that entitles the local community and the affected society to participate in setting the development programs, in contrast to the traditional top-down development approach.[162] This is inherently preferable, as an expression of democracy.

However, the above benefits of participation depend on when the duty to ensure informed participation is imposed on the state. An international model for a well-governed and interest-balancing land expropriation system stipulates four stages of participation by the affected parties. These are: in the making of expropriation decision; in the assessment of compensation; in the implementation of the expropriation plan; and in the monitoring of the land use for the expropriated purpose and within the time limits.[163] Moreover, considering the power imbalance between the affected parties and the state, the necessary support to ensure "active, effective, free, meaningful and informed participation" has to be extended to the affected parties.[164]

At the stage of making the expropriation decision, the participation of the affected parties provides the chance to use voluntary land acquisition before resorting to compulsory acquisition and limits the grounds of deprivation.[165] As I argue in Chapter 1 Section C(iii) the expropriating organ has to attempt voluntary acquisition of the required land first, before conducting land expropriation. I mention above that one of the reasons the state engages in land expropriation is the landholder's unwillingness to transfer the land voluntarily or demand of an exaggerated value for land. Whether either of these apply can only be determined through an attempt first at voluntary acquisition. Attempting voluntary acquisition first, on one hand enables the taking to be done in the best interests of the affected parties. On the other hand, it also avoids unnecessary use of compulsory acquisition if the affected parties agree to transfer the land. However, expropriating organs tend to employ the mechanism of voluntary acquisition only when they are legally obliged to do so.

At this stage the participation of the affected parties together with the public also avoids the state's intensive engagement in expropriation of land by interpreting the idea of indirect benefits within the modern understanding of the notion of public purpose. As I note and argue above,[166] the notion

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[162] Katie Willis. *Theories and practices of development*. Oxon and New York. Routledge, 2005. Pp 93-114.
[163] Li (n 102); Food and Agriculture Organization. Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security. Rome. *FAO Council,* 2012. Para. 3B.6, 8.7, and 16.2
[164] FAO Voluntary (n 163) para. 3B.6.
[165] Id para. 16.8; FAO Compulsory (n 1) p 54.
[166] See Section C(i) above.

of public purpose has to incorporate indirect benefits for society. However, I also claim that determination of whether the indirect benefits justify the expropriation must be determined by an independent body[167] and a joint investment with the affected parties must be used as much as possible. Consequently, typically in legal systems where judicial review to determine whether the land is demanded for a public purpose or not, is not expressly guaranteed, like Ethiopia, the participation of the affected parties through a public hearing to reflect their views, to determine whether expropriation is conducted for a public purpose and options for joint investment are available, is crucial.[168] The participation of the affected parties can indicates either that the affected interest is greater than the expected indirect benefits resulting from the expropriation; or the possibility of joint investment in the project can be best implemented in another place.

However, the effectiveness of a public hearing to ensure the land tenure security of the affected parties depends on the form of public participation. Generally, public participation in decision making processes can take two forms. The public can either have a mere consultation role or the authority to make the binding decision itself. Realization of public participation at this stage of the expropriation process occurs only if the public assumes the decision-making authority. If not, a mere consultative role still leaves the making of the decision in whatever manner to the government. In such a scenario the public check and balance of the government's action will not be materialized.

In stage of assessment of compensation, the participation of the affected parties enables the process of determining the modes and amount of compensation and the resettlement plan to be such that they establish the assurance of land rights. As I discuss in Section C(iii) above one of the aspects of assurance of land rights is the modes and amount of compensation. In this stage the participation of the affected parties demands of the government to negotiate with the affected parties on the modes and amount of the compensation. In the case where both substitute land and monetary modes of compensation are available, the choice has to be left to the affected parties. Moreover, about the amount of compensation, the government must first try to fix it in agreement with the

[167] FAO Voluntary (n 163) para. 16.1.

[168] FAO Compulsory (n 1) p 11; Deininger (n 69) pp 170-173; Paul De Wit, Christopher Tanner, Simon Norfolk, P. Mathieu, and P. Groppo. Land policy development in an African context. Lessons learned from selected experiences. *FAO Land Tenure Working Paper*, 2009. P 72. As I discuss in Chapter 7, in the post-1991 Ethiopia, judicial review with respect to land expropriation is expressly mention about amount of compensation only. (See Proc.No.455/2005 (n 15) Article 11.

affected parties.[169] The self-assessment and negotiation/equity method of valuation as I explain in Chapter 1 Section C(iii) mainly helps to determine the amount of compensation for unmeasurable damage/incidental costs. When no agreement can be reached, the participation of the affected parties in determining the amount of compensation must be extended through the hiring, at State expense, of a personal valuer for each of them, who will propose an amount of compensation on their behalf.[170] However, in a developing country the state may not have the capacity to hire an independent valuer for every affected party. In such a case, appointment of one independent valuer to determine the amount of compensation is enough to enhance the assurance of land rights.

At the stage of implementation of the land expropriation plan, participation of the affected parties is necessary in deciding: the allocation of compensation between the landholder and the actual user when the expropriation is conducted while the land use right is in the hands of someone other than the landholder; the time of payment of compensation; the time and manner of vacating land; and the recouping of investment. This is necessary to ensure their land tenure security and to protect them from any further hurdles and challenges. Accordingly, in consultation and agreement with the affected parties (including the actual user) the state must establish the basis of allocation of the compensation among them. In addition, the affected parties must have the right to payment of compensation and the resettlement plan in advance.[171] In case of delay, they must also have the right to demand payment of interest in the case of monetary compensation and a similar kind of payment in the case of another form of compensation.[172] Furthermore, the affected parties must participate in setting the time frame within which the land is to be vacated and the investments are to be recouped. Such a period depends upon the ability of the affected parties to vacate the land, recoup investments and establish alternative livelihoods, among other things. Thus, the adequacy of the time frame cannot be evaluated objectively, but must be analysed subjectively, case by case. In addition, the participation of the affected parties helps to ascertain and make available sufficient time for such purposes, as seen below.

Finally, the participation of the affected parties in land expropriation is required at the stage of implementation of the project for which their land rights is taken. In the stage of monitoring, their

[169] FAO Compulsory (n 1) p 25; Li (n 102) p 9.
[170] Ibid.
[171] FAO Compulsory (n 1) pp 27 and 44; Li (n 102) p 9.
[172] Ibid.

participation enables them to check and control whether the expropriated landholdings is utilized for its initial purpose and within the time limit. The affected parties' participation at this stage plays three important roles in relation to their land tenure security. First, it limits the possibility of deprivation of land rights for other purposes, under the guise of public purpose. Particularly in a system like in Ethiopia, where local government is authorized to expropriate land without supervision of a higher authority, expropriated land may in fact not be used for purpose initially provided to justify the expropriation, with the purpose initially advanced only as a ruse. The involvement of the affected parties in monitoring the project implementation reduces the possibility of fabrication of a public purpose to justify land expropriation.

Moreover, it assists to control land wastage/idling and promotes effective utilization. Unlike the regulatory authority, the affected parties may have both the concern and the opportunity to examine whether the taken land is put to use within the required period of time. In an agrarian economy, like Ethiopia's, economic performance and GDP depends on the utilization of the agricultural land and idling of land resources greatly impacts the economy. To avoid such situations, an effective controlling mechanism to employ land resources is fundamental. In the context of expropriation this presupposes an institutional framework through which to follow up whether the expropriated land is put to use and a time limit within which the land resource is supposed to be used fully. Since the affected parties have a vested interest – to claim the restitution of the land rights[173] - they have an incentive to monitor effectively whether the expropriated land is put to use within the required period.

Furthermore, the participation of the affected parties in monitoring also facilitates their right to reclaim the restitution of their land rights. As I discuss in Chapter 1 Section C(iii) above and in Section D below, to enhance the legal construct of assurance of land rights for land tenure security, the affected parties should have the right to reclaim their land rights if the expropriated land is no longer required for the initial expropriation purpose,[174] or if there is delay in using it. To make this right effective, the participation of the affected parties at the stage of monitoring land use is essential.

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[173] FAO Voluntary (n 163) para. 16.5.
[174] Ibid.

In the post-1991 legal system of Ethiopia, the idea of public participation and of including specific parties in policies and projects affecting them is recognized in the Constitution as a human right. The FDRE Constitution provides that nationals have the right to be consulted in formulation of development policies and projects affecting their community.[175] Especially when such projects demand expropriation of communal or individual land rights, the participation of the community and the affected parties is necessary, not only for the protection of the affected parties' interest but also for the maintenance and success of the broader land project itself, as claimed above.

However, this constitutional right to participation has been implemented in Ethiopian law only as a consultative approach. In a sense, the affected parties and the community do not have the power to approve or disapprove of the decision. Up on the consultation of the public it is up to the state authority alone to incorporate or leave the views of affected parties and the community in the decision-making.[176] The consultative nature of community and affected parties' participation means that a top-down development model still prevails and avoids actual public scrutiny of land expropriation decisions of the state authority.[177] Basically, in a legal system where the components of public purpose are defined in a vague way and judicial review to determine it is not provided, as in Ethiopia, limiting public participation only to consultation avoids putting in practice a system of checks and balances and exposes parties affected by an expropriation to deprivation of their land rights for any purpose regarded as a public purpose by the expropriating organ.

Furthermore, no legislative measures to make the constitutional right to public and affected parties' consultation by itself effective are taken in either federal or most state law. In certain state laws,

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[175] See FDRE Constitution (n 12) Article 43(2).

[176] See for instance, Andrea Rigon. Participation of people living in poverty in policy-making: Lessons for implementation of post-2015. *CAFOD*, 2014; Worku Tessema. Stakeholder participation in policy processes in Ethiopia. *Managing Africa's Soils-Drylands Programme, IIED*, 17, 2000. In Ethiopia, the constitutional provision on public participation is formulated in consultative approach. (See FDRE Constitution (n 12) Article 43(2)).

[177] A good illustration about this can be deduced from the case of "Addis Ababa Integrated Regional Development Plan" which proposes to annex most of the city's surrounding areas belonging to the National Regional State of Oromia. The implementation of the Master Plan on the other hand leads to the expropriation of rural land rights for the expansion of the urban centres and provision of land to private investors as 85% of the area intended to be covered by the plan are rural areas. (See Addis Ababa and Addis Ababa Zuria Oromia Special Zone Integrated Development Plan Project Office. Addis Ababa and Addis Ababa Zuria Oromia Special Zone integrated development plan (2006 – 2030 E.C). Bela Printing Press, nd. (Amharic document; translation mine). P 20). As it was formulated without the participation of the affected parties and community, it caused an opposition and mass protest that forced the government to cancel the plan. (See Tsegaye R. Ararssa**.** Why resist the Addis Ababa Master Plan? – A constitutional legal exploration. (Addis Standard, Aug. 20 2015); The Guardian. Violent clashes in Ethiopia over 'Master Plan' to expand Addis. (Dec. 11 2015); BBC. Ethiopia cancels Addis Ababa master plan after Oromo protests. (Jan. 13 2016).

such as Afar, Amhara, SNNP, Somali, and Benishangul Gumuz State's the constitutional right is incorporated, although they vary in their extent of application and the nature of community participation required. These State laws, however, determine that the community participation is required at the stage of making the land expropriation decision only.[178]

Three different approaches to community participation are adopted in these State laws. In the Amhara and Benishangul Gumuz State laws, community participation is not limited to consultation only. Instead, in fact exceeding the constitutional right, the community is entitled to take the decision for or against expropriation by majority vote.[179] In same fashion, the Somali State law indicates that a land expropriation decision may be taken only upon the consent and participation of the community.[180] The incorporation of the notion of consent and participation here indicates the community's role of both consultation and making the decision itself, but this law fails to define how the community decision is to be made. In the SNNP and Afar State's laws, by contrast, the effect of community participation in the decision-making is not clearly indicated. They only indicate that the land expropriation decision can be determined by the participation of the community.[181] In light of the understanding of the constitutional right, set out above, the implication is that expropriating organs believe that what is required is to conduct consultation only with the public, while the final decision is in its own discretion. This clearly doesn't serve the expected role of public participation at this stage of land expropriation, as is discussed above.

Moreover, these state laws also vary in defining the scope of application of the public participation at the stage of making the land expropriation decision. Apart from the Amhara and Benishangul Gumuz State laws, no scope restrictions are imposed. The Amhara and Benishangul Gumuz State laws, by contrast, require public participation to be conducted in two alternative scenarios only. These are where it is found that the purpose of expropriating the land is "directly interrelated with the development of the local community or where the community itself pays compensation" for

[178] Proc. No. 110/2007 (n 61) Article 13(11); Proc. No. 49/2009 (n 61) Article 19(1); Proc. No. 252/2017 (n 33) Article 26(2); Proc. No. 128/2013 (n 62) Article 18(1); Proc. No. 85/2010 (n 16) Article 33(2). In the stage of implementation of expropriation plan, about allocation of compensation among the landholder and actual user is also slightly regulated.
[179] Proc. No. 133/2006 (n 16 above) Article 28(2); Proc. No. 85/2010 (n 16 above) Article 33(2).
[180] Proc. No. 128/2013 (n 61) Article 18(1). The Amharic version has a different essence. It is not clear whether the consent or the consultation is required.
[181] Proc. No. 110/2007 (n 61) Article 13(11); Proc. No. 49/2009 (n 61) Article 19(1).

the expropriation. [182] In other cases of land expropriation decisions community participation or/and consent is not a requirement. Moreover, these laws do not explicitly define the type of projects that are directly interrelated with development of local community and the situations in which the community is supposed to pay the compensation.

Nevertheless, the application of the idea of direct benefit that helps in demarcating the constituting element of the notion of public purpose assists to understand the essence of the term "directly interrelated with the development of the local community." As highlighted in Section C(i) above, "direct benefit" in the definition of public purpose refers to the actual benefit the public stands to derive from the project for which the land expropriation occurs. In this context, the concept of "directly interrelated with the development of the local community" in the two state laws can be understood as those projects which the public can make actual use of. Consequently, this phrase demands the participation of the community in the making of a land expropriation decision when it is required for the purposes that directly benefit the community.

The irony is the exclusion of public participation with regard to land expropriation decisions with indirect benefits. As I argue in Section C(i) above, public participation in an expropriation decision is precisely required to limit the expropriating organ's freedom to define the supposed indirect benefits of public purpose. The main threat to the legal construct of assurance of land rights of land tenure security is the state's adoption of the modern and vague understanding of public purpose to justify land expropriation. The direct benefits, since they are meant to provide actual benefit to the larger society at the expense of individual interests, do not easily result in abuse of function, provided that the other protections are satisfied. By contrast, it is defining the indirect benefits that opens the door for abuse of function and makes the expropriation process susceptible to the influence of the haves. As a result, public scrutiny of the decision of land expropriation is

[182] Amhara National Regional State. Rural land administration and use system implementation Council of Regional Government regulation No. 51/2007. *Zikre Hig.* Year 12 No. 14. 2007. Article 29(2); Proc. No. 85/2010 (n 16) Article 33(2). The second scenario is not mentioned in Benishangul Gumuz and the 2017 Amhara State laws. However, since the new Amhara State law allows the application of the previous rural land regulation as far as it doesn't contradict with the current proclamation, we can argue that then in Amhara State public participation is allowed in both scenarios. (See Proc. No. 252/2017 (n 33) Article 26(2) and 61). However, the application of the 2007 regulation is limited in time, which is until a new regulation is issued. (See Proc. No. 252/2017 (n 33) Article 61). On this base, although a new regulation is enacted in 2018 and repealed the previous one, it remains silent about this issue. (See Amhara National Regional State. Rural land administration and use system implementation Council of Regional Government regulation No.159/2018. *Zikre Hig.* Year 23 No. 4. 2018. Article 15 and 37).

required fundamentally when the expropriated land right is required for generating indirect public benefits. The Amhara and Benishangul State laws, contrary to this argument, require public participation only when the land is required for direct benefits of the public.[183] In this way they inhibit, the realization of the benefit of public participation in protection of land tenure security of peasants and pastoralists.

Also, in the second case – when the community pays the compensation – the Amhara State law doesn't specify and define the circumstances under which the public is forced to pay compensation for land expropriation in order to distinguish where public participation is required. The only possible such scenario may be in the case of land redistribution, I discuss in Chapter 5 Section D. Particularly, when the land holding of a given peasant or pastoralist community is taken for the construction of an irrigation structure, the landholdings of other peasants and pastoralists is redistributed to compensate the expropriatee. In this way, the community bears the burden of paying compensation and their participation and consent is required to expropriate land for the purpose mentioned. However, this instance also falls under the first case of direct benefit and it makes no sense to treat it as an alternative scenario.

With respect to the stage of implementation of the expropriation plan, some state laws provide for a rule about allocation of compensation between the landholder and the actual user when the decision of expropriation is made while the land use right is in the hands of someone other than the landholder. The federal and most state laws establish only the payment of compensation to the landholder and they do not provide rules on how compensation may be paid to affected parties who are not the landholders, but to whom the land use right has been transferred. This can be inferred from provisions that state that compensation shall be paid to "…landholders whose holdings have been expropriated,"[184] and also from the provision that provides that "[a]ny person who claims compensation [for expropriation] shall produce proof of legitimate possession of the

[183] *A fortrario* reasoning may be adopted to incorporate the public participation for land expropriation decision for indirect public purpose.

[184] Proc.No.455/2005 (n 15) Article 5(2) and 7(1). The law defines landholder as a person, be it a legal and natural, that "has lawful possession over the land to be expropriated and owns property situated thereon." (Id Article 2(3)). Two fundamental defects can be deduced from this definition. One it has only assumed the individualistic landholding system and failed to incorporate the communal landholding system in which the rights in land is assigned to community, like the case in point of pastoralists. Two, it has not assumed the probability of departure of the lawful possession of land and ownership things over land. The landholding rights holder, and the actual user of land rights and who has also developed property over or made improvement to the land may be different persons.

expropriated land and ownership of the property [thereon]."[185] The laws fail to make any reference to how actual users who, for instance, have a legally established use right through rent and have developed property or introduced permanent improvements on the expropriated land, may participate in allocation of compensation.

In some other states, like in Amhara and Benishangul Gumuz, the burden of compensating the actual user is imposed on the landholder after receiving the compensation for expropriation.[186] The two State laws do not establish any legal relation between the actual user and land expropriator. Instead, the actual user is, in a separate juridical relation, entitled to claim compensation for loss of property situated on expropriated land he/she/it/they developed, and/or the cost of removing, transporting and rebuilding such property in another place, and the return of the lease payment for the unused period, if paid in advance.[187] Such an obligation on the affected peasants and pastoralists may mean that the compensation they required to pay to the actual user exceeds the compensation they received from the expropriator, given that the loss of land rights is non-compensable interest.[188] Thus, to reduce the burden on the affected landholders, the laws should instead regard the actual users as affected parties with a right to take part in the compensation scheme of expropriation rather than imposing the obligation to compensate actual users on the landholders.

Generally, the post-1991 land tenure system of Ethiopia highly restricted the public and affected parties' participation in land expropriation proceedings. The federal and some state laws are devoid of any rule with respect to it, even though the FDRE Constitution stipulates a human right to

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[185]Reg. No. 135/2007 (n 125) Article 22.

[186] Reg. No.51/2007 (n 182) Article 30(8); Benishangul Gumuz Regional State. Rural land administration and use regulation No. -/2012. 2012. Article 28(7). However, the new Amhara State rural land laws do not regulate the matter.

[187] Ibid. However, the actual user's claim for permanent improvement made to the land, if any, is not considered.

[188] This can be illustrated by taking an ideal instance. For instance, let assume that the landholder has leased his holding for 25 years for a payment of lease of 1000 Ethiopian dollar (ETD) per year. The total payment of 25000 ETD is made in advance. In the end of the 5th year of the lease period, the state has decided to expropriate the landholding permanently. Further assume that the property over the expropriated land is developed by the lessee. Accordingly, the government is required to pay the compensation for property over the land, permanent improvement made to the land and "displacement compensation" (the amount of which is five years average income, which is 1000 ETD multiplied by ten and the total of which is 10000 ETD). On the other side, the affected landholder is required to compensate the lessee for property over expropriated land, and rent payment for the unused period. On this basis, the landholder is supposed to transfer the total amount of compensation he received for property over the land, and return the rent payment of 20 years, i.e. equivalent to 1000 ETD multiplied by 20 unused years, the balance of which is 20000 ETD. Therefore, the affected landholder that get 10000 ETD as a displacement compensation is required to return back 20000 ETD to the lessee for the unused period.

consultation. By contrast, some state laws, like Amhara, Afar, Benishangul Gumuz, Somali and SNNP State's laws, require participation only at the stage of expropriation decision-making. In the rest of the three stages, the participation of the affected parties is not provided for. These state laws also differ in providing and defining the nature of and the scenarios for community participation. Consequently, the limitations in the legislation on the public and affected parties' participation in the land expropriation process inhibits the accrual of its benefits in enhancing land tenure security.

b. Time and notice

In Chapter 1 Section C(iii) I argue that expropriation must be conducted at a convenient time and with advance notification to the affected parties, as this is an aspect of the legal construct of assurance of land rights for land tenure security. Typically, in the case of peasants' and pastoralists' land rights, land expropriation should not be conducted at harvesting or grazing time. Unless the public need for land is urgent, for an emergency situation, expropriation must be conducted after the harvest of annual products or use of the land for annual grazing. Such legislative restriction of the occasion of expropriation benefits both the affected parties and the expropriating organ. For the expropriating organ it reduces the burden of the amount of compensation to be paid, because, if the expropriation is conducted after harvest and grazing, the expropriating organ is not obliged to pay compensation for the loss of yields and grass. For affected parties, the restriction helps them recoup their investment and the fruits of the land. This is important, because peasants and pastoralists often prefer the use of land and collection of its fruits over compensation.[189]

Advance notification, on the other hand, is aimed at avoiding the difficulties faced by affected parties if they are confronted with a sudden expropriation. A sudden land expropriation exposes the affected parties to impediments and challenges in the process of relocation. Periodically, in case of Ethiopian peasants and pastoralists, whose livelihood depends on their land rights and who are prohibited from engage in non-farming activities to support their lives, sudden land expropriation puts them at risk of impoverishment, because, as I argue in Chapter 5 Section C(i), they may not have acquired another skill with which to make living. This claim holds true when the form of compensation is not substitute land.

[189] FAO Compulsory (n 1) p 43; Li (n 102) p 9.

At this juncture, the question yet unanswered is how the sufficiency of the period of notice can be defined. Above, in Section C(iii(b)) I argue that the period has to be determined on a case by case basis and in negotiation with the affected parties. However, in absence of agreement, an independent organ, including a court of law must fix the period in the judicial review. When expropriation is conducted without provision of sufficient notice, the affected parties must have the right to take legal action on the ground of procedural irregularities and be awarded compensation.[190] To determine whether sufficient notice has been given or not, different extra-legal factors may be regarded. For instance, the mode of the compensation awarded, and the nature of the affected parties are some. If the affected parties are peasants and pastoralists, who do not possess any other skills to make a living and the compensation awarded is in another form than substitute land, the notice period is certainly required to be long enough to enable them to acquire skills to make living.

The post-1991 statutory land tenure system of Ethiopia doesn't take the approach of ensuring a convenient occasion to expropriate peasants' and pastoralists' land rights. The expropriating organ is entitled to expropriate land rights at any occasion, irrespective of the impact on them and without considering any approach to diminish it. This approach, rather than striking a balance between the public need for land and the land tenure security of peasants and pastoralists, emphasizes the public interest aspect.[191]

About the advance notification of the expropriation order, the Ethiopian legal system adopts its own unique approach, different from what I propose above. The federal legislation provides that the notice period must be defined in directives to be issued by the respective states.[192] It also determines that the minimum period may not be less than three months.[193] However, as an interim measure until the various states enact directives, the federal legislation stipulates two types of

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[190] FAO Compulsory (n 1) p 47.

[191] The implementing agency is required to submit to the demand for land to the expropriating organ a year before the proposed activity on the land begun. (See Proc.No.455/2005 (n 15) Article 5(1); Reg. No.51/2007 (n 182) Article 29(3(a)); Reg. No. -/2012 (n 186) Article 27(2(a)). However, this period is just to enable the expropriator to ascertain the fulfilment of the public purpose requirement and the absence of another alternative land for the project. It doesn't mean to look for the convenient time of expropriation.

[192] See Proc.No.455/2005 (n 15) Article 4(2) and Article 14(2).

[193] Id Article 4(2).

notice periods.[194] These periods apply in different situations, depending on the presence of property or investments on land. If there is no crop, perennial crop or other property on the land, the affected parties are forced to hand over the land within a month from the date of receipt of the expropriation order in writing.[195] If there are crops or property, the period extends to within three months from the date of payment of compensation or in case of refusal after depositing the money into blocked bank account.[196]

Three basic issues may raise from this interim provision. First, it leads one to ask why the interim provision in the federal law itself infringes the minimum period stipulated in the same federal law.[197] In case of no crops or property, the notice period is only one month, while in case of crops or property, the three-month notice applies.

The basic assumption and factor considered by the legislature in setting the notice duration seems to have been regard for recouping of investments and properties on the land. It has assumed that the three-month period is enough to recoup investments and to take away properties. In the absence of any property at the time of expropriation, it seems to have viewed provision of extended notice as unnecessary. The problem here, however, is twofold and this makes the legislature's assumption untenable. First, in defining the time to vacate and hand over land, what has to be taken into account is not only the presence of property on the expropriated land. As mentioned above, the nature of the affected parties and the form of the compensation to be awarded must be also be considered. Second, from simple logical reasoning, while adopting and employing a shorter period for oneself, demanding that others enshrine a longer period is not right.

Moreover, the interim provision also forces one to inquire why the legislature provides two different benchmarks for when the notice period commences. In the case of expropriation of land on which crops, perennial crops or other property is situated the notice-period begins to count from the date of payment of compensation or in case of refusal from the date of deposit of the

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[194] The way the provisions of framed here is somehow vague and open for another line of interpretation. Contrary argument may consider these periods as an additional period after the lapse of the notification about the expropriation decision which has to made at least three months ago. However, taking the purpose of notification – informing the decision made about land expropriation and the time when the land is vacated and amount of compensation to be paid – there is no another period granted.

[195] Proc.No.455/2005 (n 15) Article 4(4)

[196] Id Article 4(3).

[197] Id Article 4(4).

compensation in blocked bank account.[198] Where there is no such thing on the expropriated land the period is due from the date of receipt of the expropriation order.[199] However, the effect of these two benchmarks may be observed only if they refer to a different date. Otherwise, if the date of payment or deposit of compensation and the date of receipt of the expropriation order are identical, despite terminological differences we cannot observe any practical distinction.

Taking the contents of the expropriation order that the law refers to, possibly the two benchmarks are referring to different dates. The expropriation order is meant to be in writing and is fundamentally required to mention and inform the affected parties about when to vacate the land and of "the amount of compensation to be paid".[200] The phrase "amount of compensation to be paid" indicates that at least at the time of receipt of the expropriation order, the affected parties only know the compensation amount and the decision of land expropriation. It implies that the compensation will be paid some time in future, but before handover of the land, because what is adopted under the Ethiopian legal system is advance payment of compensation.[201] Accordingly, the future time can be even a day before handover of the expropriated land. Coupled with a very short notice-period provided – a month - the receipt of expropriation order as commencement of the time period prevents the affected parties establishing another means of living by using the compensation before handing over of the land.

By comparison, in the scenario where the notice-period begins from the date of payment/deposit of compensation, the affected parties get more time to try to establish another means of living, because, for one thing, as the period commences after the payment of compensation, they will have comparatively longer time to think and make a living. Also, unlike with the first scenario, in this case the notice-period is three months. Nevertheless, this period is also not sufficient to recoup investment or property on the land. As mentioned above, since the legislation doesn't restrict the occasion of land expropriation, within three-month period, the crop, perennial crop, trees and protected or grazing grass may not be in a state to harness.

[198] Id Article 4(3).
[199] Id Article 4(4).
[200] Id Article 4(1).
[201] Id Article 3(1); FDRE Constitution (n 12) Article 40(8).

Finally, the interim provision also leads one to ask whether the federal government is bound by the notification period defined in the state directives or may continue to employ the interim provision itself. As inferred from the federal law, without any exception the notice period in the state directives is required to be at least three months, while the interim provision allows for application of a lesser period – a month, where property is not situated on the expropriated landholding. The question that then remains is which notice period abides when the decision of expropriation of peasants' and pastoralists' land is made by the federal authority. That is, it is unclear whether application of the interim provision is limited to until the directives are enacted by each state; or continues to apply for federal land expropriation decisions.

This can, for instance be illustrated by taking the SNNP State law. In the SNNP state rural land regulation enacted by the state administrative council the affected parties are required to hand over the expropriated land within three months.[202] This is without allowing any exception as is done in the federal law; and there is even an additional period allowed to harvest annual crops unless the project is sensitive.[203] Even without making a distinction, the three-month notice period commences from the date of payment of compensation.

From the land tenure security perspective, it is possible to claim that the state law provides a better period to vacate land relative to the federal law. However, whether the period defined in the state law binds the federal expropriating organ is a point of contention. This point cannot be settled through the judiciary, because, as I discuss in the next Chapter, taking a legal action on the ground of procedural irregularities in land expropriation is not allowed.

In general, the post-1991 statutory land tenure system of Ethiopia has not taken sufficient measures to afford procedural protection to enhance the legal construct of assurance of land rights for peasants' and pastoralists' land tenure security. This is particularly because of the legislative failure to impose a duty to expropriate at a time convenient to the affected parties, and to demand negotiation with the affected parties to define the time within which the land has to be handed over.

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[202] Reg. No. 66/2007 (n 113) Article 13(3(c)).
[203] Id Article 13(3(d)).

D. Restitution of the Land Rights

The right to restitution of land rights is a post-expropriation legal right of affected parties that has the possibility of enhancing the legal construct of assurance of land rights. It establishes both substantive and procedural rights to reclaim the expropriated land rights when the period within which the project commences on the expropriated land lapses or when the land is no longer needed because the project was abandoned or simply because it is no longer needed for the purpose for which it was expropriated.[204] Its recognition in the legal system defining the land tenure system promotes security of land tenure in two ways. On one hand, it restrains the expropriating organ from expropriating land rights for non-public purpose use under the guise of public purpose. Initially to expropriate the land rights the expropriating organ may establish the public purpose to acquire the land rights. Nonetheless, at the stage of utilization of the land the expropriator may divert the use of the land for another non-public purpose. Unless the legal regime establishes and recognizes the affected parties' right to restitution of land rights, the expropriating organ may abuse the function of land expropriation in such a way. Hence, the recognition of the right pre-limits the expropriators tendency to exploit its function to employ the land for non-public purposes. On the other hand, by establishing the right to regain the land rights for the affected parties it also provides the highest level of protection to assurance of land rights. That is, if the expropriated landholding is not utilized within the period defined or for the purpose for which it was expropriated, or is no longer needed for that purpose, the legal recognition of the right enables the affected parties to reclaim their land rights.

The right to restitution of land rights comprises both substantive and procedural rights. Substantively, it recognizes the affected parties' right to reclaim the expropriated land in a situation where it is not being used for its initial purpose within the defined time or it is no longer needed. Moreover, it constitutes the procedural right of access to justice to effect the reclaiming of the land in an independent court of law. Accordingly, it requires the satisfaction of the legal construct of enforceability of land rights for land tenure security I discuss in Chapter 1 Section C(iv).

Furthermore, three legislative measures are required to implement the right. The first is legislative recognition of the right itself. In a statutory land tenure system, the rights and obligations of the

[204] FAO Voluntary (n 163) Para. 16.5.

landholder are supposed to be defined in formal legal instruments. The right to restitution of land rights, both the substantive and procedural aspects, must be recognized and defined in the national law of a given state. Secondly, since the effectiveness of the right depends upon granting the affected parties the opportunity to participate at the stage of monitoring of the project, the legislative measure must ensure the right to participation of the affected parties in the monitoring stage of land expropriation, I elaborate in Section C(iii) above. Finally, the period within which the expropriated land must be utilized for the initial purpose must be defined, because, in order to reclaim land rights, one of the factors that has to be established is failure to use the expropriated land within the required time. The pre-setting of the period for use deters the state from making pre-matured expropriation and idling of land rights, and defines when the affected parties can take legal action to reclaim the land.

In the post-1991 statutory land tenure system of Ethiopia, peasants' and pastoralists' right to restitution of land rights is nowhere to be found, except for cases of temporary expropriation. Even in the case of temporary expropriation, no explicit provision is made for actually regaining land rights. The law simply indicates the possibility of provisional expropriation of land rights and defines how the compensation must be assessed and its amount.[205] One cannot find a specific provision that establishes and regulates the right to reclaim rights. Given that the legislation establishes the affected parties' right to take court action only on the ground of grievance about the amount of compensation in expropriation proceedings (see Chapter 7 for details), the return of the land rights after accomplishment of the purpose for which it was expropriated depends on the willingness of the expropriating organ. Even though it is common sense that in temporary expropriation restitution of land rights to the affected parties is presumed, the absence of any legal framework to effect it undermines its realization.

Consequently, one can imagine what implication the absence of legislative measures about the right to restitution of land rights has for the legal construct of assurance of land rights of the affected parties. The absence of legal recognition would undermine harnessing of its benefits in promoting land tenure security. By paving the way for expropriation of land rights under the guise of public purpose, it enables the expropriating organ to employ the expropriated land for another

[205] Proc.No.455/2005 (n 15) Article 8(2).

purpose. In this way, it broadens the possibility of deprivation of land rights of peasants and pastoralists for any purpose in the pretext of public purpose. Besides, it opens a door for pre-mature land expropriation and idling of land. Since the duration within which the expropriated land is supposed to be used and the affected parties' right to reclaim the land rights are not governed in the legislation, the expropriating organ can expropriate peasants' and pastoralists' land rights without the need of immediate use of it. This in turn denies utilization of the land by affected parties up until it is used for the intended project and results in idling of land. All in all, the failure to give legal recognition to affected parties' right to restitution of land rights has the tendency of inhibiting the legal construct of assurance of land rights for land tenure security.

E. Conclusion

The issue in any land tenure system that involves competing interests is the issue of land expropriation. The realization and satisfaction of public need for land on one hand, and protection and securing of land rights of landholders on the other hand, requires establishing an equilibrium, even if the benefit of doubt should favour securing and protection of land rights. Striking the balance depends upon how the notion of land expropriation is understood, how the function is assigned, how conditions are defined, and how the post-expropriation phase is regulated in the legal system. Conceptualization of the notion of expropriation as a limit on property rights, instead of an inherent power or right of the state leads one to understand the function in a restricted manner, to promote and protect land tenure security. Moreover, the assignment of the function to both the national and local level authority with the supervision of the higher authority has the tendency to ensure security of land tenure by limiting the possibility of abuse of function for the interest of haves, while allowing for timeous acquisition of land for the intended pubic need.

Furthermore, to maintain the required balance of interests, land expropriation must be carried out for clearly and restrictively defined public purposes, upon awarding adequate compensation and in observance of due process of law. The public purpose requirement must be defined in a single, general way legislatively, in such a manner to allow for emerging components to be added in future through judicial interpretation or public hearings. If a different way of defining the concept is required, the extent of land dependency for livelihood must be taken into account to provide a narrower understanding in such a case.

The compensation awarded on the other side must be such that it leaves the affected party better off or at least maintains their pre-expropriation economic and social state and that it restrains the state from making frequent expropriation decision. It should not result in impoverishment of the affected parties in. It also should not enable the state to make land expropriation decisions every now and then, by making the benefit derived from expropriating land much more than the cost incurred. Awarding compensation that maintains the *status quo*, or betters the economic and social condition of the affected parties, and deters the state from frequent expropriation depends on the legislative determination of the compensable interests, modes of compensation and payment, valuation method and valuer, and the basis for and amount of compensation. Accordingly, legislation must establish that any interest affected due to land expropriation must be considered a compensable interest. The selection of the mode of compensation must be left to the affected parties in cases when different options are available. The nature of the affected parties, the extent of dependency on the land rights and acquisition of another skill to make a living determines the mode of compensation. On this basis, in cases when the affected parties are peasants and pastoralists who do not possess another non-agricultural skill to make a living, it is preferable to compensate through provision of substitute land.

In case the compensation takes pecuniary form, the assessment must be carried out by an independent body. The selection of the valuation method also needs to be case-specific, depending on the measurability of the loss sustained, transferability of land rights, the nature of the duration of land rights and the presence of a strong land market. The choice among the alternative valuation methods should be guided by the notion of serving the best interest of the affected parties. Also, the basis of compensation is required to be the loss sustained by the affected parties and the amount thereof must be determined in terms of equivalency, if not greater. On the top of this, the mode of payment has to be defined by looking into the capability of the affected parties to utilize it in an efficient and economical way.

Moreover, the land tenure system must afford procedural protections in the process of land expropriation, to ensure that the acquisition land for public need doesn't occur at the expense of procedural abuses and irregularities to the detriment of the affected parties. In addition to access to justice to enforce arbitrary encroachment on land rights (I discuss in the next Chapter), participation in the process of land expropriation and delineation of appropriate time at which

expropriation may occur and a sufficient notice period are procedural safeguards that should be afforded to the affected parties. Such procedural fairness and justice promotes the land tenure security of the affected parties by limiting procedural arbitrariness of expropriating organ, assisting in the establishment of the requirements of public purpose and compensation, and creating the space for checks and balance system to work.

Finally, the legislative governance of the post-land expropriation scenario also has the possibility of enhancing assurance of land rights. The recognition and regulation of the affected parties' right to restitution of land rights is the legal concept that comes into the picture in the post-expropriation period. The right guarantees the affected parties with both the substantive and procedural rights by which they can reclaim the expropriated land in case it is not used within the period defined or no longer needed for the initial purpose it expropriated. To make the right effective, beside the legal recognition, to avoid premature expropriation, idling of land and conversion of the purpose for which the land is expropriated, the affected parties should be guaranteed with the procedural right to monitor the utilization of the land for the intended project and the period within which the land needed to be used must be defined.

In Ethiopia, with regard to the expropriation of land rights of peasants and pastoralists, the above aspects of the legal construct of assurance of land rights are mostly absent. This is to some extent because the legislature based expropriation law on an inappropriate constitutional provision, implying perpetuation of legal land tenure insecurity for affected parties. The legal ascertainment of expropriation in a power approach entails the state having a strong capacity to expropriate land rights. Moreover, granting the function of land expropriation to local authorities without supervision and approval from a higher authority, opens the door for abuse of the function for the interest of the elites. The modern understanding of public purpose that applies only to peasants' and pastoralists' land rights with the determination of components left to the expropriating organ without the judicial or public involvement, creates wide space to expropriate land rights.

Furthermore, the legislative measures taken to regulate the extent of compensation also doesn't imply protection of the affected parties from impoverishment and frequent expropriation. Making peasants' and pastoralists' land rights non-compensable interests, assigning a state-formed committee as valuer of compensation, legislative fixing of the amount of compensation for

incidental costs and failure to employ the principle of equivalency in determining the amount of compensation has made the extent of compensation incapable of maintaining the social and economic *status quo* of affected parties and discouraging the state from land expropriation. Furthermore, the failure of legislation to provide affected parties with the right to choose the mode of compensation, the absence of substitute land as a preferred form and adoption of lump sum payment puts peasants and pastoralists at threat of deterioration in living condition and social status, because, as the engagement in non-farming/pastoral activity results in deprivation of land rights, they may not have developed other skills to make a living by investing the monetary compensation awarded.

The post-1991 statutory land tenure system of Ethiopia also fails to afford sufficient procedural protection to peasants and pastoralists during land expropriation. With the exception of legislative requirement for affected parties' public participation in the Somali, Amhara, Benishangul Gumuz, SNNP and Afar State's laws, participation of affected parties in the other states' and federal laws is not mentioned. Even in those State laws where participation of affected parties is allowed, this is so only in relation to the making of the expropriation decision. It doesn't even require the state to acquire the land in negotiation before resorting to expropriation. In addition, these State laws also differ in defining the legal effect of participation. In some state laws it only has a consultative effect while in others it goes to the extent of making a binding decision.

In relation to the time of expropriation and a notice period, the legislative measures are not effective in avoiding the inconvenience sustained by affected parties during land expropriation. The legislation doesn't demand expropriation to be carried out at a convenient time for peasants and pastoralists. Moreover, the period of notice delineated legislatively doesn't consider the specific conditions of particular peasants and pastoralists. The period is not such as to enable the affected parties to harvest yields and acquire and develop other skills to make a living.

Generally, these legislative failures, coupled with the non-recognition of the right to restitution except for provisional expropriation, rather than balancing the competing interests in this respect, has the implication of derogating the security of land tenure of peasants and pastoralists. Even in case of temporary expropriation the legislation doesn't expressly entitle affected parties with the

right to reclaim land rights. With the absence of a legal base to take a court action (see Chapter 7), restitution on this scenario also depends on the willingness of expropriating organ.

Chapter 7

Enforceability of the Land Rights of Peasants and Pastoralists

In Chapter 1 Section C(iv) I note that the enforceability of land rights is an important legal construct to ensure security of tenure for landholders, because the perpetuation of land tenure insecurity results not only from the making of laws (Chapter 3 to 5 and 8), but also from their application and implementation. Consequently, designing a system through which affected parties can demand redress through constitutional review against law making that affects tenure security, and judicial review against the implementation and application of law that undermines tenure security, is fundamental to realizing secured land tenure. Such a system must possess expertise; and be independent and impartial, easily accessible, affordable and time-efficient. This requirement is particularly important, because, unlike the other legal constructs of land tenure security seen in the above Chapters, enforceability of land rights is both a distinct legal construct and a means for the realization and practical implementation of the other legal constructs.

For the legislature to fail to establish such a system perpetuates insecurity of land tenure. If the cost of enforcement is prohibitive; the system proves to be partial, time-consuming and inaccessible; there is no system to empower affected parties; and the grounds for claiming a legal remedy are limited, this will undermine the legal construct of enforceability of land rights.[1] In this Chapter I review the post-1991 statutory land tenure system of Ethiopia critically, in terms of the legal construct of enforceability of land rights of peasants and pastoralists. I do so with the view to identify how the Ethiopian legal regime provides a legal basis for legal empowerment, establishing accessible, affordable, and speedy enforcement mechanisms. I also examine the independence of the institutions involved and any limit on the grounds to claim enforcement of the right.

Against this background, I claim that the critical analysis of the post-1991 statutory land tenure system of Ethiopia that regulates the peasants' and pastoralists' land rights, reveals two sets of

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[1] Shem E. Migot-Adholla, George Benneh, Frank Place, Steven Atsu, and John W. Bruce. 'Land, security of tenure, and productivity in Ghana' in John Bruce and Shem E. Migot-Adholla (eds.). *Searching for Land Tenure Security in Africa*. Washington DC. The World Bank, 1994. 97–118. P 108; UN-HABITAT and Global Land Tools Network. Secured land rights for all. Nairobi. *UN-Habitat,* 2008. P 7; Klaus Deininger. *Land policies for growth and poverty reduction*. Washington DC. The World Bank, 2003. P 36.

outcomes, depending on against whom the landholder is enforcing the land rights. By encouraging the enforcement of land rights through out-of-courtroom dispute resolution mechanisms against ordinary persons' interference, it has paved a way for avoiding the difficulties raised in the formal enforcement mechanisms. However, with respect to claims against state encroachment the legal regime includes measures that inhibit the enforceability of land rights. It has avoided the possibility of legal empowerment, made the cost of enforcement unaffordable and institutional independence questionable, and limited the grounds to seek redress.

The analysis in the Chapter has five sections. In the first section I examine the legal status of the right to enforcement /access to justice/ effective judicial remedy/ in Ethiopia. I particularly synthesize how it is constitutionally regulated and restrains the legislature from enacting any laws that would dispense with the requirement of some form of adjudication before an impartial and independent decisionmaker. Then follows a section that explains how the Ethiopian legal regime has empowered the peasants and the pastoralists to enforce their land rights. That is through developing a system of legal empowerment and affordable cost of enforcement. This is followed by a section that articulates the legally permissible grounds to seek legal remedies for a grievance. In the next section I examine the nature of the rules establishing the enforcing institutions, in particular those dealing with their independence in decision making. This is done by looking at two institutional setups – judicial review and constitutional review. In the final section I provide a concluding remark.

A. Legal Recognition of the Right to an Effective Judicial Remedy

In Chapter 1 I note that provision of substantive legal protections to land rights as is discussed in Chapter 3 to Chapter 6 is not enough to secure land tenure, because simple disregard for the legal protections afforded individuals or the state may unlawfully encroach on the legally protected land rights of individuals or groups. Moreover, the state in the making of law that defines the land tenure system, may without observing constitutional protection also take legislative measures which impede land tenure security. The procedural safeguards by which the affected peasant or pastoralist claims redress from an independent organ in such violation is equally important to realize land tenure security.

Unlike the other legal constructs of land tenure security, enforceability of land rights plays its role in enhancing legal land tenure security in two forms. That is as a unique legal construct of land tenure security and as a means to practically implement the other legal constructs. Being a distinct construct, its presence has the implication of deterring unlawful interference with land rights, implying that when it happens the affected parties have the legal right to claim redress which then in turn imposes a liability on the party who interfered with it. At the same time, it is a means to ensure the practical realization of the other legal constructs, as there is the possibility of violations setting aside the legal protections afforded. In such situations, the failure to guarantee enforceability of land rights leads to the affected parties taking private justice to enforce their rights. This in effect creates social disorder and chaos in the society. Hence, the presence and guaranteeing of the legal construct of enforceability of land rights avoids the problems to be created as a result of its absence and gives a complete sense for the other legal construct of land tenure security.

The right to effective judicial remedy or enforceability of land rights in my context is basically affected by its legal status and recognition, the presence of an enabling environment, the nature of the institution empowered to carry it out and the legal limit on the grounds to claim redress. In this section I explain the different approaches to legal recognition of the right to effective judicial remedy and their implications on security of land tenure. I do this with the assumption that the approach adopted affects the state's role of creating the enabling environment and its power of restricting the right to effective judicial remedy.

In general, effective judicial remedy can be treated and recognized as either a self-standing human right or an ordinary legal remedy. Recognition of effective judicial remedy as a human right has two advantages over treating it as ordinary legal remedy. First, imposing the duty to promote and fulfil the right demands of the state to take legislative and administrative measures which create an enabling environment for the right-holder to exercise the right.[2] That is, as I discuss in Section B below, by addressing the factors affecting the realization of the right, particularly by taking measures which make accessing judicial remedies affordable and fill the legal knowledge gap. In the absence of this judicial remedies would be available only to those who have the financial

[2] Olivier De Schutter. *International Human Rights Law: Cases, Materials and Commentary*. New York. Cambridge University Press, 2010.

resources necessary to meet the often prohibitive cost of lawyers and the administration of justice, and have legal knowledge.[3] Adopting the ordinary legal remedy approach in the recognition of the right to an effective judicial remedy opens a door for such discrimination, as it leaves it to the state to define and determine this procedural safeguard without mandatorily demanding creation of an enabling environment.

Second, requiring the state to respect the right to a judicial remedy would impose at least some minimal restraint on the legislature, which would be prohibited from enacting any laws that would dispense with the requirement of some form of adjudication before an impartial and independent decisionmaker in connection with any deprivation of the legal rights.[4] In the ordinary legal remedy approach the legislature would be entitled to define the general process of seeking judicial remedies without it being moulded by any principle. Accordingly, for instance, as I discuss Section C below, the state may take legislative measures which restrict the grounds to demand judicial remedies.

In Ethiopia the right to an effective judicial remedy is recognized as a human right. This is done through the ratification of international and regional human rights instruments[5] and incorporation of it as a constitutional human right.[6] Nevertheless, unlike the international human rights instruments, the FDRE Constitution seems to adopt a narrow approach to defining the right. It is narrower in a sense that the constitution stipulates the condition of "justiciable matter" to access the judicial remedy.[7] It provides that in order to exercise the right to access to justice, it is required to show that the affected interest is a "justiciable matter." In the human rights treaties there is no such pre-condition to make the right effective.[8] This condition paves the way to denying access to

[3] Francesco Francioni. 'The rights of access to justice under customary international law' in Francesco Francioni (ed.). *Access to justice as human rights*. New York. Oxford University Press, 2007. 64–138. Pp 64–65.
[4] Ibid.
[5] Ethiopia has ratified and is a member to the International Covenant on Civil and Political Rights since 1993 and it also ratified the African Charter of Human and Peoples Rights (Federal Democratic Republic of Ethiopia. Accession to African Human and Peoples' Rights Charter proclamation No. 114/1998. *Fed. Neg. Gaz.* Year 4 No.40. 1998). Moreover, in its constitution it refers to the principles of Universal Declaration of Human Rights to guide the interpretation the human rights enshrined in the Constitution. (Constitution of Federal Democratic Republic of Ethiopia (FDRE). Proclamation No.1/1995. *Fed. Neg. Gaz.* Year 1 No.1. 1995. Article 13(2)).
[6] FDRE Constitution (n 5) Article 37.
[7] Id Article 37(1).
[8] See for instance, UN General Assembly. Universal declaration of human rights. UDHR res 217A (III) 10 December. 1948. Article 8; AU/OAU. African (Banjul) charter on human and peoples' rights. Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986. Article 7(1).

a judicial remedy on certain grounds by categorizing some legal interests as non-justiciable matter. Besides, the constitution is not clear in demarcating or providing guidelines to distinguish "justiciable matters." It, then, opens a space for legislative measures to limit the grounds on which judicial remedy can be claimed. An illustration in this regard can be drawn from the rural land restriction on the grounds upon which to claim a judicial remedy in land expropriation as it is discussed in Section C below.

At the time of drafting the Constitution criticism was raised about the inclusion of the phrase "justiciable matter." Some argued that the phrase be removed, arguing that it would lead to power competition on who should determine whether a given matter is justiciable or not.[9] Nevertheless, much attention was not given to the issue and the Constitutional Assembly adopted and incorporated the phrase in the constitution with the view that *there must be some administrative matters which may not be seen by a court of law*.[10] In elaborating on this, the constitutional briefing that aimed to explain the constitutional provision underscored that the concept of "justiciable matter" is aimed at defining/delineating matters actionable to the court of law and other judicial organs[11] and not at totally deny judicial remedies for some issues. Instead, the concept is incorporated to imply that there are matters which may not be actionable in a court of law but may well be so before judicial organs other than courts.[12]

However, nowadays the issue is a point of discontent. Appraising constitutional and Federal Supreme Court cassation bench decisions and some federal subordinate legislation Yemane Kassa has argued that the restriction of the judicial power of courts through ouster legislation and the interpretation of constitutional and subordinate legislation goes against the principles and spirit of the FDRE constitution.[13] He mainly questions the legislature's approach of limiting the judicial

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[9] Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 3, Nov. 17–22/1994 Addis Ababa), 1994. Debate on Article 37.

[10] Ibid. In the FDRE Constitution the judicial power is entrusted not only court of law. The reading of the constitution in its entirety implies that there are other organs of state or community or religious institutions that can assume judicial power. (See FDRE Constitution (n 5) Article 34(5) "… the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute"; Article 37(1) "… a court of law or any other competent body with judicial power…" and Article 78(4) and (5) indicate the constitutional recognition of the judicial power of other organs).

[11] A Brief Explanation of the Final Draft approved by the Constitutional Assembly, Oct. 28, 1995.

[12] Nevertheless, some authors try to argue as if there is a contradiction between the constitutional assembly minutes and the brief explanations on this point. (See for instance Yemane Kassa. Dealing with justiciability: in defense of judicial power in Ethiopia. (2015) 3 *Mekelle University Law Journal.* 42–87. Pp 51–54).

[13] Ibid.

power of courts in terms of inserting a "finality clause" for administrative decisions and empowering other organs to assume judicial power over certain actionable matters.[14] He further contends that the interpretative approaches adopted by the constitutional interpreter and the federal cassation bench are restrictive of rather than broadening the power of courts.[15]

Although Yemane Kassa's arguments are tenable in many respect, I disagree with his claim that the legislature has no constitutional power whatsoever to limit the judicial power of courts through transferring it to other organs or making the decision of other organs final.[16] This is, because in some cases the Constitution itself empowers the legislature to recognize and even to establish other institutions to assume judicial power. I say this on the basis of the assumption that to empower other organs to assume judicial power in effect is a limit to the judicial power of the ordinary courts of law. The constitutional power of the legislature to take away the judicial function of ordinary courts and transfer it to other organs is stipulated in two distinct forms. One is establishing of special or *ad hoc* courts, that follows prescribed legal procedures.[17] A critical reading of article 78(4) of the FDRE Constitution establishes two things about establishment of *ad hoc* or special courts. First, other than the legislature, no organ of government can establish a structure that assumes judicial power. This is basically aimed at deterring the executive from forming a distinct judicial organ to take away the judicial power of ordinary courts. Second, the *a contrario* reading of the provision dictates that the legislature can legally establish other judicial organs that can take away the judicial function from courts of law, provided that these organs then follow legally prescribed procedures. Here the phrase "… *institutions legally empowered to exercise judicial function*…"[18] indicates that legislature has the power to establish other judicial organs other than the constitutionally empowered ones. The only condition here is that the so-established institution is required to follow the due process of law in its decision-making process.

The second form is through empowering the legislature to recognize or establish customary or religious courts.[19] As per article 78(5) and 34(5) the legislature is constitutionally empowered to recognize the already existing or to establish a new religious or customary court to litigate matters

[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] FDRE Constitution (n 5) Article 78(4).
[18] Ibid.
[19] Id Article 78(5).

of personal and family laws. Perhaps these institutions assume jurisdiction upon submission of the parties. Furthermore, the Constitution authorizes the legislature to empower the religious and customary courts to settle disputes in consideration of the customary and religious laws which may not necessarily be in line with the state (formal) laws. This is to indicate that these courts are not supposed to follow the legally prescribed procedures, among other things.

Consequently, the act of the legislature in such a scenario can be questioned in terms whether the legally established or recognized institution is capable of rendering impartial and independent justice. The argument and criticism against the legislature's act of transferring judicial power from a court of law to another judicial organ should be made in terms of the independence of the institution, because, the guiding constitutional principle about the right of access to a judicial remedy is not about which institution renders the judicial remedy. Rather, it is founded on whether the judicial organ is independent from any undue influence and interference in making of its decisions.

Therefore, particularly with respect to disputes where one of the disputants is a state organ, as in the case of expropriation and land administration in my context, the organ with the judicial power should be one that is free from executive influence. That is, in such situations, where the matter is subjected to administrative decision, the final determination should be left for another, independent organ, which is the ordinary court of law in most cases. This is, because exclusive assignment of such judicial power to the administrative tribunal and prohibition of review of the administrative decision in a court of law through a finality clause goes against the constitutional right of access to an effective judicial remedy, which supposes the judicial independence of the institution rendering judgment.[20]

In general, although the notion of "justiciable matter" has the tendency to limit the right to an effective judicial remedy and create ambiguity, as I argue above, the recognition of the right as constitutional human rights in Ethiopia obliges the state to take legislative and administrative measures to promote and fulfil it. Moreover, it restrains the state from infringing the right through legislative enactment, among others. Thus, the subsequent two sections analyze whether the

[20] FDRE Constitution (n 5) Article 37.

Ethiopian government has taken legislative measures to create an enabling environment to enforce land rights and has restrained itself from infringing it in enacting the rural land laws.

B. Capability to Enforce the Land Rights

As I note above, recognition of access to a judicial remedy as a human right imposes positive obligations on the state, among other things.[21] The obligation requires the state to take measures that are aimed at making the right-holders capable of exercise and enforcement of their rights. On this basis, Amartya Sen and later Martha Nussbaum have developed the idea of a "capabilities approach of social justice" to empower people to do what they actually do.[22] In my context, it demands of states to take measures that can create an enabling environment for individuals and communities to claim and enforce their rights. This is with the view that mere recognition and guarantee of the rights to the society may not make them effective and implemented. Instead, for those who are unable to afford the necessary resources and skills to make their rights real, the state should bear the duty to take measures – legislative and administrative – to enable and capacitate them.

The enabling environment is supposed to address the inability that deters right-holders from enforcing their rights. In the context of the legal construct of enforceability of land rights of land tenure security, the creation of an enabling environment requires the state to build the ability of the affected parties to enforce their land rights. It must take legal measures that address the financial and legal knowledge gap to enforce land rights. Particularly, in a society in which poverty is prevalent like Ethiopian peasant and pastoralist societies, failure to empower the society to enforce their land rights amounts to denial of access to judicial remedy. Besides implying the perpetuation of tenure insecurity, it makes the legal right of access to a judicial remedy available

[21] This is not denying the obligation of non-state actors. Nevertheless, the state carries additional obligation of creating enabling environment for non-state actors to play their roles in human rights protection and fulfilment. The idea here is not in the form of establishing the accountability of non-state actors for violation of human rights. (See Andre Clapham. *Human rights obligations of non-state actors*. New York. Oxford University Press, 2006 for more on this point). The idea here is that non-state actors can play significant role in the realization of human rights by taking positive measures. This can be done and realized when in domestic level nations create conducive environment for the operation of the non-state actors.

[22] See Martha C. Nussbaum. Capabilities and human rights. (1997) 66 *Fordham L. Rev.* 273–300; Amartya Sen. *Development as freedom*. New York. Alfred A. Knopf, 1999.

only for those who have the legal knowledge and financial resources to afford to cover the cost of litigation.

However, in developing states it may not be feasible to demand that the state cover the entire cost of enforcement and states may raise their underdeveloped status as an excuse for not being able to afford the cost of enforcement for all those who are incapable. Apart from playing its share in minimizing the cost of enforcement, the state should take measures to create and enabling environment in the alternative to those engaged in by non-state actors, to create legal empowerment of the poor and to realize their access to effective judicial remedy. Thus, the following two sub-sections are aimed at establishing how these obligations of the state to establish the construct of enforceability of land rights have been addressed in the Ethiopian legal system for the land rights of peasants and pastoralists.

i. Cost of Enforcement and Legal Knowledge

Effective protection for the legal construct of enforceability of land rights for land tenure security presupposes acquisition of legal knowledge about the substantive and procedural legal protections for land rights and/or acquisition of the necessary financial resources. As I note in Chapter 1 Section C(iv), this is because it has been established that the inhibiting nature of the cost of enforcement and/or lack of legal knowledge has the implication of perpetuating land tenure insecurity.[23] The cost of enforcement basically incorporates the court fees, hiring of lawyer and cost of administration of justice, which constitutes the cost of transportation and allowance for the parties and witnesses to appear at court.

The inhibiting effect of the cost of enforcement depends upon its amount, and the time the proceedings takes. When the amount is unaffordable, and the judicial process takes long, with a series of adjournments, it can be treated as inhibiting. In Ethiopia, about peasants' and pastoralists' land rights, for instance, Dessalegn Rahmato has revealed that the cost of enforcement is inhibiting.[24] His assessment is in terms of the distance that must be travelled to where the judiciary

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[23] About the empirical evidence on how lack of legal knowledge affects the land tenure security, see the case of Uganda in Klaus Deininger, Daniel Ayalew Ali, and Takashi Yamano. Legal knowledge and economic development: The case of land rights in Uganda. (2008) 84 *Land Economics*. 593–619.
[24] Dessalegn Rahmato. 'Peasants and agrarian reforms: the unfinished quest for secure land rights in Ethiopia' in André J Hoekema, Janine M Ubink, and Willem J Assies (eds.). *Legalising Land Rights Local Practices, State*

is located. He claims that the courts are located far from the place where the peasants and pastoralists reside and that taking a complaint there is inconvenient and costly for average peasants and pastoralists.[25]

His evaluation has not even considered the lack of legal knowledge and other costs related to litigation, like court fees and the hiring of a lawyer and the additional costs for administration of justice. The accumulation of these, with the far distance of the institutions make the cost of enforcement even more inhibiting. However, there are some legislative measures that are aimed at mitigating the cost of enforcement and the problem of lack of legal knowledge so that it should not be a bar to accessing justice for the poor, like peasants and pastoralists. These are waiver of the court fee, demanding of private lawyers to provide *pro bono* assistance, subjecting disputes to settlement out of court, and enabling certain institutions to provide free legal aid.

Waiver of court fees in suits brought by poor people has been introduced in the Ethiopian legal system as one means to avoid challenges of accessing justice by the poor. Anyone who doesn’t possess sufficient means to enable him/her to pay all or part of the court fee can apply for leave to sue as a pauper to the court that has the jurisdiction to entertain the main case.[26] As a separate application, the application for leave to sue as a pauper has to follow the normal civil litigation rules and rules relating to adducing of evidence to prove pauperism.[27]

Moreover, the legislative measure that obliges private lawyers to provide free or reduced fee legal service – *pro bono* – for a certain period or number of cases for, among others, the needy and vulnerable part of the society, is also aimed at mitigating the cost of enforcement. Under the Ethiopian legal system, one of the duties of private lawyers is provision of *pro bono* work for fifty hours per year.[28] However, given the very small number of private lawyers and the fact that they

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Responses and Tenure Security in Africa, Asia and Latin America. Leiden. Leiden University Press, 2009. 33–58. P 46.

[25] Ibid.

[26] Civil Procedure Code of the Empire of Ethiopia. 1965. Decree No. 52/1965. *Neg. Gaz.* No.3. Article 467–479.

[27]Ibid.

[28] Federal Democratic Republic of Ethiopia. Federal court advocates' code of conduct Council of Ministers regulation No. 57/1999. *Fed. Neg. Gaz.* Year 6 No. 1. 1999. Article 49. State laws may adopt a different approach in defining the statutory *pro bono* services. For instance, the Tigray State law rather than fixing in terms of duration, it preferred to fix it in the number of the cases – a case per annum.

reside in the urban centers,[29] and given that the poor in other parts of society than only the poor are also eligible for the *pro bono* service,[30] it would be difficult to imagine that the peasants and pastoralists who live far away in rural areas could benefit from this scheme.

Furthermore, the rural land laws also encourage settling land disputes through alternative dispute resolution mechanisms rather than going to the judiciary to enforce land rights.[31] The assumption here is that as there is no need to pay the dispute settler; or to incur any cost in the form of hiring a lawyer or for administration of justice; and since the institutions are in the locality of the peasants and pastoralists, they will not face the inconvenience and cost that arise when the case is referred to court. However, this option faces two distinct problems. First, the rural land laws impose a mandatory requirement of referring disputes first to alternative dispute resolution – i.e., it is not an optional alternative to enforcement through the judiciary. Parties to a dispute must first try to resolve it through an arbitral body they selected or other customary mechanisms.[32] This obviously restricts a party who wishes to take a case directly to court without resorting to out-of-court resolution mechanisms. It also consumes time and effort, as often parties use out-of-court mechanisms only to satisfy the statutory requirement so that they may then proceed with the enforcement of land rights in a court of law. Above all, it goes against the constitutional protection

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[29] The total number of those who have got the federal advocate licence are approximately around 3520. Among them a few may not practice it. Moreover, most of them reside in the urban centres nearby the justice institutions. (See Kokebe Wolde (ed.). Assessment of legal aid in Ethiopia. *A research report & proceeding of the National Workshop of Legal Aid Providers, Centre for Human Rights, Addis Ababa University*, 2013.

[30] Besides persons unable to afford to pay for advocate services, the law makes charity organizations, civic organizations, community institutions, committees and institutions that work for improving the law, the legal professions and the justice system, and persons to whom court requests legal services legible for the mandatory pro bono service. (See Reg. No. 57/1999 (n 14)).

[31] Federal Democratic Republic of Ethiopia. Rural land administration and land use proclamation No. 456/2005. *Fed. Neg. Gaz.* Year 11 No. 44. 2005. Article 12; Gambella Peoples' National Regional State. Rural land administration and use proclamation No. 52/2007. *Neg. Gaz.* Year 13 No. 22. 2007. Article 24(1); Oromia National Regional State. Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of Oromia rural land use and administration proclamation No. 130/2007. *Megelata Oromia*. Year 15 No. 12. 2007. Article 16; Southern Nations, Nationalities and Peoples Regional State. Rural land administration and utilization proclamation No. 110/2007. *Debub Neg. Gaz.* Year 13 No. 10. 2007. Article 12; Afar National Regional State. Rural land administration and use proclamation No. 49/2009. 2009. Article 15; Benishangul Gumuz National Regional State. Rural land administration and use proclamation No. 85/2010. 2010. Article 34; Ethiopian Somali Regional State. Rural land administration and use proclamation No. 128/2013. *Dhool Gaz.* 2013. Article 7 and 14; Amhara National Regional State. Revised rural land administration and use proclamation No. 252/2017. 2017. Article 52(1).

[32] Ibid.

that requires the submission to alternative dispute resolution mechanisms based on the consent and agreement of parties to the dispute.[33]

Second, the land laws seemingly limit the application of out-of-court dispute resolution mechanisms to the cases between private parties.[34] Even among private parties, only disputes between peasants or between pastoralists *inter se*, or between peasants and pastoralists are subject to the alternative dispute resolution mechanism. This is inferred from the Federal Supreme Court cassation decision in the case of *Wonji Sugar Factory vs Ato Bacha Alemu*.[35] This decision excludes disputes that occur between peasants or pastoralists on the one hand and the other private persons such as investors and legal persons, whose cases may go to court directly. As I discuss in Section C below, land disputes with the state can occur during the administration of land rights and expropriation of land. However, the land laws do not require resolution of land disputes with state through alternative or customary dispute resolution mechanisms.

From the viewpoint of land tenure security, referring land disputes with the state to alternative or customary dispute resolution mechanisms is in the best interest of peasants and pastoralists, because in addition to minimizing the cost of enforcement, it avoids the assumed partiality of judiciary in favour of the state. However, the land laws, while certainly not requiring that disputes with the state must first go to alternative dispute resolution, also give no clear indication about whether disputes with state can be subjected to alternative or customary dispute resolution. This seems to reflect the general position in terms of which disputes with the state as party are not subject to arbitration.[36]

With respect to creating an enabling environment for non-state institutions to provide free legal aid, the Ethiopian legal regime takes two approaches. One is to entitle certain institutions, particularly university law schools, to provide legal services to the needy for free. This has taken two forms – through free legal aid centers and through legal clinical programs that are made part

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[33] FDRE Constitution (n 5) Article 34(5).

[34] The Amhara State law takes a clear stand on this issue. Because it expressly states that any grievance about the decision of the land administration authority can be review in the appropriate court of law. It is not subjected to alternative dispute settlement mechanisms. (See Proc. No. 252/2017 (n 31) Article 52(6)).

[35] *Wonji Sugar Factory vs Ato Bacha Alemu* file No.102406 (18 November 2016) the Federal Supreme Court Cassation Decisions, Vol.21 (Addis Ababa, Federal Supreme Court of Federal Democratic Republic of Ethiopia, January 2018).

[36] The Civil Procedure Code (n 26) Article 315(2).

of the national curriculum for undergraduate law education.[37] However, the problem is that these institutions are still not accessible to peasants and pastoralists, because the legal aid centers and clinical programs are not close to the peasants and pastoralists, as the universities are located in the urban centers. Moreover, they are not equipped with the necessary human and capital recourses.[38]

The second approach is negative: to discourage civil society organizations (CSOs) from playing their roles in legal empowerment. As I discuss below in detail, particularly with the introduction of a new law in 2009, the Ethiopian legal system discourages CSOs from engaging in legal empowerment of the rural society[39] by limiting the services that may be provided by domestic/national CSOs and also limiting their access to financial resources.[40] This has caused a decrease in the number and scope of service of CSOs operating in this field.[41]

To recap, taking into account the economic incapacity and legal knowledge gap,[42] the far distances of the judiciary from their locality, the absence of an enabling environment for CSOs, and the time-consuming nature of the judiciary process, which I discuss in next sub-section, in Ethiopia there really is no enabling environment to minimize the cost of enforcement of land rights for peasants and pastoralists. I conclude this without losing sight of some attempts to enable enforcement, in the form of a waiver of court fee, the imposition of an obligation to perform *pro bono* service on private lawyers, the subjection of land disputes to alternative or customary dispute

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[37] Mizanie Abate, Alebachew Birhanu, and Mihret Alemayehu. Advancing access to justice for the poor and vulnerable through legal clinics in Ethiopia: constraints and opportunities. (2017) 11 *Mizan Law Review*. 1–31.

[38] Ibid. Unlike the federal and other state land laws, the Amhara State law introduces government-sponsored provision of legal aid in land disputes to certain poor and vulnerable peasants and pastoralists through the office of justice bureau. The service is limited to minors, disables, elderly and women who lacks capacity to litigate. (See Proc. No. 252/2017 (n 31) Article 53).

[39] Federal Democratic Repblic of Ethiopia. Charities and societies proclamation No. 621/2009. *Fed. Neg. Gaz.* Year 15 No. 25. 2009. Revision and amendment of this law is one of the top prorities the new Prime Minister Abiy Ahemd's regime is striving for. Very recently, it is amended but yet published.

[40] Brightman Gebermichael. 'The legal framework for Civil Society Organizations (CSOs) in Ethiopia and its implications for their roles in promoting good governance, human rights and environmental Protection' in Getnet Mitiku (ed.). *Promoting democracy, good governance and human rights*. Addis Ababa. Eclipse Printing Press, 2015. 155–189.

[41] Amnesty International. *Ethiopia: The 2009 charities and societies proclamation as a serious obstacle to the promotion and protection of human rights in Ethiopia*. (Statement to the 20th Session of the UN Human Rights Counci*l.* AFR 25/007/2012), 2012.

[42] An attempt for create legal awareness has been carried out by different media of communications to fill legal gaps. However, their accessibility to the rural community still doubtful in the presence of language barriers. (See Wolde (n 29)).

resolution and the empowering of state institutions like universities to provide free legal aid. However, to supplement or upgrade the above attempts of legal empowerment, an alternative means has to be looked for. In the next sub-section an alternative means to address the inhibiting nature and cost of enforcement and the legal knowledge gap are discussed.

ii. Alternative Means

As I note above, peasants and pastoralists in Ethiopia are not capable economically and in knowledge terms to enforce their land rights in a court of law. Besides their endemic poverty, the state has not taken sufficient measures from its side to empower them. The measures taken, as I explain above, are not adequate to address the problem. The alternative measures I discuss below are aimed at supplementing the efforts made to capacitate the peasants and pastoralists to enforce their land rights in a court of law. These proposed measures are demanding of the state to take measures that can shorten the time taken in resolution of the dispute, making the relevant institutions accessible and attracting CSOs to engage in legal empowerment.

In Ethiopia one of the factors that make the cost of enforcement unaffordable is the duration and extent of adjournment. Given the case load of the courts and the prevalence of numerous hierarchical judicial remedies a particular land dispute may take years to get final judgment. The courts in the country are overloaded with cases.[43] Rendering the final verdict comes after years and series of adjournment for which the parties are exposed to transportation cost and allowance, since the courts are located away from the peasants and pastoralists.[44] Moreover, since for the peasants and pastoralists land rights are a means of livelihood, the absence of speedy decision affects the sustainability of their livelihood or their ability to establish a new one immediately in case of losing the case.

Multiplication of different judicial remedies is the other factor making enforcement of land rights costly and time-consuming. In Ethiopia, a single land dispute can be entertained in six different courts in the judicial hierarchy – and that excludes the compulsory alternative dispute resolution.

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[43] Elias N. Stebek. Judicial Reform Pursuits in Ethiopia, 2002-2015: Steady Concrete Achievements-versus-Promise Fatigue. (2015) 9 *Mizan Law Review.* 215–257. P 234.

[44] Because of the time-taking nature of the rendition of judicial remedies as part of the judicial reform program an objective of rendering decision to a case within six months has been set. (Stebek (n 43)). Moreover, the exhaustion of all the judicial structures to get the final decision takes years. (See Ethiopian Lawyers Association. Needs assessment report on the state of legal aid services. Addis Ababa. *ELA*, 2015).

These are courts in the first instance (*woreda*), appellate courts (high court and supreme court), state cassation, federal cassation and constitutional review in House of Federations (HOF).[45] The existence of such institutional multiplication may be important for rectifying errors committed in the lower courts by the higher judicial organs. However, the problem is that the parties may use them as alternative forums up until the decision in favor of them is made. An illustration of this fact can be found in the case of *Ali Dawe vs Mohamed Adem*, which went through all the six judicial structures.[46] This case is illustrative of the parties using the appeals structure to delay resolution until they get their way.

In addition, legislative determinations and judicial interpretation also contribute to excessive multiplication of judicial review. That is with the introduction of the jurisprudence of cassation over cassation,[47] and introduction of double rights to appeal in some states. The FDRE Constitution stipulates that the *both Federal and State Supreme Courts have a power of cassation over any final decision and any final decision on state matters* respectively which contain a basic error of law.[48] Although the wording of the Constitution and the subsequent subordinate legislation is not clear and expressly guarantees double cassation,[49] the minutes of the constitutional assembly indicate

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[45] FDRE Constitution (n 5) Article 78 and 80. Additional court structure of social courts is introduced in most States though the constitutionality of which is arguable.

[46] *Ali Dawe vs Mohamed Adem* Federal Democratic Republic of Ethiopia House of Federation 4th parliamentary round, 5st year, 2nd regular meeting, (29 June 2015).

[47] About the arguments for and against cassation over cassation see Muradu Abdo. Review of decisions of state courts over state matters by the Federal Supreme Court. (2007) 1 *Mizan Law Review*. 60–74.

He also showed the existence of cassation over cassation as the law and constitution stands and argued for disallowing of double cassation for the sake for minimizing cost, energy and time adjudication, and respect of semi-sovereignty of States, which as such not undermine the uniform interpretation and application of laws. After analyzing three options as a way out – to maintain the status quo, gradual preclusion (maintaining the cassation power of the FSC until states establish their own) or automatic taking away of the cassation power of FSC over state matter, he is with the opinion that legislative amendment should be carried out to take away the cassation power of the FSC on state matters.

However, he failed to consider the fourth option – empowering the FSC with cassation power over any matters and taking away the cassation power of SSC – that might rectify the danger of double cassation, and also ensure uniting of the federal and state judiciary at one point as the countries federal system is built on the principle of "unity within diversity". Moreover, since the cassation power is all about dealing with how the laws should be interpreted and applied when basic error of law is committed, not about how question of fact and law in strict sense are solved, assigning the cassation power on all matters to the FSC only as such not affect the semi-sovereignty of state.

Otherwise, with regard to the judiciary branches the states become absolute-sovereign. In addition, since the country is introducing the caselaw system whereby the interpretation of law made by the FSC in its cassation division has the binding effect on all the federal as well as the state judicial organs. The decision does not bind only the FSC cassation division. (Federal Democratic Republic of Ethiopia. 2005. Federal courts proclamation reamendment proclamation No.454/2005. *Fed. Neg. Gaz*. No. 42 Year 11. Article 2(1)).

[48] FDRE Constitution (n 5) Article 80(3).

[49] Federal Democratic Republic of Ethiopia. Federal courts proclamation No. 25/1996. *Fed. Neg. Gaz.* Year 2 No. 13. 1996. Article 10.

that the Federal Supreme Court (FSC) can assume cassation power on state matters which the State Supreme Court (SSC) has heard and pronounced upon in its cassation bench.[50]

In the same fashion as with cassation, a different jurisprudence of double appeal as of right is also established for land disputes by the FSC cassation division. Depending on the hierarchy of courts, the right to appeal to the next higher court should be a one-time right for both disputant parties as of a right. On this basis, a party aggrieved with the decision of the lower court may appeal to the higher court only once. The second appeal as of right lies only when the higher court reverses or modifies the lower court, and the other party who was respondent in the first appeal wants to appeal further. Otherwise, the applicant in the appellate hearing should have no right to appeal again as of right. Allowing further appeal in such scenario as of right without putting the requirement of appeal with leave as the case in South Africa creates the possibility for abuse of the appeal system as a means to drag out the process.[51]

In opposition to this principle of appeal, the FSC cassation division decision on the SNNP (Southern, Nations, Nationalities and People's (SNNP) State rural land law affirms the right to double appeal for a single party as of right.[52] The SNNP State rural land law provides that with

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This provision provides three different situations from which the FSC can assume cassation power. These are when final decisions are rendered in: the appellate jurisdiction of Federal Hight Court, regular division of FSC, and a regular division or appellate jurisdiction of State Supreme Court. Nothing is mentioned about FSC's cassation power of the cassation decision of State Supreme Court. Moreover, this stipulation by itself creates another absurdity and opens legal problem with respect to double cassation and appeal right. The first problem is whether the FSC can assume cassation power over its appellate decision is unclear. Second, with respect to whether State High Court (SHC) can render a final decision or not, and/or whether the FSC Cassation power, with respect to final decision of State Courts is limited to federal matters.

In Ethiopia, the state high and supreme courts have two types of judicial powers – the inherent on state matters and delegated on the federal matters. They are constitutionally delegated to assume the federal first instance and high courts judicial power respectively. On the delegated jurisdiction a final decision can happen only in the SSC since the provision about FSC appellate jurisdiction does not refer to it (See *id* Article 9). Although, the constitutional minutes indicated the possibility of appeal to the FSC on the decision of the SSC on delegated matters. (See Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 5, Nov. 30–Dec. 3/1994, Addis Ababa), 1994. Deliberation on Article 80). With respect to state matters a final decision can be made in the SHC unless a right to second appeal is granted. Because, a decision made in the state first instance (woreda) against appeal lied to the SHC may be confirmed. Therefore, as the above provision about the cassation power of the FSC stands two lines of interpretation can be drawn. It is either the FSC has no cassation power over state matters but only on decisions of State Supreme Court on delegated jurisdictions, or a legal recognition of a second appeal even in case of confirmation of the decision by the first appellate court.

[50] Constitutional Minutes Vol. 5(n 49) Deliberation on Article 80.

[51] For more one this see for instance, Tertius Geldenhuys, J. P. Swanepoel, Stephanus Salomon Terblanche, S. E. Van der Merwe. *Criminal procedure handbook*. Cape Town. Juta and Company (Lty) LTD, 2014.

[52] *Baniku Eressu et al vs Samson G/Yohannes* file No.114670 (7 July 2017) the Federal Supreme Court Cassation Decisions, Vol.21 (Addis Ababa, Federal Supreme Court of Federal Democratic Republic of Ethiopia, January 2018).

rural land disputes resolution through negotiation or arbitration by local elders of the parties' choosing must first be attempted.[53] Any party dissatisfied with the decision of the elders is entitled to take the claim to the first instance (woreda) court.[54] Here the case is brought to the court as a first instance jurisdiction and not in appeal form. As such both parties are entitled to take an appeal to the SHC if either of them is aggrieved with the decision of the woreda court.[55] At the same time the law as it stands provides, *without making any distinction on the nature of decision rendered*, that any party dissatisfied with a decision of the SHC in its appellate jurisdiction has the right to appeal to the SSC.[56] This stipulation is open to the interpretation that the party who appealed to the high court is still entitled to take a second appeal to the supreme court as of right. And in *Baniku Eressu et al vs Samson G/Yohannes* the FSC Cassation division interpreted it in affirmation to allow the second appeal, stating that in resolution of rural land disputes, the state rural land law introduces special rules on dispute resolution and the provisions guarantee a second appeal to a single party as of right without requiring the procedure for appeal with leave.[57] This further contributes to delay in getting a final decision and also unnecessarily consumes the resources and energy of both the parties and the court.[58]

Consequently, to shorten the time taken, energy consumed, and cost incurred in judicial proceedings the judicial system should outlaw the redundant judicial practices like cassation over cassation, and a double-appeal right to a single party as of right.

Dealing with the accessibility of judicial organs is another mechanism to make the cost of enforcement of land rights affordable to peasants and pastoralists in Ethiopia, because, as mentioned above the distant location of the judicial institutions have made the cost of enforcement unaffordable. This can be done by getting the service providers to go to the service seekers. Instead

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[53] Proc. No. 110/2007 (n 31) Article 12(1).
[54] Id Article 12(2).
[55] Id Article 12(3).
[56] Id Article 12(4).
[57] Baniku Eressu et al *vs* Samson G/Yohannes (n 52).
[58] Moreover, although it needs an empirical study to proof, I am with the suspicion that the courts rather than dwelling on the legal problem they legally empowered to do so, they engage on matters left for the other courts and burdens themselves with others task. This thing may happen specially in the appellate and cassation decisions. The appellate courts rather than reviewing the decision and the mistake committed therein of the first instance courts, they may dwell themselves with retrying the entire case. In the same way, the cassation divisions may also in *ultra-vires* examine the question of fact and law, and non-fundamental error of laws, while their constitutional function is limited to resolving question of fundamental errors of law.

of demanding that peasants and pastoralists travel to the courts, mobile rural land dispute benches can be set up, thus making the judiciary accessible. In this regard, an attempt has been made to establish mobile benches, mainly for the state supreme courts, but that is not enough to address the problem. Since inaccessibility of courts is not limited to the supreme courts, mobile benches of the high and district/woreda courts are still required.

Attracting and creating an enabling environment for CSOs is considered as another alternative mechanism to address the problem of cost of enforcement. CSOs, besides being the third forces – other than state and market – to protect ordinary peoples, have the role to reach marginalized society and provide the services the states or market are unable to do. One such services is provision of legal empowerment. Ethiopia offers an excellent practical illustration and explanation of both a favorable and a discouraging legal environment in governing CSOs' contributions in legal empowerment of marginalized groups in the post-1991 period.

The appraisal of an enabling legal environment for CSOs in Ethiopia can be done taking the year 2009 as a benchmark, because this year marks a dramatic weakening of and shrinking in their operation after the enactment of a new charities and civil societies law.[59] Before the promulgation of the law both indigenous and foreign CSOs were actively involved in legal empowerment. Particularly, financial grants from foreign CSOs to indigenous ones enabled the latter to reach rural communities in legal awareness creation and representation in courts.[60] The case of three CSOs - Action Professionals Association for People (APAP), *Ye Ethiopia Goji Limadawi Dirgitoch Aswogaji Mahiber* (EGLDAM) Ethiopian Women Lawyer's Association (EWLA) – illustrates clearly how such organisations operated pre- and post-2009 and what impact the 2009 charities and societies law had on provision of legal aid services to the poor.

Pre-2009, these CSOs were actively involved in provision of free legal aid services for the poor and vulnerable parts of society. They enjoyed autonomy from state interference in their operations, a conducive environment for their creation, support from the state, and access to resources, including foreign funding. There was also no discrimination between CSOs on the basis of their

[59] Proc. No. 621/2009 (n 39)
[60] Wolde (n 29) pp 128-129.

nature with respect to being authorized to engage in a particular type of activity.[61] However, upon the coming into effect of the charities and societies law in 2009, APAP and EGLDAM were prohibited from providing free aid legal services.[62] The reason was that these associations derive more than 10% of their budget from foreign sources, which makes them foreign CSOs that are in effect prohibited by the law from engaging in promotion, fulfilment and protection of human rights.[63]

In the same fashion, though its role in legal empowerment is not totally outlawed, the EWLA's role of women empowerment in every aspect, including legal empowerment, is drastically shrunken.[64] It was given the option either to stop accept foreign funds in excess of 10% of its budget or to change and convert its programs to social service and relief activities, which have nothing to do with promotion, fulfilment and protection of human rights. EWLA, then preferred to continue its initial programs and limited its access to foreign funds.[65] It in effect forced EWLA to close some of its branch offices and become highly dependent on volunteerism of legal professionals in providing its legal aid services.

These cases illustrate how the CSOs law is affecting their contribution to enforcement of land rights for the poor and vulnerable part of the society. The state has justified particularly restriction on access to foreign funding of the national CSOs on the ground that they may be used as a channel to implement donor-driven agendas.[66] What I argue is that the state in doing so fails to adopt a suitably specific and context driven mode of control, determined by what activities any given CSO actually engages in. The generalized approach, by regulating and controlling all CSOs in the same

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[61] Kassahun Berhanu. 'The role of NGOs in protecting democratic values: the Ethiopian experience' in Bahru Zewde and Pausewang Siegfried (eds.). *Ethiopia: the challenge of democracy from below.* Stockholm. Elanders Gotab Press, 2002. 120–129; Dessalegn Rahmato, Akalewold Bantirgu andYoseph Endeshaw. CSOs/NGOs in Ethiopia: partners in development and good governance. Addis Ababa. *Ad Hoc CSO/NGO Taskforce,* 2010. Pp 80-86.

[62] Mizanie A. Tadesse. *A rights-based approach to HIV prevention, care, support and treatment: a review of its implementation in Ethiopia*. (Doctoral dissertation, University of Alabama), 2013. P 300.

[63] Proc. No. 621/2009 (n 39) Article 2(2 and 3) and 14(5). The CSOs discouraging measure is not only restriction of their access to finance. It is also through adopting complex, inaccessible and ill-defined registration procedures; using discretionary or discriminatory practices for recognition of CSOs; and creating an opportunity for public authorities to interfere in the functioning of the organizations. (See Gebremichael (n 40)).

[64] Eden Fissiha Hailu. Who speaks for whom? parliamentary participation of women in the post-1991 Ethiopia. (2017) 33 *Journal of Developing Societies*. 352–375. P 365.

[65] Center for International Human Rights. Sounding the horn: Ethiopia's civil society law threatens human rights defenders. *Northwestern University, School of Law,* 2009.

[66] The suspicion of the state in this regard is not without merit, as it is noted in Issa G. Shivji. *Silences in NGO discourse: the role and future of NGOs in Africa.* Oxford. Fahamu -Network for Social Justice, 2007.

manner, simply on the basis of whether they receive foreign funding, has the effect of undermining also the genuine CSOs that play a crucial role in areas which are not exposed to donor-driven agendas, like that of provision of legal aid services.[67]

Consequently, revisiting the CSOs law in manner that ensures it doesn't prevent but instead promotes creation of an enabling legal environment is a further alternative mechanism to overcome cost of enforcement of land rights to peasants and pastoralists. This can be done in terms of lightening their establishment and registration process and procedures, establishing non-interference in their internal affairs, and broadening their access to resources, at least for the purpose of legal empowerment.[68]

C. Grounds to Take Legal Action

On the top of the existence of an enabling legal environment for legal empowerment of the peasants and the pastoralists as I elaborate above, and an independent judiciary I discuss in the next section, the enforceability of land rights can also affected by the presence of any restriction on the grounds of grievance on the basis of peasants and pastoralists can claim a judicial remedy. As I note in Chapter 1, stipulating a limitation on the grounds on which one may claim a judicial remedy also inhibits enforceability of land rights, because it absolutely and from the beginning prohibits accessing justice and seeking a judicial remedy on certain grounds.

The trend in the post-1991 land tenure system of Ethiopia has been to adopt a system of legislative definition to determine the justiciability/actionability of different encroachments on the land rights of peasants and pastoralists. The restriction in this regard may be systematically studied by categorizing the sources of grievances into two broad categories: those land-related grievances emanating from the exercise of particular land rights and obligations and those emanating from the process of expropriation. The following two sub-sections are devoted to showing how

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[67] I say provision of legal aid services is not exposed to donor-driven agendas, because its concern is to make effective use of the country's judicial services and to limit the happening of miscarriage of justice as a result of lack of legal knowledge and inability to afford the cost of administration of justice. There is argument advanced that the measures taken in the CSOs law are in excess of the purpose it intended to achieve. (See for instance, Sisay Alemahu Yeshanew. CSO law in Ethiopia: Considering its constraints and consequences. (2012) 8 *Journal of Civil Society*. 369–384).

[68] After Prime Minister Abiy Ahmed came to power, the process of revising and amending the CSOs law of Ethiopia has been started.

legislative limitation on the actionability of grievances in each of these two categories affects the enforceability of Ethiopian peasants' and pastoralists' land rights.

i. Exercising Specific Land Rights and Obligations

I note in Chapter 1 Section C(i) and (iii) that the non-intervention of an administrative authority in the exercise of specific rights in land and non-imposition of vague and absurd obligations to determine the continuity and validity of land rights are examples of legal protection to enhance security of land tenure. The experience in Ethiopia, as I discuss in Chapter 5 Section B and C shows that legislative measures instead open space for state intervention in utilization of specific land rights, like in the right to land leasing/renting. Moreover, the laws impose vague and unnecessary standards, such as the failure to conserve land, non-observance of a residency requirement, engagement in non-farming activities and idling of land for certain period as grounds for administrative deprivation of land rights. Furthermore, they also required the state to grant free land rights for a livelihood and empower it to register land, as I discuss in Chapter 4 section A and D. Such measures create leeway for administrative abuse and so threaten security of land tenure.

Besides simply removing some such interventions from the law, entitling landholders to claim judicial remedies from an independent body in such situations is an important way to protect land rights and to ensure checks and balances. This would happen when access to judicial remedies for the affected parties is not statutorily limited to certain grounds. Whether the post-1991 rural land laws introduce such restrictions is open for interpretation. Predominately, there are two opposing views in this regard. On one side, it is claimed that there is no legislatively express prohibition and restriction on actionable grounds and judicial review of administrative decisions in relation to peasants' and pastoralists' land-related disputes and administrative decisions.[69] Hence, the affected peasants and pastoralists have the right to claim judicial remedy on any ground of grievance. Those who uphold this thought base their argument on the dictum 'what is not prohibited is

[69] Muradu Abdo. Reforming Ethiopia's expropriation law. (2015) 9 *Mizan Law Review.* 301–340. P 330. The same author in his PhD thesis, argues otherwise. (See Muradu Abdo Srur. *State policy and law in relation to land alienation in Ethiopia*. (Doctoral dissertation University of Warwick, UK), 2014. P 153). More on this view see Daniel Behailu. *Transfer of land rights in Ethiopia: towards a sustainable policy framework.* Netherland. Eleven International Publishing, 2015; Daniel W. Ambaye. *Land rights and expropriation in Ethiopia*. Switzerland. Springer, 2015.

allowed'. [70] They also invoke the access to justice clause enshrined in the FDRE Constitution to this end.[71]

On the other side, there is a contrasting claim that the post-1991 rural land laws limit the grounds by which peasants and the pastoralists can claim judicial remedy in relation to land-related disputes. Those in this line of thought base their argument on the omitted-case canon and the absence of the judicial practices. They argue that the rural land laws cover claim of judicial remedy on the grievance of amount of compensation during expropriation.[72] The other grounds of grievances are not covered. Hence, based on the dictum "a matter not covered is to be treated as not covered," they consider other grounds of grievances non-actionable.[73] Moreover, they also present the absence of judicial review practice on grounds of grievance other than amount of compensation as the indication of the prohibition.[74]

Both the above two views are susceptible to criticism. The first view doesn't establish what purpose the express mentioning of actionability of the amount of compensation serves. What purpose the express provision of the right to take judicial action on the amount of compensation can serve other than limiting the actionable grounds is not explained. The proponents of the second view in turn also do not consider how restrictions on rights are made, and they incline to recognize the idea that rights can be restricted in an implied manner.

I claim that the law has to be examined critically and through pluralistic interpretation in recognition of the different kinds of stipulation made in the law in this regard. This can be done by taking into account the nature of legal protections afforded, and how the rules about state intervention in land rights in relation to specific land rights and obligations, on one hand, and land expropriation on the other hand, are governed. Accordingly, in the situation of interests for which no legal recognition exists, for instance as is the case with the restitution of land rights, the generalized and monolithic interpretation of "what is not expressly prohibited is allowed," would not work, because, in such scenario there will be no violation of a legal right or interest – a vested

[70] Abdo (n 69).
[71] FDRE Constitution (n 5) Article 37.
[72] Federal Democratic Republic of Ethiopia. Expropriation of landholding for public purposes and payment of compensation proclamation No. 455/2005. *Fed. Neg. Gaz.* Year 11 No. 43. 2005. Article 11.
[73] Antonin Scalia and Bryan A. Garner. *Reading law: the interpretation of legal texts.* St. Paul. Thomson/West, 2012.
[74] Srur (n 69).

interest – on the basis of which to regard it an actionable interest. Here the discourse must be about the recognition of the right in the first place and thereafter only does the issue of actionability come.

With respect to state intervention in enforcing specific land rights and obligations, where there is total silence of the law about the actionability of a state act, the view that promotes seeking judicial remedy where it is not prohibited, works. Those who argue that the law prohibits the bringing of legal action on other grounds than the expressly mention ones fail to appreciate how restrictions on rights are, or ought to be formulated. I am of the opinion that limitations on rights can only be made through explicit stipulation and not by implication. As these are restrictions on rights, they should be recognised only if explicit and cannot be inferred by implication through canons of interpretation. In the case at hand, those who argue for the existence of restriction on the grounds of actionability base their view on the "what is not expressly allowed is prohibited" principle. However, this principle should work and apply for interpretation of restrictions. The guiding principle for interpretation of rights must be what is not expressly prohibited is allowed. Therefore, in the absence of express prohibition to bring legal actions against the state on other grounds, the silence of the law should be interpreted in favor of broadening the right to access judicial remedies rather than restricting it.

In support of and in line with this view the FSC cassation division has developed a jurisprudence which has binding effect on both the federal and state judicial organs.[75] In the case of *Hidase 1st level Cross-Country Public Transportation Service Owners' Association vs the Federal Transportation Authority* the cassation division developed a legal concept about how actionability of a certain cause of action or grievance is determined.[76] According to its decision, actionability in a court of law can be defined and determined based on whether the party who brought a legal action is entitled to the relief he sought by law, if it is proved.[77] It doesn't require an express stipulation about taking of a court action. The presence of the legal protection that establishes the

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[75] Proc. No. 454/2005 (n 47) Article 2(1).
[76] *Hidase 1st level Cross-Country Public Transportation Service Owners' Association vs the Federal Transportation Authority* File No. 136775 (26 July 2017) the Federal Supreme Court Cassation Decisions, Vol.21 (Addis Ababa, Federal Supreme Court of Federal Democratic Republic of Ethiopia, January 2018).
[77] Ibid.

party's relief sought from the court is the only standard to determine actionability of a given cause of action or grievance in a court of law.[78]

However, the above view works when there is total silence in respect of grievances emanating from the same category of legal issue. When there is express mentioning of actionability of certain grounds in a single legal issue and silence about other grounds of grievances emanating from the same legal issue, the interpretation should not be the same. For instance, as implied above and I discuss more in the following sub-section, in relation to the legal issue of expropriation, the post-1991 land tenure law of Ethiopia expressly mentions the right to seek judicial remedy on the ground of amount of compensation. This semi-silence of the law should not be interpreted in the same fashion as total silence. Therefore, the specific permission of the legislation to take judicial action about the amount of compensation while remaining silent on the other causes of action within the expropriation issue, indicates the legislature's intention of making them non-actionable. What other grounds of grievances there are about expropriation is discussed in detail in the next sub-section.

Taking the legal protections afforded to the peasants and pastoralists, and the state interventions expected to implement the same, grievances in relation to specific land rights and obligations may happen in executing their right to free access to land (see Section A of Chapter 3 and 4), the process of land registration and certification (Chapter 3 Section D), at the time of registering and/or approving land transactions (Chapter 5 Section B), and in deprivation of land rights for other reasons than expropriation (Chapter 5 Section C and D). Nonetheless, the absurd formulation of the legislation, except for the Amhara State rural land law where rural landholders are expressly allowed to take court action against the administrative decisions on these issues,[79] has forced people and the judicial practice to regard that peasants and pastoralists are not entitled to claim judicial remedies on these grounds. This is as a result of the paradoxical demand for an express legal rule on the actionability of these grounds, as with the amount of compensation, and of the adoption of a monolithic approach to interpreting the legislation. This way, the post-1991 land tenure system of the country has limited the possibility of enforcing land rights in a presumably

[78] Ibid.
[79] Proc. No. 252/2017 (n 31) Article 52(6).

independent court of law. The same problem is also happening in relation to land expropriation, as seen below.

ii. In relation to Land Expropriation

The other area of the legal construct of enforceability of land rights that demands access to judicial remedies to secure land tenure is land expropriation. In the exercise of land expropriation, the affected parties may be aggrieved for different reasons. These include grievance on the non-fulfilment of the conditions for taking or on delay on the use of the expropriated land or use of the expropriated land for a purpose other than the initially proposed project.

I discuss in Chapter 6 that land expropriation is done legitimately when the legally empowered authority compulsorily takes peasants' and pastoralists' land rights for greater societal interest upon the advance payment of compensation through set procedures. Beside how these conditions are legislatively defined as seen in Chapter 6, any restriction on their actionability affects security of land tenure. Whenever the affected parties feel that any of these conditions are not satisfied, they should be allowed to take court action to enforce their land rights.[80]

For instance, in cases where the decision of expropriation is made by an organ which is not legally empowered to do so or without the approval of the higher authority, affected parties should be allowed to challenge it before an independent judiciary. This can be properly effected if it is predefined and identified which state authority is entitled to make the decision of expropriation and which is assigned to approve and supervise the same. In Ethiopia, as the discussion in Chapter 6 reveals, it is not specified which higher organ are assigned with the authority to make the decision. Moreover, land expropriation decisions of lower organs since they are not subjected to supervision and approval of a higher authority, cause a challenge to complain against these decisions to court on the ground that they were carried out without the approval and supervision of the higher authority.

Moreover, the affected parties may challenge the expropriation claiming that the purpose for which the land is demanded doesn't satisfy the public purpose requirement or that it can be effectively

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[80] Food and Agriculture Organization. Compulsory acquisition of land and compensation. Rome. *FAO Land Tenure Studies 10,* 2008. P 46.

implemented elsewhere, without deprivation of land rights. As I argue in Chapter 6 Section C(i), land expropriation may be done only for strictly and clearly constructed public purposes. In addition, the purpose should be determined through a cost-benefit analysis approach, taking into account the damage caused as result of expropriation and the benefit expected to be gained from the proposed project for the sake of which the expropriation is done. This should be done on the basis of clearly defined standards in the legislation.

The limiting of the state expropriating authority and protection of the land rights from state encroachment on the ground of the public purpose clause is substantially realized if affected parties are guaranteed with the right to seek judicial remedies for non-adherence to it. Accordingly, affected parties must be allowed to take legal action against the state decision on their land rights on the ground that the project is best implemented in another place, there is alternative way to get the needed land or the requirement of public purpose is not satisfied.

Particularly, challenging the expropriation decision on the ground of non-fulfilment of the public purpose requirement further depends on which organ of the government is empowered to define it and how its components are determined in the legislation. In a system where defining of the components of public purpose is assigned to the legislative organ alone or jointly with the judiciary and they are listed exhaustively or illustratively, it is easier to challenge the satisfaction of the requirement. This is because, in such a scenario, what is expected from the affected parties is to indicate that the purpose for which their land rights are expropriated doesn't fall within or is not related to the lists in the legislation. However, in situations where the task of specifying the components is assigned to an administrative authority with or without legislative standards, challenging the expropriation decision on the ground of non-fulfilment of the requirement of public purpose is very difficult, if not impossible, because the judicial argument is conducted between unequal forces – landholders vs state – in terms skilled manpower and resources.[81]

In Ethiopia, as mentioned in the above sub-section, we do not find any express stipulation that allows or prohibits peasants and pastoralists from bring a court action on this ground.[82] However,

[81] Ibid.

[82] However, with respect of the urban land rights, the urban land law expressly outlaws bring a court action against the state on the grounds other than amount of compensation. The decision of administrative tribunal is final on other matters. (see Federal Democratic Republic of Ethiopia. 2011. Urban land lease holding proclamation No. 721/2011.

unlike the views reflected about actionability grounds in general above, a different outlook prevails about the public purpose requirement issue. That is, the assumption is held that the task of determination of the constituting elements of public purpose based on the standards provided by the legislature implies its non-actionable nature. This means that in the post-1991 Ethiopian legal tenure system, determination of what constitutes public purpose is left for the administrative expropriating authority.[83] However, the legislature provides two subjective and absurd standards: to fit into the urban plan and to ensure direct and indirect benefits to society.[84] This, in turn, undermines the affected parties' capability to challenge the fulfilment of the public purpose requirement if it is allowed in the existing legal framework. This is in distinction to some state laws, which do define its components in an illustrative manner, as is discussed in Chapter 6 Section C(i).

The other source of affected parties' grievance about expropriation that demands judicial remedies concerns compensation. About the compensation, affected parties may be aggrieved on its amount, time of payment and modes. Especially in the scenario where the amount is calculated by the state-formed entity and the affect parties have no say, the compensation basis and valuation method doesn't consider the extent of dependency of the affected parties on the land rights, and the mode is determined by the state organ, as in Ethiopia, it is high likely that the affected parties may be aggrieved with the compensation awarded.[85] They may claim that the amount of compensation is inadequate, the expropriation is carried out without advance payment of compensation and the mode of compensation is not the one they prefer.

In the post-1991 Ethiopian land tenure system, peasants and pastoralists are expressly allowed to claim judicial remedies on the amount of compensation[86] - that is, when the amount of compensation paid is inadequate. However, it doesn't indicate whether the affected parties can seek judicial remedies in cases where the compensation is not paid in advance and the mode of the compensation is not the preferred one, where different modes are available. This would lead one

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Fed. Neg. Gaz. No. 4 Year 18. Article 29(3)). Nevertheless, this stipulation does not prohibit the cassation division from assuming power to entertain the case when fundamental error of law is committed.

[83] Proc. No. 455/2005 (n 72) Article 2(5) and 3(1) cumulatively.

[84] Id Article 2(5).

[85] See Chapter 6 for detail discussion.

[86] Proc. No. 455/2005 (n 72) Article 11; Proc. No. 252/2017 (n 31) Article 26(5).

to believe that with respect to compensation aggrieved parties can take judicial action only with respect to the amount. The other grievances about compensation are also non-actionable.

Nevertheless, the judicial practice of the FSC cassation division implies the incorporation of actionability of other grievances revolving around compensation. Particularly, in the case *Ethiopian Road Authority vs Abebech Seyoum* the cassation division was of the opinion that affected parties can take court action to effect the payment of compensation when the expropriating organ failed to make it.[87] Moreover, from the case of *Ethiopian Road Authority vs Kedir Hailejinso* it can be inferred that the cassation division has made the question when displacement compensation is due, an actionable ground.[88] These binding FSC cassation division decisions indicate that with respect to compensation, actionability is not limited to the amount only as in the legislation. It broadens the scope of actionability in respect of compensation, implying that any matter connected to compensation is actionable.

Furthermore, the affected parties may still be aggrieved with the process of taking itself. Although the substantive protections and requirements are fulfilled, procedural irregularities may be committed that affect the legal interests of affected parties. As I discuss in Chapter 6 Section C(iii), procedural guarantees and practical observation of the same protects the affected parties from further damage and encumberment incurred as a result of expropriation. Such procedural guarantees include the participation of the affected parties in all stages of the expropriation process, provision of advance notice and time to recoup investments and vacate the land, and to vacate at a convenient time.

However, the expropriating organ may not observe such procedural guarantees in conducting the land expropriation. In such cases the affected parties' legal interest will be at risk and it requires a means to redress the damage caused. This can be effected if the affected parties are allowed to bring legal action against the expropriating organ in a presumably independent court of law

[87] *Ethiopian Road Authority vs Abebech Seyoum* file No. 33975 (14 March 2008) the Federal Supreme Court Cassation Decisions, Vol. 5 (Addis Ababa, Federal Supreme Court of Federal Democratic Republic of Ethiopia, April 2009). However, the cassation division has denied the payment of compensation justifying that though expropriation decision was made, the affected party did not evict from her land holding and damage is not sustained to that effect.

[88] *Ethiopian Road Authority vs Kedir Hailejinso* file No. 52496 (26 October 2010) the Federal Supreme Court Cassation Decisions, Vol. 11 (Addis Ababa, Federal Supreme Court of Federal Democratic Republic of Ethiopia, November 2011). According to the decision of the cassation division of the FSC displacement compensation is due even if the expropriated rural land is vacant one.

claiming the restarting of the expropriation process from where the irregularity was committed or compensation for the damage incurred as a result.[89] In the post-1991 Ethiopian land tenure system we cannot find an express stipulation about the right of affected peasants and pastoralists to make such claim. Consequently, judicial practice may suppose that such grievances are reviewed in the administrative channels and not actionable. This, then, restricts the affected parties' right to seek judicial remedy to enforce their land rights and opens the way for administrative arbitrariness and perpetuation of land tenure insecurity.

With the fulfilment of all the substantive and procedural requirements of the expropriation, still, affected parties may have a grievance on the utilization the expropriated land. In this juncture the grievance takes two forms. These are if the land is not utilized timely after taking and/or if the change in purpose for which the land was taken is made. In such scenario the affected parties should have the right to claim the restitution of their land rights as mentioned in Chapter 6 Section D. This would happen if the affected parties are entitled to take judicial action in an independent organ. Nevertheless, in the post-1991 land tenure system of Ethiopia, peasants and pastoralists are not entitled to the right to restitution. The right to restitution is not recognized as a substantive right of peasants and pastoralists.[90] Accordingly, they do not have a legal basis to claim it. The restriction or prohibition here is not about the actionability, but about the very presence of the legal right itself.

In general, about the actionability of grievances in land expropriation, the adoption of a monolithic interpretation of the law without considering the decisions of FSC cassation division as seen in the above sub-section doesn't make sense and gives effect to the legislative mentioning of claiming of judicial remedy on the amount of compensation, but not to the others. Except for grievances revolving around compensation in general, it may have been the legislature's intention to exclude the other grounds with the view that they delay the prompt acquisition of the land. However, this idea doesn't take into account the implication of the absence of judicial enforcement in such cases on the perpetuation of land tenure insecurity of peasants and pastoralists. In fact, this problem may not be addressed by simply allowing affected parties to claim judicial review on any grievances.

[89] FAO (n 80) p 47.

[90] In the post-1991 rural land tenure system land restitution is tacitly mentioned with respect to temporary expropriation only. (See Proc. No. 455/2005 (n 72) Article 8).

Instead, it also requires the capability of the affected parties as I discuss in Section B above and the institutional and personal integrity and independence of the judiciary as is discussed in the subsequent section.

D. Nature of Institutions

In the above sections I discuss how the manner of legal recognition of access to judicial remedies, the cost of enforcement, and the restriction on the grounds of actionability under the post-1991 legal system of Ethiopia impact on the legal construct of enforceability of land rights of security of tenure of peasants and pastoralists. However, we couldn't see the completed feature of the legal construct unless we examine the nature of the institution where the judicial remedy is claimed, because even in the satisfaction of the mentioned elements, the absence of impartiality and independence of the judiciary undermines the possibility of enforceability of land rights. It then becomes paramount to examine how the legal framework of Ethiopia has established an independent and impartial judiciary.

The matter of judicial independence and impartiality in post-1991 Ethiopia can be considered through two separate approaches. These are judicial review and constitutional review approaches, because, for one thing, these powers are assigned to different organs. While the power of judicial review is entrusted to a court of law,[91] the constitutional interpretation and review is assigned jointly to the House of Federation (HOF) and Council of Constitutional Inquiry (CCI).[92] The rules about their establishment are also different. Thus, I discuss them here below in separate sub-sections.

i. Judicial Review

An impartial and independent judicial review on land disputes can be realized only when the personal and institutional independence of the judiciary is prevalent. Especially when the state is party to the dispute the impartiality and independence of judicial review should not only exist in fact, but must also be seen to exist, in order to enhance public trust and confidence in the judiciary,

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[91] FDRE Constitution (n 5) Article 79. But it is notwithstanding the judicial power of other institutions as the constitution itself designates.
[92] Id Article 62 and 84.

and "to maintain state submission to law."[93] This is so because achieving impartial justice and to check government wrong-doing or abuse of power, can be rendered or be seen to be rendered when the judiciary is independent *from* any forces and in *performing* its function.[94] This would happen when legislative measures, among other things, are taken to ensure the independence and impartiality of the institution and the judges.

The personal independence and impartiality of judiciary is the capability of a judge to decide on a case based on the law without interference of any force and any fear and influence of or from anyone.[95] This personal integrity of the judges depends on how the standards for and the process of their appointment, removal and withdrawal, among other things are defined in legal instruments.[96] As independence and impartiality is a matter of power relations with the other branches of government – legislative and executive – both about an individual judge and the judiciary as institution, the appointment, promotion, withdrawal and removal of judges is required to be in accordance with objective standards and without undue influence from other state organs, typically the executive. Accordingly, to realize the personal independence and impartiality of the judiciary, substantive conditions (standards for appointment, withdrawal, promotion and removal of judges) and procedural conditions (making of the decision of appointment, withdrawal, promotion and removal of judges) must be free from political interference.

To ensure the personal independence and impartiality of the judiciary in post-1991 Ethiopia the FDRE Constitution and state constitutions contain measures in relation to the appointment and

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[93] Christopher M. Larkins. Judicial independence and democratisation: a theoretical and conceptual analysis. (1996) 44 *Am. J. Comp. L.* 605–626. P 606. In the post-1991 Ethiopia it is argued that the public trust and confidence on the judiciary is seems to be declining. (See Stebek (n 43) p 215).

[94] Vicki C. Jackson. 'Judicial independence: structure, context, attitude' in Anja Seibert-Fohr (ed.). *Judicial Independence in Transition*. Heidelberg. Springer, 2012. 19–86. P 20.

[95] Democracy Reporting International. International standards for the independence of the judiciary. *Briefing Paper, 41*, 2013. P 1; International Bar Association. Minimum standards of judicial independence. *IBA Adopted 1982*. Principle A (1); The International Association of Judicial Independence and World Peace. Mount Scopus international standards of judicial independence. *JIWP International Project of Judicial Independence. (Approved March 19, 2008, Consolidated 2015)*. Principle 2.2. In my context personal independence and impartiality refers to both "the terms and conditions of judicial service are adequately secured by law" and while carrying out the judicial functions the judge should be subjected to "nothing but law and commands of his conscience."

[96] These are not the only factors which influence the personal independence and impartiality of the judiciary. The subjective factors like attitude, which cannot be regulated in legal rules, (Jackson (n 94)) and financial security, which also depends on the development level of a country (see UN Office of the High Comm'r for Human Rights. *Human rights in the administration of justice: a manual on human rights for judges, prosecutors and lawyers*. New York. United Nations, 2003. Pp 128–129) and the likes are not discussed here. Only those factors than can be translated to legal protections are the concern of this thesis.

removal of judges. After securing the non-interference of any body and that a judge should solely be guided by the law in carrying out judicial functions,[97] the constitutions stipulate principles on appointment and removal of judges. About appointment, the constitutions have more in the way of procedural rather than substantive conditions to ensure personal judicial independence. The substantive conditions applicable to judges other than the president and vice-president of the supreme courts are stipulated in the laws enacted by the law-making organs of both the federal and state governments.[98] The procedural conditions vary depending on the position an appointee-judge assumes and whether the appointment is for federal or state courts.[99]

The appointment of the president and vice-president of the federal and state supreme courts is done by the respective law-making organs (the House of Peoples' Representatives (HPR) and State Council (SC)) upon the nomination and recommendation of the respective heads of government of the federal and state government.[100] Nevertheless, neither the constitutions nor any other federal or state law provide for other procedural conditions and any substantive conditions the nominees are required to satisfy. Thus, it makes their nomination very subjective and totally reliant on the whim of the highest executive organ of both the federal and state governments – the Prime Minister and Chief Executive respectively.[101] In such a situation it is difficult to think the nomination is done solely on the basis of the nominees' capability and personal integrity. The political loyalty

[97] See FDRE Constitution (n 5) Article79(3); Afar Regional State. The revised constitution of Afar regional state. July 2002. Article 66(3); Amhara National Regional State. The revised Amhara national regional constitution proclamation No. 59/2001. *Zikre Hig* No. 2 Year 7. 2001. Article 66(3); Benishangul Gumuz Regional State. The revised constitution of Benishangul Gumuz regional state. December 2002. Article 67(3); Gambella Regional State. The revised constitution of Gambella peoples' national regional state. December 2002. Article 68(3); Harari Regional State. 2004. The revised constitution of the Harari People's regional state. October. Article 69(3); Oromia Regional State. The revised constitution of Oromia regional state. October 2001. Article 63(3); Ethiopian Somali Regional State. The revised constitution of Somali regional state. May 2002. Article 67(3); Southern Nations, Nationalities and Peoples' Regional State (SNNP). Constitution of the Southern Nations, Nationalities and Peoples' regional state proclamation No. 1/1995. *Debub Neg. Gaz.* Year 1 No. 1. 1995. Article 61(3); Tigray National Regional State. Constitution of the Tigray national regional state proclamation No. 1/1995. 1995. Article 61(3).

[98] For instance, about the federal courts' appointee-judges see Federal Democratic Republic of Ethiopia. Amended federal judicial administration council establishment proclamation No. 684/2010. *Fed. Neg. Gaz.* Year 16 No. 41. 2010. Article 11. The same trend is followed in the state laws as well.

[99] See FDRE Constitution (n 5) Article 81.

[100] Id Article 81(1) and (3); Afar State Constitution (n 97) Article 68(1); Amhara State Constitution (n 97) Article 68(1); Benishangul Gumuz State Constitution (n 97) Article 69(1); Gambella State Constitution (n 97) Article 70(1); Harari State Constitution (n 97) Article 71(1); Oromia state Constitution (n 97) Article 65(1); Somali state Constitution (n 97) Article 69(1); SNNP state Constitution (n 97) Article 63(1); Tigray state Constitution (n 97) Article 63(1).

[101] Ibid.

will be also taken into account, which in effect undermines the personal independence and impartiality of these judges.

On the other hand, the remaining judges of the supreme courts and any judges of the high and first instance courts are appointed by the HPR and SC upon the nomination and selection by the respective Judicial Administration Councils.[102] Unlike the state court judges, in the federal courts the judges' appointment process opens a space for involvement of the head of the government. The FDRE Constitution implies that the appointment of federal court judges by the HPR is made upon submission by the Prime Minister.[103] With respect to the state supreme and high court judges the state judicial administration council (SJAC) is required to get the opinion of the federal judicial administration council (FJAC).[104] Accordingly, the SJAC has to compile its and the FJAC comments and suggestions together and present the same to the state council. The FJAC must forward its opinion within three months. If it fails to do so, the SJAC submits the nominees to the State council for approval without the view of FJAC.[105]

The involvement and interference of the none-judiciary in the nomination process of the judges in Ethiopia is inferred by letting the executive authority and others be a member of the councils.[106]

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[102] FDRE Constitution (n 5) Article 81(2) and (4); Afar State Constitution (n 97) Article 68(2); Amhara State Constitution (n 97) Article 68(2); Benishangul Gumuz State Constitution (n 97) Article 69(2); Gambella State Constitution (n 97) Article 70(2); Harari State Constitution (n 97) Article 71(2); Oromia State Constitution (n 97) Article 65(2); Somali State Constitution (n 97) Article 69(2); Tigray State Constitution (n 97) Article 63(2) and (3).
The SNNP State Constitution adopts somehow a different approach regarding the authority that has the power to select and propose and appoint judges. It implied that the SJAC is empowered to select and propose and present judges of the SSC to the SC. However, with regard to judges of SHC and first instance court/woreda court (though not clear) the selection and proposal is required to be made by the Zonal JAC and appointed by Zonal Council. (See SNNP State Constitution (n 97) Article 63(2)). These organs are lower in hierarchy than SJAC and SC respectively. This may make the appointment of judges for those courts much exposed to undue influence from the executive; and in effect, compromises the personal independence of the judiciary. In addition, it may raise the issue about how the relation between the federal and state constitutions is seen.

[103] FDRE Constitution (n 5) Article 81(2). The power of submission of the candidates may not simply imply the procedural requirement of presentment to the HPR. It may open a space for the chief executive to screen out the nominees he/she is not interested in. That way the appointment of the federal courts' judges exposed to the influence of the executive again.

[104] FDRE Constitution (n 5) Article 81(4). One may question why it is needed to solicit and obtain opinions for the FJAC with respect to the nominees of the state supreme and high court judges. It is because these courts at the same time are constitutionally delegated to see federal matters which fall under the jurisdiction of the federal high and first instances courts respectively. Accordingly, the federal government has a concern on the appointment of judges in such courts. That is why both the federal and state constitutions require the SJACs.

[105] Ibid.

[106] In this juncture, the influence of the executive in the appointment of judges can be explored by looking into how the FJAC and SJAC formed and the members thereof. The FJAC is established by the law enacted by the HPR. With the objective of enabling the judiciary to administer itself in a way free from interference among other things the FJAC establishing proclamation has specified the members of the Council. (See Proc. No. 684/2010 (n 98) the preamble). It

Perhaps, as per the international standards, the involvement of the other body in the selection and promotion of judges may not necessarily compromise the personal independence of judges and be inconsistent with the principle of judicial independence, as long as the selection and promotion is done by a judicial selection board or commission in which a majority of members are from the judiciary or are legal professionals.[107] The numerical majority in representation, however, is not enough to ensure the independence of judiciary. In a transitional democracy like Ethiopia, since the executive assumes strong power, the bargaining power and the power-relation among the members should also be taken into account. Consequently, in Ethiopia, as the discussion in footnote 96 indicates, in actual fact the dominance of the executive both in terms of numerical representation and bargaining power is prevalent in the councils.[108]

About the substantive conditions, the HPR on the federal level has laid down substantive requirements that must be observed in the nomination process of the federal judges. Such conditions are basically academic and professional skill qualifications, personal conduct, age and non-membership of any political organization and the executive and legislative organs.[109] These

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comprises twelve members and majority of which are judges take at face value. The president and vice-president of the federal supreme court, three members of HPR, the attorney general (formerly the minister of ministry of justice), the presidents of the federal high and first instance courts, a judge selected by all federal judges, a practicing lawyer, a law academic and a distinguished citizen appointed by the council itself are the members of the council. (*Id* Article 5). Moreover, the involvement of the executive may be widened as the members of HPR can serve also in the executive. Therefore, three of the HPR members may be at the same time serve in the executive which in turn makes the number of members from the executive four. For instance, the government whip minister, who is member of the HPR, is also a member of the council. Furthermore, the selection of a practicing lawyer, a distinguished legal scholar and citizen may also be exposed to the influence of the executive given the power dominance they assume. Thus, the judiciary de facto does not assume a majority in the council.

Unlike the FJAC, the SJAC are established constitutionally. All state constitutions expressly stipulated that SJAC shall be established. Furthermore, they provide that the judges shall be represent with a majority vote in the council and the president of the state supreme court to chair the council. (See Afar State Constitution (n 97) Article 69; Amhara State Constitution (n 97) Article 69; Benishangul Gumuz State Constitution (n 97) Article 70; Gambella State Constitution (n 97) Article 71; Harari State Constitution (n 97) Article 72; Oromia state Constitution (n 97) Article 66; Somali state Constitution (n 97) Article 70). Then they leave particulars about the composition, membership, powers and duties of the council to be determined by further law.

A different approach is taken only in the Constitution of Tigray and SNNP States. The constitutions of the two states go to the extent of determining the composition of the council (See Tigray State Constitution (n 97) Article 64; SNNP State Constitution (n 97) Article 64).

[107] IBA (n 95) Principle A(3); JIWP (n 95) Principle 4.2.

[108] The selection of judges by the FJAC mostly causes grievance. To mention the 2018 compliant submitted to the Prime Minister and HPR is an indication of prejudice and biasness in the process. (See Tamiru Tsegie. Th*e federal judges' selection has instigated grievance*. (The Report Amharic, 25 April 2018).

[109] Proc. No. 684/2010 (n 98) Article 11.

conditions are aimed at ensuring the necessary legal knowledge and skills, personal character and neutrality expected from judges to establish personal independence and impartiality of the same.

Nevertheless, some subjective standards are also enshrined in the law, which opens space to discriminate in the appointment of judges on the basis of political outlook. For instance, the requirement of loyalty to the constitution that has to be proved in writing is an absurd standard.[110] For one thing, the essence of loyalty to the constitution is not clear and proving and showing of the same is not as such easy since it is a perception. Accordingly, any critic of any constitutional provisions may be regarded as disloyal to the constitution. For another, practically the idea of loyalty to the constitution is understood as non-opposition to or support of the ruling party and its policies and laws, because the proof of loyalty to constitution is produced from the local administration office where the candidate resides. Therefore, it opens a loophole to discriminate against those who criticize the ruling party and to select those supporting it. This in effect, apart from affecting the personal independence of judges, goes against the constitutional right to equality,[111] because, in conflict with the constitution, it creates the possibility to discrimination based on political opinion, while precisely neutrality in that respect is required in the judiciary.

In relation to the withdrawal of judges – also termination of tenure - the federal as well as state constitutions contain substantive and procedural measures to ensure the tenure of judges so that their personal independence and impartiality is enhanced. Substantively, the constitutions in principle secure that no judge is removed from his/her duties before the age of retirement.[112] Moreover, in conformity with international standards they also strictly limit and listed out the exceptional grounds for which judges may be removed from their posts before retirement age.[113] The grounds are violation of disciplinary rules, gross incompetence or inefficiency, and inability to carry out the responsibilities on account of illness.[114] The reasons for these grounds are associated with preventing the occurrence of miscarriage of justice resulting from a judge's

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[110] Id Article 11(1(d)).
[111] FDRE Constitution (n 5) Article 25.
[112] FDRE Constitution (n 5) Article 79(4); Afar State Constitution (n 97) Article 66(4); Amhara State Constitution (n 97) Article 66(4); Benishangul Gumuz State Constitution (n 97) Article 67(4); Gambella State Constitution (n 97) Article 68(4); Harari State Constitution (n 97) Article 69(4); Oromia State Constitution (n 97) Article 63(4); Somali State Constitution (n 97) Article 67(4); SNNP State Constitution (n 97) Article 61(4); Tigray State Constitution (n 97) Article 61(4).
[113] IBA (n 95) Principle D(29 and 30); JIWP (n 95) Principle 5.5.
[114] FDRE Constitution (n 5) Article 79(4). The same grounds are listed on all state constitutions too.

personal problems. Hence, except for these grounds, withdrawal of judges even on the account of legislatively incorporated grounds not only impedes the personal independence of judges, but also goes against the constitutional rule, because the issue of withdrawal of judges is a constitutional matter and the grounds for withdrawal are listed exhaustively in the constitution.

Nevertheless, due to the subjective nature of the above reasons for dismissal, other grounds may be added through interpretation. A good example to explain this scenario is the dismissal of federal high court judge Gizachew Mitiku Belete.[115] The reason mentioned in the resolution demanding his withdrawal from judgeship is that he was not loyal to the constitution. His criticism of the government in different meetings and suggestion of amendment of certain provision of the FDRE Constitution was regarded as "political activity" in violation of judicial duty.[116] The FJAC in its recommendation and the HPR while approving his dismissal insisted that his acts shed light on political biases and undermine the personal independence of the judge.[117]

This decision is a landmark decision on the basis of which to examine what constitutes "political activity" that affects the personal independence and impartiality of judges, whether the judge is expected to be loyal and support each and every provision of the Constitution; whether he/she is expected to respect and implement the Constitution even in the presence of his/her reservations on the Constitution; whether there is any special restriction on freedom of opinion and expression in reference to judgeship;[118] and whether the personal independence of the judge is threatened by the interference of the executive itself or by the political view of the judge.

The procedural safeguards, on the other hand, include that the decision of withdrawal of judges is to be made in the administrative structure of the judiciary itself and approved by the law-making organs of the respective governments. Accordingly, the decision of withdrawal of judges is required to be made by the respective JAC and the decision must be approved by the majority vote of the respective law-making organs.[119] The constitutions give due concern to judges' tenure security so that the personal independence and impartiality is not compromised due to the threat

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[115] Solomon Goshu. Constitutional loyalty: is it a must for judiciary? (The Report English, nd).
[116] Ibid.
[117] Ibid.
[118] A limit on the right to freedom of expression and opinion on the basis of position occupied is not mentioned in the FDRE constitution. (See FDRE Constitution (n 4) Article 27(5)).
[119] Id Article 79(4).

of losing job. This is inferred from the constitutions requiring that the final say on the decision of withdrawal be made by the highest authorities of the federal and state governments. The HPR and SC are the highest authorities of the federal and state governments and responsible to the people.[120]

The problems with the procedural guarantees are that the members of the executive are made to hear and decide on the withdrawal of judges and any other disciplinary measures taking part in the JAC as I elaborate above.[121] It is against the international minimum standard that prohibits the executive from taking part in the adjudication of disciplining of judges.[122]

With respect to promotion of judges, its existence as a system in the country is inferred from the subordinate law that defines the power and duties of the FJAC. It is stated that the council has the power to decide on the promotion of the judges.[123] Although the promotion is required to be based on objective standards like ability, integrity and experience,[124] the incorporation and prescription of the standards is not mentioned. This in effect makes the decision of the council subjective and subject to influence by the individual judge's loyalty to the ruling government.

Finally, the personal independence of judges can be also ensured when legal protection is afforded against arbitrary removal of the judge from a particular case. This means that the pre-judgement of the judge without good cause and depriving the same from presiding and hearing a given case is an interference in the personal independence of judge. Such forms of intervention should be outlawed to secure the personal independence of judge. However, this doesn't mean that the judge has to continue to hear a case if there is an actual or sufficiently deemed bias. In such situations the removal of the judge from trying the case should be allowed for the sake of justice. Without compromising the personal independence of judge, the removal may be carried out in exceptional

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[120] Id Article 50(3) and (5).
About the status of the judge until the HPR or SC approves the withdrawal the constitutions in the country do not take the same stand. Some of them like Afar, Harari, Oromia, and Somali State Constitutions provide the suspension of the judge. Whilst, the FDRE Constitution and State Constitution of Amhara, Benishangul Gumuz, Gambella, SNNP and Tigray prefer to remain silent. Moreover, the Constitutions do not mention anything about the status of the judge in period of hearing in the JAC. However, the prefers among these approaches should be made taking into the impact of the continuation of trial by the judge on the miscarriage of justice and suspension on the personal independence and tenure of the judge.

[121] FDRE Constitution (n 5) Article 79(4) and 81(6).

[122] IBA (n 95) Principle A(4).

[123] Proc. No. 684/2010 (n 98) Article 6(1(g)).

[124] UN. Basic principles on the independence of the judiciary. (Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by General Assembly resolutions 40/32 of 29 Nov.1985 and 40/146 of 13 Dec), 1985. Principle 13.

situations for clearly defined reasons and in the judicial process without the intervention of other organs.

In the judicial system of Ethiopia, removal of judges from a case happens in cases where an injustice may otherwise be done. The federal courts' establishing law provides causes for removal of judges in an illustrative manner. It provides that when the judge is related to one of the parties or advocate by consanguinity or by affinity, has previously acted in some capacity in connection with the case, has a case pending in the court with one of the parties or advocate thereof, the dispute relates to a case in which one of the parties is a person for whom the judge acted as representative in any form, or when there is sufficient cause to believe that injustice may be done, the judge must withdraw.[125] Apart from these causes, no judge is removed from a case.

Moreover, the removal decision can be made either by the judge's own motion or upon the demand of one of the parties.[126] Whenever, the judge is aware of the presence of either of the above causes he/she should automatically remove himself/herself from trying the case. Moreover, a party to the case is also entitled to apply to the court in writing about the removal of the judge when he/she is of the opinion that the judge should not sit for the reasons mentioned above. The application must be submitted to the same court and bench.[127] The concerned judge, having considered the application, may withdraw. However, in case he/she is not convinced, then he/she has to refer the application to another bench in the court or to the appellate court.[128] This implies that the decision here is totally judicial and there is no interference from another body like in the case of appointment and dismissal of judges I explain above.

Institutional independence, on the other hand, demands non-interference of the other organs – the legislature and executive - in the functioning of the judiciary. The judiciary as an institution is supposed to discharge justice and its internal function without influence and interference from other state organs. This includes non-transfer of the judicial function to other organs, autonomy in its administrative and financial matters, and respect and observance of its decisions by other

[125] Proc. No. 25/1996 (n 49) Article 27(1).
[126] Id Article 27(2) and 28(1).
[127] Id Article 28(1– 4).
[128] Id Article 28(3).

organs.[129] Such matters preferably should be guaranteed in the constitution or any higher normative instruments as they are aspects of separation of power.

One of the strategies employed to undermine the institutional independence of the judiciary is transferring the judicial power to a non-judiciary organ, particularly to the executive. This happens in two ways. One is making the administrative decisions final and non-reviewable in the judiciary. The other is empowering the executive or other organ to exercise judicial functions, supposed to belong to the judiciary one. In this respect, the FDRE and state constitutions take a firm stand to ensure the institutional independence of the judiciary. The constitutions, first, totally prohibit the establishment of special or ad hoc courts which take away the judicial power from the regular courts or institutions legally empowered to exercise judicial functions; and exclusively reserve judicial power to courts with the recognition of the judicial power of religious and customary courts.[130] Second, when establishment of another judicial organ is required it has to be done with the blessing of the relevant legislative organ and the organ so created should follow legally prescribed procedures in carrying out the judicial function.[131]

Nevertheless, although the establishment of an additional judicial organ that enjoys full constitutional protection of both personal and institutional independence by law is constitutionally allowed, in Ethiopia the legislative practice of transferring judicial power to the executive through the above two strategies is becoming very common.[132] The approach of legislative deprivation and transfer of the judicial function from the judiciary to the executive undermines the institutional independence of the judiciary in the country. Moreover, it goes against the constitutional spirit of the legislature's power of establishing another judicial organ. In the Constitution, the legislature is empowered to establish additional judicial organs in addition to those mentioned in the

[129] John Ferejohn. Independent judges, dependent judiciary: explaining judicial independence. (1999) 72 *S. Cal. L. Rev.* 353–384; The High Comm'r for Human Rights (n 96) pp 120–121.
[130] FDRE Constitution (n 5) Article 78. All state constitutions stipulate the same provision. The phrase "institutions legally empowered" creates certain absurdity whether it refers the religious and customary courts only or about the establishment of other judicial organs as well, like administrative tribunals by law. In practice, it is understood in the later way and that is why additional court structure – social courts and different administrative tribunals are established by law in the country.
[131] Ibid.
[132] Assefa Fiseha. Separation of powers and its implications for the judiciary in Ethiopia. (2011) 5 *Journal of Eastern African Studies.* 702–715; Kassa (n 12).

constitution.[133] The going-to-be-established judicial organs are, as I argue in section A above, supposed to enjoy the same kind of personal and institutional independence as with the constitutionally established one. Hence, it is not with the view to transfer judicial functions to administrative tribunals that the legislature is empowered with judiciary-establishing authority.

Moreover, institutional independence demands administrative autonomy for the judiciary in formulating and discharging internal administrative matters. Such administrative functions include recommendations about appointment and withdrawal of judges; placement, promotion, allowance, medical benefits, transfer and suspension of judges;[134] and allocation of cases to the judges in a particular court.[135] In Ethiopia, except for allocation of cases, in the other administrative tasks of the judiciary involvement of the executive and legislature is prevalent. This happens by looking into the authority entitled to carry out these functions and the member compositions thereof. It is prescribed in subordinate law that these tasks fall under the power and duties of the JAC.[136] As I show above the council is predominantly composed of representatives of the three organs of the government. That way the executive and the legislature are involved in the administrative functions of the judiciary, which in effect impedes the independence of the judiciary as to administrative matters.

About financial independence of the judiciary, the FDRE and State constitutions contain progressive measures. The proper functioning and impartiality of the judiciary further depends upon availability of sufficient financial resources and administering the same independently. In the absence of adequate funds and where the administration of funds is left to other organs, the judiciary may be unable to perform its functions effectively and efficiently, and may be susceptible to undue influence from outsiders.[137] This would happen when the judiciary has no say in proposing and preparing, and administration of its budgets. The federal and state judiciary are

[133] FDRE Constitution (n 5) Article 37(1) and 78(4 and5). These provisions tacitly prohibit the establishment of any judicial organ, and quasi-judicial organ by the executive branch.
[134] As I note above in a system whereby such things are required to be performed by a commission as the case in Ethiopia, the majority of the judiciary in number and power of decision-making is required. In Ethiopia both are missing.
[135] The High Comm'r for Human Rights (n 96) p 120.
[136] Proc. No. 684/2010 (n 98) Article 6(1(g)).
[137] The High Comm'r for Human Rights (n 96) p 121.

constitutionally empowered to prepare and submit their budgets for approval to the HPR and SC. Moreover, upon the approval they are empowered to administer their budgets autonomically.[138]

Generally, from the above analysis one can deduce that the legislative measures in Ethiopia can produce two types of outcomes about the personal and institutional independence of the judiciary. The constitutional declaration of establishment of an independent judiciary; judges' freedom from any influence and guarantee to be guided solely by law; restrictive stipulations on grounds of withdrawal; the need of law-makers' approval in appointment and withdrawal of judges; prohibition on establishing special or *ad hoc* courts; and empowering of the judiciary in preparing its budget are positive steps to ensure the independence and impartiality of judiciary. Nevertheless, other organs' involvement in the appointment, withdrawal, and promotion of judges through the membership of the JAC, adoption of some subjective and absurd requirements like loyalty to constitution for appointment, liberal interpretation of the causes of withdrawal of judges to add additional grounds, and the prevalence of state violation of constitutional rules, threaten the independence of the judiciary.[139] Consequently, landholders lack an independent judiciary to enforce their land rights against the state. In effect the security of their land tenure is threatened.

ii. **Constitutional Review**

In Chapter 3 I discuss the constitutional protections afforded to peasants' and pastoralists' land rights. The realization and implementation of their rights demands an independent constitutional review mechanism in time of arbitrary encroachment. Therefore, the presence of an independent constitutional review mechanism provides a platform for peasants and pastoralists to enforce their constitutional rights against any act of interference. It again happens just like the judicial review system when the constitutional interpreter has both the personal and institutional independence.

Generally, to determine the authoritative constitutional interpreter, there are two possibilities. One, departing from the position that it should be a legal mechanism, prefers an institution with skills in and knowledge of law that makes decisions based on legal arguments and legal reasoning, and is as much as possible free from any political intervention, particularly from the legislature and the

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[138] FDRE Constitution (n 5) Article 79(6). The same constitutional provision is also enshrined in all state constitutions.
[139] From the practical view point, particularly in relation to political cases, it is found that the judiciary is not independent in Ethiopia. (See Adem Kassie Abebe. *The potential role of constitutional review in the realization of human rights in Ethiopia*. (Doctoral Dissertation, Centre of Human Rights University of Pretoria), 2012. Pp 155ff).

executive – protection from majoritarian pressure.[140] The assumption here is that the institution is supposed to control and review whether conduct of the state, typically legislative and executive acts and decisions are in line with constitutional norms. Thus, at any expense that institution is required to be independent and knowledgeable in legal reasoning and argument. On this basis, some nations establish either a separate constitutional court or empowered their supreme courts with the power of interpreting the constitution.[141]

By contrast, other nations like Ethiopia, based on constitutional ownership and distrust of the judiciary do not assign the power of interpretation of the constitution to a special institution. Viewing it from the political point of view as a political covenant between nations, nationalities and people, in Ethiopia the 1995 FDRE Constitution is regarded as the constitution of such nations, nationalities and people of the country. Assigning its interpretation to the judiciary exposes it to judicial activism and policy choice.[142] Accordingly, the constitution makers argued for assigning the power of its interpretation to the elected representatives of the nations, nationalities and people and established the Council of Constitutional Inquiry (CCI), composed of legal experts to address the legal reasoning and argument knowledge gap of the house.[143] That is why the power of constitutional interpretation is assigned to the House of Federations (HOF) in the FDRE Constitution as its members are supposed to be representatives of the nations, nationalities and people.[144]

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[140] Keith E. Whittington. Extrajudicial constitutional interpretation: three objections and responses. (2002) 80 *NCL Rev.* 773–852; Erwin Chemerinsky. *Interpreting the Constitution*. New York. Praeger, 1987. Pp 82-105; Walter F. Murphy. Who shall interpret? The quest for the ultimate constitutional interpreter. (1986) 48 *The Review of Politics*. 401–423.

[141] Jeffrey Goldsworthy (ed.). 2006. *Interpreting constitutions a comparative study*. Oxford University Press.

[142] Constitutional Minutes Vol. 5(n 49) Deliberation on Article 62; Assefa Fiseha. Constitutional adjudication in Ethiopia: Exploring the experience of the House of Federation (HoF). (2007) 1 *Mizan Law Review.* 1–32.

[143] Ibid.

[144] FDRE Constitution (n 5) Article 62.

This does not reflect the entire feature of constitutional interpretation in the country. Because in the state constitutions the same approach is not adopted in prescribing the constitutional interpreter. In worse case, some state constitutions like Tigray and SNNP state constitutions assigns the power to make authoritative interpretation of their respective constitutions to the law-making organ – SC. (See SNNP State Constitution (n 97) Article 66; Tigray State Constitution (n 97) Article 66). Whilst, in the rest state constitutions it is assigned to commission of constitutional interpretation. However, the composition and members of the commission varies among the states. (See Afar State Constitution (n 97) Article 70; Amhara State Constitution (n 97) Article 70; Benishangul Gumuz State Constitution (n 97) Article 71; Gambella State Constitution (n 97) Article 72; Harari State Constitution (n 97) Article 73; Oromia State Constitution (n 97) Article 67; Somali State Constitution (n 97) Article 71). However, every state constitution recognizes the establishment of CCI consisting of legal experts.

The problem with the Ethiopian approach is that the institution may be politically influenced by the ruling government and it may lack the legal knowledge to interpret the Constitution. Accordingly, critics have called for transferring the power of interpretation to an independent judiciary, either establishing a special constitutional court or empowering the existing courts. This went so far as even initially arguing that the current courts are not prohibited from interpreting the Constitution.[145] The assumption with these views is that the courts or a constitutional court are/will be independent from interference and influence from any state organ.

However, the thought of transferring the power of constitutional interpretation to the judiciary has not given due regard to the foundation for assigning it to the HOF. Besides, an alternative approach to reform the HOF to make it free from political influence has not been put forward. Assigning the power of constitutional interpretation to courts may not result in the intended level of independence in constitutional interpretation. As seen in the above sub-section in the absence of personal and institutional independence in the judiciary itself, shifting the power of constitutional interpretation to the courts will not procedure any meaningful and different outcomes. First, the necessary legal reforms must be made to ensure judicial independence. Apart from this, the problem of interference with and political influence over the HOF in interpreting the Constitution is not mainly associated with the institution itself. Rather it is the process of electing the members, how the house is constituted and the undermining of the essential role the CCI plays in constitutional interpretation, apart from filling the legal knowledge gap in the house.

About the process of electing the members of the house, the FDRE Constitution provides for two alternative ways. One way is election of the representatives by the law-making organs of the states – the SC. The other way is direct election of representatives by the people.[146] In the latter case the SC nominates its candidates and the people directly elect the one to represent them in the HOF. Which approach to follow is in the discretion of the SC and in both ways, it has strong influence to get its choice is elected. Therefore, given that the majority seat of the SC is supposed to be occupied by a political party or a coalition of parties that have the power to form the executive, the elected member of the HOF, elected in either way, may not have the personal independence to

[145] See Chi Mgbako, Sarah Braasch, Aron Degol, and Melisa Morgan. Silencing the Ethiopian courts: non-judicial constitutional review and its impact on human rights. (2008) 32 *Fordham Int'l LJ*. 259–297; Abebe (n 139).
[146] FDRE Constitution (n 5) Article 61(3).

question constitutionality of the laws enacted by the same organ that nominated or elected it, or the acts and practices of the executive formed by and mostly from the SC.

Moreover, underestimation of the role of the CCI and the way it is formed and constituted has also prompted scholars to claim that the power of constitutional interpretation is assigned to a political organ and this should be reformed by establishing a special constitutional court or empowering one among the existing courts. As majority of the members, as seen below, are legal professionals the basic role of the council is to give a legal opinion and recommendation on interpretation of the constitution to the house. Nevertheless, its role is not only limited to submitting recommendations, but it is also constitutionally empowered to determine whether a particular legal issue submitted needs constitutional interpretation or not, as one task.[147]

In any lawsuit, including constitutional review there are three main stages. These are reviewing of whether the legal dispute at hand involves a constitutional matter (justiciability), interpreting the applicable rule on the merits, and determining the remedy.[148] Determination of whether the dispute consists a constitutional issue is a prerequisite and half way into constitutional interpretation, because the next step is how to decide it and determining the remedy. The CCI has a constitutionally assigned role in all the stages, although they differ effect-wise. With respect to deciding whether the legal dispute involves a constitutional issue, the CCI's role is not submitting recommendations, but making the decision by itself, without referring to the HOF.[149] When it finds no need of constitutional interpretation, it remands the case to the concerned court. In such case the aggrieved party can claim review of the council's decision by way of appeal to the HOF.[150]

With respect to matters that necessarily need interpreting of the constitution, the CCI shall submit recommendations about how the constitution is to be interpreted and on the remedy to the HOF.[151] However, its recommendation is not binding. The house can either accept reject it and decide in otherwise. In this respect, the influence of the CCI can be deduced from the extent to which the house has confirmed or rejected its recommendations. With respect to the land rights of peasants

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[147] Id Article 84.
[148] Richard H. Fallon. The linkage between justiciability and remedies: and their connections to substantive rights. (2006) *Virginia Law Review*. 633–705. P 634.
[149] FDRE Constitution (n 5) Article 84(1) and (3(a)).
[150] Ibid.
[151] Id Article 84(1–3).

and pastoralists reveals the house has never rejected the recommendations submitted by the CCI. Instead, the constitutional interpretations are done directly incorporating the interpretation, reasoning and stand of the CCI.[152]

Given that its constitutionally assigned role is so important in practice, one has to question the personal and institutional independence of the CCI itself, because unless the independence of the CCI is established and maintained, constitutional interpretation will be exposed to political interference and influence. Its independence can be assessed on the basis that we use for assessing judicial independence, I indicate above. The CCI is a constitutionally established council composed of eleven members. It comprises the president and vice-president of the Federal Supreme Court, six legal experts who have proven professional competence and high moral standing appointed by the head of state upon the recommendation of the HPR, and three representatives designated by the HOF from its members.[153] The majority of the appointees are legal experts and the Constitution makes their appointment free from interference by the executive.

The tenure of the appointees is also secured for the period they are legally supposed to serve. The terms of office of the appointees is not identical. The federal supreme court president's and vice-president's terms on the ICC is the same as their presidency and vice-presidency terms of office, while the persons from the HOF are supposed to serve for the terms of office of the house – five years.[154] The legal experts appointed by the head of state serve for six years.[155] However, the persons from the HOF and the legal experts can be also reappointed for successive terms.[156]

Nevertheless, there are circumstances in which the appointees are removed before lapse of the term of office. This could happen for the persons from the HOF and the legal experts appointed by the head of state.[157] The president and vice-president of the Supreme Court cannot be removed

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[152] See for instance, Ali Dawe vs Mohamed Adem (n 46); *Kelebe Tesfu vs Ayelegn Derebew* Federal Democratic Republic of Ethiopia House of Federation 4th parliamentary round, 5th year, 2nd regular meeting, (10 June 2015); *Emohay Banchiamlake Dersolegn vs Abebew Molla* Federal Democratic Republic of Ethiopia House of Federation 5th parliamentary round, 1st year, 2nd regular meeting, (13 March 2016); *Alemitu Gebre vs Chanie Dessalegn* Federal Democratic Republic of Ethiopia House of Federation 5th parliamentary round, 1st year, 2nd regular meeting, (14 March 2016).
[153] FDRE Constitution (n 5) Article 82.
[154] Federal Democratic Republic of Ethiopia. Council of constitutional inquiry proclamation No. 798/2013. *Fed. Neg. Gaz.* Year 19 No. 65. 2013. Article 17(1) and (2).
[155] Id Article 17(3).
[156] Id Article 17(4).
[157] Id Article 19.

unless they are removed from their presidency and vice-presidency respectively.[158] To guarantee tenure, the subsidiary legislation also highly restricts the grounds of withdrawal and requires their removal by the authority that designated or appointed them.[159] The grounds are the same as the grounds to withdraw judges, I explain above. Commission of disciplinary offences or lack of significant work competence and efficiency are the only two grounds to withdraw members.[160]

Moreover, the subsidiary legislation has a further measure to ensure the institutional independence of the CCI. It requires the CCI to have its own office and staff to run its internal administrative and financial matters.[161] Furthermore, financial independence is guaranteed by entitling it to prepare and submit its budget to the highest authority of the country – HPR.[162] This way protection from unnecessary interference from any other organs, particularly the executive, is afforded the CCI, enabling it to fulfil its roles regarding constitutional protection independently.[163]

Hence, discounting implementation defects, I do not see any fundamental problem in assigning the power of constitutional interpretation jointly to the HOF and CCI on the foundation that the owner should interpret it. One serious problem that probably challenges the independence in interpretation is the manner of electing of the members of the HOF. This apart, the argument for empowering courts or establishing a special constitutional court with the task of interpreting the constitution doesn't escape the criticism against the HOF as far as personal and institutional independence are not secured first. Moreover, the critics' failure to consider the role and the nature of CCI, which has a joint power of interpreting the constitution with the HOF and assumes relatively a better independence, forced them not to see an option of independent constitutional interpretation within the existing institutional framework. My review of the decision of the house about the issue of peasants' and pastoralists' land rights shows that the CCI have tremendous impact, as its recommendation are accepted as is by the house. Therefore, since the constitution is both a legal and a political document, assigning the power of interpretation jointly to the HOF and

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[158] Ibid.
[159] Id Article 19(2).
[160] Id Article 19(3).
[161] Id Article 27-30.
[162] Id Article 31.
[163] Id see the preamble.

the CCI serves the interpretation to reflect the nature of the document itself and doesn't cause any special problem as a result.

E. Conclusion

Enforceability of land rights, unlike the other legal constructs of land tenure security, has double features and roles. It can be regarded as a distinct legal construct of land tenure security and a means to realize the other legal constructs. As a distinct legal construct provision of sufficient legal protection about enforceability of land rights contributes to the enhancement of legal land tenure security. Accordingly, when arbitrary interference with and encroachment on land rights occurs the presence of a legal protection providing an affordable enforcement mechanism through an independent judiciary without restriction on grounds contributes to enhancing land tenure security. Its existence will have the effect of deterring any arbitrary encroachment on landholders' land rights from individuals or state. Enforceability of land rights also paves the way for the practical implementation and realization of the other legal constructs of land tenure security. The legislative incorporation and provision of legal protection of the other legal constructs I construct in Chapter 1 and 3 to 6 will have full meaning if the affected parties are provided with the opportunity to enforce the unlawful interferences that undermines these constructs of land tenure security. Thus, the legal construct of enforceability of land rights establishes the mechanism for practical assurance of the other legal constructs of land tenure security.

The above two roles come into reality when the affected parties are made capable to take legal action, no unnecessary limitations and restriction on the grounds upon which to claim judicial remedies exist and the independence of the judiciary prevails. Lack of legal knowledge, prohibitive cost of enforcement, restrictions on the grounds for claiming judicial remedies and the absence of judicial independence undermines the affected parties' opportunity to enforce land rights. This in effect not only undermines the establishment of the legal construct of enforceability of land rights but also restrains the implementation and realization of the other legal constructs. Consequently, making laws that ensure the capacity of the affected parties to enforce their land rights, removes restriction on actionable grounds, and guarantees the independence of the judiciary is the first step toward establishing the legal construct of enforceability of land rights.

Although some such laws are made in Ethiopia, many issues remain. Positive steps taken are the legal recognition that of land disputes between individuals and communities should be settled through out-of-court settlement mechanisms; introduction of waiver of court fees, mobile courts; mandatory *pro bono* work and the entitlement of certain institutions to provide free legal aid services. Nevertheless, these measures are not sufficient to capacitate peasants and pastoralists to enforce their land rights. The legislative incapacitation of CSOs, the absence of a separate bench for land disputes in courts, and the distance of courts from peasants and pastoralists, among others, hinder enforcement of land rights.

Moreover, laws and their interpretation introduce an important restriction on actionable grounds to demand judicial remedies in the post-1991 land tenure system. This restriction derives from the FDRE and state constitutions, which, while proclaiming the right to access to justice, introduced the phrase "justiciable matter." Such phrase is uncommon in international human rights instruments that are considered the source for the constitutional provisions. It paves the way for legislative restrictions on actionable grounds. Accordingly, for instance, explicit statutory authorization for peasants and pastoralists to demand a judicial remedy on the amount of compensation during expropriation has been interpreted as excluding other actionable grounds within the expropriation process. So, for instance, peasants and pastoralists cannot challenge non-satisfaction of the public purpose requirements; commission of procedural irregularities; or demand restitution of land rights. The legislative silence with respect to other land disputes should not imply the existence of a limit on actionable grounds.

Furthermore, to establish the independence of the judiciary to ensure enforceability of land rights, different legislative measures are taken in post-1991 Ethiopia. However, the analysis of the nature of the institution demands considering it from two distinct approach as constitutional interpretation is assigned to a different organ – jointly to HOF and CCI at federal level. For judicial review, the independence of the judiciary is constitutionally guaranteed. In addition to ensuring the personal independence of judges the Constitution ensures their tenure security by restrictively (although still ambiguously) defining grounds for their withdrawal before retirement age. Furthermore, to ensure the institutional independence of the judiciary the Constitution prohibits establishment of special or *ad hoc* courts that take away the judicial power and entitles the judiciary to prepare and

submit its budget to the highest authority of the federal and state government – HPR and State council respectively – to get approved and to administer it, itself.

Apart from such constitutional measures, there are legislative measures that go against judicial independence. Particularly, the involvement of the executive in the appointment, withdrawal, promotion, and determining of the benefits of judges through being members of the FJAC and SJAC undermines the independence of the judiciary. Moreover, incorporation of subjective standards in selecting judges for an appointment, like loyalty to the constitution, and the incorporation of a broader approach in the interpretation of the grounds of withdrawal of judges, to include more like disloyalty to the constitution, affect judicial independence.

Constitutional review, in contrast, enjoys better independence. Despite what other legal scholars claim, the power of constitutional interpretation is not the mandate of HOF only. Instead, I claim that it is the joint power of the HOF and CCI. Besides, the fact that the HOF is entitled to interpret the Constitution doesn't allow political interference in the decision. The problem basically relates to the process of electing the members of the house. And in the prevailing current system empowering the judiciary or a special constitutional court will not produce any meaningful and distinct outcome on independence in constitutional interpretation.

Empowering instead a politico-judicial organ (HOF as a political organ and CCI as a judiciary) is in line with the ownership claim of the FDRE Constitution and with the nature of constitution. Since the owners of the Constitution in Ethiopia are the nations, nationalities and peoples of the country, empowering their representatives – the HOF - doesn't in itself cause a problem. Nevertheless, the way members are elected may be open to political influence and interference. Moreover, as constitution is both a legal and political document, entrusting its interpretation to an institution that has both natures helps to make feasible political decisions and appropriate legal interpretations.

One thing the critics miss is properly appreciating the role of the CCI in constitutional interpretation. The CCI, which is constitutionally established and composed of eleven members, the majority of whom are legal professionals elected without political influence and interference, enjoys better independence and plays a key role in constitutional interpretation. Besides the advisory role on how constitutional matters are to be interpreted, the council is constitutionally

empowered to determine whether a given legal issue demands constitutional interpretation or not. Any grievance on its decision can be submitted to the HOF in appeal form. Furthermore, the council's recommendation on how to interpret the Constitution, particularly on legal matters is also automatically approved by the house.

However, some state constitutions introduce a different approach in empowering and identifying a constitutional interpreter. Although the constitutional protections afforded to peasants' and pastoralists' land rights in state constitutions are similar to the FDRE Constitution's, the power of interpretation of these constitutions is assigned to different organs and probably based on different justifications, which needs further study. The difference is not only institutional but also extends to the substantive protections afforded to the peasants' and pastoralists' land rights as seen throughout Chapter 3 to 6. Accordingly, in the next Chapter I interrogate why such differences came to exist and their implication for land tenure security of peasants and pastoralists.

Chapter 8

Normative and Institutional Pluralism in the Rural Land Tenure System of Ethiopia and Its Implications for Land Tenure Security

Legal pluralism is the presence of multiple legal orders to govern socio-economic, political and environmental relations.[1] From a land tenure security perspective, legal pluralism's recognition in a particular state in the observance of human rights standards is considered as one way to enhance security of land tenure. In fact, its contribution to land tenure security depends on the non-parallel existence of two or more legal orders that can be applied at the same time in the same situation as I explain in Section C(iii). Otherwise, it becomes a source for the perpetuation land tenure insecurity, causing uncertainty about to which normative and institutional framework the landholders are subjected.[2] This is because the plurality here causes variations in standards, and also causes a difficulty in achieving coherent national land policy and establishing a body of expertise.[3]

In fact, whenever we think of legal pluralism in context of land tenure and administration, what comes into mind is the statutory-customary legal system dichotomy. In federations, like Ethiopia, within the statutory legal system one must also add the central/federal-state division. Moreover, the institutional pluralism to carry out a particular administrative function, for instance in the case of land administration, may cause the multiplication of institutions on the same or different administrative level charged with performing the same functions at the same time. These forms of legal pluralism would subject the landholders with contradictory legal regimes and administrative decisions that create uncertainty about their land rights.

Against this backdrop, in this Chapter I discuss the situation of legal and institutional pluralism and its implications for the land tenure security of peasants and pastoralists in the post-1991 federation of Ethiopia. In Chapters 3 to 7 differences between the federal and state and among the

[1] John Griffiths. What is legal pluralism? (1986) 18(24) *J. Legal Pluralism & Unofficial L.* 1–55.
[2] Ross Andrew Clarke. Securing communal land rights to achieve sustainable development in sub-Saharan Africa: Critical analysis and policy implications. (2009) 5 *Law Env't & Dev. J.* 130–151. P 150; Ruth Suseela Meinzen-Dick and Rajendra Pradhan. *Legal pluralism and dynamic property rights*. Washington DC. CGIAR Systemwide Program on Collective Action and Property Rights, International Food Policy Research Institute, 2002.
[3] Food and Agriculture Organization. Compulsory acquisition of land and compensation. Rome. *FAO Land Tenure Studies 10,* 2008. P 13.

state rural land laws are not noted. The differences relate *inter alia* to understanding the nature of land ownership, defining rights in land, and stipulating grounds for deprivation of land rights. Moreover, application of customary legal systems seems to be limited to the land dispute resolution mechanisms and its legal status is not clearly defined. Consequently, in Chapter 8 I specifically explain why these differences are created and how their juridical relationship is defined and determined, what legal status and role the customary land tenure system have and what implications they hold for the land tenure security.

In this Chapter I argue that, although some of the variations among the laws have a legal basis and are aimed at enhancing land tenure security, the majority of them seem to go against the constitutional rule on division of power and have the implication of perpetuating land tenure insecurity. The cause of the variations is attributed to a failure to take the division of power in the Federal Democratic Republic of Ethiopian constitution (FDRE constitution) seriously. Moreover, the failure to clearly define the legal status and extent of application of the customary legal system may force its parallel *de facto* application in every spectrum of land rights, particularly in the pastoralist communities.

To do so, the Chapter is organized in six sections. It starts with the section that highlights the approach of division of power and function between the federal and state governments in the federation of Ethiopia. This is done with the aim of identifying how the general approach of division of power and function serves to understand the power division with respect to the land issue. This is followed by a section where I specifically examine the power division with respect to land matters in the FDRE constitution. In conjunction with the discussion in the first section, this section serves to establish the foundation against which the actions of the federal and state governments are appraised. In the next section I provide a summary of the fundamental differences that are identified throughout Chapter 3 to 7 regarding land matters. Taking the constitutional rule on division of power established in Section A and B, the fourth section comprises a synthesis of whether the variations summarized in Section B are warranted by and in line with the FDRE constitution. Particularly, I examine there the legislative intervention of both the federal and state governments in each other's power, their constitutional implications and juridical relations. Then, the section that analyses the status and extent of application of customary land tenure system follows. Here the stand taken by the government in defining the status and application of customary

land tenure systems is reviewed to determine whether it has opened a situation for its parallel application with the statutory one. In the final section I wind up the discussion with concluding remarks.

A. Division of Power and Function in the Federation of Ethiopia

One of the basic features and a defining element of the notion of federalism is the apportionment of powers and functions between central/federal government and the federating states.[4] The division of powers and functions between the two levels of government is not simply about demand for power decentralization. It is also concerned with the autonomy of the self-governing federated states and the principle of non-intervention in each other's powers and functions. As the constitution of federations is, among other things, a covenant between the two governments, it prescribes the approach adopted in the making of the power division.

Theoretically, four different approaches to the specificities of power division between the central and federating state governments can be identified. The adoption of one in a given federation state may not be a random selection, although it needs an investigation to understand the factors that influence it. These approaches are: *an exhaustive-listing-residual power approach; the exhaustive-exclusive listing approach; the illustrative-exclusive-listing approach;* and *a modified-exhaustive-listing-residual power approach*.[5] In the federations where the exhaustive-listing-residual approach applies, the powers of either/both of the governments and concurrent powers are listed exhaustively in the constitution and the residual power is reserved to one of them.[6] In the exhaustive-exclusive listing approach the powers of both the central and state governments are exhaustively listed out in the constitution, but here an indication about to which government the residual power is left is not provided. In the case of illustrative-exclusive listing approach the power of both governments are listed in an enumerative manner, with an indication that powers of

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[4] See Ronald L Watts. Federalism, federal political systems, and federations. (1998) 1 *Annual Review of Political Science*. 117–137. P 121; Kenneth C. Wheare. *Federal government*. New York. Oxford University Press, 1964. Pp 32-33. In their definition of federalism, the issue of distribution of power between the central government and federating states is the basic characteristics that defines federalism from other forms of government.

[5] Ronald L. Watts. *Comparing federal systems in the 1990s*. Kingston. Institute of Intergovernmental Relations, Queen's University, 1996. Pp 31-36; Akhtar Majeed, Ronald L. Watts and Douglas M. Brown (eds.). *Distribution of powers and responsibilities in federal countries.* Montreal and Kingston. McGill-Queen's University Press, 2006. The specifications and nomenclatures of the approaches are developed and deduced from the critical review of literatures.

[6] Semahagn Gashu Abebe. *The last post-cold war socialist federation: ethnicity, ideology and democracy in Ethiopia*. Surrey. Ashgate Publishing, 2014. P 10.

the same nature also belong to the respective government. The modified-exhaustive-listing-residual power approach, on the other hand, in principle exhaustively lists the power of either/both governments and shared powers, and reserves the residual power to one of them. What makes it different from exhaustive-listing-residual power approach is that, in the latter case the constitution provides the possibility of future determination of certain powers, transfer of power from one level of government to the other, or delegation for some time.

In the federation of Ethiopia, the approach adopted to the division of power and functions in the FDRE Constitution resembles the fourth approach. Apart from exhaustive listing of the federal exclusive and shared powers and functions, the FDRE Constitution reserves residual power and function to the state governments.[7] It further provides a list of state powers,[8] the legal basis for future determination,[9] transfer of power[10] and delegation.[11] Let us see the nature of these modifications and what implications they have for powers and functions of both levels so that any ambiguity in the constitutional division of power over land matters be settled.

In the FDRE constitution, in addition to reserving residual power to state governments, a list of state powers and functions is also mentioned.[12] Such a list in the presence of the residual power clause creates ambiguity and opens space for different lines of interpretation. The problem is worsened by variation between the Amharic and English versions in the introductory section of the provision. The English version stipulates that "consistent with [the residual power clause] States have the following powers and functions",[13] while, the Amharic version states that "without prejudice to [the residual power clause] States have the following powers and functions" (translation mine).[14] Consequently, three different lines of interpretation arise for this provision: provision of instances of power; to give emphasis; or additional power.

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[7] Constitution of Federal Democratic Republic of Ethiopia (FDRE). Proclamation No.1/1995. *Fed. Neg. Gaz.* Year 1 No.1. 1995. Article 51, 98 and 52(1).
[8] Id Article 52(2).
[9] Id Article 99.
[10] Id Article 55(6).
[11] Id Article 50(9) and 78(2).
[12] Id Article 52.
[13] Ibid.
[14] Ibid and Article 106.

When one goes through the nature of state powers and functions listed in this provision to identify the distinguishing principle, it appears they are not of the same nature. Some may look like shared/concurrent powers. For instance, the power to protect and defend the FDRE Constitution is listed as the exclusive power of the federal government.[15] But, at the same time it is mentioned under the list of the state powers.[16] This suggest that one should not regard the list as simply providing instances of state power, but that it instead entrusts states with additional power. On the other hand, taking the powers of land administration; to enact and execute a state constitution; and to levy and collect taxes and duties on revenue sources reserved to States mentioned in the list as examples, it is also possible to consider the provision a list of the residual powers of states.[17] Moreover, arguing from the perspective of emphasis only to explain the listing of state powers is also not persuasive, because for one thing there are additional powers of state in this provision other than residual powers and for another, there appears no reason to emphasise certain powers of states in the presence of the residual power clause. This is not to deny that some powers need emphasis. Particularly where drawing a bright line for division of powers is difficult, like with land administration and utilization and conservation of land, providing a list of such powers in the presence of a general residual power clause can be understood as emphasis. In sum, following only one line of interpretation here is not sound. Instead, taking the specific nature of each of the powers listed, it is necessary to interpret and understand them based on the particular line of interpretation that fits them.

The FDRE Constitution has also modifies the approach to power apportionment of reserving undesignated power for future determination. Undesignated power is limited to the power of taxation. The Constitution, after determining exclusive and concurrent powers of taxation of the federal and state governments, reserves the undesignated powers of taxation for future determination by joint decision of the House of Federations (HOF) and the House of Peoples' Representatives (HPR).[18] This is an exception to the residual power of the states. The two houses

[15] Id Article 51(1).
[16] Id Article 52(2(a)).
[17] Id Article 52(2(b-e)).
[18] Id Article 99.

in joint session determine and assign the power of the undesignated taxation to both or either level of government by special vote of two-third majority.[19]

Here the FDRE Constitution stipulates two conditions that complicates assignation of power to either level of government. First, to limit the probability of bias toward one level of government, the Constitution requires assigning decision to be taken by a joint meeting of the two houses. Although both houses are federal houses, unlike the HPR, the selection of the members of the HOF is totally left for the state councils, as I discuss in Chapter 7 Section D(ii). Thus, the interest of state governments is not compromised, as they are represented through their elected members in the HOF. Second, the Constitution requires a special vote, indicating that the constitution makers were concerned about the impartiality of the decision. A two-third majority vote in the Constitution applies only for serious issues like declaration of an emergency.[20] The adoption of this special vote to decide to which level of government to assign the undesignated power of taxation, indicates the desire to protect the state governments' interest. As the number of members of the HPR outweigh that of the HOF, a simple majority vote would render the decision *de facto* the HPR's alone.[21] It will also make the decision in favour of the level of government to which it belongs – the federal government.

The third modification in the FDRE Constitution is transfer of legislative power on civil laws to the federal government.[22] This is with the assumption that this power is in principle regarded as a residual power of the States. Nevertheless, whenever it is believed necessary to establish and sustain one economic community, the HOF can assign the power of enactment of civil laws to the federal government.[23] One of the fundamental objectives of the FDRE Constitution as mentioned in the preamble is creation of one economic community. Accordingly, if the HOF is of the opinion that the states adopt or will adopt their respective civil laws with divergent standards and such differences impede the Ethiopian peoples' commitment to live in one economic community, it can transfer the power of setting standards on civil laws to the federal government. Here the power transfer is limited to the power of *enacting* civil laws that are necessary for the formation and

[19] Ibid.
[20] Id Article 93(2(a)).
[21] See id Article 54(3) and Article 61(2) about the number of members of both houses.
[22] Id Article 55(9).
[23] Ibid.

realization of one economic community. The decision is also required to be made by the HOF. The transfer of legislative power with respect to any other matters or in the absence of the blessing of the HOF will go against the constitutional rule.[24]

The final modification is in the form of delegation. The FDRE Constitution provides a basis for delegation of power from one level of government to the other. Downward delegation, from the central to state government, is expressly enshrined in the Constitution and takes two forms. One is delegation the Constitution itself makes. The FDRE Constitution delegates the judicial power of the federal first instance and high courts to the state high and supreme courts respectively, without requiring consent of the federal government.[25] This delegation is made in the Constitution itself and the federal government can regain it only on the conditions mentioned in the constitution: when the HPR, by two-thirds majority vote, establishes nationwide or in only in some parts of the country, Federal First Instance and High Courts.[26]

The second is consent-based delegation. The FDRE Constitution under article 50(9) authorizes federal government to delegate powers and functions listed in the Constitution whenever it thinks necessary. Unlike the judicial power delegation, this delegation, which is about the legislative and executive powers, depends wholly on the federal government - it is up to it alone to decide when to delegate and reclaim the delegated power. One thing that is unclear is whether there is any constitutional limit on the federal government's right to delegate its authority. There is no explicit such limitation. What the federal government does is, for instance, in case of delegating legislative power, adopt framework legislation and delegating details to the state governments to make it compatible with the unique contexts of the states' situation. Some scholars regard this as another form of division of power and functions between the federal and state governments.[27] For me it is not distinct, but an aspect and one manner of the federal government's delegation of power to state governments.

[24] Id Article 9(1).
[25] Id Article 78(2).
[26] Ibid.
[27] See for instance Assefa Fiseha and Zemelak Ayele. 'Concurrent powers in the Ethiopian federal system' in Nico Steytler (ed.). *Concurrent powers in federal systems: meaning, making, managing*. Leiden, Boston. Brill Nijhoff, 2017. 241–260.

Review of the constitutional minutes reveals the constitution makers' intention to limit the federal government's right to delegate its constitutional powers and functions. The limit relates to the power of taxation. The constitutional assembly noted that the federal government's authority to delegate its constitutional power doesn't apply to its power of taxation.[28] It provided two reasons for this – neither is persuasive. The first is that, mostly, the functions mentioned in the federal government's power of taxation must be performed by state governments; and the second, that tax sources are in the States.[29] However, it can be argued that these reasons do not indicate a limit on delegation, but state governments have inherent, not delegated constitutional power to exercise the federal government's power of taxation.

About upward delegation, from the state government to the federal government, the federal constitution mentions no rule. In the initial draft of the Constitution it was incorporated with the downward delegation. Later, during the constitutional assembly deliberation, upward delegation was excluded, for three reasons. First, it was assumed that it puts pressure on the state governments to build their capacity and ability to carry out their powers and functions. Second, it was also thought that it causes psychological pressure on state governments. Finally, it was justified on the basis of *delegata potestas non potest delegari*.[30] Since the source of power of the state governments is the people, transferring the same to any other in any extent is not proper. Instead, the assembly imposed on the federal government the duty to capacitate and strengthen state governments to discharge their own powers and functions.[31]

Except for the above strictly defined modifications the FDRE Constitution doesn't allow interference of one level of government in the power of the other. It contains a *mutual respect clause*.[32] The federal government is duty bound respect and not interfere in state powers, and the vice-versa. Moreover, the Constitution has no hierarchy between the two levels of government and no supremacy clause, except the self-declared constitutional supremacy.[33] Therefore, unless it is

[28] Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 6, Dec. 5–29/1994, Addis Ababa), 1994. Deliberation on Article 96. (Amharic document, translation mine).
[29] Ibid.
[30] Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 4, Nov. 23–29/1994, Addis Ababa), 1994. Deliberation on Article 50. (Amharic document, translation mine).
[31] Ibid.
[32] FDRE Constitution (n 7) Article 50(8).
[33] Id Article 9(1).

on delegated matters, as with land law, I explain below, the Constitution avoids contradiction between federal and state law on the same subject matter.

Generally, the approach to division of powers and functions between the federal and state governments in Ethiopia is intended to protect or further empower regional governments. Specifically, the listing of state government powers in the presence of a residual power clause and adoption of downward delegation only, reflect a concern to empower the state governments. Furthermore, the stringent requirements for assigning undesignated powers of taxation, and giving the power to decide on transfer of legislative power on civil laws from the state to the federal government when it is necessary for creation of one economic community to an institution the members of which are elected by the state councils, shows the extent of concern with protecting state powers and interests from federal government. Additionally, the absence of a supremacy clause in case of contradiction between the federal and state laws indicates the constitutional protection afforded to the state governments against subordination to federal government. Therefore, any vagueness and absurdity in the constitutional division of powers and functions, as with land matters I show below, must be interpreted in this light.

B. Constitutional Division of Power on Land Matters

Aside from the general approaches and modifications to the division of powers and functions I elaborate in the above section, in federations constitutional division of power over land matters in particular and property regimes in general may mainly take either the exclusive state power approach or shared power of the federal and state governments. The exclusive state power approach, adopted in the USA federal system, holds that all land matters are under the jurisdiction of the state government for legislative and implementation purposes.[34]

In the shared power approach, land matters do not exclusively vest in one level, but is assigned to both governments as a concurrent power, as in the Russian Federation.[35] This concurrence may take different forms: sharing of both legislative and implementation powers; or else assigning

[34] Hao Bin. *Distribution of powers between central governments and sub-national governments*. (Committee of Experts on Public Administration Eleventh session New York, April 2011), 2012. P 3.
[35] Ibid.

certain aspects of power to one level and the rest to the other. That is, the federal government assumes legislative power, with implementation reserved to the states.

In the Ethiopian federation the approach adopted is not expressly indicated. The FDRE Constitution assigns legislative power over land matters to the federal government, but indicates with respect to which specific land matters. It provides *"[the federal government] shall enact laws for the utilization and conservation of land…*"[36] The section that defines and lists the federal law-making organ's (HPR's) power likewise limits its land-related law-making power to the *"utilization of land"*.[37]

Apart from these self-contradictory constitutional rules, the FDRE Constitution also, in the presence of a residual power clause, lists the state governments' power of "*[administering] land in accordance with the Federal laws.*"[38] As this provision is mentioned without prejudice to the residual power clause, it plays an emphasising role with respect to the implementation power of the state governments, as I argue in Section A. However, when one looks critically at the federal legislative power in conjunction with the states' power of land administration, the question arises whether the state governments have legislative power over land matters, be it express or implied, consequential to the power of land administration.

The answer lies in the general approach to division of powers and functions as I show in the above; the contextual meaning of "utilization and conservation of land" and "administer land"; any indication in the listed power of state governments; and the constitution makers' deliberations on the prevailing land policy. From the general approach and modifications to division of powers and functions one can conclude that state governments have legislative power over land matters on issues other than utilization and conservation of land, unless a land-related transfer of legislative power on civil laws with respect to land has been made to the federal government by the decision of the HOF.[39] I know of no such transfer.

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[36] FDRE Constitution (n 7) Article 51(5).
[37] Id Article 55(2(a)).
[38] Id Article 52(2(d)).
[39] Id Article 55(6). However, there is a claim that in the Ethiopian federalism it is not much intended to apportion legislative powers in general to the States. (See Andereas Eshete. Ethnic federalism: New frontiers in Ethiopian politics. (First national conference on federalism, conflict and peace building, Addis Ababa), 2003. P 25)

Apart from having no definitional clause, which is common in constitutions and laws, the FDRE Constitution provides no in-context meaning to the phrases "utilization and conservation of land" and "administer land" like it does for the concept "private property".[40] This forces one to look for an ordinary and neutral understanding of the concepts to draw a line between the power of the federal and state governments over land matters. Establishing an understanding for only one of the phrases – land administration - can tells on which land matters state governments are inherently empowered to legislate.

Scholars in the land jurisprudence of Ethiopia agree that the prerogative of land administration is reserved to state governments. However, none of them have questioned what land administration in the context of Ethiopia refers to. Instead they rely on definitions in subordinate legislation, which differ and do not question who has the power to define it. Since the idea of land administration reflects the socio-cultural context in which it operates, its contents may vary from country to country and even within a country from time to time based on changes in government land policy.[41] However, when the concept is a constitutional matter and that involves division of power, as in Ethiopia, specifying and changing its contents presupposes constitutional interpretation and amendment. Subordinate legislative definition of the contents, as in federal and state rural land laws in Ethiopia, leads the legislative organ to adopt the definition that favours the level of government it belongs to.[42] That is why the need for an ordinary and neutral understanding of the notion of land administration is required to determine the constitutionally inherent legislative power of states on land matters.

Here the definition given by the Food and Agriculture Organization (FAO) is paramount. The FAO defines land administration as:

> "the way in which the rules of land tenure are applied and made operational; and it includes an element of enforcement to ensure that people comply with the rules of land tenure. It comprises an extensive range of systems and processes to administer:

[40] FDRE Constitution (n 7) Article 40(2).

[41] Abebe Mulatu. 'Compatibility between rural land tenure and administration policies and implementing laws in Ethiopia' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 1–30. P 5.

[42] See for instance, Federal Democratic Republic of Ethiopia. Rural land administration and land use proclamation No. 456/2005. *Fed. Neg. Gaz.* Year 11 No. 44. 2005. Article 2(2); Amhara National Regional State. Revised rural land administration and use proclamation No. 252/2017. 2017. Article 2(2).

1. land rights: the allocation of rights in land; the delimitation of boundaries of parcels for which the rights are allocated; the transfer from one party to another through sale, lease, loan, gift or inheritance; and the adjudication of doubts and disputes regarding rights and parcel boundaries;
2. land use regulation: land use planning and enforcement, and the adjudication of land use conflicts;
3. land valuation and taxation: the determination of values of land and buildings; the gathering of tax revenues on land and buildings, and the adjudication of disputes over land valuation and taxation." [43]

The above understanding of land administration has two fundamental aspects. These are implementation of land tenure; and enforcement to make sure that people abide by the rules of land tenure. Hence, it presupposes the existence of land tenure rules that "define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints."[44] In our context, defining "the rights of individuals or groups over land, how such rights are acquired, what they consist of, how they operate in the holding, transfer and inheritance of land, and how they may be extinguished"[45] is assigned to the federal government. In other words, by way of exclusion, in other aspects of land matters than what land tenure rules define, state governments have the constitutionally inherent power to legislate.

This line of argument is supplemented by taking the nature of taxation power of state governments listed in the FDRE constitution. The Constitution assigns the power to collect and levy land use payment - an aspect of land administration in the above definition - to the States.[46] For similar

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[43] Food and Agriculture Organization. Access to rural land and land administration after violent conflicts. Rome. *FAO Land Tenure Studies 8*, 2005. Pp 23-24; see also Tony Burns and Kate Dalrymple (eds.). *Land administration: indicators of success, future challenges.* Wollongong, Land Equity International Pty Ltd, 2006. Pp 13-14, that has indicated that land administration system consists of the following major things:

a) the management of public land;
b) the recording and registration of private rights in land;
c) the recording, registration and publicizing of the grants or transfers of those rights in land through, for example, sale, gift, encumbrance, subdivision, consolidation, etc;
d) the management of the fiscal aspects related to rights in land, including land tax, historical sales data, valuation for a range of purposes including the assessment of fees and taxes, and compensation for State acquisition of private rights in land, etc; and
e) the control of the use of land, including land use zoning and support for the development application/approval process.

[44] Food and Agriculture Organization. Land tenure and rural development. Rome. *FAO Land Tenure Studies 3,* 2002. P 7.

[45] C.M.N. White. A survey of African land tenure in N. Rhodesia. (1959) 11 *Journal of African Administration*. 171–178. P 172.

[46] FDRE Constitution (n 7) Article 97(2).

reasons, with regard to other aspects of land administration that requires legislating, the state governments in Ethiopia are constitutionally empowered to enact laws.

Furthermore, a review of the constitution makers' outlook substantiates arguments for the state governments' power to enact law on the matter of land administration. Particularly, one of the reasons for the rejection of the adoption of private ownership of land in the country, as highlighted in Chapter 3 Section B(i), was that *it will not be uniformly applied throughout the country.*[47] Because of the prevalence of communal landholding systems in pastoral communities, those who argued in favour of the *status quo* were of the opinion that the adopted land policy must be capable of uniform and coherent application nationwide. This assumption presupposes formulation of a single national land policy that defines land tenure rules. In federations such uniformity can be achieved only if legislating land tenure rules is assigned to central government. In this light it is clear that, in Ethiopia the constitution makers intended to confine the power of the central government to legislate only with respect to defining land tenure and to assign the rest – land administration – to state governments.

In conjunction with the residual power clause and the empowering and protective nature of modifications to the approach to division of powers I claim in Section A, this legal reasoning establishes the state governments' land administration power. The power is not only limited to implementation of land tenure, but also includes the constitutionally inherent power to legislate consequential to land administration. It includes enacting laws that determine the formality requirements about boundary demarcations for parcelling and transfer of land rights; determining land dispute settlement mechanisms; and establishing an institutional framework for implementation of land tenure, land zoning, land tax and payment, and land valuation. In addition to the inherent legislative power on the issues of land administration, state governments may also have delegated legislative power with regard to land tenure if the federal government delegates it as I argue in Section A. Hence, whether these constitutional principles are observed in the enactment of rural land laws in Ethiopia is the next logical question to deal with. In order to do this, I first discuss and summarize the variations between and among the rural land laws in the country.

[47] The Constitutional Minutes Vol. 4 (n 30) Deliberation on Article 40.

C. Glimpse of Variations Among and Between Rural Land Legal Regime

As highlighted in the above sections, in the federal system of government in Ethiopia, powers and functions in general and powers and functions in relation to land in particular are constitutionally apportioned between the federal and state governments. On this basis, the federal constitution assigns the power of defining land tenure to federal government, reserving the land administration to the federated states. Beside implementing and enforcing land tenure rules defined by federal legislation, states also have inherent authority to enact legislation necessary and proper to execute land administration and delegated power to provide details or their own rules with respect to land tenure rules if delegated by the federal government.

The apportionment of the legislative power in this way has resulted in variations between the federal and state legislation and among state legislation as the discussion in Chapters 3 to 7 reveals. The distinctions among state laws with respect to land administration and delegated power to states to provide details or their own rules on land tenure, are expected and the result of the need for contextualising the rules within the unique features of each state. However, variations between the federal and state rural land laws and among state rural land laws other than in this respect are arbitrary interventions in the power of each level of government and goes against the constitutional clause of mutual respect.[48] This point and the juridical relation between the federal and state laws are discussed in the next section. First, I summarize the fundamental and ambiguous differences that raise the legality issue.

The basic differences can be analysed in in four categories. These are: in relation to understanding the nature of land ownership; determining access to land; prescribing and delineating the nature of rights in land; and providing and defining the circumstances under which land rights are extinguished. As I argue in Chapter 3 and 4, the nature of land ownership adopted in the federation of Ethiopia has not been understood and defined in the same manner in the federal and state constitutions. The idea of "state and people's ownership" is understood in two distinct ways. In the FDRE Constitution and Harari State Constitution it is conceived on a nationwide scale.[49] That

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[48] FDRE Constitution (n 7) Article 50(8).
[49] Id Article 40(3); Harari Regional State. 2004. The revised constitution of the Harari People's regional state. October. Article 40(3).

is, the notion of "state and people's" in defining the nature of land ownership refers to the national state and the people of the country in its entirety, respectively.

In other state constitutions reference to the two concepts is made in a regionalized/localized manner, referring to the state and peoples of a particular regional state.[50] Leaving the determination of the prevailing conception to the subsequent section, in the ethnic-federalism of Ethiopia, the latter line of construction may threaten land tenure security of landholders from another states. In conjunction with the "settler-indigenous narratives" of landholders in a particular state, a regionalized understanding of the nature of land ownership may have its own contribution to current eviction of "settler" peasants and pastoralists.[51]

In the same fashion, there are differences with respect to prescribing rules to give effect to peasants' and pastoralists' constitutional right to free access to land. The FDRE Constitution expressly guarantees Ethiopian peasants' and pastoralists' right to free access to land.[52] The same provision leaves the details and particulars of the right to be determined by law. On this basis, as I discuss in Chapter 4 Section A, the federal rural land law determines that, in priority to others, any Ethiopian of the age of majority who engages or wants to engage in agriculture can get rural land for free.[53] As the constitution makers emphasized, the federal legislation also puts the nationality criterion at the centre of free access to rural land.[54]

In opposition to this, as I note in Chapter 4 Section A, state rural land laws introduce a residency requirement to access rural land for free. This means that a peasant or pastoralist, to get free land

[50] See Afar Regional State. The revised constitution of Afar regional state. July 2002. Article 38(3); Amhara National Regional State. The revised Amhara national regional constitution proclamation No. 59/2001. *Zikre Hig* No. 2 Year 7. 2001. Article 40(3); Benishangul Gumuz Regional State. The revised constitution of Benishangul Gumuz regional state. December 2002. Article 40(3); Gambella Regional State. The revised constitution of Gambella peoples' national regional state. December 2002. Article 40(3); Oromia Regional State. The revised constitution of Oromia regional state. October 2001. Article 40(3); Ethiopian Somali Regional State. The revised constitution of Somali regional state. May 2002. Article 40(3); Southern Nations, Nationalities and Peoples' Regional State (SNNP). Constitution of the Southern Nations, Nationalities and Peoples' regional state proclamation No. 1/1995. *Debub Neg. Gaz.* Year 1 No. 1. 1995. Article 40(3); Tigray National Regional State. Constitution of the Tigray national regional state proclamation No. 1/1995. 1995. Article 40(3).

[51] A counter-argument that recognizes the regionalized way of defining the nature of land ownership is also considered as the proper way. (See for instance, Husen Ahmed Tura. Land rights and land grabbing in Oromia, Ethiopia. (2018) 70 *Land Use Policy*. 247–255. P 250).

[52] FDRE Constitution (n 7) Article 40(4) and (5).

[53] Proc. No. 456/2005 (n 42) Article 5.

[54] The Constitutional Minutes Vol. 4 (n 30) Deliberation on Article 40.

in a particular state, must be a resident of that state.[55] Conversely, any Ethiopian who wants to make a living from agriculture and has attained the age of 18 years from another part of the country may not have the right to get land for free in that state. This requirement to get free land, besides contradicting with the FDRE Constitution makers' intention, with the adoption of ethnic federalism by which states are demarcated predominately on an ethnic basis, opens a door to discriminate between indigenous residents and settlers in accessing free land.

Also, in relation to the nature of rights in land, there are variations between the federal and state laws and among state laws. The differences take two basic forms. One is in the scope of the bundle of rights and the other is concerning the landholders' liberty in exercising a particular land right. For instance, unlike the federal and other state laws, as highlighted in Chapter 4 Section B, the 2017 Amhara State law entitles the peasants with the right to mortgage their land rights to secure credit.[56] From the land tenure security perspective such broadening of the bundle of rights in land has an implication of enhancing land tenure security of the landholders. On the other side, the Gambella State law fails to incorporate the right to rent/lease land use rights, which is adopted in both the federal and other state laws. It narrows the bundle of rights of peasants and pastoralists contradicting federal and other state laws.

In defining the extent of liberty in exercising particular land rights, typically lease, donation and inheritance, differences are noted in Chapter 5 Section B(i). The first difference relates to who can lease/rent the land rights. Federal and some state laws reserve the right to peasants and pastoralists whose land rights are registered, who have a land certificate and possess more than the minimum landholding size.[57] The remaining state laws make no distinction about who can rent land rights.

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[55] Gambella Peoples' National Regional State. Rural land administration and use proclamation No. 52/2007. *Neg. Gaz.* Year 13 No. 22. 2007. Article 6(1); Oromia National Regional State. Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of Oromia rural land use and administration proclamation No. 130/2007. *Megelata Oromia*. Year 15 No. 12. 2007. Article 5(1); Southern Nations, Nationalities and Peoples Regional State. Rural land administration and utilization proclamation No. 110/2007. *Debub Neg. Gaz.* Year 13 No. 10. 2007. Article 5(2); Afar National Regional State. Rural land administration and use proclamation No. 49/2009. 2009. Article 5(5); Benishangul Gumuz National Regional State. Rural land administration and use proclamation No. 85/2010. 2010. Article 6(1(b)); Ethiopian Somali Regional State. Rural land administration and use proclamation No. 128/2013. *Dhool Gaz.* 2013. Article 5(6); Tigray National Regional State. Revised Tigray national regional state rural land administration and use proclamation No. 239/2014. *Tigray Neg. Gaz.* Year 21 No. 1. 2014. Article 8(1) and (5); Proc. No. 252/2017 (n 42) Article 10(1).

[56] Proc. No. 252/2017 (n 42) Article 19.

[57] Proc. No. 456/2005 (n 42) Article 8(1); Proc. No. 110/2007 (n 55) Article 8(1); Proc. No. 49/2009 (n 55) Article 9(1); Proc. No. 85/2010 (n 55) Article 16(2); Proc. No. 128/2013 (n 55) Article 11(1); Proc. No.239/2014 (n 55) Article 9(1).

Differences about the right to rent land are also observed regarding the extent of landholding that can be legally rented out. The federal and most state rural land laws provide a limit on the rentable amount of land, whereas the Southern Nations, Nationalities and Peoples (SNNP) law fails to provide any restriction in this regard.

Distinctions among rural land laws in defining landholders' freedom to select beneficiaries of land inheritance and donation are observed in Chapter 5 Section B(ii). The extent of freedom in selecting the beneficiaries reaches three levels. The narrowest approach, adopted in the federal and most state laws, employs residency and dependency requirements to delineate them.[58] The Tigray state law, on the other, approaches determination of beneficiaries in terms of highly restricted consanguineal ties.[59] The Amhara State law incorporates a liberal approach in providing the liberty of selecting the beneficiaries of land inheritance and donation.[60] Such differences will have their own impacts on the level of land tenure security. The broader the liberty the landholders enjoy in selecting the beneficiaries, the higher the level of their land tenure security. However, whether such differences are legal or not and determining the prevailing approach when the difference is between the federal and state laws must be settled, as I attempt in the next section.

Finally, variations in the Ethiopian rural land regime occur in laws regulating extinguishing of land rights. Apart from land expropriation other grounds of extinguishing peasants' and pastoralists' land rights vary in federal and state rural land laws. As I elaborate in Chapter 5 Section C and D in addition to differences in details, variations among the laws are inferred with respect also to grounds. Except for failure to conserve land, the adoption of other grounds to deprive land rights of peasants and pastoralists varies among federal and state rural land laws.[61] While extinguishing land rights for failure to observe residency requirements is adopted in federal and most state laws,[62]

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[58] Proc. No. 456/2005 (n 42) Article 5(2) and 2(5); Proc. No. 130/2005(n 55) Article 9(1 and 5) and Article 2(16); Proc. No. 49/2009(n 55) Article 9(13) and 2(7); Proc. No. 110/2007 (n 55) Article 5(11), 8(2), and 2(7); Proc. No. 128/2013 (n 55) Article 9(12) and 2(5); Proc. No. 52/2007 (n 55) Article 7(2) and 2(5).
[59] Proc. No.239/2014(n 55) Article 14(1 and 2).
[60] Proc. No. 252/2017 (n 42) Article 16 and 17.
[61] Proc. No. 456/2005 (n 42) Article 10(1); Proc. No. 85/2010 (n 55) Article 13(1(d)); Proc. No. 110/2007 (n 55) Article 10(1); Proc. No.239/2014 (n 55) Article 13(2); Proc. No. 130/2005(n 55) Article 6(16); Proc. No. 49/2009 (n 55) Article 18(2); Proc. No. 128/2013 (n 55) Article 17(2); Proc. No. 52/2007(n 55) Article 11(1); Proc. No. 252/2017 (n 42) Article 21(1(e)).
[62] Proc. No. 456/2005 (n 42) Article 9(1); Proc. No. 85/2010 (n 55) Article 13(1(b)); Proc. No. 110/2007 (n 55) Article 9(1); Proc. No.239/2014 (n 55) Article 13(1); Proc. No. 52/2007(n 55) Article 9(1); Proc. No. 252/2017 (n 42) Article 21(1(a)).

it is not in Afar, Oromia and Somali State's. Similarly, almost all state laws, except Gambella and Tigray, incorporate idling of land – not mentioned in federal rural land law - as another reason to deprive peasants' and pastoralists' land rights.[63] Engagement in non-farming activity is also made a ground to deprive land in the State rural land law of Amhara, Tigray and Benishangul Gumuz.[64] Moreover, whereas federal and all other state's laws adopt conversion of communal landholdings to private landholdings as another ground to extinguish communal land rights, Oromia State's doesn't.[65]

Variation is prevalent also in extinguishing of land rights through expropriation. The basic difference relies on identifying the approach in assigning the power to expropriate land to state authority and defining of the public use clause. As I note in Chapter 6 Section B the federal rural land law defines the approach to assigning the power of expropriation to authorities. Apart from empowering the federal government, defines how the federated states may assign this power in their administrative structures.[66] It assigns the local and higher regional state authorities the power to expropriate land rights. This approach is endorsed by most state laws except the Amhara State law. In the Amhara State law, land expropriation authority seems to be assigned to the local authority – woreda/district/ administration only.[67]

In the same fashion variations on constituting element of the public purpose clause are common among the rural land laws. Particularly as I show in Chapter 6 Section C(i) the federal and most state's laws follow the modern/broadest line of understanding, while the rural land laws of the SNNP, Afar and Somali State define it in the traditional/narrowest view.

The differences between the federal and state laws and among the state laws are not confined to what is discussed above. The discussion here provides only examples of variations. Some of the

[63] Proc. No. 85/2010 (n 55) Article 13(1(c)); Proc. No. 110/2007 (n 55) Article 13(13); Proc. No.239/2014 (n 55) Article 28(8); Proc. No. 130/2005(n 55) Article 6(16); Proc. No. 49/2009 (n 55) Article 19(3); Proc. No. 128/2013 (n 55) Article 18(3); Proc. No. 252/2017 (n 42) Article 21(1(d)).
[64] Proc. No. 252/2017 (n 42) Article 21(1(a)); Proc. No.239/2014 (n 55) Article 13(5); Proc. No. 85/2010 (n 55) Article 13(1(a)).
[65] Proc. No. 456/2005 (n 42) Article 5(3); Proc. No. 110/2007 (n 55) Article 5(14); Proc. No.239/2014 (n 55) Article 17(3); Proc. No. 52/2007(n 55) Article 7(5); Proc. No. 85/2010 (n 55) Article 29(1) and 32(1(d)); Proc. No. 49/2009 (n 55) Article 5(8 and 9); Proc. No. 128/2013 (n 55) Article 5(9 and 10); Proc. No. 252/2017 (n 42) Article 50(1(d)).
[66] Federal Democratic Republic of Ethiopia. Expropriation of landholding for public purposes and payment of compensation proclamation No. 455/2005. *Fed. Neg. Gaz.* Year 11 No. 43. 2005. Article 3.
[67] Proc. No. 252/2017 (n 42) Article 26(1).

variations cause apparent contradictions between the federal and state laws, which in effect makes landholders uncertain how to identify the governing legal regime, since the FDRE Constitution has no supremacy clause for such situations. The uncertainty about the nature of and protection afforded land rights also has a negative implication on the land tenure security of landholders.[68] To clear out the uncertainty and determine the prevailing legal regime is paramount for security of tenure. In the following section I attempt a reconciliation of the contradictions among the legal regimes governing land rights of peasants and pastoralists.

D. Legislative Interventions and the Juridical Relation Between Federal and State Rural Land Laws

As the instances I provide in the above section and the details I discuss throughout Chapter 3 to 7 reveal, there are fundamental differences and variations between the federal and state rural land legal regimes. Some of the variations are mutually contradictory and provide double standards, which puts peasants and pastoralists in uncertainty about the nature and protection afforded their land rights, especially without a supremacy clause. They also result from a failure to take the constitutional division of power seriously. Thus, it is paramount to show the intervention of each level of government on the legislative power of the other and their juridical relation on the basis of the constitutional power division I discuss in section A and B above.

i. Federal Intervention

In light of the absence of a HOF decision to transfer power to enact laws consequential to land administration to the federal government; and the constitutional confinement of the federal government's power to enact laws on land utilization and conservation, implying any specific stipulation about land administration in the federal legislation is a legislative intervention in the inherent constitutional power of states. The federal legislative intervention begins with the nomenclature of one of the federal rural land laws. In Section A and B, I conclude that the federal government's legislative power with respect to land is confined to defining land tenure. In terms of the FDRE Constitution the federal government has the power to enact laws on the "utilization

[68] Frank Place, Michael Roth, and Peter Hazell. 'Land tenure security and agricultural performance in Africa: Overview of research methodology' in John Bruce and Shem E. Migot-Adholla (eds.). *Searching for land tenure security in Africa*. Washington DC. The World Bank,1994. 15–40. Pp 20–21.

and conservation of land."[69] Despite this, it has titled one of its rural land laws as "*Rural Land Administration* and Land Use Proclamation",[70] implying the legislation incorporates land administration which is entirely, including legislating legislation consequential to land administration, constitutionally assigned to the federated states.

Beside the nomenclature the same federal legislation intervenes in state legislative power in different ways. One is by defining the notion of "land administration," it seems to empower itself with some aspects of land administration, which are the constitutional power of the state governments. It defines land administration as:

> "a process whereby rural land holding security is provided, land use planning is implemented, disputes between rural land holders are resolved and the rights and obligations of any rural landholder are enforced, and information on farm plots and grazing land [holders] are gathered analysed and supplied to users."[71]

The comparison of the definition in the federal law and the neutral definition of the FAO I indicate in Section B reveals that at least two aspects of land administration are excluded in the federal law definition. It fails to incorporate the issue of land valuation and taxation and limits the concept to incorporate only implementation of land use planning, excluding development of land use planning itself. However, state laws, as in the Amhara State law, define land administration more broadly, also to include these two aspects.[72]

The federal government again intervenes in the state power by prescribing land disputes resolution mechanisms. From the discussion in Chapter 7 it can be inferred that the federal rural land laws interference in the state legislative power in relation to land dispute resolution in two ways. The first is by mandatorily requiring land dispute resolution to be attempted in alternative dispute resolution mechanisms, before resorting to the state justice system.[73] The federal legislation's delineation of actionable grounds especially in case of land expropriation is another form of interference in the state power of dispute resolution,[74] because consequential to dispute resolution

[69] FDRE Constitution (n 7) Article 51(5).
[70] Proc. No. 456/2005 (n 42) Article 1.
[71]Id Article 2(2).
[72] Proc. No. 252/2017 (n 42) Article 2(2).
[73] Proc. No. 456/2005 (n 42) Article 12.
[74] Proc.No.455/2005 (n 66) Article 11.

it is up to the state governments to define where to settle land disputes and what matters are subjected to judicial review mechanisms.

As highlighted in Chapter 6, the federal legislature also interferes with respect to defining the mechanism of land valuation. In the federal land expropriation legislation, the authority and manner to assess compensation are defined.[75] The legislation stipulates that it applies when the land expropriation decision is made by federal government. Where the decision is made by the state government the applicable land valuation method is the one adopted in the state law.[76] These provisions create an impression that both the federal and state governments have the power to enact their respective legislation defining the land valuation method for compensation, depending on who decided to expropriate. Land valuation is an aspect of state power of land administration in the federation of Ethiopia, so that the federal government's enactment of law to define the land valuation method and authority for compensation is another form of legislative interference in state powers.

A further federal legislative interference in state land administration power concerns designation of the power to take administrative decision regarding land. For one, it has legislated to empower itself: it authorized itself to make land expropriation decision[77] and to transfer land to investors.[78] For another, it has intervened by defining the approach to assignment of power of expropriation within the state governments.[79] As I discuss in Chapter 6 section B it prescribes to states to adopt the middle-path approach by which the higher state authority and local government to assume the power to make land expropriation.

ii. State Intervention

Unlike the federal intervention seen above, state legislative intervention over the federal powers on land matters cannot be established by simply examining the power to define the land tenure and land administration dichotomy. Rather, it further requires close examination of whether federal legislation stipulates any delegation to state governments. Unlike the state governments the federal

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[75] Id Article 7-10.
[76] Proc. No. 456/2005 (n 42) Article 7(3).
[77] Proc.No.455/2005 (n 66) Article 3(1).
[78] Federal Democratic Republic of Ethiopia. Ethiopian agricultural investment land administration agency establishment Council of Ministers regulation No. 283/ 2013. *Fed. Neg. Gaz.* Year 19 No. 32. 2013.
[79] Proc.No.455/2005 (n 66) Article 3(1).

government is constitutionally authorized to delegate its power to the state governments.[80] Moreover, there may be unregulated aspect of land tenure in federal legislation which are neither expressly delegated to states, nor federally legislated upon. In the latter case, what role states play up until the federal legislature enacts law must also be considered in the analysis of state legislative interference in federal matters. The illustrations below of state interference in federal land matters are provided only on matters which are neither delegated nor unregulated aspects of land tenure.

The first states intervention is in the way they constitutionally the nature of land ownership (except Harari state).[81] All other state constitutions define "state and people's land ownership" in a regionalized.[82] This clearly deviates from the nationwide conception of state and people in the FDRE constitution.[83] It has, as I argue above, contributed to eviction of landholders from other states. Additionally, as seen above, it led states to incorporate residency requirements (*de facto* ethnicity) in prescribing requirements for free access to rural land.

Another state interference in federal power concerns defining who can access land freely. Federal legislation defines grounds for free access to land. Apart from requiring a certain age and the desire to make a living from agriculture, as the federal legislation, all state laws incorporate residency in the state where the request for land is made in addition. This paves the way for discrimination on grounds of ethnicity as state residency reflects ethnicity.

Moreover, state legislative intervention is also prevalent in relation to defining the nature of rights in land of peasants and pastoralists as seen in Chapter 4 Section B and here above in Section C. The intervention in delimiting the bundle of rights in land has taken both the *maximalist* and *reductionist* approaches. In a sense it has taken both in the form of broadening and narrowing the bundle of rights from the one defined in the federal legislation. A good illustration about the maximalist approach is found in the 2017 Amhara State law. There the right to mortgage land is

[80] FDRE Constitution (n 7) Article 50(9).
[81] Harari State Constitution (n 50) Article 40(3).
[82] Afar State Constitution (n 50) Article 38(3); Amhara State Constitution (n 50) Article 40(3); Benishangul Gumuz State Constitution (n 50) Article 40(3); Gambella State Constitution (n 50) Article 40(3); Oromia state Constitution (n 50) Article 40(3); Somali State Constitution (n 50) Article 40(3); SNNP State Constitution (n 50) Article 40(3); Tigray State Constitution (n 49 above) Article 40(3).
[83] FDRE Constitution (n 7) Article 40(3).

incorporated as the additional right, which is not in the federal and even in the previous Amhara State rural land law.[84]

States have here also interfered reductively. Some state laws define the bundle of rights in land of peasants and pastoralists in narrower sense than the federal laws. For instance, the right to use land rights as a contribution for joint development activities with investors is regarded as a right of peasants and pastoralists in the federal legislation,[85] but the Gambella and Tigray State laws exclude it. The narrowing of the bundle of rights affects the breadth of land rights construct of land tenure security.

In relation to peasants' and pastoralists' freedom and liberty within the legal permitted rights in land, state legislative intervention is also inferred from comparative analysis of the federal and state legislation as seen Chapter 5 Section A. Just like the nature of intervention in defining the property rights I explain above, here too the state intervention takes two different forms. In some state laws peasants and pastoralists are guaranteed more freedom in exercise of particular rights than federal legislation secures. The SNNP state law reflects this. Federal legislation limits the amount of land peasants and pastoralist can legally rent out. It demands without any exception that the peasants and pastoralists can rent their respective landholdings in a manner that doesn't displace them.[86] In contrast, the SNNP law in exceptional cases allows peasants and pastoralists to rent out their landholdings as a whole.[87]

However, there is also a *restrictivist* approach to defining the freedom and liberty of the landholders in the state laws. A good example is the Tigray state law's approach to defining beneficiaries of land inheritance and donation. As I argue in Chapter 5 Section A, federal legislation defines the freedom of the peasants and pastoralists to select the inheritors and donees of their land in residency and dependency terms.[88] The Tigray state law defines it more restrictively, limiting the choice to their landless children, grandchildren and parents.[89] It means

[84] Proc. No. 252/2017 (n 42) Article 19.
[85] Proc. No. 456/2005 (n 42) Article 8(3).
[86] Id Article 8(1).
[87] Southern Nations, Nationalities and Peoples Regional State. Rural land administration and use regulation No. 66/2007. Year 13 No. 66. 2007. 2007. Article 8(1(c)).
[88] Proc. No. 456/2005 (n 42) Article 2(5), 5(2) and 8(5).
[89] Proc. No.239/2014 (n 55) Article 14.

in Tigray peasants are not free to bequeath or donate land rights to those children, grandchildren and parents who have insufficient land or anyone else in line with federal legislation.

Similarly, with respect to extinguishing of peasants and pastoralists land rights, state legislative interference in federal government's land power is also either permissive or restrictive, as seen in the detailed discussion in Chapter 5 Section C and D and Chapter 6 Section C(i). Some states limit the grounds to deprive peasants' and pastoralists' land rights more than the federal laws. The more *restrictive* approach can be seen in the Oromia state law's non-recognition of conversion of communal land rights to private landholdings; the Afar, Somali and Oromia State rural land laws' non-incorporation of failure to observe residency requirement as a ground to deprive land rights; and the traditionalist (the narrow) approach to understand the concept of "public use" to expropriate land in the Afar, Somali and SNNP State's rural land laws.[90] From the view point of land tenure security, this approach better protects the land rights of peasants and pastoralists than the federal rural land law, because it reduces the reasons for which landholders may lose their land rights.

By contrast, some state laws interfere in the federal power by introducing additional grounds to deprive peasants' and pastoralists' land rights. An example is incorporation as additional grounds to deprive rights of engagement of non-farming activity in the Amhara, Benishangul Gumuz and Tigray State's laws[91] and idling of land for a certain period in all state laws, except Gambella State's and Tigray State's.[92] The widening approach of state intervention on the federal power exposes peasants and pastoralists to other reasons for deprivation of land rights. The broadening of the vulnerability to deprivation undermines their land tenure security.

The dualistic nature of state legislative interference in federal land matters causes uncertainty of land rights and impedes the legal construct of assurance of land rights for land tenure security. It also leads to the prevalence of double standards in implementation and affects the achievement of coherent national land policy. Moreover, the apparent contradictions between the federal and state

[90] Proc. No. 110/2007 (n 55) Article 2(23); Proc. No. 49/2009(n 55) Article 2(27) and 5(9); Proc. No. 128/2013 (n 55) Article 5(10).
[91] Proc. No. 252/2017 (n 42) Article 21(1(a)); Proc. No.239/2014(n 55) Article 13(5); Proc. No. 85/2010 (n 55) Article 13(1(a)).
[92] Proc. No. 85/2010 (n 55) Article 13(1(c)); Proc. No. 110/2007 (n 55) Article 13(13); Proc. No.239/2014 (n 55) Article 28(8); Proc. No. 130/2005(n 55) Article 6(16); Proc. No. 49/2009 (n 55) Article 19(3); Proc. No. 128/2013 (n 55) Article 18(3); Proc. No. 252/2017 (n 42) Article 21(1(d)).

laws as seen and in section D(i) demands consideration of juridical identification of which law overrides. Below I attempt to show how these contradictions are solved in light of constitutional rules and enhancement of land tenure security.

iii. The Juridical Relation Between the Federal and State Rural Land Laws

From the detailed discussion in Chapter 3 to 7 and the summary in Section C and the above two sub-sections, we can clearly see the apparent contradictions between the federal and state constitutions, and federal and state rural land laws. The contradictions themselves, on one hand affect land tenure security by creating uncertainty about land rights. On the other side, separate examination of the legislative measures of the federal and state governments on the subject matter on which they contradict indicates the different implications they have on land tenure security. One may provide better protection to tenure security of peasants and pastoralists than the other. This makes the determination of the juridical relation between the federal and state laws important.

Since the contradictions are between the constitutions and among the subordinate legislation, the quest for their juridical relations has two features. The first is to look for the legal solution to the contradictions between the federal constitution and the state constitutions. As repeatedly mentioned, except for the Harari State Constitution, all the other state constitutions' regionalised understanding of the nature of land ownership goes against the national conception in the federal constitution, opening the door for discrimination on the basis of ethnicity in implementing the constitutional right to free access to rural land and eviction of landholders originating from other states.

The question becomes whether the states have the power to define the nature of land ownership in contradiction to the federal constitution. This requires a look into the federal constitution, regarded as a covenant between the federal government and states. Two fundamental clauses in the FDRE Constitution establish the juridical relation between the federal and state constitutions. The first is the self-declared supremacy clause. Article 9(1) proclaims the Constitution as *the supreme law of the land,* and declares that *any law*, customary practice or decision an organ of state or a public official which *contravenes it shall be of no effect*.[93] The supremacy clause of the federal

[93] FDRE Constitution (n 7) Article 9(1).

constitution indicates the nationwide application of its supremacy and over any other law. The phrase "any law" in the Constitution refers to all law other than itself.[94] The state constitutions, thus, are also under the FDRE Constitution and if they contradict the latter, shall be of no effect. In other words, the federal constitution prevails whenever it is in apparent contradiction with the state constitutions.

Second, the *consistency clause* in the federal constitution also indicate the overriding nature of rules of the federal constitution over its state counterparts. The FDRE Constitution expressly provides that in the drafting, adoption and amending of state constitutions the makers must make sure that provisions are consistent with the federal constitution.[95] The consistency clause in effect prohibits any deviation of the state constitutions from the federal one. Deviations from the spirt of the federal constitution in making of the state constitution is an unauthorized power and a violation of the federal constitution. Therefore, the consistency clause requires the state constitutions to understand the nature of land ownership adopted in the country in the same fashion as the federal constitution. The deviation the state constitutions in defining the nature of land ownership are unlawful and violate the supremacy and consistency clauses of the FDRE constitution.

About the juridical relation of subordinate legislation of the federal and state governments, the primary legal basis to define it relies on the division and source of legislative power. As I note in Section A and B above the federal and state governments have their own respective inherent constitutional legislative power on land matters. While the federal government is authorized to enact law that defines land tenure rules, the prerogative to enact laws consequential to land administration is reserved to the federated states. Consequently, the question of the juridical relation of federal and state legislation comes up when one has interfered in the other's power as seen in the above two sub-sections and also, when the state laws define land tenure rules acting beyond the delegation made by the federal government.

[94] However, the FDRE Constitution incorporates an exception to its supremacy clause with regard to fundamental human rights and freedoms incorporated in the constitution. It has required them to be interpreted in conformity with the international human rights instruments the country has adopted and ratified. (*Id* Article 13(2)). This stipulation, in effect, allows the state governments to provide a better protection to human rights and freedoms in their respective constitution than the federal one.

[95] Id Article 50(5).

Against this backdrop, it can be argued that with respect to land tenure rules the federal legislation prevails over the state counter-part. Inversely, in case of contradictions between the federal and state laws on matters of land administration the state laws prevail. This claim is supported by the federal constitution's "mutual respect clause" and its non-inclusion of a supremacy clause about the subordinate legislation of the federal and state governments.[96]

However, what if one level of government delegates its legislative power to the other level of government? This may entail total delegation on a particular land matter or adoption of framework legislation which delegate the determination of the details to the other level of government. In the federation of Ethiopia since upward delegation is constitutionally outlawed, the issue of delegated legislative power lawfully occurs with respect to downward delegation.[97] Legally speaking, the federal government shall not assume and exercise any delegated power from state governments. It is only the state governments that can assume and exercise delegated legislative power over land matters. Hence, the federal rural land laws' legislative intervention seen in sub-section i above have neither constitutional basis nor even state delegation in violation of the constitutional rule. Moreover, it is not based on the constitutional rule of transfer of legislative power adopted in the Constitution.[98]

The federal government's delegation of legislative power on land tenure rules to states was made after providing the framework legislation. The legislative delegation was made both in general form, that states may enact laws containing the detailed provisions necessary to implement the federal laws;[99] and in particular form, leaving the determination of details with respect to specific land tenure matter, to the states.[100] Here the general delegation also serves to address another legal problem: it authorizes state governments to take legislative measures on the aspects of land tenure rules the federal legislation has left totally unregulated. Thus, such state legislative measures validly address the legal vacuum until the federal government takes legislative measures to fill it.

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[96] Id Article 50(8).
[97] Id Article 50(9); The Constitutional Minutes Vol. 4 (n 30) Deliberation on Article 50.
[98] FDRE Constitution (n 7) Article 55(6).
[99] Proc. No. 456/2005 (n 42) Article 17(1); Proc.No.455/2005 (n 66) Article 14(2).
[100] For instance, about the amount and duration of renting and leasing land (Proc. No. 456/2005 (n 52 above) Article 8(1)); the duration of rural land use rights of others (*id* Article 7(1)); defining failure to observe residency requirement (*id* Article 9(1)); regarding deprivation of land rights on the ground of failure to conserve land (*id* Article 10(1)) etc.

However, a problem is created when the state laws provide stipulations that clearly contradict with the federal legislation on land tenure issues, as illustrated in the above sub-section. These contradictions can be simply resolved by arguing that the delegated legislation should not override the delegating legislation and they can be treated as unlawful encroachment on the legislative power of the federal government. Nevertheless, the issue becomes more complicated when the state legislation provides better protection to land tenure security of peasants and pastoralists than the federal, as I show in the above sub-section.

In this case, resolving the legal puzzle in the above way of legal interpretation would be against the interest of the weaker parties – peasants and pastoralists. The alternative assumption, that the standards and protections in the federal legislation are the minimum standards and protections so that any better measures in state laws are legally authorized, as far as it doesn't contravene other constitutional limitations, would rather enhance land tenure security of peasants and pastoralists. This pragmatic approach to defining the juridical relation between the federal and state rural land laws is centred on the subjects of law rather than the strict rules of legal interpretations. Since the final goal of law is to enhance the overall welfare of the society at large,[101] adopting the better subject-serving interpretation approach to resolve the legal problem at hand forces the federal government to take legislative measures to cope with the protection afforded in the state legislations.

E. The Legal Status and Role of Customary Land Tenure and Administration

In a country like Ethiopia where the colonial influence on the legal system is minimal, if not none, it is logical to think that customary rules and institutions play a central role in defining the rural land tenure and administration. This was true in the period before the country entered into the legal modernization period as I indicate in Chapter 3 Section A. In the process of legal modernization, the role of customary rules and institutions shrank. Particularly, the 1960 Civil Code limited its application to exceptional cases where there is a direct reference to customary rules and institutions or on matters that are not expressly governed, to fill a legal vacuum.[102]

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[101] Ian Ward. *An introduction to critical legal theory*. London. Cavendish Publishing, 1998; Raymond Wacks. *Philosophy of law: a very short introduction*. New York. Oxford University Press, 2006.

[102] T The Civil Code of the Empire of Ethiopia. Proclamation No. 165/1960. *Neg. Gaz.* Extraordinary Year 19 No. 2. 1960. Article 3347(1).

However, as I discuss in Chapter 2 Section B, the *Derg* regime restored the application of customary rules and institutions at least with respect to pastoralists' land rights.[103] Accordingly, after regarding their land rights as possessory rights, it left the entire regulation and definition of their rights in land to the customary rules.[104] That way the *Derg* regime revived the customary land tenure rules concerning pastoralists' land rights.

Post-1991 rural land tenure and administration, on the other hand, approaches customary land tenure rules and administration in a different way. The way the FDRE Constitution recognizes customary rules and institutions is distinct from the extent of its application defined in the 1960 Civil Code, which still applies in most civil law matters. Although the particulars are to be determined by law, the FDRE Constitution doesn't preclude application of customary rules to adjudicate disputes relating to personal or family matters in accordance with customary laws based on the consent of the parties.[105] This implies whenever a land issue arises between private individuals or among family members and the parties consented to resolve the dispute through customary law, then the application of customary land tenure rules comes into picture. The Constitution still requires the extent of application of the customary laws to be defined in subordinate legislation.[106]

In the federal subordinate land legislation, unless we assume that the legislation itself incorporates customary rules as statutory ones, we cannot see any reference made to customary laws, as was at least done in the Civil Code.[107] In such cases it is possible to claim that currently the status and role of customary land tenure in Ethiopia is the same as the status and role it had in the time 1960 to 1974, disregarding the status and role customary land tenure played in the period of the *Derg* regime with respect to the pastoralists land rights. This renders customary law only a gap-filling measure on matters that are not covered by legislation, also only as far as it is not inconsistent with legislation. It reduced the role of customary law even below what it was in the Civil Code, because

[103] Ethiopia. A proclamation to provide for the public ownership of rural lands proclamation No. 31/1975. *Neg. Gaz.* Year 34 No. 26. 1975. Article 24.
[104] Ibid.
[105] FDRE Constitution (n 7) Article 34(5) and 78(5).
[106] Ibid.
[107] Proc. No. 456/2005 (n 42) Article 20(2); Proc.No.455/2005 (n 66) Article 15(2).

it makes no express reference to it in the substantive contents. The same approach is adopted in the Tigray, Oromia, SNNP, and Amhara laws.[108]

Nevertheless, when we go through the remaining federated states' rural land legislation, we somewhat broader space for application of customary land tenure, especially with respect to communal (pastoralist) land rights. The way these state laws approach the customary laws and define the scope of application is not identical. Examination of the preamble of the Somali state law reveals that the state council approaches customary laws as a bar to natural resource management and conservation of land that incentivizes investment.[109] By contrast, the Afar and the Amhara laws (although they define the application of customary law in the same fashion as the federal legislation) approach it positively with respect to its importance for land utilization and conservation.[110] Particularly the Afar State's law even recognises the fact that "the weakening of the [customary] rural land administration system is giving rise to natural resource degradation and spread of conflict."[111]

In defining the scope of application of customary law the state laws that adopt the broader approach still differ. Apart from sharing the general approach to its application as far as it is not inconsistence with the legislation,[112] these state laws are distinct in defining its scope of application in their substantive content. The Gambella and Benishangul Gumuz laws indicate the application of customary law specifically on the utilization of communal lands in observance of the respective rural land legislation of states,[113] whereas the Afar State's law and Somali State's law expand application of customary laws in relation to defining access to land and natural resource protection and conservation.[114]

On the other side, the FDRE Constitution opens the space for customary institutions to be involve in the land administration, specifically, by demanding that customary institutions should have

[108] Proc. No. 110/2007 (n 55) Article 13(13); Proc. No.239/2014 (n 55) Article 38(3); Proc. No. 130/2005(n 55) Article 30(2); Proc. No. 252/2017 (n 42) Article 59(2).
[109] See preamble of Proc. No. 128/2013 (n 55).
[110] See preambles of Proc. No. 49/2009 (n 55) and Proc. No. 252/2017 (n 42).
[111] Preamble of Proc. No. 49/2009(n 55) (translation mine).
[112] Proc. No. 85/2010 (n 55) Article 29(4); Proc. No. 49/2009(n 55) Article 25; Proc. No. 128/2013 (n 55) Article 23; Proc. No. 52/2007(n 55) Article 26.
[113] Proc. No. 85/2010 (n 55) Article 29(4); Proc. No. 52/2007 (n 55) Article 13(3).
[114] Proc. No. 49/2009 (n 55) Article 5(7) and 8; Proc. No. 128/2013 (n 55) Article 5(8) and 8.

jurisdiction to resolve land disputes between private persons or among family members.[115] This in fact happens, as I note in Chapter 7, upon the blessing of the federal and state law making organs – HPR and state councils respectively.[116] With regard to the customary courts that had state recognition and functioned prior to the adoption of the Constitution, these were only required to be organized on the basis of the FDRE Constitution.[117] That they do not require the blessing of the HPR and the state councils to be legally recognised. The constitution itself recognizes them and the only thing the HPR and state councils can do is to reorganize them on the basis of the Constitution.

The analysis of the subordinate legislation on the role of customary institutions in resolving land disputes still finds variations. As I discuss in Chapter 7 Section B, the federal and some state legislation define the particular form of out-of-court-room dispute resolution mechanism to be adopted, while the Afar and Somali State's laws do not refer to a particular form of customary dispute resolution mechanism.[118] The selection of any particular customary dispute resolution form is left to the parties in dispute. The Tigray State law, on the other hand, has no provision that indicates the land disputes to be resolved by alternative dispute resolution mechanisms. From the perspective of land tenure security, the Afar and Somali State laws' approach provides landholders with the opportunity to select the one customary dispute resolution mechanism that serves their best interests.

Besides the variations between the federal and some state rural land laws on the issue at hand, the actual practice about the application of the customary laws may not be compatible with the determination of the laws. Especially in the states where the pastoralists are dominant there may be parallel application of the customary laws and institutions with the statutory ones. However, determining whether there is parallel application and the extent thereof demands an empirical investigation in a separate study.

F. Conclusion

[115] FDRE Constitution (n 7) Article 34(5) and 78(5).
[116] Ibid.
[117] Id Article 78(5).
[118] Proc. No. 49/2009(n 55) Article 7; Proc. No. 128/2013 (n 55) Article 14.

As I argue in Chapter 1 Section C(iii) the legal and institutional pluralism that defines and administers the same land matter may pave a way for emergence of inconsistent land tenure rules and variations in implementation. This then undermines uniformity of standards, achievement of a coherent national land policy and establishment of a body of core expertise. That in effect creates uncertainty about land rights and perpetuates the legal construct of assurance of land rights for land tenure security. In federations like in Ethiopia, the contradictions and inconsistency can emerge from two distinct sources. It is either from federal-federated states legislative and institutional variations or statutory-customary land tenure and administration dichotomy. Consequently, the prevention and rectification the pluralisms require clear and unambiguous constitutional division of power over land matters between the federal and state governments, and an express delineation of the application of customary land tenure and administration and according implementation.

A critical assessment of the post-1991 land tenure system of Ethiopia, against this background, reveals that peasants' and pastoralists' land rights are exposed to the uncertainty of land rights resulting from inconsistencies and contradictions emanating from the federal and state rural land laws, and the possibility of parallel application of a customary land tenure system with the statutory one, particularly with respect to pastoralist land rights. The variations and inconsistencies are related to the understanding of the nature of land ownership adopted; regulation of access to land; defining of the rights in land; provision of liberty and freedom in the exercise of land rights; stipulation of the grounds to extinguish land rights; identification of the state authority with the power to make land expropriation decision; and delineation of the application of customary land tenure and administration, among other things.

The cause for the variations and inconsistencies is mainly the failure to take the constitutional division of power seriously. Although the FDRE Constitution is slightly ambiguous, through the canons of construction I argue that the power to define land tenure is assigned to the federal government, while the prerogative of land administration is reserved to the federated states. Disregarding the constitutional rules, both the federal and state governments have interfered in each other's legislative power, resulting in variations and inconsistencies of land tenure rules and multiplication of authorities with the power of land administration. The federal government, in the absence of transfer of legislative power by the HOF, has defined what the state governments'

powers are with respect to land matters, and some aspects of land administration like specifying the authorities with land expropriation powers and defining the land dispute resolution mechanisms. In the same fashion state governments, acting beyond delegated power have introduced regionalized understandings of land ownership, demarcated the nature of rights in land, and defined the liberty and freedom in the exercise of specific land rights, the grounds for extinguishing land rights and the scope of application of customary land tenure rules. However, there are also differences among the state laws in these respects.

Therefore, it may be argued that such contradictions and inconsistencies can be addressed by applying the proper canon of interpretation, especially in the absence of a supremacy clause in the federal constitution in reference to subordinate legislation. Making reference to the federal constitution about the division of power and the principle of delegation, the contradictions can be easily resolved. However, the problem is that such approach may not best serve the interests of the landholders, because in some legal constructs of land tenure security the state laws afford better protection to land rights than the federal. Thus, viewing the matter from a land tenure security perspective may require one to see the land tenure standards in the federal legislation as minimum standards and the better protection afforded in the state laws as valid and prevailing.

Chapter 9
Conclusions and the Way Forwards

In a developing country like Ethiopia where poverty is prevalent, democracy is in its infancy, the livelihood of 83% of total population and the economic growth of the country depends on agriculture and the political history of the country has been influenced by the question of land, the quest for land tenure security is paramount.[1] It plays a pivotal role in the eradication of poverty, democratization and realization of human rights, and achievement of sustainable development.[2] Among other things, the establishment of land tenure security requires affording of the necessary and proper legal protection to the different objective elements/legal constructs of land tenure security at the same time. It also requires regulating certain aspects of legal land tenure security in constitutional law. This is because derogation from land tenure security happens both in the making and implementation of law.[3] Also, particular to federations, due to the possibility of existence of mutually contradicting land tenure rules and overlapping of the power of land administration, which in effect results in power competition between the central and state governments and uncertainty about land rights and the responsible authority, constitutional demarcation of the power of each level of government is still necessary to enhance land tenure security. In this Chapter I provide concluding remarks and indicate the way forward to enhance security of land tenure of peasants and pastoralists in the federation of Ethiopia.

To do so, the Chapter is organized in two sections. In the first section an attempt is made to bring a working conceptual framework of legal land tenure security against which the legal protections afforded to land rights of any country are evaluated. After summarizing and showing gaps in the existing framework and approach to study of land tenure security, the section is devoted to formulating a working legal land tenure security framework from the discussion in Chapter 1.

[1] The World Bank. Options for strengthening land administration Federal Democratic Republic of Ethiopia. *The World Bank Document, Report No: 61631-ET*, nd. P 17; Population Census Commission. Report of Ethiopia`s 2007 Population and Housing Censes. Addis Ababa. Federal Democratic Republic of Ethiopia, 2008. P 7; Gebru Tareke. *Ethiopia: power and protest: peasant revolts in the twentieth century*. New York. Cambridge University Press, 1991; Teshale Tibebu. *The making of modern Ethiopia: 1896-1974.* New Jersey. The Red Sea Press, 1995; Dessalegn Rahmato. Agrarian change and agrarian crisis: State and peasantry in post-revolution Ethiopia. (1993) 63 *Africa.* 36–55; Dessalegn Rahmato. *Searching for tenure security? The land system and new policy initiatives in Ethiopia.* Addis Ababa. Forum for Social Studies, 2004. P 16.

[2] Klaus Deininger. *Land policies for growth and poverty reduction*. Washington DC. The World Bank, 2003; Alejandro Morlachetti, The rights to social protection and adequate food. Rome. *FAO Legal Paper No.97*, 2016.

[3] Edwin Baker. Property and its relation to constitutionally protected liberty. (1986) 134 *U. Pal. L. Rev.* 741–816.

From the same Chapter a conclusion is also drawn about the aspect of land tenure security that requires constitutional regulation and the constitutional interpretation approach to be adopted to enhance land tenure security. On this foundation, in the next section conclusions and ways forward from the analysis in Chapter 3 to 8 are provided, about where the post-1991 statutory land tenure system of the federation of Ethiopia revolving around the peasants' and pastoralists' land rights fits into the working conceptual framework of legal land tenure security. It begins with the constitutional protections afforded to their land rights and the constitutional interpretation approach adopted. Then an appraisal of the subordinate legislation in light of the legal construct of land tenure security follows. I show the historical continuities and points improved in the post-1991 from the pre-1991 statutory land tenure systems of the country I discuss in Chapter 2.

A. Revisiting the Conceptual Framework for Legal Land Tenure Security

i. The Existing Theoretical Framework and Gaps

The existing literature stipulates that legal land tenure security is the outcome of the legal constructs of adequate breadth and duration of land rights, assurance of land rights, and enforceability of land rights in conjunction with land registration and certification.[4] Their essence is not well-defined and comprehensively provided. Taking the Hohfeldian bundle-of-rights metaphor of property, the legal construct of adequate breadth of land rights requires that the landholder should be guaranteed the necessary quality and quantity of land rights.[5] It doesn't define what factors are to be considered to delineate the breadth of land rights, except for providing that it is not necessary to include the right to sell land. Furthermore, it also fails to appreciate the role the other metaphors of property, such as the web of interest, the exclusionary and the decision-making authority metaphors play in establishing the nature of the rights in land construct.[6]

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[4] Shem E. Migot-Adholla, George Benneh, Frank Place, Steven Atsu, and John W. Bruce. 1994. Land, security of tenure, and productivity in Ghana. In John Bruce and Shem E. Migot-Adholla (eds.). *Searching for Land Tenure Security in Africa* Dubuque, Iowa: Kendall/Hunt Publishing Company. P 108; Gershon Feder and Akihiko Nishio. The benefits of land registration and titling: economic and social Perspectives. (1999) 15 *Land Use Policy*. 25–43. P 26.

[5] Wesley Newcomb Hohfeld. Some fundamental legal conceptions as applied in judicial reasoning. (1913) 23 *Yale Lj.* 16–59; Frank Place, Michael Roth, and Peter Hazell. 'Land tenure security and agricultural performance in Africa: Overview of research methodology' in John Bruce and Shem E. Migot-Adholla (eds.). *Searching for land tenure security in Africa*. Washington DC. The World Bank,1994. 15–40. P 20.

[6] Craig Anthony (Tony) Arnold. The reconstitution of property: Property as a web of interests. (2002) 26 *Harv. Envtl. L. Rev.* 281–364; William Blackstone. *Commentaries on the laws of England*. (WM. Hardcastle Browne, A.M., ed) West Publishing Co. St. Paul, 1897; Baker (n 3).

About the duration of land rights legal construct, the existing literature only requires it to be adequate.[7] The general duration and the duration of the specific rights are in general required to be sufficient to reap the proceeds of investment. In the absence of an objective guide it leaves it for the legislature of a given country to determine, in which case it becomes too subjective to argue whether the duration is adequate or not.

For the legal construct of assurance of land rights, the prevailing literature indicates that the overriding interest should be limited to the expropriation for public purpose upon payment of adequate compensation and through procedural due process.[8] Without indicating on which theoretical foundations (inherent power, reserved rights or consent theory) it has to be based and their respective implications for land tenure security, in the existing conceptual framework of land tenure security, the state is entitled to expropriate land rights in exceptional cases for clearly defined public purposes through due process of law and upon payment of adequate compensation. However, it doesn't clearly demarcate what the public purpose consists of and how it is determined (whether on the political justification of a weak rationality model; a deontological model; or a cost-benefit rationality model) and its role becomes a point of disagreement in the academia.[9] The due process of law is mostly seen from the perspective of judicial review and the participation of affected parties in the different stages of expropriation.[10] The adequacy of compensation, that serves social justice and economical decision-making, on the other hand, is mainly perceived in terms of the amount of monetary compensation taking the economic value of the expropriated land.[11] As such, the extent of dependency on the land is not taken into account in the assessment of compensation. Moreover, attention is also not given to the implications that the plurality of legal and institutional frameworks have for the assurance of land rights in the existing framework.

[7] Deininger (n 2) p 8; Place *et al* (n 5) pp 19–21.
[8] Migot-Adholla *et al* (n 4) p 108; Deininger (n 2) p 36.
[9] Micah Elazar. Public Use and the Justification of Takings. (2004) 7 *U. Pa. J. Const. L.* 249–278; Abraham Bell and Gideon Parchomovsky. The uselessness of public use. (2006) 106 *Colum. L. Rev.* 1412–1449.
[10] D. Zachary Hudson. Eminent domain due process. (2010) *The Yale Law Journal*. 1280–1327; Food and Agriculture Organization. Compulsory acquisition of land and compensation. Rome. *FAO Land Tenure Studies 10,* 2008. Pp 5, 20-21 and 45-47; Linlin Li. Adoption of the international model of a well-governed land expropriation system in China —problems and the way forward. (2015 World Bank Conference on Land and Poverty, Washington DC), 2015.
[11] Paul Niemann and Perry Shapiro. 'Compensation for taking when both equity and efficiency matter' in Bruce L. Benson (ed.). *Property rights: eminent domain and regulatory takings re-examined*. New York. Palgrave Macmillan, 2010. 55–76. P 57; Rachel D. Godsil and David Simunovich. 'Just compensation in an ownership society' in Robin Paul Malloy(ed.). *Private property, community development, and eminent domain*. Aldershot. Ashgate Publishing, 2008. 133–148. P 137.

The legal construct of enforceability of land rights in the existing framework is viewed from the perspective of the cost of enforcement and the independence of the enforcing organ.[12] It requires that the cost of enforcement not be inhibiting and the enforcement in specific challenges be made in and by an independent and neutral organ. Nonetheless, it doesn't observe the possibility of state interference in limiting the grounds of enforcement and making the cost of enforcement unaffordable through legislation.

Although variations in the empirical evidence are prevalent, land registration and certification is theoretically assumed to promote security of land tenure. Without giving any attention to its legal effects, the existing literature examines the contribution of land registration and certification only from the perspective of the process of registration, and its cost and inclusiveness.[13] However, its contribution to the enhancement of land tenure security depends on the satisfaction of the other legal constructs of land tenure security and its legal effect and evidentiary role in establishing the entitlement.

Perpetuation of land tenure insecurity is not only limited to the implementation and observation of the legal protections afforded to land rights. It also results from the making of the law. Accordingly, as the issue of land tenure security is the broader outlook of property rights and it involves apportionment of power over wealth between the people and state, and within state between the federal and state governments in federations, some aspect of it is supposed to be regulated under the constitutional law. This is with a view to guide the prescription of the rights and protections to be afforded in subordinate legislation, and to check the act and practice of the state, and individuals' interference from a constitutional perspective.

The nature of constitutional protection, in fact, depends on what purpose the constitution makers intended the constitutional property clause to serve. Edwin Baker has identified the six constitutional property functions that can be categorized as doctrinal stipulations and policy guiding rules.[14] The doctrinal stipulations suggest the constitutional property clause to serve the protective, use, personhood, welfare and sovereign functions, while the policy guiding rules, which

[12] Deininger (n 2) p 36; Place *et al* (n 5) pp 19–21.
[13] Klaus Deininger and Gershon Feder. Land registration, governance, and development: Evidence and implications for policy. (2009) 24 *The World Bank Research Observer*. 233–266.
[14] Baker (n 3).

are subjected to value judgements, demand the constitutional property clause to serve an allocative function.[15] The extent of incorporation of these functions in the constitution of a nation basically depends on the nature of the society and extent of dependency of the society on a given resource, among other things.

For instance, if we take land in some society it may be treated as just like any kind of property, whereas in some other society like the case of peasants and pastoralists of Ethiopia, land is a means of living, defines the social status and cultural identity of persons, and is used for political control - it is regarded differently and more extensively.[16] The scope of constitutional protection varies accordingly. Nevertheless, given that the constitutional amendment has stringent requirements while the land policy is supposed to be flexible to fit into socio-economic and political changes, constitutional recognition and regulation of land rights should be in a form such as to allow changes.[17] Moreover, the approach to constitutional interpretation must also be compatible with the flexible nature of land policy, particularly in such a way as to promote land tenure security.

ii. Factors Affecting the Development of an Ideal and Comprehensive Conceptual Framework for Legal Land Tenure Security

In the above sub-section, I conclude the absence of a comprehensive conceptual framework of legal land tenure security by showing the gaps in the existing one. Before drawing my own that fills the gaps in the existing one, it is paramount to give conclusory remarks on why such gaps in the literature are created. I forward four theoretical arguments. These are: variations in understanding the concept of land tenure security, adoption of a piecemeal approach to studying the legal constructs, consideration of privatization of land as the ultimate means to secure land tenure and treatment of security of land tenure as one right in the property right regime.

Differences in the understanding and definition of land tenure security has affected in its own way the development of a well-defined and comprehensive conceptual framework of land tenure security. The subjectivist understanding defines it taking into account only the perception of

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[15] Ibid.

[16] Rahmato Searching (n 1) p 16; Committee on Economic, Social and Cultural Rights. General comment No. 21: Right of everyone to take part in cultural life. *UN Doc. E/C*, 2009. P 3; Allan Hoben. *Land tenure among the Amhara of Ethiopia: the dynamics of cognatic descent*. Chicago. University of Chicago Press, 1973; Paul Brietzke. Land reform in revolutionary Ethiopia. (1976) 14 *The Journal of Modern African Studies*. 637–660. P 637.

[17] Deininger (n 2) p 51.

landholders about their land rights.[18] The objectivist approach understands it from the objective elements /legal constructs, which are themselves incomplete and it has given little attention, if any, to the subjective element of land tenure security.[19] The dualist conception attempts to understand the concept from both the subjective and objective elements.[20] However, it still fails to give the full-fledged legal constructs and the constituting elements of the constructs incorporated in this definition are also not clearly defined.

The place of the idea of land tenure security in the property right regime has also contributed the emergence of gaps in its conceptual framework. Particularly in the bundle of rights metaphor of property, the security of property is equated with "immunity from expropriation" and one right incident to ownership.[21] For instance, in an essay on ownership, Honore considers security as immunity from expropriation and one right from his bundle of eleven rights.[22] The conception of land tenure security influenced by this way of understanding forces one to make the following assumptions. First, it regards security of land tenure as nothing but immunity against expropriation. The other aspects of land tenure security, such as its duration, breadth, enforceability and registration and the certification of land rights are not reflected and incorporated in this line of thought. Additionally, even about the assurance of land rights the Honoreian conception of security of property is confined to the issue of expropriation only. The other elements in the legal construct of assurance of land rights, like avoidance of legal and institutional pluralism and inconsistencies, haven't been incorporated.[23]

Second, the conception of security of property as incident of ownership forces one to synthesize the issue of land tenure security within the ambit of ownership discourses. Rather than looking at

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[18] Anne M. Larson, Deborah Barry, and Ganga Ram Dahal. 'Tenure change in the global south' in Anne M. Larson, Deborah Barry, and Ganga Ram Dahal (eds.). *Forests for People Community Rights and Forest Tenure Reform*. London. Earthscan, 2010. 3–18. P 13.

[19] Food and Agriculture Organization. Land tenure and rural development. Rome. *FAO Land Tenure Studies 3,* 2002. P 18; Alain Durand-Lasserve and Harris Selod. The formalization of urban land tenure in developing countries. (The World Bank urban research symposium, Washington), 2007. P 6.

[20] Place *et al* (n 5) p 20.

[21] A.M. Honore. 1961. Ownership. In A.G. Guest (ed.). *Oxford Essays in Jurisprudence* 107 as cited in Stephen R. Munzer. *A theory of property*. Cambridge. Cambridge University Press, 1990. P 22.

[22] Ibid.

[23] Collins Odote. The dawn of Uhuru? Implications of constitutional recognition of communal land rights in pastoral areas of Kenya. (2013) 17 *Nomadic Peoples*. 87–105; Ross Andrew Clarke. Securing communal land rights to achieve sustainable development in sub-Saharan Africa: Critical analysis and policy implications. (2009) 5 *Law Env't & Dev. J.* 130–151; Klaus Deininger, Harris Selod, and Anthony Burns. *The Land Governance Assessment Framework: Identifying and monitoring good practice in the land sector*. Washington DC. The World Bank, 2012. Pp 20-21.

the issue of land tenure security as a distinct and even broader conception of property than ownership, the line of thought at hand brings the view that land tenure security is dependent on the form of land ownership and requires a search for the form of land ownership that best serves and ensures it.[24] This takes us to my third theoretical argument about why we lack a comprehensive conceptual framework of legal land tenure security.

Predominately, the ultimate suggestion in the existing discourse on land tenure security is private ownership of land as the best possible option to provide the highest level of land tenure security. The dominant thought among scholars is that private ownership of land with its right of disposition of land is the key to tenure security.[25] It is considered as the highest standard to evaluate the legal land tenure security in the other land tenure systems that guarantee landholders with lesser ownership rights of land. However, I argue that securing the tenure doesn't necessarily depend on the form of the land ownership. Instead, security of land tenure must be perceived as a broader concept and out of the box of ownership discourses.

The argument for and demand to examine the issue of land tenure security out of the context of the land ownership debate can be justified in terms of the fact that a single land ownership form doesn't necessarily fit to the different land use and holding forms; the adoption of one form of land ownership doesn't automatically indicate the status of land tenure security since the state may use its power of land use regulation that affects it; and the gap and difference between different land ownership forms in terms of nature of rights in land granted, is minimal, if any. Thus, the demand to analyse the issue of land tenure security away from the ownership debate gives one the chance to develop a comprehensive conceptual framework of land tenure security.

Lastly, the approach to studying the issue of land tenure security has also undermined the development of its comprehensive conceptual framework. Mostly, the approach taken in studying land tenure security issues has been piecemeal. Either it entailed examining single legal constructs

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[24] Deininger (n 2) p 55; Harold Demsetz. Toward a theory of property rights. (1967) 57 *American Economic Review*. 347–359; Christian Lund. *African land tenure: Questioning basic assumptions.* International Institute for Environment and Development. 2000; Berhanu Abegaz. Escaping Ethiopia's poverty trap: the case for a second agrarian reform. (2004) 42 *The Journal of Modern African Studies*. 313–342. P 315.
[25] Ibid.

on their own or the subjective feelings of the landholders.[26] No attempt to study land tenure security in its entirety hast been conducted to the best of my knowledge. My attempt to show the existing conceptual framework is also collected from those piecemeal works. Thus, I argue that such way of studying the issue of land tenure security will not indicate the real status of land tenure (in)security and has also affected the development of a comprehensive conceptual framework against which a nation's legal measures are evaluated.

iii. Reformulation of the Conceptual Framework

My reformulation of the conceptual framework of land tenure security is based on the gaps in the existing conceptual framework emanating from the above factors and is aimed at filling those gaps. To begin with the legal construct of breadth of land rights, first it must be defined through an integrative approach that views the nature of rights in land cumulatively through all metaphors of property. Unlike the prevailing conceptual framework that views the breadth of land rights in the Hohfeldian bundle of rights metaphor only, defining the breadth of land rights in light of the other metaphors too – the Blackstonian exclusionary, the Arnoldian web of interest and the Bakerian decision-making authority – provides a better approach to establishing this legal construct. This is because, apart from the quality and quantity of rights, also the freedom in the exercise of these rights and the nature of obligations attached thereto directly affects the breadth of the rights.

The Blackstonian exclusionary metaphor, for instance, helps to restrict or avoid unnecessary stipulations of procedural requirements which open the door for state organ interference in the exercise a specific land right like subjecting it to state organ approval. The Bakerian decision-making authority metaphor adds the landholder to have a freedom in the manner and situation in which to utilize the bundle of rights legally provided. The Arnoldian web of interest dimension, in turn, further strengthen the breadth of land rights construct by demanding that the environmental obligation the landholder has towards the land itself must be clear and necessary to realize the other legitimate goal – environmental protection. This conception also informs that the state use of its power of land use regulation must be clearly defined and required to be exercised with the

[26] For instance, about the legal construct of assurance of land rights see Daniel W. Ambaye. *Land rights and expropriation in Ethiopia*. Switzerland. Springer, 2015; about the legal construct of land registration and certification see Deininger and Feder (n 13).

aim to achieve a legitimate goal. This then avoids the probability of subjective regulation and vague standards, which may be manipulated and threaten land tenure security.

Furthermore, to establish the legal construct of breadth of land rights, the existing framework has only required that numbers of rights must be adequate and key rights should be guaranteed.[27] Of course, it claims that the right to sell land is not necessary to establish this construct.[28] What is adequate and which one is a key right requires objective standards to avoid the legislature's subjective provision. I claim that delineation of the nature of rights in land so as to establish the legal construct of breadth of land rights demands the appraisal of the social, economic and historical context. The social context requires a legislature to take into account the manner of land use and holding of the particular community. The breadth of the land rights in the society where communal land use and holding is prevalent cannot be the same with the individualistic use and holding system. This is because there are some specific land rights which require and presuppose an individualistic way of land use and holding. Introduction of these in a communal land use and holding society, like pastoralists in my case, apart from being impracticable, may lead to conflict between the members. The breadth of land rights should be defined in recognition of the practicability requirement and in consultation with the customary rules. In case of individualistic land use and holding, the breadth of land rights should go to the extent of incorporating all rights except sale of land.

The historical context, on the other hand, demands the delineation of rights in land in the current regime and requires one to review the question of land rights in previous political regimes, particularly in states like Ethiopia, where the question of land is at the centre of political movements and change of regimes. The historical assessment, then, enables the current regime to provide a better breadth of land rights than the previous regimes. That is with the view to answer the question of land rights that was raised against the previous regime so that the historical continuity of the problem comes to an end.

The economic context in defining the legal construct of breadth of land rights requires that the rights in land to be guaranteed to landholders must be ones that can bring economic transformation,

[27] Place *et al* (n 5) p 20; Deininger (n 2) p 36; Rahmato Searching (n 1) p 36.
[28] Deininger (n 2) p 76.

which may not necessarily result in loss of land rights forever. The economic transformation of the landholders can be realized if they can make further investments in their landholdings and are able to derive additional source of income from other economic activities. This can be realized when the landholders are guaranteed with the right to use their land rights as collateral to access loans and to lease it so that they can engage in another economic sector without the fear of losing it.

The integrative approach of understanding, and delineation of security of tenure, taking the social, historical and economic context cumulatively provides the opportunity to establish the legal construct of breadth of land rights that establishes land tenure security. In fact, it warrants that the nature of rights in land may not necessarily be uniform nationwide for every society. Instead, it establishes provision of different nature of breadth of land rights taking the context of the landholders into account.

About the legal construct of duration of land rights, the subjectivity in defining it may be addressed by taking into account the purpose for which the land rights are acquired with respect to the general duration and leaving determination of the specific duration to the parties involved in the transaction. For the society where land rights are a livelihood and a defining element of their cultural identity, like peasants and pastoralists in Ethiopia, the general duration of land rights should be time-unbounded. With regard to other landholders and their specific durations, determining the duration must be left for the parties in transactions. As an aspect of freedom of contract, apart from the legislature indicating the time-bounded nature of specific land rights and land for other purposes, if it wishes, fixing the actual duration should be left to the parties.

The legal construct of assurance of land rights, on one hand, is supposed to strike a balance between the public demand for land and the land tenure security and property rights protection of individuals and communities.[29] That is, confining the deprivation of individual or communal land rights only on the land expropriation and upon the fulfilment of both the substantive and procedural guarantees that limits or avoids arbitrariness in the taking. Perhaps establishing the balance demands review of the theoretical foundation of the state power of expropriation itself. The

[29] FAO Compulsory (n 10); Bin Cheng. The Rationale of Compensation for Expropriation. (1958) 44 *Transactions of the Grotius Society*. 267–310.

existing theoretical foundations – the inherent power, the reserved right and the consent theory – grant a strong position to the state to have the power of land expropriation and it seems to go against the constitutional democracy prevailing nowadays.[30] Neither of these theoretical foundations claims that the state has the power from constitutional law that establishes the state and its power. Furthermore, nor do they view the expropriation from the perspective of the affected parties, like as an exceptional limitation to their property right; which in effect has an implication to restrict state power. This is because assuming land expropriation from the perspective of the affected parties as a limit to right has the tendency and implication to cause restrictive interpretations of the state power.[31] Besides, this then presupposes the state to have a constitutional source to exercise the power of expropriation. The approach of designation of the authority of land expropriation to a state agent should be the one that ensures the timely acquisition of land, and unabusive use, coherent and uniform establishment of power at the same time.[32]

The specific requirements of expropriation such as public use, compensation and procedural due process should be constructed in a manner as to strike a balance. Clear construction of elements of public use on the basis of a cost-benefit analysis model and to let it to play its legal role of restricting the state power of expropriation is one of the elements to establish the legal construct of assurance of land rights.[33] The establishment of a public use requirement also requires the use of uniform standards to define its constituting elements so that its rhetoric should not be open to the elites and the haves to abuse power for their own benefit against the poor, like peasants and pastoralists. This happens when the power of defining the public use clause is a shared power of the legislature – by providing illuminative lists with objective standards to guide incorporation of others, and an independent judiciary to interpret the incorporation of other similar elements.[34]

When one views the requirement of compensation from the perspective of land tenure security, it is clear it must play two fundamental roles. One is a deterrent effect. That is, assuming more benefits than the cost incurred, the state may involve itself more frequently in land expropriation.

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[30] Matthew P. Harrington. "Public Use" and the Original Understanding of the So-Called "Taking" Clause. (2001) 53 *Hastings LJ*. 1245–1301.
[31] Francis G. Morrisey Omi. Strict interpretation helps avoid Harshness. (2012) *Health Progress.* 71–73.
[32] FAO Compulsory (n 10).
[33] Elazar (9); Bell and Parchomovsky (n 9).
[34] FAO Compulsory (n 10) p 11; A. H. B. Constable. Expropriation of Land for Public Purposes. (1901) 13 *Jurid. Rev.* 164–184. P 165.

However, if the cost of expropriation – compensation, is proximate to the loss of the affected parties, the state will refrain from making unwise decision of expropriation.[35] As its second role from the side of affected parties, the general assumption and idea behind the compensation requirement is that due to land expropriation the affected parties' socio-economic and political position should not be impoverished.[36] Since the taking is done for a better societal interest and the state is in a better position to transfer and distribute the cost to the society at large and with a better capacity to shoulder it as well, the compensation must enable the affected parties to be better off in all respects. It, thus, doesn't create a sense of victimization and insecurity of land tenure on the affected parties, at least from the compensation perspective. Accordingly, approaching compensation from the land tenure security perspective demands taking into consideration of the extent of dependency of the affected parties on the land rights.

These roles of compensation force us to look into the different factors which influence one way or other its role of serving them. It includes the demarcation of the compensable interests, the basis of compensation, the nature of valuation method and valuer, modes of compensation and payment, and the amount of compensation. In this regard to establish the assurance of land rights the law defining the land tenure is required to make any interest affected due to the land expropriation, including loss of land rights, a compensable interest and the extent of damage should be assessed on the basis of affected parties' loss.[37] This may result in difficulty in assessing some losses that are sentimental by their nature with regard to which the amount of compensation should be fixed requiring the affected parties to prove it and employing the principle of equity.[38]

The legislative specification of the compensation valuation method with respect to measurable damage cannot be a single one that applies to every land expropriation. Instead, it must be

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[35] Daniel Weldegebriel. 'Compensation during expropriation' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 191–234. P 200; Paul Niemann and Perry Shapiro. 'Compensation for taking when both equity and efficiency matter' in Bruce L. Benson (ed.). *Property rights: eminent domain and regulatory takings re-examined*. New York. Palgrave Macmillan, 2010. 55–76. P 57; Rachel D. Godsil and David Simunovich. 'Just compensation in an ownership society' in Robin Paul Malloy(ed.). *Private property, community development, and eminent domain*. Aldershot. Ashgate Publishing, 2008. 133–148. P 137.

[36] Ibid.

[37] Robert Kratovil and Frank J. Harrison Jr. Eminent Domain--Policy and Concept. (1954) 42 *Calif. L. Rev.* 596–652. P 615.

[38] Jack L. Knetsch and Thomas E. Borcherding. Expropriation of private property and the basis for compensation. (1979) 29 *U. Toronto LJ*. 237–252. P 239.

diversified and must be adopted by taking into account the nature of the land rights the affected parties have, the marketability of their land rights, the duration of their land rights, the period the expropriation lasts, the nature of land utilization, and the level of the affected parties' dependence on the land rights.[39] There is no fast and single valuation method that can establish the compensation that ensures the interest of the affected parties. The legislative adoption of a particular valuation method should be guided by the aforementioned factors, opening the door for diversifications. Moreover, the determination of the amount of compensation should be guided by the principle of damages is equivalent to damage.[40] Any legislative restriction on the amount makes the affected parties to be undercompensated.[41]

The nature of the valuer also affects the compensation. As much as possible the independence and neutrality of the valuer must be maintained.[42] Especially, the expropriating organ should not be involved in the formulation and assignment of the valuer. The valuer should not be subjected to the influence of the expropriating organ. Otherwise, the amount of compensation to be awarded may be assessed in a manner to benefit the expropriating organ, through fixing a lesser amount than the actual damage sustained.

Beyond these, the mode of compensation and the form of payment in case of monetary compensation also have their respective implications in establishing the element of assurance of land rights. The selection of a particular mode of compensation among monetary, in kind (land to land), or other economic activity, and modes of payment in case of monetary compensation – lump sum or periodical, should take into account the nature of the affected parties and their preference when all options are available.[43] Particularly, when the land rights are a means of living for the affected parties, the selection of the particular type of compensation and payment mode should make sure of the restoration and continuity/sustainability of the livelihood.[44]

On the other side, the establishment of assurance of land rights still depends on the extent of procedural guarantees provided in land expropriation for the affected parties and to the extent the

[39] FAO Compulsory (n 10) pp 27ff; Ambaye (n 26) pp 198ff.
[40] Oscar Schachter. Compensation for expropriation. (1984) 78 *American Journal of International Law*. 121–130.
[41] Food and Agriculture Organization. Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security. Rome. *FAO Council,* 2012. Guideline 16.
[42] FAO Compulsory (n 10) p 25.
[43] Li (n 10); FAO Compulsory (n 10).
[44] Ibid.

legal measures minimized the overlapping institutional and normative pluralisms.[45] To ensure procedural safeguards legislative measures should be made to demand the expropriating organ to ensure the informed participation of the affected parties in the entire process of expropriation.[46] By requiring the state to attempt to acquire land voluntarily through negotiation; involving the affected parties in social implication assessment and public hearings to define public purpose when it is not expressly stipulated; letting the affected parties propose the amount and mode of compensation and resettlement plan; and empowering the affected parties to follow and oversee the use of the expropriated land with the view to reclaim it if not used within the fixed time and for the initial project, the procedural guarantee of affected parties' participation can be ensured.[47] Moreover, the procedural safeguards include the decision of expropriation to be made at a convenient time for the affected parties and with advance notice and payment of compensation.[48] The notice period should be one that enables the affected parties to recoup investments on the land, and to establish a new livelihood when their means of living is land.[49]

Furthermore, the establishment of the element of assurance of land rights of land tenure security again requires guaranteeing certainty about the legal rights and protections afforded and clear delineation of the institutional framework for the land administration. Uncertainty about the nature of legal rights and protections happens when there are mutually contradicting and inconsistent normative land tenure rules to define the land rights and obligations of landholders. This happens in two scenarios, particularly in federations like Ethiopia. The first one when the contradictory statutory and customary land tenure rules *de facto* apply parallel on the same landholders at the same time. The second scenario comes into play in federations when the federal and federated state enact their respective laws and made determinations on land tenure matters in a mutually contradicting manner, without taking the constitutional division of power seriously.

Institutional pluralism -assigning the same matter of land administration to different institutional setups at one time - also has a negative implication for the element of assurance of land rights for land tenure security. Apart from institutional appropriateness, accessibility, proximity and

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[45] Place *et al* (n 5) p 21; Deininger (n 2) p 36; Clarke (n 23); Odote (n 23).
[46] Li (n 10).
[47] Ibid.
[48] FAO Compulsory (n 10).
[49] Ibid.

accountability, institutional multiplication, discoordination and decentralisation without oversight also imply the undermining of the assurance of land rights.[50] Because, among others, it affects the uniformity of standards, achievement of a coherent national land policy and establishment of a body of core expertise.[51] Additionally, it creates uncertainty on the side of the landholders about where to effect the land administration matters and opens a door for making contradictory decision by the different institutions on the same land administration issue.

The element of land registration and certification of land tenure security presupposes the establishment of the above constructions of law. Besides the process of registration being conducted with the participation of the public and hearing of the affected parties, its cost is affordable, and inclusive of all nature of land rights;[52] its contribution to land tenure security further depends on the clear stipulation of its legal effect. Unless the registration and certification itself is contested, the establishment of the rightful and legal landholder should be made by considering it as conclusive evidence. Otherwise, in uncontested registration and certification of land, the demand for additional collaborative evidence to establish title leads to the assumption that the state organ that conducted the registration and issued the certificate cannot be trusted and also minimizes its role of securing land tenure.

Apart from the above substantive protections and procedural safeguards, legislative measures are also required to construct the element of enforceability of land rights.[53] Having a dualistic role in securing land tenure – as a distinct element and means to implement and make effective the other legal constructs of land tenure security – the legislative measures should go beyond making the cost of enforcement affordable and establishing the independence of an organ where land rights are enforced.[54] Taking legislative measures that create a conducive environment for legal empowerment in terms of cost and legal knowledge, like introducing exemption from the court fee, provision of free legal aid, introduction of a mobile court bench, and creation of an enabling environment to civil society organizations contribute the establishment of the element of assurance

[50] Monique van Asperen, Lucia Goldfarb and Katie Minderhoud. *Strengthening land governance for poverty reduction, sustainable growth and food security*, 2011. P 8; Klaus Deininger, Harris Selod, and Anthony Burns. *The Land Governance Assessment Framework: Identifying and monitoring good practice in the land sector*. Washington DC. The World Bank, 2012. Pp 16–17.
[51] FAO Compulsory (n 10) p 13.
[52] Deininger and Feder (n 13).
[53] Deininger (n 2) p 36; Place *et al* (n 5) pp 19–21.
[54] Ibid.

of land rights. This must be coupled with adopting at least the minimum standards of personal and institutional judicial independence.[55] Moreover, the legislative approach to limit the grounds to claim the judicial remedy and constitutional review and to make the cost of enforcement unaffordable should be outlawed.

In fact, leaving determination and prescription of the above objective elements of land tenure security for the legislature's construction may open a door for affecting it in the law making.[56] In order to rectify that probability, it demands provision of constitutional principles which guide what legislative protections and rights to property in general and land rights in particular should be incorporated. The constitutional protections afforded property rights should not only be interpreted in terms of the function of property intended by the constitution makers as Edwin Baker claims.[57] It must further allow the progressive incorporation of the other functions which were not intended at the time of making of constitution, particularly in relation to broadening the scope of constitutional protections to land rights. It can be done through the Policy Based Interpretation of the constitution.[58] However, about any approach to reduce the constitutional function should be done only through amendment of the constitution and in such cases the constitutional originalism principle of constitutional interpretation should guide.[59] This eclectic way of constitutional interpretation enhances the securing of land tenure.

B. The Legal Land Tenure Security of Peasants and Pastoralists in Post-1991 Ethiopia

Based on the above conceptual framework of objective land tenure security, in this section I provides concluding remarks on where the post-1991 statutory land tenure system of Ethiopia fits, taking the constitutional and subordinate legislative protections afforded to the land rights of peasants and pastoralists. In doing this, the section is divided into two sub-sections. It begins with what the constitutional protections and interpretation reveal and imply about the securing of land

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[55] Vicki C. Jackson. 'Judicial independence: structure, context, attitude' in Anja Seibert-Fohr (ed.). *Judicial Independence in Transition*. Heidelberg. Springer, 2012. 19–86; Democracy Reporting International. International standards for the independence of the judiciary. *Briefing Paper, 41*, 2013.
[56] Baker (n 3).
[57] Ibid.
[58] See footnote 161 of Chapter 3.
[59] About different approaches to constitutional interpretation see Richard H Fallon Jr. A Constructivist Coherence Theory of Constitutional Interpretation. (1987) 100 *Harv. L. Rev.* 1189–1286; R. Randall Kelso. Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History. (1994) 29 *Val. UL Rev.* 121–233.

tenure of peasants and pastoralists and what academic debates say about it. Then follows the sub-section that shows how the constitutional protections are defined in the subordinate legislation and its implication for the land tenure security of peasants and pastoralists.

i. Constitutional Protections and Interpretation

In Ethiopia, the existing academic and policy discourses on the issue of rural land tenure security has predominantly taken three different perspectives. The ownership changing arguments have expounded on land privatization or introduction of associative land ownership, which has centred on the guaranteeing of the right to alienation – sale of land – to secure land tenure. This is with the assumption that the *status quo* land ownership in the Federal Democratic Republic of Ethiopian (FDRE) Constitution – state and people's ownership – is the dominant threat to land tenure security.[60] This line of thought has further assumed that the land ownership adopted in the Constitution grants the state strong discretionary power on the land rights of peasants.[61] Thus, it requires the amendment of the Constitution itself to change the form of land ownership. This one-sided view, as it doesn't look into the nature of pastoralist's land use and holding system, apart from being subject to the same criticism I have forwarded and summarized in section A(iii) above, has not made a critical inquiry on the measures the FDRE Constitution takes to limit state power and intervention in peasants' and pastoralists' land rights. Besides, the nature of the land ownership in the Constitution is also understood in different ways, the highlights of which is given later.[62]

Those in the support of the *status quo* land ownership, have also argued and viewed land tenure security from the land ownership viewpoint, but in a reversed way. The proponents here have argued that the *status quo* land ownership is aimed at promoting the land tenure security of peasants

[60] Constitution of Federal Democratic Republic of Ethiopia (FDRE). Proclamation No.1/1995. *Fed. Neg. Gaz*. Year 1 No.1. 1995. Article 40(3); Wibke Crewett and Bendikt Korf. Ethiopia: Reforming land tenure. (2008) 35(116) *Review of African Political Economy*. 203–220.

[61] Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 4, Nov. 23-29/1994, Addis Ababa), 1994. Deliberation on Article 40. (Amharic document, translation mine); Crewett and Korf (n 60) pp 205-206; Mesfin Woldemariam. Land and development in Ethiopia. (1999) 12 *EEA Economic Focus.* 12–13. (Translation mine); Rahmato Searching (n 1) p 10; Yigremew Adal. Review of landholding systems and policies in Ethiopia under the different regimes. Addis Ababa. *Ethiopian Economic Policy Research Institute working paper 5,* 2002. P 27.

[62] Mellese Damite. 'Land ownership and its relation to sustainable development' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 31–38; Daniel Weldegebriel. The new land lease proclamation: changes, implications. (Reporter Nov. 12 2011).

and pastoralists by controlling the market force.[63] Arguing that the introduction of other forms of land ownership, privatization or associative ownership, exposes the peasants to distress sale of land and then resorts the historical injustice and oppression by different actors now - urban bourgeoisie class. However, this perspective has not seen the other source of land tenure insecurity, the state, and doesn't examine the constitutional measures taken to restrict state intervention in the land rights of peasants and pastoralists.

Finally, in-between the above two perspectives, the revisionists perspective, without engaging in the debate on the form of land ownership has argued for the introduction of more land reform laws to broaden land rights of peasants and pastoralists.[64] It is with the premise that the state have a power to define the peasants' and the pastoralists' land rights as it did in the subordinate legislation so far. Apart from being non-holistic, the revisionists haven't critically examined the constitutional protections and questioned the state legislative measures in light the constitutional protections afforded to peasants' and pastoralists' land rights.

Situating my claim at the heart of land tenure security should be examined out of the box of the ownership dichotomy, and a critical examination of the FDRE Constitution reveals the incorporation of all the Bakerian protections of constitutional property functions in a capacious manner. The constitutional protections afforded shield peasants and pastoralists not only from market forces, but also from state control. As a capacious constitution, that opens the protections and rules to be defined from narrowest understanding to the broadest giving the state broad space to play within, the nature of the protections can evolve throughout time. It gives the chance to bring changes in the land rights of peasants and pastoralists when socio-economic and political changes forces one to do so without engaging in constitutional amendment. Thus, the evolution must be in a way to enhance the land tenure security of the peasants and the pastoralists and

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[63] Constitutional Minutes (n 61) Deliberation on Article 40; Crewett and Korf (n 60) pp 204-205; Gebru Mersha. Privatization of rural land: to protect whose security. (Inaugural Workshop of the Forum for Social Studies. Vol. 18, Addis Ababa), 1998. P 9;

[64] Solomon Fikre Lemma. *The challenges of land law reform: smallholder agricultural productivity and poverty in Ethiopia*. (Doctoral dissertation University of Warwick, UK), 2015; Getnet Alemu. *The challenges of land tenure reform to structural transformation of the economy: lessons from country experiences*. (In proceedings of the 16th international conference of Ethiopian studies (Svein Ege, Harald Aspen, Birhanu Teferra and Shiferaw Bekele (eds.)) Trondheim, Norway), 2009; Gudeta Seifu. 'Rural land tenure security in the Oromia National Regional State' in Muradu Abdo (ed.). *Land law and policy in Ethiopia since 1991: Continuities and challenges*. Addis Ababa. Addis Ababa University Press, 2009. 109–146.

minimize state encroachment on their land rights. Besides, the constitutional interpretation approach must also be guided by the eclectic interpretation approach.

However, the FDRE Constitution incorporates the allocative function of constitutional property, which is vulnerable to value-judgement as a distinct and substantive right to peasants and pastoralists.[65] Perhaps with the view to adopt the welfare function, it also includes the right to free access to rural land for the needy in priority to any rural land claimers.[66] The rural land demand of others can be secured after peasants' and pastoralists' demand for land has been satisfied. By guaranteeing them with the right to free access to land, a policy decision was taken that may contradict with the notion of land tenure security. Because, as the land resource is a limited and fixed resource and there is an ever-increasing rural population and demand for land, the state may engage in forced redistribution of land to satisfy its obligations in terms of this right.[67]

Furthermore, the use-value function is also guaranteed for peasants. Especially, without specifying the purpose for which peasants can employ and utilize their landholding, the Constitution entitles them to consume and transform land for any developmental and survival activities as it doesn't contravene with the constitutional restrictions.[68] About the pastoralists' communal utilization and landholding system, the Constitution specifically defines the purpose for which they can employ their landholdings – grazing.[69] That is with presumption that if the purpose is not specified as such the members may opt to use the landholding for different purposes which, in effect may result in conflict of interests.

The protective, and personhood functions are also established while the FDRE Constitution guarantees peasants and pastoralists with the right to immunity against eviction and the right to compensation and relocation.[70] Unlike the case with other landholders, distinct to the peasants and the pastoralists the Constitution guarantees the right to immunity against eviction and displacement expressly. It doesn't even mentioned expropriation for greater societal interest as an exception expressly, so that its very existence is constructed through interpretation. Apart from this, taking

[65] FDRE Constitution (n 60) Article 40(4 and 5).
[66] Ibid; Crewett and Korf (n 60) pp 204-205.
[67] Rahmato Searching (n 1) p 12.
[68] FDRE Constitution (n 60) Article 40(4); Baker (n 3) p 759.
[69] FDRE Constitution (n 60) Article 40(5).
[70] FDRE Constitution (n 60) Article 40(4 and 5) and 44(2); Baker (n 3) p 747.

the livelihood nature of land rights that defines the personality or group identity of peasants and pastoralists the Constitution adopts a special form of protection that forces the state to compensate and relocate them when they are displaced due to state programs.[71]

Furthermore, the sovereign function of property is also established in the FDRE Constitution while it outlaws "sale or exchange of land by other means".[72] In the *a contrario* reading in other means of transaction the Constitution entitles peasants and pastoralists to exercise power of others. Moreover, in defining women's rights, the Constitution implies that the sovereign function of property is also incorporated in the land rights.[73] This restriction must be interpreted and constructed for the purpose of ensuring and protecting the other constitutional rights. One such right in my context is the right to immunity against eviction and displacement.

In addition to incorporating the above constitutional functions of property, as federation, it is fundamental to establish how the power in relation to land has been apportioned between the central and state governments, because unless it is divided expressly, it may lead to the adoption of different standards, and multiplication of authorities with the power of land administration.[74] This then causes uncertainty of land rights on the side of peasants and pastoralists. Against this backdrop, a critical examination of FDRE Constitution reveals that the land related powers are divided between both the central and state governments. Accordingly, the central government is empowered to prescribe land tenure rules and authorized to delegate it to the states, if it believes it necessary so as to accommodate variations in federated states.[75] The states are constitutionally assigned the power of land administration, without any power to delegate it to the central government.[76]

However, the absence of a clear definition in the Constitution of the phrases "land utilization and conservation" and "administer land" forces one to construct legal argument to establish the above division of power. The above conclusion is reached through a critical appraisal of the modified-exhaustive list-residual power division approach adopted in the FDRE constitution, the nature of

[71] FDRE Constitution (n 60) Article 44(2).
[72] Id Article 40(3).
[73] Id Article 35(7).
[74] Deininger *et al* (n 50) pp 16-17.
[75] FDRE Constitution (n 60) Article 51(5) and 50(9).
[76] Id Article 52(2(d)); Constitutional Minutes (n 61) Deliberation on Article 50.

powers assigned to the central and state governments, and the ordinary and literary meaning of the concept of land administration. Nonetheless, as highlighted in the following sub-section, the constitutional stand has not been observed in the subordinate legislation of the federal and state governments.

Aside from the constitutional rules themselves, the constitutional interpretation approach adopted also matters in translating constitutional protections afforded to peasants' and pastoralists' land rights to practice to ensure their land tenure security. Given the capacious nature of FDRE constitution, at least in respect to peasants' and pastoralists' land rights, and the constitutional aim to protect their land rights from state interference that is deep-rooted in the political history of the country, the constitutional interpretation approach adopted has a great emphasis on promoting their land rights. This would happen if the constitutional interpreter adopts an eclectic interpretation approach. However, an analysis of the cases decided so far reveals that the constitutional interpreter adopts an originalist/historical approach of constitutional interpretation in all situations.[77] Accordingly, it makes broadening of the constitutional functions of property so as to enhance land tenure security subject to constitutional amendment. This line of interpretation makes any attempt at broadening for instance the breadth of land rights of peasants, as in the Amhara State law by incorporating the right to mortgage, against the Constitution, unless changes are made.[78] Nevertheless, such measures in state laws also cause the issue of constitutionality in light of division of power between the federal and state governments. This issue is dealt with in the next sub-section in conjunction with whether the above discussed constitutional measures are translated in the subordinate legislation.

ii. Implications of Subordinate Legislative Measures on Land Tenure Security

The appraisal of the rural land laws of post-1991 Ethiopia against the holistic elements of objective land tenure security and the constitutional protections afforded to peasants' and pastoralists' land rights shows perpetuation of land tenure insecurity and failure to reflect constitutional protections. To begin with the constitutional right to free access to land for all needy, the subordinate legislation

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[77] *Emohay Banchiamlake Dersolegn vs Abebew Molla* Federal Democratic Republic of Ethiopia House of Federation 5th parliamentary round, 1st year, 2nd regular meeting, (13 March 2016).

[78] Amhara National Regional State. Revised rural land administration and use proclamation No. 252/2017. 2017. Article 19.

has reaffirmed it and guaranteed peasants with the priority in acquiring land.[79] For the pastoralists what they secured is the free use of the already acquired and possessed landholdings.[80] Nevertheless, going against the constitutional spirit, the state rural land laws introduce the requirement of residency and imposed the obligation of land use payment.[81] Furthermore, the establishment of a land bank to collect and accumulate land for investors in each state, given the prevalence of landlessness in the rural areas, makes the peasants' and pastoralists' priority rights in accessing land meaningless.[82] While the constitution makers assumed nationality as a defining ground of peasants' and pastoralists' right to access to free land, state rural land laws introduce residence of the state to claim land.[83] This resulted from the localized/regionalized way of understanding the notion of "state and people's land ownership" in their respective constitution.[84] This, in turn, opens a space for discrimination among the residents of state on their ethnic background in implementing their right to free access to land due to the ethnic-based federalism implemented in the country. Furthermore, it has resulted in the eviction of ethnic groups who belong ethnically to other states.[85]

Regarding the breadth of land rights, the post-1991 rural land laws of Ethiopia construct it in terms of a bundle of rights metaphor, without making any distinction on the basis of the land utilization and holding system.[86] This would then make some rights *de facto* impracticable in communal land

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[79] Federal Democratic Republic of Ethiopia. Rural land administration and land use proclamation No. 456/2005. *Fed. Neg. Gaz.* Year 11 No. 44. 2005. Article 5(4).

[80] Afar National Regional State. Rural land administration and use proclamation No. 49/2009. 2009. Article 5(5); Ethiopian Somali Regional State. Rural land administration and use proclamation No. 128/2013. *Dhool Gaz.* 2013. Article 5(6); Southern Nation, Nationalities and Peoples' Regional State. Rural land use rent and agricultural activities income tax proclamation No. 4/1996. *Debub Neg. Gaz.* Year 1 No. 5. 1996; Oromia National Regional State. Revised rural land use payment and agricultural income tax proclamation No. 131/2007 issued to amend the previous proclamation No. 99/2005, and rural land use payment and activities income tax amendment proclamation No. 99/2005. 2007.

[81] All State laws under study incorporate the residency requirement. (See footnote 22 of Chapter 4). About land use payment See for instance Proc. No. 4/1995 (n 80); Proc. No. 131/2007 (n 80).

[82] Federal Democratic Republic of Ethiopia. Ethiopian agricultural investment land administration agency establishment Council of Ministers regulation No. 283/ 2013. *Fed. Neg. Gaz.* Year 19 No. 32. 2013; Peter Bodurtha, Justin Caron, Jote Chemeda, Dinara Shakhmetova, and Long Vo. Land reform in Ethiopia: Recommendations for reform. *Solidarity Movement for a New Ethiopia*, 2011. P 1.

[83] Constitutional Minutes (n 61) Deliberation on Article 40.

[84] See footnote 134 of Chapter 3; Husen Ahmed Tura. Land rights and land grabbing in Oromia, Ethiopia. (2018) 70 *Land Use Policy*. 247–255. P 250.

[85] Ambaye (n 26) p 69; Daniel Berhane. Benishangul, Guraferda evictions deliberate: opposition party. (Horn Affairs, May 14, 2013); The Ethiopia Observatory. HRC confirms abuses against expelled Amharas in Benishangul-Gumuz. (Dec. 12, 2013).

[86] Proc. No. 456/2005 (n 79) Article 2(4). See also footnote 32 of Chapter 4 about its nomenclature and definition in state laws.

utilization and holding pastoral community as they are defined with the assumption of individualistic land use and holding system. It implies still the continuous domination of the individualistic land use system and marginalization of communal land use and holding in the legislative and policy discourse. Rights in land are generically named "holding rights," which incorporates the different rights.[87] Common to the federal and most state rural land laws, the contextual understanding of the notion reveals that it fits the restrictive usufruct right in classic Roman law and Blackstonian category[88] and the restrictive alienation right in Schlager and Ostrom categorization,[89] because it consists of the right to use, lease/rent, donate, inherit, consolidate and exchange land for land, and as contribution for a joint development activity with an investor.[90]

Nevertheless, there is deviation between the federal and state laws in defining land rights. Some state laws narrow down the breadth of rights in the federal rural land law; whereas others broaden it by incorporating new of land rights, which are not recognized in the federal legislation. In the former case a good illustration is the Gambella State rural land law that is silent about the right to lease and use the land as a contribution for joint investment with an investor.[91] The latter case is exemplified by the Amhara State rural land law that recognizes and guarantees peasants' right to use land as a collateral.[92] Such deviations, apart from having different implications for the land tenure security of peasants and pastoralists, raise the issue of legality and constitutionality. On one hand it goes against the constitutional rule of division of power over land matters between the federal and state governments, because, as I claim, the power to enact laws that define land tenure is the exclusive power of the federal government and the prerogative of land administration, while the consequential legislative power is reserved to the states. On the other hand, the Amhara State law's incorporation of the right to mortgage, proves the capacious nature of the FDRE constitution, and changing and revisiting of the historic and originalist approach to constitutional interpretation to a policy-based and contextual interpretation.

[87] Ibid.

[88] Shael Herman. The uses and abuses of Roman law texts. (1981) 29 *The American Journal of Comparative Law*. 671–690. Footnote 15; Blackstone (n 6) p 43.

[89] Edella Schlager and Elinor Ostrom. Property rights regimes and natural resources: a conceptual analysis. (1992) 68 *Land Economics*. 249–262.

[90] Proc. No. 456/2005 (n 79).

[91] Gambella Peoples' National Regional State. Rural land administration and use proclamation No. 52/2007. *Neg. Gaz.* Year 13 No. 22. 2007.

[92] Proc. No. 252/2017 (n 78) Article 19.

The legislature's failure to approach the breadth of land rights from an integrative approach, synergy of bundle of rights, exclusionary, web of interest and decision-making authority in the post 1991 statutory land tenure system of Ethiopia has also led to legislative introduction of restrictions and administrative interference in the exercise of a particular land rights and incorporation of grounds of deprivation of peasants' and pastoralists' land rights other than land expropriation.[93] The limitations include prohibition of transforming the purpose for which land is used, restriction on the selection of the beneficiaries of land donation and inheritance, and restriction of the duration and amount of land leased/rented out. These limitations and restrictions, apart from varying between the federal and state laws and among state laws, undermine the decision-making freedom within legally granted rights in land and allow the state administrative interference. This in effect has a negative implication for the adequacy of breadth and assurance of land rights element of land tenure security.

Furthermore, with the introduction of absurd environmental standards and economically unsound grounds, the laws open the door for bureaucratic deprivation of peasants' and pastoralists' land rights. Unlike other rural landholders, the laws include additional grounds, other than land expropriation to deprive land rights of peasants and pastoralists. Although variation between the federal and state legislation is also common in this regard, engagement in non-agricultural activity, failure to observe the residency requirement, failure to conserve land, conversion of communal land to private holding, and the probability of redistribution of land are introduced as additional grounds to deprive land rights.

About the general duration of land rights, the rural land laws take into account the extent of dependence of peasants and pastoralists on land and made it timely unbounded.[94] This will have the implication of enhancing land tenure security. However, the specific duration, for example lease and rent duration, is legislatively fixed differently in each state, on the basis of different criteria.[95] Moreover, constitutional interpretation absurdly approaches leasing and renting of the

[93] See Chapter 5.
[94] Proc. No. 456/2005 (n 79). Article 7(1). The same provision is stipulated in the rural land laws of states.
[95] See Section B(i) of Chapter 5.

land in excess of the maximum duration in the laws as unconstitutional and against peasants' and pastoralists' constitutional right to immunity against eviction and displacement.[96]

In relation to the element of assurance of land rights, apart from introduction of additional grounds of deprivation as land use regulation seen above, the laws are neither based on the correct constitutional rule nor are legislative measures taken to maintain a balance between the public demand for land and the protection of property rights and land tenure security for peasants and pastoralists in prescribing and governing the issue of land expropriation.[97] Rather than view it from the livelihood perspective and in accordance with its constitutional protection, subordinate legislation in post-1991 Ethiopia treats peasants' and pastoralists' land rights as any property right interest in governing land expropriation. The subordinate legislation also conceives of the notion of expropriation on the basis of the inherent power theory that provides the state with strong holding. Moreover, by empowering the national, regional and local governments with the power of expropriation of land without coordination, it opens the door for variation in standards, incoherent establishment of national land policy and difficulty to establish a body of expertise.[98] The authorization of local governments to expropriate land by their own motion and without the oversight and supervision of the higher organ or public hearing, exposes peasants and pastoralists to losing their land rights through bureaucratic discretionary power that can be easily manipulated by elites.[99]

Aside from the legislative construction of the requirement of public use, compensation and procedural due process of land expropriation also in a way perpetuate land tenure insecurity. The adoption of absurd standards and leaving of the determination of the constituting element of public use to administrative organs, leads to the conclusion that everything is for public use.[100] It then totally denies the role of the public use clause in restricting the state authority in expropriating land. This is done by introducing multiple ways of understanding the concept for the different landholders. Going against the constitutional rights to immunity against eviction and displacement

[96] *Alemitu Gebre vs Chanie Dessalegn* Federal Democratic Republic of Ethiopia House of Federation 5th parliamentary round, 1st year, 2nd regular meeting, (14 March 2016).
[97] Federal Democratic Republic of Ethiopia. Expropriation of landholding for public purposes and payment of compensation proclamation No. 455/2005. *Fed. Neg. Gaz.* Year 11 No. 43. 2005. Preamble.
[98] Id Article 3.
[99] FAO Compulsory (n 10) p 13.
[100] Michael M. Berger. 2005. Public Use Goes Valley Girl; Now Means Public Whatever. *Planning & Envtl. L., 57*(9), pp.12-13; Proc. No. 455/2005 (n 97) Article 2(5) and 3(1).

of peasants and pastoralists, the broadest conception of public use is adopted to expropriate their land rights while the narrowest understanding is adopted for other rural landholders.[101]

The legislative measures taken to define the compensation requirement do not take into account social justice, which complicates and impedes the role they play with respect to protecting the land tenure security of peasants and pastoralists. That is through making their land rights non-compensable interests;[102] assigning the task of assessing compensation to state-formed committees;[103] adopting legislatively fixed amounts of compensation for other affected interests, rather than measuring in terms of equivalency;[104] failing to incorporate compensation in kind as a preferred form of compensation, taking the nature of the affected parties; and adopting lump sum modes of payment of monetary compensation.[105]

Similarly, adequate procedural guarantees in the process of land expropriation is not legislatively sanctioned to the affected parties. The laws do not impose a duty on the state to attempt to acquire in voluntary negotiation with the affected parties first and only then to expropriate, and then at a convenient time. Although as part of procedural safeguards the laws require advance payment of compensation and provision of adequate notice, the period fixed in the legislation doesn't give due regard to the conditions of a particular affected party and the ability to recap investments and establish new livelihoods.[106] The participation of the affected parties in the expropriation process is limited only to the stage of making the expropriation decision, which is also incorporated in some state rural land laws.[107] There is no legislative measure that empowers the affected parties to participate in the assessment of compensation, implementation of the expropriation decision, and supervision and follow up of the use of the expropriated land for the intended purpose and project timely. This in turn makes the process of taking itself arbitrary and exposes the affected parties to other hurdles and costs so that they are unable to reclaim the land rights when it is not used for the initial project in time.

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[101] Proc. No. 455/2005 (n 97) Article 2(5) and 3(2).
[102] Id Article 2(1) and 7(1); Muradu Abdo. Reforming Ethiopia's expropriation law. (2015) 9 *Mizan Law Review.* 301–340. P 311.
[103] Proc. No. 455/2005 (n 97) Article 10(1); FAO Compulsory (n 10) p 25.
[104] Proc. No. 455/2005 (n 97) Article 8.
[105] Id Article 4(3); FAO Compulsory (n 10) p 40.
[106] Id Article 4(2).
[107] See footnote 178 of Chapter 6.

The element of assurance of land rights of land tenure security of peasants and pastoralist in post-1991 Ethiopia has been further undermined by parallel but contradictory legal and institutional pluralisms. Apart from institutional multiplications with the authority to expropriate land I note above, failure to take the constitutional division of power on land matters between the federal and state governments seriously has led to the emergence of mutually contradicting provisions about land tenure and administration. This has happened due to legislative interference of each level of government in the power of the other. Besides, the failure of the statutory rules of land tenure and administration to fit into and take into account the long serving customary land tenure and administration particularly in pastoral communities may force their *de facto* parallel existence and application. These scenarios create uncertainty on the side of peasants and pastoralists about their land rights and legal protections.

In relation to the element of enforceability of land rights, some legal measures are taken to capacitate the affected parties to be able to enforce their land rights. Although it is stipulated in mandatory form, land disputes between peasants and pastoralists are made to be resolved through out-of-court dispute resolution mechanisms. To mitigate the legal knowledge gap and cost of enforcement legislative measures are stipulated about waiver of court fees, mandatory *pro bono* service by private lawyers, entitlement of certain institutions to provide free legal services and introduction of mobile courts. However, these measures by themselves are not adequate to make peasants and pastoralists capable to enforce their land rights. Still, the far away location of the judiciary, the time-consuming nature of the litigation, and the absence of an enabling legal environment for civil society organizations to engage in advocacy and court representation have hindered the possibility of making peasants and pastoralists capable of enforcing their land rights.[108]

The legislative measures and judicial interpretations further undermine the realization of the element of enforceability of land rights by introducing the idea of actionability of grievances. Particularly with regard to grievances against state organs, the grounds for taking judicial action are restricted.[109] Such legislative and judicial restrictions base themselves on the incorporation of the phrase "justiciable matters" in the FDRE constitution, while recognising the right of access to

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[108] See Chapter 7 Section B.
[109] See Chapter 7 Section C.

justice.[110] Although it is uncommon to modify the right with this phrase in international human rights instruments, in Ethiopia this has paved the way for legislative construction of actionable grounds. Legislative silence while mentioning some grounds in the same legal issue has been interpreted as non-actionability of the other grounds of grievances. Thus, with respect to the issue of land expropriation, peasants and pastoralists are entitled to take court action with respect to the amount of compensation.[111] This has led to the interpretation that with respect to grievances about the purpose for which the land is expropriated, commission of procedural irregularities, and the restitution of land for failure to use it for the initial project, peasants and pastoralists cannot demand judicial remedy.

On the top of this, the subordinate laws' failure to ensure the independence of the judiciary and the constitutional interpreter, implies a difficulty in the establishment of the element of enforceability of land rights for land tenure security. As the judicial power and interpretation of constitution are assigned to different organs in the FDRE constitution, the analysis of judicial independence should be made separately with respect to the two. About the constitutional interpreter – House of Federations (HOF) and Council of Constitutional Inquiry (CCI) jointly – the Constitution requires interpretation on the foundation of ownership of the Constitution and the politico-legal nature of the constitution as an instrument.[112] Except for the manner of electing the members of the HOF, the Constitution contains all the necessary measures to ensure the independence of the HOF and CCI in its interpretation. Empowering the state councils to elect the members of the house or to make them elected by the people upon nominating the candidates clearly exposes them to political influence.[113]

About the independence of judiciary too, the FDRE Constitution contains progressive normative measures. It contains measures that ensure personal and institutional independence of the judiciary. To guarantee the personal independence it guarantees non-interference of any body and the judges to be guided and to base their functions solely on the law.[114] It also restrictively defines the grounds

[110] FDRE Constitution (n 60) Article 37(1).
[111] Proc. No. 455/2005 (n 97) Article 11.
[112] Ethiopia. The Ethiopian constitutional assembly minutes. (Vol. 5, Nov. 30-Dec. 3/1994, Addis Ababa), 1994. Deliberation on Article 61-62; Assefa Fiseha. Constitutional adjudication in Ethiopia: Exploring the experience of the House of Federation (HoF). (2007) 1 *Mizan Law Review.* 1–32. P 10.
[113] FDRE Constitution (n 61) Article 61(3).
[114] Id Article 78.

for withdrawal of judges to provide security of tenure and the final decision is required to be made by the law-making organs.[115] Nevertheless, about the appointment of judges the involvement of the executive is constitutionally guaranteed while the prime minister and chief executive of state are empowered to select and recommend the president and vice-president of the federal and state supreme courts respectively to their respective law-making organs.[116] Any substantive requirements are not prescribed in the constitutions. About other judges, although the appointment is made by the law-making organs, the selection process is conducted by the Judicial Administration Councils (JAC).[117] However, the constitutions, except some state constitutions, do not guarantee the majority of the councils to be judges. To ensure the institutional independence the FDRE Constitution contains measures about prohibition of establishing of special or *ad hoc* courts and empowering of the judiciary in preparation of its budget - these are positive steps to ensure the independence and impartiality of judiciary.[118]

Appraisal of the subordinate legislation, on the other side opens the door for the active involvement and interference of the executive in the appointment, withdrawal, and promotion of judges through the membership of the JAC.[119] Furthermore, adoption of some subjective and absurd requirements like loyalty to the constitution for appointment, and liberal interpretation of the causes of withdrawal of judges to broaden the grounds of withdrawal as seen in the analysis of cases, implies that the subordinate legislative measures create space to compromise the independence of the judiciary.[120] It in effect makes the peasants' and pastoralists' enforcement of land rights against the state difficult, if not impossible.

With regard to the element of registration and certification of land rights too, legislative measures are not sufficiently sanctioned to enhance its role of establishing security of land tenure. In post-1991 Ethiopia its role of promoting land tenure security is twofold. It establishes the right to lease and rent land and is also aimed at establishing one's entitlement on the land. Although the legislative measures require the registration and certification to be all-inclusive and affordable

[115] Id Article 79(4).
[116] Id Article 81.
[117] Ibid.
[118] Id Article 78(4) and 79(6).
[119] Federal Democratic Republic of Ethiopia. Amended federal judicial administration council establishment proclamation No. 684/2010. *Fed. Neg. Gaz.* Year 16 No. 41. 2010.
[120] Ibid.

cost-wise (the state shares), the manner it is required to be effected and its role in establishing the entitlement is not adequately established. This makes the contribution of land registration and certification meaningless, particularly in establishing an entitlement, as the judicial interpretation demands additional evidence to prove the entitlement.[121]

In general, in the subordinate legislation sufficient measures are not taken to ensure the land tenure security of peasants and pastoralists and to reflect the constitutional limit of the state power. It instead allows and opens room for the present state to use land rights as a means of political control, just like its predecessors. Consequently, it requires taking the constitutional protections and safeguards afforded to peasants' and pastoralists' land rights seriously and redefining the legislative measures in a way to enhance their land tenure security and protect them from both the market and state forces.

[121] *Tilahun Gobeze vs Mekete Hailu and Aweke Muchie*, file No.69821 (27January 2011) the Federal Supreme Court Cassation Decisions, Vol.13 (Addis Ababa, Federal Supreme Court of Federal Democratic Republic of Ethiopia, November 2011).

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