

# HAWASSA UNIVERSITY



**COMMUNAL LAND TENURE AND LIVELIHOOD  
IN SMALLHOLDERS FARMING COMMUNITY  
REFERENCE FROM KEMBATA-TEMBARO ZONE, SNNPR**

**LLM. THESIS**

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**May, 2019**

**Hawassa, Ethiopia**

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**IN SMALLHOLDERS FARMING COMMUNITY**

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**A THESIS SUBMITTED TO HAWASSA UNIVERSITY,  
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**ADVISOR’S APPROVAL SHEET**  
**SCHOOL OF GRADUATE STUDIES, HAWASSA UNIVERSITY**

This is to certify that the Thesis entitled “**Communal Land Tenure and Livelihood in Smallholders Farming Community: reference from Kembata Tembaro Zone, SNNPR,**” submitted in partial fulfillment of the requirements for the Master's Degree with specialization in Environmental & Land Law, the Graduate Program of the College of Law & Governance, and has been carried out by Mr. BIRUK TADESSE ADEGO: ID. No ELLR/0003/10, under my supervision. Therefore, I recommend that the student has fulfilled the requirements and hence hereby can submit the Thesis to the department.

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## **DECLARATION**

I hereby declare that this LL.M Thesis entitled “Communal Land Tenure and Livelihood in Smallholders Farming Community: reference from Kembata Tembaro Zone, SNNPR.” is my original work and has not been presented for a degree to any other university, and all sources of material used for this Thesis have been duly acknowledged.

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**Glory to the Almighty God!!!**

Biruk Tadesse Adego  
May 2019,  
Hawassa University, Ethiopia.

## **DEDICATION**

*To my Father; Tadesse Adego Abura*

## List of Abbreviations and Acronyms

AUFGLP	African Union Framework Guidelines for Land Policy
CBNRM	Community Based Natural Resource Management
CLARA	Communal Land Rights Act
CPRs	Common Property Resources
CSA	Central Statistical Authority
FAO	Food and Agricultural Organization
FDRE	Federal Democratic Republic of Ethiopia
FGD	Focus Group Discussion
GT	<i>Gestion de Terroirs</i> (Village Land Management model)
HRC	Human Rights Committee
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
SNNPRS	Southern Nations Nationalities and People's Regional State
TLGFA	Traditional Leaders Governance Framework Act
UNDRIP	United Nations Declaration on Rights of Indigenous People
UNC	Charter of the United Nations
UDHR	Universal Declaration of Human Rights
VGLT	The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security
VLA	Village Land Act

## **Abstract**

*The thesis examines the inter-connection between communal land tenure and livelihood, factors making it insecure and led to its extinction including its legal status, among smallholders in Kembata-Tembaro Zone, SNNPR. Since the early 1980s, there has been a resurgence of research activity in the area of common property resources and growing recognition of the importance of common pool resources for rural livelihoods. Lands for grazing and wildlife, forests and woodlands, mountaintops, sacred localities, lakes and streams within the community lands are usually retained purposely as collective property in which all members have use rights and communal land is essential to the community as a source of livelihood. Theoretically, Hardin's tragedy of commons lies in the expectation that a resource will be overused when it is part of a "commons" and points out the hazards of open access (res nullius), rights or duties have not been defined and lack of property right. He argued for the privatization of the commons for effective use. Ostrom's new common pool resource theory, justifies protecting the commons by underlining its significance for their needs and future generations. Practically, Communal land tenure is a typical feature of many developing countries. Lands held customarily in many parts of the world have always been vulnerable to involuntary loss, particularly those that are unsettled or unfarmed; that is, lands normally held collectively by individual communities. Nonetheless, concerns are repeatedly voiced by different civil society organizations and human rights advocates that state and private interests are increasingly infringing on poor people's rights and access to the commons. There is growing international acknowledgment of the importance of communal land and there are soft laws in the form of guidelines and declarations were set in place for the recognition and protection of communal land tenure. In addition, there are many countries legal framework that safeguard communal land tenure for the sake of the rural poor. In Ethiopia, communal land rights are largely discussed in terms of pastoral society or semi-pastoral society. However there are communal lands among the smallholder farmers as well and play a major role in diversifying the livelihoods. In addition to their individual farmlands for crop production, smallholders are highly dependent on communal land and resources such as timber, firewood, fodder and most essentially, a place for ritual ceremonies. The empirical data obtained from the study area indicates that due to a number of unregulated practices and considering it as (res nullius) ownerless property, communal lands remain insecure. It is at the verge of extinction, led to poverty and human right violation. Thus, the writer argues for amendment of land laws and effective implementation to ensure tenure security of communal lands thereby securing and diversifying the livelihoods of poor smallholder rural farmers and ensuring human rights.*

**Key terms:** *Communal lands · Livestock · Poverty · Livelihoods · Rural Poor · Tenure security; legislative recognition*

# CHAPTER ONE

## Introduction

### 1.1 Background of the study

Property is everything that has material or moral value for human beings and guaranteed and enforced by law.<sup>1</sup> The evolution of property in land was tied to state; making property only existing on the say-so of the State, and from which its protection descended. From the outset, state defined property was individual, male, and private; a relation which individuals held with the State, not with each other. Collective or communal tenure was in contrast, as 'natural'; its relations were controlled by and internal to a self-defining community.<sup>2</sup>

Private property has become the dominant form of property relationship in the modern capitalist world.<sup>3</sup> Perhaps one of the first and most fundamental theories justifying the existence of private property is the natural rights theory, the earliest advocate of which was John Locke. According to Locke, property was originally owned in common by all men; however, men had a natural right to appropriate this common property for their own private use where they themselves had laboured<sup>4</sup> to create it.

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<sup>1</sup>Daniel W. Ambaye, '*Land Rights and Expropriation in Ethiopia*' (Springer International Publishing 2015) 27

<sup>2</sup>Liz Alden Wily, 'Collective Land Ownership in the 21st Century: Overview of Global Trends' (29 May 2018) p. 1 Available at < <https://www.mdpi.com/journal/land> > Accessed Sep. 24/ 2018); Wily states that No philosopher, from Hobbes and Locke onwards, could ignore the role of private property in social change, or battling ideologies around this. Locke's theory of labor in property (1689) was especially influential in distinguishing lands as being either developed or undeveloped (e.g., cultivated or not). This was unhelpful to societies that purposely harvested from, rather than transformed, their lands. This legacy which continues to discriminate against off-farm communal, ownership over forests, rangelands and marshlands, key resources for millions of land dependents.

<sup>3</sup> Abraham Bell and Gideon Parchomovsky, 'A Theory of Property', (2005) Cornell L. Rev. 531 Available at: <http://scholarship.law.cornell.edu/clr/vol90/iss3/1> < accessed on 22 Sep.2018

<sup>4</sup> Id 542: Early post-Enlightenment theories of property focused on a natural right to property. Perhaps the most famous of these theories is "the labor theory" associated with John Locke. Locke's point of departure was that God gave mankind in common the bountiful nature of the earth. Locke then posited that "every man has a property in his own person" and in the labor of his body and the work of his hands. Locke, therefore, deemed it just that one who expended labor upon objects could remove them from the common and claim them as private property.

As opposed to private ownership, communal ownership is a property right allocation made in the interest of group of users, land being the prime-property. Here, there is no single individual in a privileged position to control and have command over all of the resources. In a system of communal property, rules governing access to and control of material resources are organized on the basis that each resource is, in principle, available for the use of every member alike.<sup>5</sup> The defining characteristic of communal property is that every member of the community has the right not to be excluded from the resource.<sup>6</sup> Statutory recognition of rural communities as collective owners of their lands is substantial, expanding, and an increasingly accepted element of property relations.<sup>7</sup> The most usual types of properties owned in common are grazing lands, forest lands, fisheries, irrigation systems, underground water, water wells, village roads, neighborhood streets, and so on.<sup>8</sup> Communal rights over the commons – common pool resources such as grazing land, forests, fallow fields, inland waterways and wetlands – are an essential aspect of many rural livelihoods, allow access to and use of resources, and provide a foundation for many communities' way of life.<sup>9</sup>

The debate about the nature and status of the commons in general and rural communal lands in particular is important because of the crucial significance of these resources for the livelihood of rural masses. Rural people in poor countries use the commons to carry out life sustaining economic activities such as grazing, gleaning, and firewood and honey collection as well as place

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<sup>5</sup> See (n 1) 31

<sup>6</sup> Id

<sup>7</sup> Liz Alden Wily, 'Collective Land Ownership in the 21st Century: Overview of Global Trends' (29 May 2018) p. 1 Available at < <https://www.mdpi.com/journal/land> > Accessed Sep. 24/ 2018)

<sup>8</sup> See (n 1)

<sup>9</sup> Ross Andrew Clarke, 'Securing Communal Land Rights to Achieve Sustainable Development in Sub-Saharan Africa: Critical Analysis and Policy Implications' (2009) 5/2 Law, Environment and Development Journal , p. 130, available at < <http://www.lead-journal.org/content/09130.pdf> > Accessed 15 Nov. 2018

of burial and of cultural and religious rites and festivities.<sup>10</sup> Literatures explain livelihood as the activities; the assets and the access that jointly determine the living gained by an individual or household. When it comes to an individual, a livelihood is the ability of that individual to obtain the basic necessities in life, which are food, water, shelter and clothing. Therefore all activities involved in finding food, searching for water, shelter, clothing and all necessities required for human survival at individual and household level are referred to as a livelihood.<sup>11</sup> Rural livelihoods depend heavily on natural capital in which land is the basic one. Land is particularly important in rural livelihoods as it is the vital input in agricultural production.<sup>12</sup> Land is a basic livelihood asset since it provides shelter and food and all other livelihood activities rely on it. Thus, enhanced tenure security, including security of communal tenure, can be a key strategic element in alleviating rural poverty.<sup>13</sup> Land and property rights have broad impact on people's lives and livelihoods.<sup>14</sup> Without property rights, no other rights are possible. Since man has to sustain his life by his own effort, the man who has no right to the product of his effort has no means to sustain his life.<sup>15</sup>

As they are vital to many rural communities recognition of the Commons as an important property system, many countries in the world recognized and accord legal protection to the commons. For example Tanzania and Uganda gave effective protection to the communal land for the benefit of the community. The present legal status of the rural commons in Ethiopia may be

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<sup>10</sup> Muradu Abdo, 'State Policy and Law in Relation to Land Alienation in Ethiopia' (D.Phil thesis, University of Warwick 2014), Available at <<http://go.warwick.ac.uk/wrap/74132>>

<sup>11</sup> M. Phande F.A. 'Infectious Disease and Rural Livelihood in Developing Countries' (Springer 2016) p. 17 Available at <<https://www.springer.com/978-981-10-0426-1>> Accessed 17 Nov. 2018

<sup>12</sup> Sosina Bezu and Stein T. Holden, 'Land Access and Youth Livelihood Opportunities in Southern Ethiopia' (2013) Center for land tenure studies working paper 11/13 p. 4 Available at <<https://www.clts.wp112013>> Accessed on 14 Oct. 2018

<sup>13</sup> Kirsten Ewers, 'Communal tenure and the governance of common property resources in Asia' (2011) Land Tenure Working Paper 20 Available at <<https://www.am658e00>> Accessed on 10 Nov. 2018

<sup>14</sup> FAO, "Land and Property Right" (2010) Facilitators Guide Available at <<https://www.fao.org>> Accessed 5 Nov. 2018

<sup>15</sup> Anderson, 'property Right' (Hoover Press 2010) p. 1 Available At <<https://www.0817939121>> Accessed on 10 Sep. 2018

linked with two perspectives. The perspective, which may be tagged ‘old’ thinking about the commons is articulated by Garret Hardin “the tragedy of the commons.”<sup>16</sup> The tragedy would likely derive from the fact that everyone having free access to resources tend to exploit them until they are completely depleted, according to a logic of unbridled free riding.<sup>17</sup> Hardin argues that the commons which include grazing land belong to everyone and thus ultimately to no one, which definitely invites desecration of these resources.<sup>18</sup> He proposes that since the commons are unmanaged, policy option is private enclosure of the commons. The second perspective that may be designated as new thinking about the commons has been popularized by Elinor Ostrom and involves nuanced conceptualization of the commons. It no more views the commons as resources necessarily left in norm-less condition.<sup>19</sup> Ostrom argues that the world is replete with non-tragic use of the commons and thus the issue is not whether the commons are feasible or how faster we shall privatize the commons but under what conditions and at what scale the commons can be feasible.<sup>20</sup> The direction we should go is not towards exclusion but towards finding an appropriate level or mix of governance of the commons to prevent spill over by outsiders and to prevent exploitation of some members from within.<sup>21</sup>

Hardin’s approach that goes for privatization of the commons is not dead at least in the Ethiopian context.<sup>22</sup> Currently, land and natural resources are under public ownership. The state

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<sup>16</sup> See (n 10)

<sup>17</sup> Negasa Deressa, ‘The Role of Rural Land Registration in enhancing governance and tenure security of communal land holding in Beneshangul Gumuz Regional State Ethiopia’ (World Bank Conference on Land and poverty, Washington DC, March 20-24, 2017) Available at < <https://www.deressa742pdf> > Accessed 18 Sep. 2018

<sup>18</sup> Id

<sup>19</sup> See (n 10)

<sup>20</sup> Id

<sup>21</sup> Id

<sup>22</sup> Id : Muradu Abdo states the fact that communities are actually occupying and using these resources ought not to be mistaken for a sign of legal recognition of their rights by the state. In the eye of the state, it is a *de facto*, but not a *de jure*, occupation in the sense that the communities are using such resources without any legal basis and only until the state needs the resources. The tragedy of the commons is used to justify the categorization of the commons under the state domain and consequently to facilitate the use of such resources as the state deems fit. It presents the commons as existing in a situation without governing regime which invites self-interested commoners to take too

and nations, nationalities and peoples are collective owners of land and other natural resources.<sup>23</sup> Furthermore; the land laws both at federal regional level recognizes three types of land holdings; these are private, state and communal holdings.<sup>24</sup> Conversely; customary land tenures (communal land) are severely undermined especially in the farming community because the law states that communal land can be subject to distribution as private landholding where the need arises. It defines communal holding as rural land which is given by the government to local residents for common grazing, forestry and other social services. As this shows, communal land is given by the government in the sense of not recognition but creation of the commons.<sup>25</sup> This indicates that communal lands are not given priority as they become source of livelihood to the rural community.

Although many writers connect communal land to Pastoral and Semi-pastoral communities, it is also the source of livelihood in highland farming communities like Kembata Tembaro Zone who practice mixed farming—agriculture and livestock breeding. Rural livelihoods are closely linked to agriculture, often performed at a smallholder and subsistence level.<sup>26</sup> In order for a livelihood to be sustainable, and for a household to survive, there is need for diversifying means of livelihood.<sup>27</sup> One of the determinant factors for this is access and availability of Communal Land. Generally the insecurity of Communal Land has negative impact on rural community's livelihood.

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much out of common resources while investing nothing on it, leading to their ultimate ruin. The theory invites one to parcel the commons out to individuals who would supposedly take good care of the land. The doctrine proceeds on the assumption that there is a cause-effect relationship between privatization and economic productivity.

<sup>23</sup>FDRE Constitution, Art. 40(3)

<sup>24</sup>FDRE Rural Land Use and Administration Proclamation No.456/2005 and SNNPR Rural Land Use and administration Proc. No. 110/2007 Arts. 2(13) (14) and (15)

<sup>25</sup> See Muradu (n 10)

<sup>26</sup> See (n 11)

<sup>27</sup> Id

## 1.2 Statement of the Problem

Land is among the most important assets for rural people around the world.<sup>28</sup> Most importantly, Communal lands are one of the sources of livelihood. The unabated decline in the acres of communal lands in the research area is expected to endanger the livelihood of the community of the area. On the other hand, the youth is landless. In search of means of livelihood they have been emigrating to South Africa and different Arab countries. While on the way to South Africa and different Arab countries, they have been facing a number of problems. Many lost their life, many lost their money and the rest faced moral, bodily, etc injuries. Hence, there needs to be a way of addressing the right to sustainable livelihood.

Communal grazing lands are important sources of livestock feed in developing countries.<sup>29</sup> Communal land is a complementary or sole means of livelihood for the rural poor via mixed farming/ agriculture, i.e., a mix of crop with livestock farming.<sup>30</sup> The law says that communal lands are to be given for rural youths who wish to engage in agricultural activity.<sup>31</sup> Its advantage is more pronounced for women and the youth who are landless. On the other way, the sizes of these communal lands are diminishing and communal lands are at the verge of extinction in the study area.

In the highland areas of Ethiopia the commons are essential because the private landholdings are not big enough to sustain the peasant`s life. Land degradation and population increase with lack of off farm opportunities have made these private holdings minuscule.<sup>32</sup> There is typically a

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<sup>28</sup> Desalegn Rahmato, 'The Peasant and The State: Studies in Agrarian Change in Ethiopia 1950-2000' (2008) (Create Space Independent Publishing Platform) 2

<sup>29</sup> Berhanu Gebremedhin , Pender, J. and Girmay Tesfay, 'Community Resource Management: The Case of Grazing Lands in Northern Ethiopia' ( International Conference on African Development Archives, Paper 49,2001) Available at < [http://scholarworks.wmich.edu/africancenter\\_icad\\_archive/49](http://scholarworks.wmich.edu/africancenter_icad_archive/49) >

<sup>30</sup> Daniel Behailu Gebreamanuel and Getiso Detamo Mekebo, "Res Nullius vs. Res Communis in Matters of Communal Lands of Smallholder Farmers in Ethiopia" (2018) MIZAN LAW REVIEW, Vol. 12, No.1. Available at <http://dx.doi.org/10.4314/mlr.v12i1.4> p.102

<sup>31</sup> SNNPRS Rural Land Administration and Utilization Proc. No. 110/ 2005 Art. 5 (4)

<sup>32</sup> Srur, M. 'Rural Commons and the Ethiopian State', 2013(1), Law, Social Justice & Global Development (LGD).

close link between tenure and conflict over land. Within a society, competing claims for control and use of land may provoke conflicts. One of the guiding principles of responsible land governance is reducing dispute. Communal land in the study area is now becoming one of the sources of dispute between the community, individual farmers and the government.

In Ethiopia, communal land rights are largely discussed in terms of pastoral society or semi pastoral society. However there are communal lands among the smallholder farmers as well. In practice, there are no communal landholdings identified and registered in the land registry. In general customary rights are undermined and the state has an overarching role. The, the status of communal land is insecure even compared to private holding which is largely registered and certified. The consideration of it as ownerless property and the existing notion of public ownership of land is making the government to act according to his wish, without due regard to the global and regional commitments. Generally, insecurity of communal land tenure is now resulting in the loss of alternative means of livelihood and the researcher deal with above and other problems that might come under study.

### **1.3 Research Question**

The research has the following basic question

What causes insecurity and extinction /loss of communal lands in the study area where it is the base of livelihood?

How communal lands are becoming source of dispute between the government and community?

How does the existing legal framework address the rural Communal land tenure security?

What lesson can be learned from other countries in addressing the livelihood aspect of communal land?

What kind of legislative mechanism is capable of lessening the diminishing of communal lands upon which the livelihood of the local people is established?

## **1.4 Objective of the Study**

### **1.4.1 General Objective**

The main aim of this research is to find out the inter-connection between rural communal land tenure and livelihood in the highland small holders farming communities in Kembata Tembaro Zone.

### **1.4.2 Specific Objectives**

- To define the concept of communal land tenure, livelihood, community, commons and customary tenure
- To investigate factors that led to the declining of communal land in the study area.
- To analyze the legal recognition and protection of rural communal lands in Ethiopia
- To investigate the relationship between the communal land and the livelihood security issue.
- To investigate factors causing dispute in relation to communal land in the study area
- To examine best experiences of some other countries in protecting communal lands tenure security

## **1.5. Methodology of the study**

The researcher employs qualitative research approach. Qualitative researchers aim to gather an in-depth understanding of human behavior and the reasons that govern such behavior.<sup>33</sup> The qualitative method investigates the why and how of decision making, not just what, where, when. The goal of qualitative research is to discover patterns which emerge after close observation, careful documentation and, thoughtful analysis of the research topic.<sup>34</sup> Research studies that are qualitative designed to discover what can be learned about some phenomenon of interest,

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<sup>33</sup> Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13 (3) Utrecht Law Review 95 < <https://www.utrechtlawreview.org> > Accessed on 10 Sep. 2018

<sup>34</sup> Pamela Maykut and Richard Morehouse, 'Beginning Qualitative Research: A Philosophic and Practical Guide' (The Falmer Press Teachers' Library) 20.

particularly social phenomenon where the people are participants.<sup>35</sup> Qualitative research refers to research about peoples' lives, lived experiences, behaviors, emotions, and feelings as well as about organizational functioning, social movements, cultural phenomenon and interactions between nations.<sup>36</sup> Since the researcher wants to know issues related to communal land as a source of livelihood; its current status, impact of the existing laws, the attitude/reaction of local communities against government measures, matters discussed in related court cases and factors causing the declining of communal land that leads to loss of livelihood of local people qualitative research approach is employed. This makes research the non-doctrinal legal research which focuses on social dimension or the impact of laws on the given community unlike Doctrinal legal research which focuses on analysis of statutory provisions and cases by the application of power of reasoning. In a non-doctrinal legal research, the researcher tries to investigate through empirical data how law and legal institutions affect or mould human attitudes and what impact on society they create. He endeavors to look into social face or dimension of law and gap, if any, between legal idealism and social reality.<sup>37</sup> In addition, the inclusion of Comparative studies in relation to better protection of communal land rights in the research for looking better experience from other jurisdictions that suits to the reality in the study area makes it Non-Doctrinal. Therefore, Non-Doctrinal/ Socio- legal research method employed.

### **1.5.1. Data Sources**

The research will employ both primary and secondary sources of data.

Primary data sources will be gathered from Legislations, court cases, interview conducted with different respondents and key informants, focus group discussion, direct observation will also be employed because what people say they believe and say that they do are often contradicted by

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<sup>35</sup> Id

<sup>36</sup>Natasha Mack and Others, '*Qualitative Research Method: A Data Collectors Field Guide* (FHI 2005) 2

<sup>37</sup> Andrew Knight (ed.), *Advanced Legal Research in the Built Environment* (Blackwell Publishing 2008)

their behavior. Observation can be a powerful check against what people report about themselves during interviews.<sup>38</sup>

Secondary sources of data will be gathered from books, journal articles, reports, conference papers, newspapers and the internet, published and unpublished research papers, working papers, official reports, bulletins and magazines etc.

### **1.5.2. Sampling Techniques**

Because of different factors such as time, finance, and the likes, it is not feasible to conduct the research by taking the whole population as a sample study. As stated earlier in the research methodology, the researcher has opted for qualitative research approach. In a qualitative research, purposive sampling is widely used in qualitative research for the identification and selection of information- rich cases related to the phenomenon of interest.<sup>39</sup> Purposive sampling, one of the most common sampling strategies, groups participants according to preselected criteria relevant to a particular research question.<sup>40</sup> In Kembata Tembaro Zone there are seven Woredas and three town administrations. Among the seven Woredas Kedida Gamela and Kaca-Bira Woredas are be selected because issues affecting the communal land tenure occur frequently in these two woredas than others. In Kedida Gamela Woreda there are eight kebeles. Among these eight kebeles Zato Shodera Kebele and Aze Dobo'o kebele are selected because many hectares of communal land were given to inefficient private investors and the rest of communal lands were on the verge of declining and environmentally degraded. In Kaca-Bira Woreda Ashira and Wonko Kebeles are selected because of court cases in encroaching

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<sup>38</sup> See (n 34) 13

<sup>39</sup> Lawrence A. Palinkas and Others, 'Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research' ( Springer 2013) Available at <https://www.researchgate.net/publication/258315317> > Accessed 08 Oct. 2018

<sup>40</sup> Id

communal land in addition to other factors affecting the livelihood side of communal lands are existent here.

### **1.5.3 Data Collection Tools**

#### **A. Interview with Key Informants**

Key informant interviews are qualitative, in-depth interviews with people who know what is going on in the community. The purpose of key informant interviews is to collect information from a wide range of people including community leaders, professionals, or residents who have first-hand knowledge about the community. Based on this, primary data is collected from farmers who are dependent on communal lands by using unstructured and semi-structured interviews. To generate the required information from the respondents, open and closed ended questions were administered. Whereas the former types of questions were intended to answer very short and clear questions, the latter questions were aimed at making the respondents reply to the questions raised by the researcher freely on their own thoughts. Stopping intervening is dependent on redundancy of information or saturation. In furtherance, semi-structured in-depth interviews were conducted with selected government officials; Land Administration and Use Core Work Experts, Experts at Office of Investment, Kebele land administration committee, prosecutors, judges and academicians to support the primary data collected from farmers. This type of interview can also help the researcher to find out about relevant policies and programs that enhance the livelihood and rural communal land tenure security.

#### **B. Focus Group Discussion**

A focus group is a qualitative data collection method in which the researcher and several participants meet as a group to discuss a given research topic.<sup>41</sup> It is effective for capturing

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<sup>41</sup> See (n 34)

information about social norms and the variety of opinions or views within a population.<sup>42</sup> It is one of the ways that used to create a complete picture of how a given issue affects a community of people.<sup>43</sup> The insecurity of communal land as source of livelihood in the study area affects more than one person, FGD is essential. It includes Community elders, Kebele Administrators, Officials and experts from Woreda Land and Natural Resource Conservation Office in addition to other community members. The numbers of participants are will from eight to ten depending on consideration of manageability and diversity of opinions.

### **C. Field Observations**

Participant observation is a qualitative method with roots in traditional ethnographic research, whose objective is to help researchers learn the perspectives held by study populations.<sup>44</sup> It is widely believed that to understand fully the complexities of many situations, direct participation in, and observation of, a given phenomenon of interest may be the best research method.<sup>45</sup> This makes the data collected a descriptive one.<sup>46</sup>

#### **1.6. Significance of the Study**

The findings of the research will be vital in addressing communal land tenure insecurity.

Accordingly, the research will have the following importance:

1. It helps land policy makers and framers to consider the issue of communal land in order to make the domestic legislations to fully protect and make secure its tenure.
2. The finding of the study may serve as model to consider communal lands are source of livelihood not only in lowlands of Ethiopia but also in the highlands of Ethiopia.
3. It shows the government and land administration and use officials to work for better communal land administration system.

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<sup>42</sup> Id

<sup>43</sup> Id

<sup>44</sup> See ( n 34) 13

<sup>45</sup> Id

<sup>46</sup> Id

### **1.7. Scope of the study**

Geographically the study is limited to Kembata Tembaro Zone, Southern Nation Nationalities and People's Regional State. There are seven woredas in the study area of which agriculture is the primary economic activity, mixed agriculture (farming and cattle raring ) is practiced in all woredas. For the purpose of this study Kedida-Gamela and Qaca-Birra woreda will be selected.

### **1.8. Limitation of the study**

The absence of a previously conducted full scale study on communal land tenure and livelihood in terms of highland farming community makes the mission of conducting legal research difficult. Another difficulty is the problem of accessing administrative documents as well as lack of well-organized and up-to-date data showing full insight of the study area. Nevertheless, the researcher is devoted to face this and other limitations throughout the study.

### **1.9. Organization of the study**

The study is organized in four chapters. Accordingly, Chapter One is an introduction, related with the proposal of the research paper which is aimed at showing the framework of the study in general, and acting as a blueprint by which both the writer and the readers are supposed to navigate through. Chapter two will be literature review: that rely on theoretical and conceptual framework aims on communal land, livelihood, property right in land, land tenure and also experiences of other countries. Chapter three will be the current legal and practical aspects of communal land in Kedida-Gamela and Qaca-Birra woreda; the legal status of communal land, factors that causes insecurity and diminishing communal land, the causes of dispute with regard to communal land in the study area are the issues that will be discussed in this chapter. Finally; chapter four will come up conclusions and pertinent recommendations.

## **CHAPTER TWO**

### **THEORETICAL AND CONCEPTUAL FRAMEWORK OF COMMUNAL LAND TENURE**

#### **2.1. INTRODUCTION**

For countless global rural communities, land virtually means life. Land is among the most important assets for the rural population. It is vital source of livelihood and can be part of cultural and social identities. Communal land tenure is a typical feature of many developing countries. Lands held customarily in many parts of the world have always been vulnerable to involuntary loss, particularly those that are unsettled or unfarmed; that is, lands normally held collectively by individual communities. Secure access to common pool resources through systems of common property forms the basis for the livelihoods of many of the rural community. Nonetheless, concerns are repeatedly voiced by different civil society organizations and human rights advocates that state and private interests are increasingly infringing on poor people's rights and access to the commons.

The division of land into property units serves a number of purposes, probably the most important of them being to individualize objects of ownership and other rights in land. Resources, which, are common property, are jointly owned – held in common – by a limited group of individuals. That group is entitled to exclude other individuals from using the property, and use of the property is decided and supervised by the group. The school of thought popularized by the ecologist Garrett Hardin in 1968, assumed that any shared management system would inevitably result in a "tragedy of the commons". The tragedy would likely derive from the fact that everyone having free access to resources tends to exploit them until they are completely depleted, according to logic of unbridled free riding. The other perspective developed and popularized by Eleanor Ostrom involves nuanced conceptualization of the commons. It no

more views the commons as resources necessarily left in norm-less condition. Hence, according to Ostrom, the fact that a certain property right is collective or communal does not necessarily lead to the conclusion that it is not well defined. As they are vital to many rural communities recognition of the Commons as an important property system, re-design of a comprehensive land rights system founded on the fundamental tenets of a common property regime, and the reconstruction of land rights security systems drawing upon community values and principles at appropriate levels of organization is crucial.

This Chapter presents the Theoretical Background as a result of literature review. It brings into discussion defining the fundamental concepts, theoretical perspectives on Common Property as by developed Scholars, experiences of other countries with respect to communal land, the international and regional legal perspective over commons, the practices regarding management and use of the commons and ends with concluding remarks.

## **2.2 Defining fundamental concepts**

### **2.2.1. Land Tenure**

There is difficulty in defining the concept tenure unanimously. Its definition vary and the spectrum of tenure types is wide. It is socio-legal concept that determines property rights relationships between or among people with respect to resource.<sup>47</sup> The word “tenure” derives from the Latin word “*tenere*” meaning “holding or possessing.”<sup>48</sup> Tenure defines the social relations between people in respect of the object of the tenure, in this case land. Tenure also defines the methods by which individuals or groups acquire hold transfer or transmit property

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<sup>47</sup>SIDA, ‘Natural Resource Tenure – a crucial aspect of poverty reduction and human rights’ (Sida Studies No. 23, 2009) p. 15 Available at < [https://www. www.sida.se](https://www.www.sida.se) > Accessed 29 Feb. 2019

<sup>48</sup> Adams, M., Sibanda, S & Turner, *Land Tenure Reform and Rural Livelihoods in Southern Africa: Natural Resources Perspective* (Overseas Development Institute, 1992)

rights in land.<sup>49</sup> Land tenure is therefore defined as the terms and conditions on which land is held, used and transacted. Land tenure is concerned with the complex relationships that exist between categories of individuals and groups in reference to land and other natural resources. These relationships can be analyzed in terms of sets of rights and obligations held by these categories of people with regard to the acquisition, exploitation, preservation, and transfer of land and related resources.<sup>50</sup> A recent document published by United Nations Food and Agriculture Organization (FAO) defines land tenure as a “relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land.”<sup>51</sup> Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions.<sup>52</sup>

Land tenure also encompasses those property rights recognized and enforced under customary systems. Customary land rights typically include communal grazing lands, private agricultural and residential houses. These rights are evolved indigenously within the local people. These traditional societies or groups have developed various ways of controlling land rights in different situations. These cover how land is managed in relation to members of communities; how land

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<sup>49</sup> Chege Waiganjo and Paul E. N. Ngugi, “The Effects of Existing Land Tenure Systems on Land Use in Kenya Today” International Conference on Spatial Information for Sustainable Development Nairobi, Kenya 2–5 October 2001, p.2 Available at < <https://www.Waiganjo-Ngugi-TS6-2.pdf> > Accessed 01 May 2019

<sup>50</sup> Daniel W. Ambaye, *Land Rights and Expropriation in Ethiopia* (Springer, 2015) P. 27 Available at < [https://www.DOI10.1007/978-3-319-14639-3\\_2](https://www.DOI10.1007/978-3-319-14639-3_2) > Accessed 12 Feb. 2019

<sup>51</sup>FAO, “Analysis on the Costs of Securing Communal Land Rights: New Technologies and Approaches Offer Potential for Scaling Up”(2014) Available at <https://www.indufor@indufor.fi> Accessed 15 Nov. 2018

<sup>52</sup> See (n 50)

rights can be transferred within the group; and how land rights can be transferred to other persons outside the group.<sup>53</sup>

Land Tenure constitutes a web of intersecting interests; the first of which is “**overriding interests.**” *Here*, “a sovereign power (e.g., a nation or community exercises the powers to allocate or reallocate land through expropriation, etc.)”<sup>54</sup> **In an “overlapping interests”** several parties are allocated different rights to the same parcel of land (e.g., one party may have lease rights, another may have a right of way, etc.)<sup>55</sup> **In penultimate, “complementary interests”** denote “different parties share the same interest in the same parcel of land (e.g., when members of a community share common rights to grazing land, water springs, etc.)”<sup>56</sup> Finally, “**competing interests” allude to** “different parties contest the same interests in the same parcel (e.g., when two parties independently claim rights to exclusive use of a parcel of agricultural land. Land disputes arise from competing claims.)”<sup>57</sup>

Based on the above definitions, there is widespread agreement that land tenure is defined in terms of the functioning of three elements, these being: breadth, duration and assurance of property rights with regard to their legal and economic dimensions.<sup>58</sup> Land tenure is accompanied by a set of value systems attached to culture and these affect the way land is used. It is therefore logical to conclude that land tenure is a context-bound issue and is accompanied by a set of values that are often also culture-bound. This particular issue often leads to conflicts

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<sup>53</sup>Paaga D, ‘Customary Land Tenure and Its Implications for Land Disputes in Ghana: Cases from Wa, Wechau And Lambussie’ (2013) 3(18) International Journal of Humanities and Social Science 263 < [https:// www.ijhssnet.com](https://www.ijhssnet.com) > accessed 22 Oct. 2018 and Arko-Adjei, A. 2011. Adapting Land Administration to the Institutional Framework of Customary Tenure: The case of Peri-urban Ghana, Amsterdam, TUDelft, p. 20.

<sup>54</sup> See (n 51)

<sup>55</sup> Ibid

<sup>56</sup> Ibid

<sup>57</sup> Ibid

<sup>58</sup> Moor G.M & Nieuwoudt WL, “The interaction between land tenure security and agricultural productivity in Zimbabwe” (1995) 34 (4) *Agrekon* p.228 Available at < <http://ageconsearch.umn.edu/record/267856/files/27-Moor.pdf?subformat=pdfa> > Accessed 29 Jan. 2019

between particular interest groups, particularly where land is a scarce resource. Land tenure security refers to people's ability to control and manage a parcel of land, use it and dispose of its produce and engage in transactions, including transfers.<sup>59</sup> There are three main characteristics of land tenure security:

- Duration – how long will different land rights last?
- Protection – will land rights be protected if they are challenged or threatened?
- Robustness – are the holders of land rights able to use and dispose of these rights, free from interference of others?<sup>60</sup>

### **2.2.2. The Four Basic Property Right Regimes**

The classification follows the work of two leading specialists of institutional analysis, Ostrom (1986) and Bromley (1989).<sup>61</sup> Resources are classified by their physical nature, ownership and use pattern.<sup>62</sup> Many literatures make a distinction between property rights and tenure. Property right brings some kind of management status to the ownership of property, but tenure refers to acts of pure ownership with no references to management.<sup>63</sup> A property right is a claim of benefit that is legally and socially recognized and respected by the communities and state.<sup>64</sup> There are four forms of properties prevalent in society, they are private, public or state, common property and open access.<sup>65</sup>

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<sup>59</sup> IFAD, "Improving Access to Land and Tenure Security" (Dec. 2008) p. 27 Available at < <http://www.ruralpovertyportal.org> Accessed 14 Feb. 2019

<sup>60</sup> Ibid

<sup>61</sup> Berkes, F, "Community-based Management Sustainable Development" (1987) Available at < <https://www.Berkes-Community-basedManagementSustainableDevelopment.pdf> Accessed 18 Feb. 2019

<sup>62</sup> Berkes, F., *Common Property Resources: Ecology and Community-based Sustainable Development* ( London: Belhaven Press, 1989)

<sup>63</sup> Singh, K., *Managing Common Pool Resources: Principles, and Case Studies* ( Oxford University Press, New Delhi, 1999)

<sup>64</sup> See (n 51)

<sup>65</sup> Kadekodi, G.K., *Common Property Resource Management: Reflection on Theory and the Indian Experience* (Oxford University Press, New Delhi, 2004)

A) **Private:** the assignment of land rights to a private party who may be an individual, a married couple, a group of people, or a corporate body such as a commercial entity or non-profit organization. For example, even within a customary community, individual families may have exclusive rights to residential parcels, agricultural parcels and certain trees. Other members of the community can be excluded from using these resources without the consent of those who hold the rights.<sup>66</sup>

B) **Public:** property rights are assigned to some authority in the public sector. For example, in some countries, forest lands may fall under the mandate of the state, whether at a central or decentralized level of government.<sup>67</sup>

C) **Open access:** specific rights are not assigned to anyone and no-one can be excluded. This typically includes marine tenure where access to the high seas is generally open to anyone; it may include rangelands, forests, etc, where there may be free access to the resources for all.<sup>68</sup>

D) **Communal:** a right of commons may exist within a community where each member has a right to use independently the holdings of the community. For example, members of a community may have the right to graze cattle on a common pasture.<sup>69</sup>

### 2.2.3. The Concept of Commons

Prior to the publication of Hardin's article on the tragedy of the commons (1968), titles containing the words 'the commons,' 'common pool resources,' or 'common property' were very rare in the academic literature.<sup>70</sup> However, between 1968 and 1985, when the Annapolis

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<sup>66</sup> See (n 50)

<sup>67</sup> Ibid

<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Frank van Laerhoven and Elinor Ostrom, "Traditions and Trends in the Study of the Commons" (Oct. 2007) Vol.1 No.1 International Journal of the Commons p. 5 < <http://www.thecommonsjournal.org> Accessed 14 Feb. 2019

conference was held, this number seemed to be on the rise.<sup>71</sup> The “Commons” mostly understood and used to explain to mean natural resources such as grazing land and forests held and used for a variety of purpose by members of a given community and sometimes even by members of several adjacent communities.<sup>72</sup> Communal rights over the commons – common pool resources such as grazing land, forests, fallow fields, inland waterways and wetlands – are an essential aspect of many rural livelihoods, allow access to and use of resources, and provide a foundation for many communities’ way of life.<sup>73</sup> As opposed to private ownership, communal ownership is a property right allocation made in the interest of group of users, land being the prime-property. Here, there is no single individual in a privileged position to control and have command over all of the resources. In a system of communal property, rules governing access to and control of material resources are organized on the basis that each resource is, in principle, available for the use of every member alike.<sup>74</sup> The defining characteristic of communal property is that every member of the community has the right not to be excluded from the resource.<sup>75</sup> Statutory recognition of rural communities as collective owners of their lands is substantial, expanding, and an increasingly accepted element of property relations.<sup>76</sup>

The most usual types of properties owned in common are grazing lands, forestlands, fisheries, irrigation systems, underground water, water wells, village roads, neighborhood streets, and so

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<sup>71</sup>Ibid: When Scholars met for the first time in 1985 in Annapolis, they were driven by environmental puzzles. While increasing natural resource degradation throughout the world; the scholars asked why certain group able to maintain CPRS, and others not? The commons at the time were forest, grazing land, irrigation system and fisheries. It was organized by National Research Council (USA). Between that time and 1984, before the Annapolis, Maryland conference organized by the National Research Council (NRC) Panel on Common Property Resource Management, the number of such titles had grown to 115. The Annapolis conference in 1985 brought together a large number of scientists from different fields and different nations to examine common-pool resources and their management.

<sup>72</sup>Srur, Muradu, “Rural Commons and the Ethiopian State,” 2013 (1), Law, Social Justice and Global Development (LGD).

<sup>73</sup> Ibid

<sup>74</sup> Daniel W. Ambaye, ‘Land Rights and Expropriation in Ethiopia’ (Springer International Publishing 2015) 27

<sup>75</sup> Ibid

<sup>76</sup> Liz Alden Wily, ‘Collective Land Ownership in the 21st Century: Overview of Global Trends’ (29 May 2018) p. 1 Available at < <https://www.mdpi.com/journal/land> > Accessed Sep. 24/ 2018)

on.<sup>77</sup> A definition of Common Property Resources quite acceptable to thinkers of Economics is: ‘A property on which well defined collective claims by an exclusive group are established, the use of the resources is subtractive, having the characteristic of a public good such as indivisibility, shall be termed as Common Property Resources.’<sup>78</sup> Further Ostrom clarified and explained that such resources are owned by state and state extends the ‘use right’ to the defined communities to use it to meet their needs. Therefore, in Common pool Resources the group may or may not have a collective claim, ownership or custodianship but may have access or ‘use rights’ to the resource.<sup>79</sup>

Generally, the conventional definition of common property resources is a class of resources for which exclusion is difficult and joint use involves subtract ability. In other words, the “Commons” are considered generally as communally owned and managed natural resource or territory.<sup>80</sup>

## 2.2.4. Defining Community

The word “community” derives from the Latin *communitas* (comprising *cum* meaning “with/together”, and *munus*, meaning duty and refers to a social group and its system of interests, values or beliefs.<sup>81</sup> Community can be considered as a theoretical concept and a philosophy, such as ‘community spirit’ or ‘connected community’.<sup>82</sup> Alternatively community may be considered as a practice of engaging and connecting with others for instance ‘creating community’ or

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<sup>77</sup> See (n 2)

<sup>78</sup> Kadekodi, G.K, *Common Property Resource Management: Reflection on Theory and the Indian Experience* (Oxford University Press, New Delhi, 2004)

<sup>79</sup> Ibid

<sup>80</sup> L.A. German and Kleer, “Hybrid Institutions: Applications of Common Property Theory Beyond Discrete Tenure Regimes” Available at < <https://www.German208901.pdf> >

<sup>81</sup> See Roberto Esposito, *Communitas. Origine e destino delle comunità*; Cited in Roger Cotterell, “A Legal Concept of Community” (1997) 12 CJLS 75 at 79. Available <https://www.books.google.com.et/books?isbn=1785367196>

<sup>82</sup> Heather Douglas, “Types of Community” (2010) Available at < <https://www.researchgate.net/publication/291185841> Accessed 13 Feb 2019

‘building community’.<sup>83</sup> No agreed definition exists of exactly what constitutes a community. Brint suggests communities are connected primarily through common emotions and personal interests in one another.<sup>84</sup> He defines communities as ‘aggregates of people who share common activities and/ or beliefs and who are bound together principally by relations of affect, loyalty, common values, and/or personal concern (i.e. interest in the personalities and life events of one another).<sup>85</sup> Each community establishes traditions and patterns of behavior which may be implied or written as rules. Members of a community share some kind of a bond such as location, interests, background or identity, situations or experiences.<sup>86</sup>

*Roger Cotterell* argued that a rigorous and distinctive concept of community is needed to understand law’s relations to different social groups and cultures. The idea of ‘communities’ now can suggest a diversity of social collectivities, commitments and systems of interests, values or beliefs, coexisting, overlapping and interpenetrating. He suggests that community can be associated with at least four distinct ideal typical contexts of interaction and collective involvement.<sup>87</sup> Accordingly there are four types of communities. First, community can be associated with habitual or traditional forms of interaction; with the often accidental circumstance that people find themselves coexisting in a shared environment and this is *traditional community*.<sup>88</sup> It includes what sociologists often refer to as ‘local community’ – the coexistence of people in a defined geographical space, a neighborhood, for example. But an empirical correlate of traditional community is also found in the sharing of language.<sup>89</sup> Secondly,

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<sup>83</sup> Ibid

<sup>84</sup> Brint S, ‘A critique and reconstruction of the community concept: Sociological Theory’ (2001) Sage 19(1),1-23. Available at < <https://www.journals.sagepub.com/doi/10.1111/0735-2751.00125> > Accessed 19 Feb. 2019

<sup>85</sup> Ibid

<sup>86</sup> Scott, W. R.(2<sup>nd</sup> ed.), *Institutions and organizations*,(Thousand Oaks: Sage, 2001)

<sup>87</sup> *Roger Cotterell, Law, culture and society : legal ideas in the mirror of social theory* (Law, justice and power series, Ashgate, 2006) 66-78

<sup>88</sup> Ibid

<sup>89</sup> Ibid

community may be associated with a convergence of interest among a group and this is *instrumental community* (or community of interest).<sup>90</sup> Thirdly, community may refer to the sharing of beliefs or values that stress solidarity and interdependence and this referred as *community of belief* (or belief-based community, or community of values).<sup>91</sup> Fourthly, the uniting of individuals by their mutual affection may be thought of in terms of community. This type can be labeled *affective community*.<sup>92</sup>

Anderson expands on ‘imagined communities’ formed around nationality that build a sense of purpose, and then may engage in nationalistic endeavors such as invasions or ethnic cleansing.<sup>93</sup> According to him Nation is also an imagined political community and the reason the community is imagined arises from a sense of comradeship, so that even if there is inequality and exploitation, one feels a sense of belongingness.<sup>94</sup>

## **2.2.5. The Concept of Livelihood**

A Livelihood can be defined as the activities, the assets and the access that jointly determine the living gained by an individual or household.<sup>95</sup> When it comes to an individual, a livelihood is the ability of that individual to obtain the necessities in life, which are food, water, shelter and clothing.<sup>96</sup> Therefore all activities involved in finding food, searching for water, shelter, clothing and all necessities required for human survival at individual and household level are referred to as a livelihood. Approximately 90 % of rural households are involved in farming activities. In

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<sup>90</sup>Ibid

<sup>91</sup>Ibid

<sup>92</sup>Ibid

<sup>93</sup> Anderson Benedict., *Imagined communities*,(London: Verso, 1991)

<sup>94</sup> Ibid

<sup>95</sup> M.Phande F.A. ‘Infectious Disease and Rural Livelihood in Developing Countries’ ( Springer 2016) p. 17 Available at < <https://www.springer.com/978-981-10-0426-1> > Accessed 17 Nov. 2018

<sup>96</sup> Ibid

Africa, 70 % of the household income in rural areas is from farming activities. In these rural populations small-scale farming, fishing, raising livestock and non-farm activities are some of the common livelihoods that these populations survive on as a source of income.<sup>97</sup> Rural livelihoods depend heavily on natural capital in which land is the basic one. Land is particularly important in rural livelihoods as it is the vital input in agricultural production.<sup>98</sup> The role of land in poverty eradication, asserts that land is a basic livelihood asset since it provides shelter and food and all other livelihood activities rely on it. Thus, enhanced tenure security, including security of communal tenure, can be a key strategic element in alleviating rural poverty, securing livelihoods and avoiding landlessness.<sup>99</sup> Land and property rights have broad impact on people's lives and livelihoods.<sup>100</sup> Without property rights, no other rights are possible. Since man has to sustain his life by his own effort, the man who has no right to the product of his effort has no means to sustain his life.<sup>101</sup>

### **2.3. Customary Tenure Systems and Common Property Resources**

Legally recognizing customary land rights can improve tenure security for both the customary group as a whole and for its individual members. In particular, demarcating the external boundaries of the group's land can decrease the threat of encroachment by outsiders.<sup>102</sup> Common property resources (CPR) are often discussed interchangeably with customary land tenure

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<sup>97</sup> Ibid

<sup>98</sup> Sosina Bezu and Stein T. Holden, 'Land Access and Youth Livelihood Opportunities in Southern Ethiopia' (2013) Center for land tenure studies working paper 11/13 p. 4 Available at < <https://www.clts.wp112013> > Accessed on 14 Oct. 2018

<sup>99</sup> Kirsten Ewers, 'Communal tenure and the governance of common property resources in Asia' (2011) Land Tenure Working Paper 20 Available at < <https://www.am658e00> > Accessed on 10 Feb. 2019

<sup>100</sup> FAO, "Land and Property Right" (2010) Facilitators Guide. Available at < <https://www.fao.org> > Accessed 5 Nov. 2018

<sup>101</sup> Anderson, 'property Right' ( Hoover Press 2010) p. 1 Available At < <https://www.0817939121> > Accessed on 10 Sep. 2018

<sup>102</sup> Joseph E. Stiglitz (ed.), *One Billion Rising: Law, Land and the Alleviation of Global Poverty* ( Leiden University Press, 2009)

systems, but should be analyzed separately. They may include many areas of forest, dry land pasture, wetlands and surface waters.<sup>103</sup> Most customary tenure systems include some CPRs and some individually held resources, and land tenure systems governed by formal law may also include CPRs. CPRs are resources that are shared by different users, who often hold varying rights. The physical nature or non-continuous and non-intensive use of the resource typically makes it difficult for the primary users to exclude other users, yet the use of the resource by one user necessarily reduces the supply available to others. Many CPRs are common to members of a defined group, and the group actively excludes non-members from use. The group may develop use customs that have the effect of limiting the extent of each member's use of the CPR.<sup>104</sup> CPRs are of particular importance for securing the livelihoods of poor and marginalized groups in society. Improving their tenure security in CPRs is crucial not only for sustaining and improving livelihoods but for providing the user groups with the necessary tools and incentives for conserving the resource base on which they depend.<sup>105</sup>

## **2.4. Common Property Regime**

The term 'common property' has been a controversial matter in practice, partly because of differences at the philosophical basis of traditional views as opposed to western scientific resource management.<sup>106</sup> This becomes true when we talk about the property rights regarding the natural resources.<sup>107</sup> While defining the term 'common property', the controversies arise through some essential elements. Firstly, the ownership or control to access, secondly, the type of resources, which can be considered as common and third, is the matter of subtractibility. The

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<sup>103</sup> Ibid

<sup>104</sup> Ibid

<sup>105</sup> Ibid

<sup>106</sup> Fikret Berkes (ed.), *Common Property Resources* (International Book Distributors, Dehradun, 1989) pp. 22 - 32.

<sup>107</sup> Yesh Pal Singh, "Sustainable Management of Common Property Resources in Uttarakhand : Factors at Work" ( 2015 ) Vol.4. No. 7 *International Journal of Advanced Research in ISSN: 2278-6236 Management and Social Sciences* Available at <https://www.garph.co.uk> Accessed 17 Feb.2019

common property resources may be placed within three property right regimes i.e., Open access, Communal property and State property. Berkes has mentioned the characteristics of these property right regimes in following manner;

**1. Open access:** - Free for all; resource use rights are neither exclusive nor transferable; these rights are owned in common but are open access to everybody.

**2. State property:** - Ownership and management control; is held by the nation, state or crown; public resources to which use-rights and access rights have not been specified.

**3. Communal Property ;** - Use rights for the resource are controlled by an identifiable group and are not privately owned or managed by governments; there exists rules concerning who may use the resource, and how the resource should be used; community based resource management system; common property.

Bromley argues that a common property regime (*res communes*) represents private property for the group of co-owners (since all others are excluded from use and decision making) and individuals have rights (and duties) with respect to the resource in question.<sup>108</sup> Common property is said to be similar to private property in a sense that there is exclusion of non-owners.<sup>109</sup> The property-owning group may vary in nature, size, and internal structure across a broad spectrum, but it is a social unit with definite membership and boundaries, with certain common interests, with at least some interaction among members, with some common cultural norms, and often their own endogenous authority system.<sup>110</sup> The management the “owners” have the right to exclude non-members, and non-members have a duty to abide by exclusion.<sup>111</sup> Individual members of the management group (the “co-owners”) have both rights and duties with respect to

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<sup>108</sup> Bromley, D. W, “Environment and Economy: Property Rights and Public Policy” (1991) Oxford, UK, Oxford University Press. Available at <https://www.link.springer.com/article/10.1007/BF00324684> Accessed 12 Feb. 2019

<sup>109</sup> Bhim Adhikari, “Review of Literature on the Economics of Common Pool Resource” ( Feb, 2001) Available at <https://www.YorkYO105DDannex.1pdf> Accessed 15 Feb. 2019

<sup>110</sup> See (n 101)

<sup>111</sup> Ibid

use rates and maintenance of the property owned.<sup>112</sup> The fundamental difference between open access and common property is that in an open access situation, every potential user has a privilege with respect to use of the resource since no one else has the legal ability to keep the person out. Accordingly, a common property regime is one in which there are rules defining who is in the resource management group and who is not.<sup>113</sup>

## **2.5. Theoretical perspectives on communal land tenure**

There are different theoretical approaches in relation to the commons and the rules applicable to their governance including sustainable exploitation of these resources. Issues of efficiency, equity, sustainability of the use patterns over the commons have been debated in many literatures. There are also confusions among literatures that relate to the difference between (1) common property and open-access regimes, (2) common-pool resources and common property regimes, and (3) a resource system and the flow of resource units.<sup>114</sup> The two leading theories with respect to the commons are Hardin's theory of the *tragedy of commons* and Ostrom's *common pool resource theory*. This sub-section deals with these two theories and highlights their philosophical attitudes behind the commons.

### **A. The Tragedy of Commons**

When we deal with the question of the common use of resources "The Tragedy of the Commons" almost automatically comes up. The metaphor was coined by the American biologist Garrett Hardin in one of the most influential articles in the social sciences. The tragedy of the commons lies in the expectation that a resource will be overused when it is part of a

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<sup>112</sup> Ibid

<sup>113</sup> Ibid

<sup>114</sup> Elinor Ostrom, "The Private and Common Property" (1999) Available at < <https://www.hbfu.org/LerchTragedypdf> > Accessed 15 Feb. 2019 pp. 332

“commons.”<sup>115</sup> Hardin was by no means the first to formulate such a theory. Aristotle already noted in his *Politics* that the least amount of care is given to that which jointly belongs to the greatest number of individuals.<sup>116</sup> Aristotle formulates this in the *Politics* as follows: “For that which is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual. For besides other considerations, everybody is more inclined to neglect something which he expects another to fulfill...”<sup>117</sup> Thomas Aquinas also pointed out this problem.<sup>118</sup> In 1833, William Forster Lloyd outlined a theory on the careless use of common property, which Hardin cites.<sup>119</sup> In 1954, a similar problem was described by H. Scott Gordon in connection with the fishing industry. In his essay “The Economic Theory of a Common-Property Resource: The Fishery” Gordon arrives at the now famous conclusion: “*everybody's property is nobody's property.*”<sup>120</sup>

When property rights over natural resources are absent and unenforced i.e. when there is open access, no individual bears the full cost of resource degradation. The result is free riding and over exploitation, what Hardin termed the '*tragedy of commons*'.<sup>121</sup> Hardin ignores the rules and norms that could possibly prevent overuse of common property resources, what he describes is in fact not a tragedy of common property structures but rather a tragedy of *open access* regimes.<sup>122</sup>

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<sup>115</sup> Ibid

<sup>116</sup> Ibid

<sup>117</sup> Conor MC.Glynn, “Aristotle’s Economic Defense of Private Property” *The Students Economic Review* Vol. XXIX Available at < <https://www.McGlynn.AristotlesEconomicDefenseofPrivatePropert.pdf> > Accessed 22 Feb. 2019.

<sup>118</sup> Ibid

<sup>119</sup> H. Scott Gordon, “The Economic Theory of a Common-Property Resource: The Fishery” (1954) *Journal of Political Economy* 63, p.187-199.

<sup>120</sup> Ibid

<sup>121</sup> Bhim Adhikari, “Literature Review on the Economics of Common Property Resource: Review of Common Pool Resource Management in Tanzania” (Feb. 2001)

<sup>122</sup> Achim Lerch, “The Tragedy of the “Tragedy of the Commons” (1999) Available at < <https://www.hbfuorgLerchTragedypdf> > Accessed 15 Feb. 2019 pp. 4-6

In this context Bromley commented the misunderstood of the concept between commons and common property.<sup>123</sup>

*There is no such thing as a common property resource – there are only natural resources controlled and managed as common property, or as state property, or as private property. Or, and this is where confusion persists in the literature, there are resources over which no property rights have been recognized. The latter situation is one of open access (res nullius).*<sup>124</sup>

## **B. Ostrom’s New Common Pool Resource Theory**

Antithesis to the theory of tragedy of commons which called for centralized governance, Elinor Ostrom has taken opposite path by giving emphasis on improving the institutional basis for local decision making system as an appropriate means for common pool resource tenure system. Founded upon the claim that people abide rules that recognize their genuine engagement in decision making, Ostrom’s institutional design theory recognized, among others, a well defined and demarcated boundary in property rights as an important variable determining the success of tenure over resource.<sup>125</sup> According to this approach, tenure rules and institutions are required to adopt decentralized decision making procedure and cost effective and accessible dispute resolution methods.<sup>126</sup>

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<sup>123</sup> Bromley, Daniel “Environment and Economy: Property Rights and Public Policy”. (Oxford, UK, 1991) Oxford University Press.

<sup>124</sup>See (n 122) p.4

<sup>125</sup>Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990)

<sup>126</sup> Ibid

In addition there are mainly three school of thoughts developed under literatures of common property for its sustainable exploitation to avert the tragedy of commons.<sup>127</sup>

*According to the property rights school the problem of over exploitation and degradation of common property resources (CPRs) can be resolved only by creating and enforcing private property rights. The second school of thought advocates that only the allocation of full authority to regulate the commons to an external agency, in other words a State Property regime, can reduce over-exploitation of CPRs. The third school believes in the 'assurance problem approach' based on voluntary compliance. In recent years, an increasing number of scholars advocate that decentralized collective management of CPRs by their users could be an appropriate system for avoiding the 'tragedy of commons'. In practice every society has its own means and adaptations to deal with natural environment common pool resources, its own 'Cultural Capital' and local level systems of resource management, which are based on the knowledge and experience of the resource users themselves.<sup>128</sup>*

## **2.6 International and Regional legal frameworks over the Communal Land**

Legally, land rights usually fall within the categories of land laws, land tenure agreements, or planning regulations; but they are rarely associated with human rights law. Internationally, no treaty or declaration specifically refers to a human right to land. In fact, strictly speaking there is no human right to land under international law. However, behind this *façade*, land rights are a key human rights issue. Land rights constitute the basis for access to food, housing and

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<sup>127</sup>See (n 121)

<sup>128</sup>Ibid

development, and without access to land many people find themselves in a situation of great economical insecurity.<sup>129</sup>

Land rights have been approached from five different angles under international human rights law. These are; land as property right, cultural right; as an issue of gender equality; as an access to adequate food and the right to housing. This section deals with International Human Right Instruments and Guidelines and frameworks produced by different global organizations. The guidelines seeks to provide improve tenure governance by providing guidance and information on internationally accepted practices for systems that deal with the rights to use, manage and control land.

### **A. International Human Right Instruments**

It is important to see land as a key instrument for ensuring human rights and more specifically as instrument for a nation to discharge their international obligation of respecting, promoting, and ensuring human rights such as the right to work, housing, food, and water. The condition of landlessness especially in the absence of alternative livelihood impacts such rights, and more so, such condition affects largely women and youngsters.<sup>130</sup> Both the Universal Declaration of Human Rights (UDHR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR) directly or indirectly affirm the right to property. Article 17 (1 and 2) of UDHR clearly states, “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.” Although UDHR is a nonbinding

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<sup>129</sup>Jeremie Gilbert, “Land Rights as Human Rights: The Case for a Specific Right to Land” ( May 2013) SUR - International Journal On Human Rights Available at < <https://www.surjournal.org> > p.115

<sup>130</sup> Daniel Behailu, *Transfer of Land Rights in Ethiopia: Towards A Sustainable Policy Framework*,(The Hague: Eleven Publishing, 2015) p.182

instrument on member states, it has already attained the status of international customary law, which is considered binding on all nations irrespective of UN membership.<sup>131</sup>

Most importantly, the right to livelihoods is backed by both national and international human rights declarations, Conventions and Instruments. The Universal Declaration of the Human Rights (UDHR) stipulates that “everyone has the right to adequate living standards,” and that means, both social and economic means shall be facilitated without discrimination.<sup>132</sup> Similar legal provisions are embodied in the International Convention on Economic, Social and Cultural Rights (ICESCR) which protects the right to adequate standard of living. Those numerous economic, social and cultural rights enshrined in the UDHR and ICESCR are intimately connected to access to land, including the rights to housing, food, health and work.<sup>133</sup>

Another international instrument related with the issue is United Nation Declaration on the right of Indigenous peoples. Many indigenous communities, territories and lands are the basis not only of economic livelihood but are also the source of spiritual, cultural and social identity. The connection between cultural rights and land rights has been acknowledged by the Human Rights Committee (HRC) in its interpretation of article 27 of the ICCPR, which concerns cultural rights for minorities. Article 27 does not allude to land rights per se, but puts an emphasis on the connection between cultural rights and land rights.<sup>134</sup> The HRC has thus developed a specific protection for indigenous peoples’ land rights by acknowledging the evidence that, for

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<sup>131</sup> Ibid

<sup>132</sup> Daniel Behailu Gebreamanuel and Getiso Detamo Mekebo, “*Res Nullius vs. Res Communis* in Matters of Communal Lands of Smallholder Farmers in Ethiopia” (2018) MIZAN LAW REVIEW, Vol. 12, No.1. Available at <http://dx.doi.org/10.4314/mlr.v12i1.4> Accessed 10 Feb. 2019

<sup>133</sup> Ibid

<sup>134</sup> Art. 27 of the HRC reads: With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.

indigenous communities, a particular way of life is associated with the use of their lands. The emergence of an indigenous peoples' right to *cultural integrity* marks the establishment of a connection between access to ancestral territories and freedom of religion, cultural rights, and right to access natural resources. A parallel law-making effort that culminated with the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007 has amplified this jurisprudential evolution. The declaration dedicates several of its articles to land rights, making land rights an essential human rights issue for indigenous peoples.

## **B. Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security**

The guidelines were produced by FAO. These Guidelines are intended to contribute to the global and national efforts towards the eradication of hunger and poverty, based on the principles of sustainable development and with the recognition of the centrality of land to development, by promoting secure tenure rights and equitable access. The livelihoods of many, particularly the rural poor, are based on secure and equitable access to and control over these resources. They are the source of food and shelter; the basis for social, cultural and religious practices; and a central factor in economic growth.<sup>135</sup>

The guideline under part 3 it deals with the legal recognition of communities with customary tenure systems, as well as of informal tenure rights.<sup>136</sup> It also states that States should ensure that policy, legal and organizational frameworks for tenure governance recognize and respect, in accordance with national laws, legitimate tenure rights including legitimate customary tenure rights that are not currently protected by law; and facilitate, promote and protect the exercise of

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<sup>135</sup>FAO, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, (2012) p. 1

<sup>136</sup> Ibid Part 3

tenure rights.<sup>137</sup> Where States own or control land, fisheries and forests, the legitimate tenure rights of individuals and communities, including where applicable those with customary tenure systems, should be recognized, respected and protected, consistent with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.<sup>138</sup> In addition, Inadequate and insecure tenure rights increase vulnerability, hunger and poverty.

### **C. Framework and Guidelines for Land Policy and Land Reform in Africa**

One of the purposes of the AU framework is promote consensus for shared principles as the basis for securing access to land for all users, enhancing agricultural productivity and sustaining livelihoods.<sup>139</sup> It offer a basis for commitment by African member states to the formulation and operationalization of sound land policies as a basis for sustainable human development that includes assuring social stability, maintaining economic growth and alleviating poverty and protecting natural resources from degradation and pollution.<sup>140</sup>

The framework recognizes the role of land in livelihood. The importance of land in development in Africa is underlined by the fact that approximately 60% of the population derives its livelihood and income mainly from farming, livestock production, and related activities.<sup>141</sup> Further it declares that Land remains an important factor in the construction of social identity, the organization of religious life and the production and reproduction of culture. The link across generations is ultimately defined by the complement of land resources which families, lineages

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<sup>137</sup> Ibid. p. 14

<sup>138</sup> AU Framework, Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods,(2010) P. 2

<sup>139</sup> Ibid

<sup>140</sup> Ibid

<sup>141</sup> Ibid

and communities share and control. Indeed land is fully embodied in the very spirituality of society. These are dimensions which land policy development must address if prescriptions for change are to be internalized.<sup>142</sup>

Specifically in view of communal land it states that land policy processes must also recognize the role of local and community-based land administration/management institutions and structures, alongside those of the State. Land policy processes should also seek to provide for the necessary interface between state and indigenous systems, particularly with regard to the certification of land rights, the empowerment of decentralized institutions in land rights administration, and the management of land as a resource at the local level.<sup>143</sup> Finally, Colonial legacies which tended to denigrate indigenous land rights systems and suppress and sabotage their evolution and which ignored community land administration structures must now give way to new and innovative policies including the provision of statutory frameworks for the documentation and codification of informal land rights regimes.<sup>144</sup>

## **2.7. Experiences from Uganda, Tanzania and Ghana**

Although communal resources have been proposed by many scholars and international institutions like the World Bank to be either privatized or state controlled, some countries have taken careful steps for their continued independent existence. In the following paragraphs, an inquiry will be made as to how communal land and resources have been handled by some African states. These three countries were purposively chosen to show their efforts in protection of communal land tenure.

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<sup>142</sup>Ibid

<sup>143</sup>Ibid

<sup>144</sup>Ibid

### 2.7.1. UGANDA

All systems of land rights, Uganda's land tenure system has evolved over time. In Uganda's case, this history - in particular its colonial legacy - has shaped the system that exists today, as well as influencing attitudes to customary land tenure. During colonialism, in the north and east of the country, a clan-based system prevailed. Under this approach, central authority was not held in the name of any one individual, but governance was by the consensus of clan elders as a whole. Land, too, could not be vested in one individual, but was held by the clan and for the clan.<sup>145</sup> In the south and west of the country, where 'kingdoms' existed, ethnic groups tended to develop centralized centers of power and authority, with the King and his Cabinet as decision-makers. Whilst this permitted existing practices to continue, in effect it gave customary owners little protection from arbitrary expropriation of their property.

Following independence, the Public Lands Act 1962 vested Crown Land (now termed "Public Land") into Local Land Boards (later replaced by the National Land Commission in 1969). This approach of greater state control was supposed to allow for the more 'rational' allocation of land, to give opportunities to those who would use land best.<sup>146</sup> The first is the 1995 Constitution, which both reinstated private property (by vesting all land in the citizens of Uganda) and recognized customary tenure as one of the four tenures by which land in Uganda can be held, the others being freehold, leasehold and Mailo. The Constitution also made provision for an optional right for landowners holding land under customary tenure to be able to apply for and acquire a

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<sup>145</sup> Judy Adoko, "Securing Family and Community land rights for equity and sustainability through resilient, traditional land management institutions" (2017) World Bank Conference on Land and Poverty" The World Bank - Washington DC, March 20-24, 2017 p. 2

<sup>146</sup> Ibid

certificate of ownership.<sup>147</sup> Following on from the Constitution, the Land Act explicitly recognizes customary tenure. This has two major implications and departures from previous practice. Firstly, without the need for formal papers, citizens who have always been considered locally to “own” land now have legal recognition of this fact: Customary land is legally owned, but does not require registration to gain recognition of this status. Secondly, the law requires that land subject to customary tenure be governed according to local custom, which is to say by the customary (traditional) rules of the clan.<sup>148</sup>

Generally, the Land Act makes provisions for converting customary tenure to freehold by following the prescribed procedure. The normal practice is for customary owners to apply for a certificate of customary ownership and later, if they wish, apply to the relevant authority to convert their customary title to freehold. However, it would seem from the Act that possession of a customary certificate of ownership is not a prerequisite for conversion to freehold. As such, applicants may directly apply to the authority to convert their customary tenure to freehold. In addition, the Land Act does not give the relevant authority discretion to decide whether to allow an applicant to convert their title to freehold. It seems that permission to change should be granted as long as the customary law of the community concerned recognizes or provides for individual ownership.<sup>149</sup> In addition, the constitution empowered the government to compulsory acquirer land for public interest from private and communal holders. But, in Uganda courts are empowered to determine the compulsory acquisition of land by the government whether it satisfies public purpose or not.

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<sup>147</sup> Ibid

<sup>148</sup> Ibid

<sup>149</sup> Ibid

### 2.7.2. Tanzania

Landholding in Tanzania was profoundly characterized by *vijiji* (villagization) and *ujamaa* (communal farming) reforms during the 1960s and 1970s.<sup>150</sup> Under colonial rule, communities had essentially been left to continue internal land allocation practices according to custom. Among non pastoralist and non-hunter-gatherer groups within Tanzania, land tenure is often grounded in the principle of "first right"; members of the indigenous ethnic group who first settled in a particular area have claim to the land there and hold the power to welcome or reject newcomers and to decide which lands to allocate to them.<sup>151</sup> Upon coming to power, Nyerere enacted the Arusha Declaration in 1967, committing Tanzania to a policy of "African Socialism" or *ujamaa* collectivism. As under colonial policy, land was declared the property of the state to hold in trust for the people. In 1963, freehold titles were converted into leaseholds under the Freehold Titles (Conversion) and Government Lease Act. Later, in 1969, these same titles were changed into Rights of Occupancy under the Conversion of Rights of Occupancy Act.<sup>152</sup>

Although the Tanzanian Government had enacted various land-related mandates since coming to power in 1961, no official national land policy had yet been drafted. As a result of growing internal and external pressures, in 1991 the president identified that a "Commission of Inquiry into Land Matters" was necessary, and created what came to be known as the Shivji Commission (named after its chair, Issa Shivji). The commission's mandate was to travel throughout Tanzania, meet with a diverse array of people and record their expressed land-related needs,

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<sup>150</sup> John W. Bruce, *Country Profiles of Land Tenure: Africa* (University of Wisconsin, 1996) p. 266

<sup>151</sup> FAO, "Statutory Recognition of Customary Land Rights in Africa: An Investigation in to Best Practices for Law making and Implementation" (2010) FAO legislative Study 105, P. 154 Available at <https://www.faolex.fao.org/faolexi1945> Accessed 12 Jan. 2019

<sup>152</sup> Ibid

interests, concerns and grievances.<sup>153</sup> Both the Land Act and Village Land Act state the "fundamental principles" of the National Land Policy within the text of the legislation, as the customary law to be applied to land held under customary tenure "shall have regard to the customs, traditions and the practices of the community concerned, to the extent that they are in accordance with the principles of the National Land Policy..."<sup>154</sup>

The Village Land Act and the Land Act of 1999 recognize - and legalize - customary law as it applies to the assignment, transfer and definition of property rights.<sup>155</sup> Over 120 different ethnic/tribal groups live in Tanzania, each made up of a system of clans. Various groups practice very different livelihoods; some are small scale farmers, some are pastoralists, and some are hunter-gatherers.<sup>156</sup> With Regard to Village land claims, rights and governance; first, under the land acts, land is divided into three categories: reserved land, village land and general land.<sup>157</sup> Reserved land is defined in the acts as all land set aside for special purposes, including forest reserves, game parks, game reserves, land reserved for public utilities and highways, hazardous land and land designated under the Town and Country Planning Ordinance.<sup>158</sup> Village land is the land falling under the jurisdiction and management of a registered village.<sup>159</sup> General land denotes all land that is neither reserved land nor village land; all urban areas fall under this category. The acts establish pre-existing customary tenure rights as the basic means of holding property rights in all areas zoned as village land, as well as any areas within general lands that

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<sup>153</sup> Ibid

<sup>154</sup> The United Republic of Tanzania: Village Land Act. No.5,1999, Art. 20.

<sup>155</sup> Ibid Art. 14

<sup>156</sup> Daley Elizabeth, "Land and social change in a Tanzanian village 2:Kinyanambo in the 1990s" (2005) 5 (4) Journal of Agrarian Change, p. 526 Available at < <https://www.researchgate.net/227564483.pdf> > Accessed 19 Feb. 2019

<sup>157</sup> See (n 150) p. 159

<sup>158</sup> Ibid

<sup>159</sup> Ibid

were occupied according to a customarily-deemed right of occupancy before the act was passed.<sup>160</sup>

Central to the Village Land Act's recognition of customary land rights is the establishment of the village as the central unit of land holding. From this, all land and natural resources management as well as all individual land rights flow. In order to fulfill the provisions of the acts and be able to grant formal land rights to individuals and families within the community, a village must first be formally registered as a village and then acquire a certificate of village land.<sup>161</sup> After registering Village, they are required to demarcate which land within the village is communal land (to be used by the whole community according to custom and need), individual/family land, and reserved land. This process is designed to foster community consultation, discussion, and to facilitate a common understanding among community members of what exists within the community's domain, as well as how they would like to manage it.<sup>162</sup>

Furthermore, the Village Land Act mandates that when defining the bounds of the village, these bounds must provide for the land rights of pastoralists, the need for commonage, and the land needs of future generations of Tanzanians.<sup>163</sup> After any disputes over village boundaries have been resolved and all village lands have been formally demarcated and mapped, the village council then starts the administrative process of applying for a certificate of village land. A village's application for a certificate of village land is made to the district land officer, who then prepares the certificate.<sup>164</sup> Finally, after the village council has reviewed, approved and signed the certificate prepared by the district land officer, the district land officer forwards it to the

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<sup>160</sup> Ibid

<sup>161</sup> Ibid

<sup>162</sup> Ibid

<sup>163</sup> The United Republic of Tanzania: Village Land Act. No.5,1999, Art. 23(2)

<sup>164</sup> See (n 150) p.164

Commissioner for Lands, who signs it on behalf of the President of Tanzania and enters it into the national registry.<sup>165</sup>

A certificate of village land grants the village council administrative management powers over the land and affirms the occupation and use of the lands in accordance with the applicable customary law. At the end of this village certification process, the village (through the village council) becomes a corporate legal body, able to transact and negotiate with outsiders.<sup>166</sup>

### **2.7.3. Ghana**

Land administration in Ghana is thus governed by both customary practices and enacted legislation. It has a dual tenure system, in which statutory and customary land management run in parallel to one other. In the customary system, land is owned by traditional societies that take the form of tribes, clans or families. Customary lands are managed by the chiefs and family heads, who have the authority to enforce rights and obligations related to the land that has been granted.<sup>167</sup> These arrangements are supported by the Constitution of Ghana.<sup>168</sup>

In Ghana, the customary tenure is the primary source of all landholding with varying tenure and management systems. The customary authorities (stools, skins, clans and families) own 80% of all the lands in the country and the State owns the remaining 20%. The customary lands represent all the different categories of rights and interests held within traditional systems and which includes stool lands, skin lands, clan lands, and family lands.<sup>169</sup> The customary land tenure

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<sup>165</sup> The United Republic of Tanzania: Village Land Act. No.5,1999, Art. 7( 7)

<sup>166</sup> The United Republic of Tanzania: Village Land Act. No.5,1999, Art. 7( 6 and 7) See also (n 2) p.165

<sup>167</sup> Ministry of Lands and Forestry, 'Emerging Land Tenure Issues' (Accra, Ghana 22 august 2003)

<sup>168</sup> Constitution of Ghana , 1992 (Article 267).

<sup>169</sup> John Tiah Bugri, 'Improving Land Sector Governance in Ghana Implementation of the Land Governance Assessment Framework: Final Report,' (Kwame Nkrumah University of Science and Technology, Kumasi February 2012) 4

interest include:<sup>170</sup> the allodial title, customary freehold title, freehold title, leasehold title and other lesser interests in the land.

In general, in Ghana, the state does not own land, except for lands acquired by lawful proclamation ordinances, statutory procedures or international treaties. Such lands are managed by statutorily-established state institutions or land commission.<sup>171</sup> Concerning the management of the customary lands, the customary lands are managed by a custodian (a chief or ahead of family) with the principal elders of the community. Any decision taken by the custodian that affects rights and interests in the land, especially disposition of any portion of the communal land to non-members of the land holding community, require the concurrence of the principal elders.<sup>172</sup>

The State exerts considerable control over the administration of customary lands. All grants of stool land to non-subjects of the stool require the concurrence of the Lands Commission to be valid. No freeholds can be granted out of stool lands. Foreigners cannot own more than 50 year leases in stool and state lands (Article 267(5) of the 1992 Constitution).<sup>173</sup> Revenue from stool lands are collected and disbursed by the Office of the Administrator of Stool Lands. Only 22.5% of the revenue eventually gets to the land owners. There is lot of resentment of the traditional authorities to the disbursement formula.<sup>174</sup>

The Land Title Registration Act of 1986 lays out the responsibilities and powers of land registries in Ghana and the appropriate manner of registration, and upholds the government's ability to compel registration of property. It is to provide a means for the registration of title to

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<sup>170</sup>John Tiah Bugri, 'Issues and Options for Improved Land Sector Governance in Ghana: Application of the Land Governance Assessment Framework Synthesis Report 2013' 6.

<sup>171</sup> See (n 168)

<sup>172</sup> Ibid

<sup>173</sup> Ibid

<sup>174</sup> Tracy Higgins and Jeanmarie Fenrich, 'Legal Pluralism, Gender, and Access to Land in Ghana,' (2011)23(2) Fordham Environmental Law Review 8-9.

land and interest in land. Land title registration was introduced to reduce conflicts over parcel borders, to give certainty to ownership and to facilitate proof of title to make dealings in land safe, simple and cheap, and to prevent fraud.<sup>175</sup> The 1986 Act provides for registration of allodial title, usufruct/ customary law freehold, freehold, leasehold, customary tenancies, and mineral licenses. Compensation for communally-owned land is paid to the head of the land-owning community.

The Office of the Administrator of Stool Lands Act of 1994 provides the framework for the management of stool and skin lands.<sup>176</sup> Though primarily focused on financial management of customary lands, providing for the collection and disbursement of revenues from stool and skin land, the Act also requires the Office to coordinate with other land sector agencies and traditional authorities on matters related to the administration and development of stool and skin land.<sup>177</sup>

## **2.8. Current Practice Regarding Management and Use of the Commons**

This section provides a survey of existing models regarding management of the commons, focusing on the legal embodiment of the ‘community’ and its tenure over land or resources. The intention is to provide an overview of various models, with a more detailed analysis of benefits and disadvantages, as well as a detailed case study, provided in later sections.

### **2.8.1. Community as a Corporate Legal Entity**

In this model, a community representative body is established; possibly through deed or under statutory corporation law, which then exercises management authority over communal land or

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<sup>175</sup> See ( n 169)

<sup>176</sup> Ibid

<sup>177</sup> Ibid

resources.<sup>178</sup> While ensuring accountable and meaningful community representation provides serious challenges, such a structure does allow a representative body to develop and oversee localized rules for resource use. Ideally, all user groups and prominent stakeholders will have a voice in the development of the usage framework. Given the prominent role the local entity will play directly managing the commons under this model, ensuring clear and effective corporate governance rules that cover the selection and dismissal of board members, decision making processes and accountability mechanisms are crucially important.<sup>179</sup>

For example, South Africa's Communal Land Rights Act (CLRA) of 2004 under article 3 defined a community-as a 'group of persons whose rights to land are derived from shared rules determining access to land held in common' – can acquire 'juristic' personality once it has registered its rules to regulate land access, use and administration. Registration creates a community-level Land Administration Committee, can be established anew or have its functions performed by an existing customary institution.<sup>180</sup> This process provides the community with formal rights and obligations over communal land.<sup>181</sup>

## **2.8.2. Decentralization: The Community as the Lowest Level of Administrative Government**

In this model executive power over land tenure devolved to the community or local level. The ownership of land remains in the hands of the state and it is the community representatives will

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<sup>178</sup> Ross Andrew Clarke, 'Securing Communal Land Rights to Achieve Sustainable Development in Sub-Saharan Africa: Critical Analysis and Policy Implications', *5/2 Law, Environment and Development Journal* (2009), p. 130, available at < <http://www.lead-journal.org/content/09130.pdf> > Accessed 15 Nov. 2018

<sup>179</sup>B. Cousins, "Tenure and Common Property Resources in Africa" in International Institute for Environment and Development, (2000) Available at < <https://www.cabdirect.org/cabdirect/abstract>. > Accessed 13 Jan.2019

<sup>180</sup>South Africa's Communal Land Rights Act (CLRA) of 2004, Art. 3

<sup>181</sup> See (n 178)

control and regulate use.<sup>182</sup> The rules and guidelines are formulated at a national level and implemented at a district and local level, subject to modification for local conditions.<sup>183</sup> Still the central and regional governments maintain a supervisory role. The ways or methodologies put in place to select community representatives, the link between the community organizations has with the customary authorities, and ensuring responsibilities among them with accountability mechanisms are the core elements under this model.<sup>184</sup>

Village Land or *Gestion de Terroirs* (GT) is one of the systems implemented across West Africa.<sup>185</sup> The main elements of this system are ensuring community based natural resource management, empowerment of local institutions, capacity building, community decision making and security of communal tenure.<sup>186</sup> By redefining community rights and responsibilities in relation to land, GT seeks to use secure communal land tenure as a foundation for achieving broader development objectives.<sup>187</sup>

### **2.8.3. Custodianship and Stewardship**

Under this model land is still vest in the ownership of the state; yet an individual or community entity is designated custodian and regulates user rights.<sup>188</sup> The designated body has the power of exclusion and develops rules of access and exploitation of the resources.<sup>189</sup> This approach will be more meaningful when it involves the customary rules and regulation of that specific community. Rose Andrew argued that the exploitation of the resource has to focus on

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<sup>182</sup> See (n 178)

<sup>183</sup> Ibid

<sup>184</sup> Ibid

<sup>185</sup> Ibid

<sup>186</sup> Ibid

<sup>187</sup> Ibid

<sup>188</sup> Ibid

<sup>189</sup> Ibid

intergenerational equity within the definition of sustainable development under international law.<sup>190</sup> He added to this:

*The concept of custodianship has been criticized as it does not amount to formal ownership and therefore can perpetuate structural inequalities for indigenous communities. Without the ability to fully control land and resources, it is argued that communities cannot determine what activities add value, cannot negotiate directly with the private sector and are therefore limited in receiving direct benefit from external exploitation of local resources.*<sup>191</sup>

#### **2.8.4. Co-management and CBNRM**

This approach has similarity with the custodian model as it empowers the local community over the land.<sup>192</sup> The difference is that it lies on the contractual arrangements or co-management. It involves the negotiated agreements between local users, stakeholders and government over resource use and access.<sup>193</sup> It increases the authenticity of the rules and results in enhanced compliance. Therefore, co-management can balance state-level priorities of efficiency and equity against local concerns for self-governance and participatory decision-making.<sup>194</sup> In the statement of Rose;

*While the flexibility advantages of a co-management approach are clear, additional research is needed regarding the negative consequences of basing localized land administration solely on contractual rights, rather than on more secure proprietary rights. Given the significant research attesting to the importance of security of tenure in achieving long-term investment in a resource, improving sustainable management, and reducing land degradation, strong justification exists to base localized land use*

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<sup>190</sup> Ibid

<sup>191</sup> Ibid

<sup>192</sup> Ibid

<sup>193</sup> Ibid

<sup>194</sup> Ibid

*regulations on proprietary over contractual rights. It should further be noted that the two approaches can potentially co-exist. For example, a community legal entity can have full title over communal land but can then still negotiate use regulations based on a contractual arrangement with local users.*<sup>195</sup>

### **2.8.5. Current Best Practice**

There are many approaches to be employed to attain communal land tenure security, land administration and local environmental management.<sup>196</sup> The approaches can start from legal reforms, decentralized management structures, custodianship arrangements to local co-management agreements.<sup>197</sup> **Here** it is vital to remind that none of these models are mutually exclusive. The best approach that we undertake to apply is the one that fits to local conditions.<sup>198</sup> The basic reason we give value is the extent to which a given model ensures tenure security over communal land.

Current best practice therefore favors communal tenure arrangements that are decentralized, participatory and based on community empowerment.<sup>199</sup> When informal rights are given formal legislative recognition and the system of land administration based on customary rules and institutions, it will result in secure communal land tenure.<sup>200</sup>

## **2.9. Conclusion**

Rural communal lands are lands, which rural communities possess and use collectively in accordance with community-derived norms, and are areas maintained as the communal property

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<sup>195</sup> Ibid

<sup>196</sup> Ibid

<sup>197</sup> Ibid

<sup>198</sup> Ibid

<sup>199</sup> Ibid

<sup>200</sup> Ibid

of all community members. It is *res-communis*. Lands for grazing and wildlife, forests and woodlands, mountaintops, sacred localities, lakes and streams within the community lands are usually retained purposely as collective property in which all members have use rights. A right to use this *commons* exists within a community where each member has a right to use the holdings of the community. A member of a community may have rights such as grazing cattle on a communal pasture and fishing activities.

Theoretically there are different views regarding the nature of communal lands. *The tragedy of commons*; the metaphor was coined by the American biologist Garrett Hardin in one of the most influential articles in the social sciences. The tragedy of the commons lies in the expectation that a resource will be overused when it is part of a “*commons*.” Precisely because Hardin ignores the rules and norms that could possibly prevent overuse, what he describes is in a tragedy of *open access* regimes (*res nullius*) no property right. Nevertheless, he urged for better property rights in land, and he advocated for the abolition of communal land tenures and supported private property because there can be the risk of free riding and overexploitation of such resources as every member strives to maximize his/her own economic benefits from the common resource. This line of argument was further confirmed by De Soto who preferred property rights in land rather than upholding communal land tenure. Others argued that communal land is characterized by lands as intra and trans-generational asset and noted that communal lands are not open access systems or species of state or socialist property. The new thinking, which Ostrom has popularized, involves in nuanced conceptualization of the commons and it no more views the commons as resources left in norm-less condition. Communal land and other associated natural resources are ultimately controlled by the concerned community or clan to the exclusion of non-

members. Members do have individual and/or common access to those resources. The members transfer these access rights to their descendants. Muradu also argued that communal lands are complementary or sole means of livelihood for the rural poor. In some occasions, because of the small size, the low quality of the private farm holdings and rainfall variability, the benefits, which the rural poor obtain from commons, might by far exceed those obtained from private land possessions.

A comparative experience of other states indicates the existence of legislative recognition of Communal lands by the national government in its constitutional and subordinate laws. Although different models for the management and use of CPRs have been advanced, it was made evident that decentralized, participatory and community-level management of the commons has to be adopted to secure communal tenure. Finally, the above theoretical framework will be analyzed in terms of Ethiopian context and study area in the subsequent chapters.

## **CHAPTER THREE**

### **The Legal and Practical Aspects of Communal land Tenure: the Case of Kedida Gamela and Qaca-Bira Woredas**

#### **3.1. Introduction**

The Land laws and policies of many countries address land tenure issues including the protection of communal land rights of the local people. For example, African countries like Uganda, Tanzania and Ghana formally recognize community land in spite of differences in the degree of effectiveness. In Ethiopia, communal land rights and attendant matters are largely discussed in terms of pastoral society or semi-pastoral society. However there are communal lands among the smallholder farmers as well. Tenure insecurity and productivity-related problems are the concerns of land rights in Ethiopia, as the majority of Ethiopia's rural poor live below the poverty line. This is due to the enduring legacy of land policy which presupposes natural resource control to maintain political power.

This chapter examines two main issues. These are the legal and practical aspects regarding communal land tenure. Based on the procedure of the proposal and following its methodology, the researcher has made a fieldwork visit to the study areas and collected qualitative data in order to understand the practical aspects of communal land rights. The practical aspects were studied in the rural communities of the study area by interviewing key informants, conducting in-depth interviews, FGDs and personal observations.

The factors that led to the diminution of communal land were identified by way of qualitative observation and the effects are analyzed in terms of its impact on the livelihood of the community. Court cases are also used to examine the existence of encroachment of communal land in the study area. The legal aspects of the existing legal framework will be analyzed by

doctrinal approach to show whether it better protect communal land tenure in view of the existing international, regional or other countries comparative experience.

### **3.2. Legal Aspects of Communal land Tenure**

The Derg regime that had come into power in 1975 through a military coup abolished the feudal system in Ethiopia and declared all land, rural or urban, property of the state. This state ownership of land has not changed with the change in political leadership in 1991. Land is owned by the state and holders have only user rights. The main concern on land rights in Ethiopia relates to tenure insecurity.<sup>201</sup> Many laws and policies have been issued throughout the history of the Ethiopian state concerning regulation of the land tenure system. But none of them effectively recognize and guarantee Communal land tenure. In the following part, the FDRE constitution and Subsequent legislations will be examined in view of communal land tenure which is a sole means of livelihood diversification for the rural community that is well above eighty per cent of Ethiopia's population.

#### **3.2.1 The FDRE Constitution (1995)**

In Ethiopia, the legal regime and the overarching policy governing land and natural resources are defined and delineated in the constitution of the country,<sup>202</sup> which is the supreme law of the land. According to the FDRE Constitution, land is common property of the nations, nationalities and peoples of Ethiopia and shall not be subject to sale or other means of exchange.<sup>203</sup> One salient

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<sup>201</sup>Daniel Behailu Gebreamanuel and Getiso Detamo Mekebo, “*Res Nullius vs. Res Communis* in Matters of Communal Lands of Smallholder Farmers in Ethiopia” (2018) MIZAN LAW REVIEW, Vol. 12, No.1. Available at <http://dx.doi.org/10.4314/mlr.v12i1.4> , Accessed 25 Feb.2019

<sup>202</sup> Daniel Behailu Gebreamanuel, *Transfer of Land Rights in Ethiopia*, (eleven international publishing,2015)

<sup>203</sup> FDRE Constitution,(1995) Art. 40

feature of this provision is that land is the property of the state and holding right can be extended to peasants and other interested groups as per the law detailing the issues of land use.<sup>204</sup>

As Mohammed Abdullahi said, one of the most important features of the Constitution is decentralization of government power based substantially on ethnic federalism. In fact, this is a clear departure from the past state tradition of a highly centralized state structure.<sup>205</sup> In its preamble, the Constitution begins with “we, the Nations, Nationalities and Peoples of Ethiopia are strongly committed, in full and free exercise of our rights to self-determination ... convinced by continuing to live with our rich and proud cultural legacies . . . have, therefore, adopted this constitution.”<sup>206</sup> In fact, most of the provisions of the Constitution reflect the above preambular statement.<sup>207</sup> For instance, one of the basic constitutional principles in the FDRE Constitution is the principle of sovereignty of the people. In this regard, Article 8 provides that “all sovereign powers reside in the Nations, Nationalities, and Peoples of Ethiopia,” enjoyed through elected representatives and direct democratic participation, in which the Constitution itself is the expression of such powers. Thus, unlike the constitutions of other countries, the FDRE Constitution uses the term ‘people’ not in its generic sense but inter sectionally as ‘nations,’ ‘nationalities’ and ‘peoples.’ This is not surprising for one who has seen the first paragraph of the preamble that recognizes the existence of nations, nationalities and peoples (communities) seeking sovereignty in their own right.<sup>208</sup> It incorporates not only individual rights but also collective rights of Ethiopian communities.

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<sup>204</sup>Ibid

<sup>205</sup>Mohammed Abdulahi, “The Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities,” (2007) Available at <https://www.HeinOnline--14Int'lJ.onMinority&GroupRts.85> Accessed 25 Jan. 2019

<sup>206</sup> Ibid

<sup>207</sup> Ibid

<sup>208</sup> Ibid

However, the issue of communal land is not well articulated, even though it is mentioned in various provisions in a manner that does not coherently articulate communal rights and their implementation.<sup>209</sup> As constitution defines private property as:

*Any tangible or intangible product which has value and is produced by the labor, creativity, enterprise or capital of an individual citizen... Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvement he brings about on the land by his labor or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it.*<sup>210</sup>

Private property, which is produced by labor, creativity, or capital, can be freely disposed of as per the constitutional order, and one is free to acquire, dispose, or make use of it. The constitutional rule obviously raises the issue of whether properties produced using land or developed as part of the land can form part of private property. The constitution affirms that anyone who builds on land or brings about permanent improvement on land using labor, intellect, or capital shall have full rights. Full ownership right to property shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation in the event of expropriation. The constitution effectively excludes land from private property regime and limits the bundles of rights attached to private property.

On the other hand, the influence of John Locke's labour theory of value is apparent in sub-Article 2 that defines private property. Locke's labour theory of value is also reflected in Article

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<sup>209</sup> See (n 201)

<sup>210</sup> FDRE Constitution,(1995) Art. 40

40, sub-Article 7 of the Constitution<sup>211</sup> which defines the rights of individuals in immovable property. One of the fundamental issues that can be raised in relation to public property of rural land and natural resources is whether it has the impact of open access to a significant part of these resources. Addressing this issue is essential because publicly owned resources can be susceptible to *de facto* open access where the law either does not adequately recognize the collective land rights of communities (who traditionally claim customary exclusive rights) or peasant associations, or where it becomes unable to effectively control access or exclude withdrawals of resources (such as trees).<sup>212</sup>

Muradu argued that the state practice of tagging the commons as state domain has continued unabated. And He added to this,

*The Constitution has thus adopted the concept of improvement. Under this Constitution, for any person to have a claim over land in the sense of usufruct, he/she must show that he/she has made an improvement traceable to his/her labor or capital. One cannot lay claim to land without establishing improvements thereon. Unimproved land in this sense belongs to the state. Those who merely extract the bare natural fruits of communal land and landed resources cannot under this approach claim to have usufruct right over those resources for they have not met the requisite condition for claiming such right.*<sup>213</sup>

Generally, the FDRE Constitution did not guarantee communal land tenure. Property rights are regarded as well-defined where the entitlements of access, withdrawal, management, exclusion and

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<sup>211</sup> Art. 40(7) of the FDRE Constitution reads as “Every 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 labor or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it. Particulars shall be determined by law.”

<sup>212</sup>Elias N. Stebek, “Conceptual foundations of property rights: Rethinking defacto rural open access to common-pool Resource in Ethiopia” (Spring 2011) MIZAN LAW REVIEW, Vol. 5, No.1. Available at <http://dx.doi.org/10.4314/mlr.v12i1.4> , Accessed 28 Feb.2019

<sup>213</sup>Srur, M, ‘Rural Commons and the Ethiopian State’, 2013(1), Law, Social Justice & Global Development.(LGD).

alienation are clearly and effectively articulated. This can take the form of recognition of customary tenure. In rural communities where such well-defined property regimes are lacking, or where they are not effectively implemented, the problems of deforestation, overgrazing, squatting, and the resultant resource dissipation are certainly widespread.

### **3.2.2. The Federal Rural Land Laws**

Communal lands under FDRE rural land legislation refers as rural land, which is allocated by government to local residents for common grazing, forestry and other social services.<sup>214</sup> Thus, customary rights are undermined and the state has an overarching role. Communal lands are subject to change to private holdings or be allocated for other commercial or non-commercial purposes as found appropriate.<sup>215</sup> Thus, the status of communal land is insecure even compared to private holding which is largely registered and certified. In practice, there are no communal landholdings identified and registered in the land registry. The state does not give due attention to communal land and it often considers it as *res nullius*, thereby rendering it susceptible to distribution as private landholding at the discretion of the government.<sup>216</sup> In addition, Land use rights (or land) per se are not considered as property in Ethiopia for the law confirms that it belongs to the state and the people.<sup>217</sup> Tenure insecurity is graver in communal lands because such lands have no formally defined owner. This gap is mainly attributable to the legal regime (at federal and regional state levels) that are vague and confusing with regard to legal titling thereby confirming lack of defined/identified owner for the purpose of compensable interest.<sup>218</sup> But the recent *Borena* communal land (pastoral land) registration and certification in the name of *Abaa Dheeda*, was one of encouraging start in Ethiopia.

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<sup>214</sup> See (n 201)

<sup>215</sup> Ibid

<sup>216</sup> Ibid

<sup>217</sup> See (n 201) p.116

<sup>218</sup> Ibid

Under the 2005 Rural Land Law, the government has made the country's historical heritage in regard to communal land quite patent quoted in the introductory part of this article, Article 5/3 of this law says "Government being the owner of rural land, communal holdings can be changed to private holdings as may be necessary."<sup>219</sup> Under article 2(12) defines communal holding as rural land which is *given by the government* to local residents for common grazing, forestry and other social services.<sup>220</sup> As the italicized phrase shows "communal land" is given by the government in the sense of not recognition but creation of the commons. Thus, the classic sense of "communal land" has been statutorily abolished.<sup>221</sup> In the statements of Muradu:

*The law also introduces the concept of minimum private holdings which is described as "rural land privately held by peasants and semi-pastoralist and pastoralists," sending the message that what is given recognition is private landholdings not communal ones. The law finds it difficult to recognize the concept of communal land as a separate form of land holding.*<sup>222</sup>

*The 2005 Rural Land Law apparently recognizes three forms of tenure including private, state holding and communal holding, but it strikes at the heart of the third land typology when it sees the government as an owner of land and bestows upon it the power to privatize communal land as it pleases. This in effect means this land law has recognized only two holdings: land is held either by private persons individually or by the state. This is consistent with the individualistic tradition*

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<sup>219</sup> See (n 213)

<sup>220</sup> Federal Rural Land Administration and Land Use Proclamation No.456/2005, Art.2(12)

<sup>221</sup> See (n 213)

<sup>222</sup> Ibid

*embodied in the Civil Code of Ethiopia, which recognizes essentially two domains:  
land in the private domain and land in the state domain.*<sup>223</sup>

It is private property subject to compensation in the cases of expropriation for public purpose. Lack of clarity as what constitutes public purpose and absence of review mechanism by courts when the decision of taking communal land for investment amounts to public purpose is another factor that contributes to insecurity of rural communal lands.

### **3.2.3. Regional Rural Land Laws**

There are two distinct features of communal lands according to Ethiopian land laws. It is a state grant as per the federal rural land law but community ownership is recognized *ipso facto* according to some laws of regional states.<sup>224</sup> The definition of communal land in the federal rural land proclamation is the contention that the government is the ‘inventor’ of communal holding. It is the traditional community that exists before government, and the government can not in any way become the creator communal land.

According to rural land laws of Oromia, SNNPRS, Ethiopian Somali, and Afar regional states, communal lands are recognized and homage is paid to the community norms.<sup>225</sup> In these regional states, communal holdings constitute a land which is outside both state holdings and private holdings. Hence, lands which are not designated under private or state holdings are communal holdings. Yet again, these lands are subject to distribution to land users and could easily be given to investors.<sup>226</sup>

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<sup>223</sup> Ibid

<sup>224</sup> See (n 201)

<sup>225</sup> Oromia National Regional State Rural Land Administration and Use Proc.No.130 /2007; Article 2(3) and Article 2(14) of the SNNPRS, Rural Land Administration and Use Proc. No.110/2007; Article 2 (17) of the Afar Regional State National Regional State Rural Land Administration and Use Proc. No 49/2009; and also The Ethiopian Somali National Regional State Rural Land Administration and Use Proc. No. 128/2013.

<sup>226</sup> Ibid

The 2007 Rural Land Law of the Southern State has not taken a positive step in accepting communal land possessions because on the one hand it appears to acknowledge land rights of the community and on the other hand it bestows ownership rights of the commons upon the state in a rather self-contradictory manner.<sup>227</sup> It defines communal land holding as “land out of government or individual possession and is being under the common use of the local community as a common holding for grazing, forest, and other social services.”<sup>228</sup> And this same law states rural youths who wish to engage in agriculture shall have the right to get and use rural land which is possessed by the community.”<sup>229</sup> That land holding certificate for communal land shall be prepared in the name of the beneficiary community.”<sup>230</sup>

The rural land laws of the regional states duly recognize the use rights of communal lands. However, the practical problems relate to considering the government as owner of the communal lands, and the act of assigning communal land for any other purpose including their conversion to private holdings. This renders communal land insecure and undermines its socio-economic contribution to the rural community. As highlighted above, communal lands indeed positively contribute towards enabling mixed farming and the retention of cultural heritages of different communities.<sup>231</sup>

Owing to the steadily increasing population pressure that is exacerbating land fragmentation and decline in productivity, many households have failed to secure their livelihood. It is thus essential for Ethiopia to ensure communal lands rights in both agricultural and pastoral communities (for the benefit of the rural poor) towards securing livelihood and diversification of economic activities.

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<sup>227</sup> See (n 213)

<sup>228</sup> SNNP Regional State Rural Land Administration and Utilization Proclamation No. 110/ 2007, Art. 2(14)

<sup>229</sup> Ibid, Art. 5(4)

<sup>230</sup> Ibid, Art. 6(12)

<sup>231</sup> See (n 201)

### 3.3. Practical Aspects

#### 3.3.1. Communal land in the Study area.

Southern Nations, Nationalities and Peoples Regional State (SNNPRS) is structured into 15 zones and three special *Woredas*.<sup>232</sup> The region's economy is based on subsistence farming and mixed agriculture. In some parts of the region (e.g. pastoral communities), people's livelihoods are based on livestock herding. The region is one of the most densely populated rural areas in Ethiopia and it is in the midst of ecological crisis.<sup>233</sup> Farmland is too scarce and heavily over utilized. The Rain fed agriculture is vulnerable due to climate changes and degraded resources. Even when farming seasons are good, more than half of the youth in the region are either unemployed or underemployed, owing to the lack of farmland. Most families in the region live on less than 0.50 US dollars per day.<sup>234</sup>

Meanwhile, kembata Tembaro is a zone in the Southern Nations, Nationalities, and Peoples' Region. This zone is named after the subgroups of the Kembata and Tembaro people. The zone is bordered on the south by Wolayta , on the southwest by Dawro , on the northwest by Hadiya , on the north by Gurage , on the east by the Alaba Zone, and on the southeast by an exclave of the Hadiya Zone. The administrative center is Durame. Based on the 2007 Census conducted by the CSA, this Zone has a total population of 1,080,837, of whom 536,676 are men and 544,161 women; with an area of 1,355.89 square kilometers. Kembata Tembaro has a population density of 502.13.<sup>235</sup> A total of 122,580 households were counted in this Zone, which

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<sup>232</sup> The Revised Constitution of SNNPR: Proc. No.35/2001. Art. 45 (1)

<sup>233</sup> See (n 201)

<sup>234</sup> USAID, "Livelihoods Ethiopia Southern Nations, Nationalities and Peoples Region (SNNPR) Livelihood Zone Reports SNNPR Follow-On to Regional Livelihoods Baseline Study," Available at < <https://www.pdf.usaid.gov/pdfdocs.pnadj866.pdf> > Accessed 15 Feb. 2019

<sup>235</sup> Kembata Tembaro zone ZOFED Annual socio economic and Geo-spatial Statistical abstract (2014) p-14

results in an average of 5.55 persons to a household, and 118,077 housing units. It has the average rural household has 0.6 hectare of land, compared to the national average of 1.01 hectare of land, and an average of 0.89 for the SNNPR.<sup>236</sup> Specifically the areas focused in this research Kaca-Birra Woreda( Ashira and Wonko Kebele) and Kedida-Gamela Woreda( Aze Dobo’o and Zato Shodera Kebeles) the communities are leading their livelihoods by subsistence agriculture, especially mixed farming.<sup>237</sup>

The long-standing practice among *Kembata community* is the using of communal lands as alternatively to secure livelihoods. Families with many children and youths are dependent to on it. The role of communal land in diversifying means of livelihood is vital. Smallholder farmers in *Kembata-Tembaro Zone* are still engaged in livestock farming and, they reserve plots from small scale farmlands, to fodder (for their cattle). The fodder from community land is thus indispensable owing to the land shortage.<sup>238</sup>

93% of the Kambata live on agricultural economy.<sup>239</sup> The agricultural life of the Kambata consists of animal husbandry, farming and trading.<sup>240</sup> Besides its economic dimension animal husbandry has following significance for the socio-economic life of the Kambata, cattle is a measure of social value.<sup>241</sup> Land and cattle has a special attachment in the community, for a good economic position and social esteem as being a sign of blessing for the lineage and its generation depended on the amount of the possessed land and cattle. Even if it is not on the same level as its role in determining social status, cattle also plays a significant religious role yet. Some splendid domestic animals are a sign that the owner is blessed by his father and forefathers. That means,

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<sup>236</sup> Ibid

<sup>237</sup> Interview with farmers in the all study areas, 10, 11, 16 and 17 March 2019

<sup>238</sup> Ibid

<sup>239</sup> Belachew G.W.Tochalo, “The impact of socio-cultural structures on the Kembata on their economic development” (April 2001) D.Phil Available at < <https://www.oefse.at> > Accessed 01 April 2019

<sup>240</sup> Interview with Zekarias Foche, a farmer from Zato-Shodera Kebele, 26 March 2019

<sup>241</sup> Interview with Genedo Abura, a farmer from Aze-Dobo’o Kebele 01 April March 2019

eternity in the religious conception of the Kambata manifests itself in the material culture. Sheep, goats, donkeys, horses, mules, cows, oxen and chicken are the domestic animals of the Kambata.<sup>242</sup>

Animal husbandry and farming in Kambata are functionally interconnected. Animal husbandry without land-cultivation is impossible because cattle fodder is usually the remnant of agricultural products.<sup>243</sup> To subsist only on animal husbandry is not possible any more, since there is an immense shortage of pasture because of decline in CPRs. To live only on farm products is impossible; the community needs cattle and its product for home consumption or to generate additional income through selling.<sup>244</sup>

Communal lands in Kambata Tembaro are governed by community norms. The common pool resources in the area mainly include community grazing lands, forestry for firewood, timber, grass and for many other purposes, water (village ponds, rivers), village roads and lands for wildlife. These resources are retained by the community for their benefits; state laws do not recognize their rights over communal lands.<sup>245</sup> In this area Lands which are not designated under private or state holdings are communal holdings.<sup>246</sup> Kambata and Tembaro people consider it as inherited from their forefathers. And, they believe that those communal lands are source of all livelihoods, especially for the rural poor.<sup>247</sup> As the scarcity of private holding and decline in productivity make the communal holding basic necessity for the mixed farming; cattle rearing. Our livelihood is based cattle raising. Crop production is not consistent due to climatic factors,

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<sup>242</sup> FDG, with participants from Zato-Shodera Kebele, 26 March 2019

<sup>243</sup> See (n 241)

<sup>244</sup> FDG, with participants from Aze-Dobo'o Kebele, 01 April 2019

<sup>245</sup> FDG discussion with participants from Zato-Shodera Kebele, 16 March, 2019

<sup>246</sup> An Interview with Mesfin Markos, officer at kedida-gamela woreda Agriculture and rural land administration, 13 March 2019

<sup>247</sup> FDG discussion from the participants of Aze-Dobo'o Kebele, 10 March 2019

drought.<sup>248</sup> But government encroachment and private intrusions are among the major challenges to communal land according to informants.

### **3.3.2. Allocation of Communal lands for investment.**

Many Communal lands in Kembata Tembaro Zone were allocated for investment. Particularly, Communal lands in Zato-Shodera Kebele were given for six investors.<sup>249</sup> During the process no compensation issues were entertained owing to the absence of community landholding title and due to the belief that land belongs to the government.<sup>250</sup> The investment is believed to have positive role in terms of agricultural technology transfer, job creation and enhancing the livelihood of the rural poor. In this area five investors who were allocated communal land are cultivating bahir-zaf (eucalyptus) and grass. They sell it to the community in return.<sup>251</sup> They are not in a position to create job opportunities to the landless rural youth and do not provide any alternative benefit to the community who has a right over communal land and to enjoy the benefits over. According to the interview of key informants; more than 1,100 households were using this land for livestock grazing and mixed farming.<sup>252</sup> The income from sale of cattle and dairy products enhance rural livelihood.<sup>253</sup> The relation between income level and dependence on land and resources upon it for livelihood are direct. In my observation, the enclosed land is not efficiently developed and goes contrary to the rationale stated to justify the takeover of community lands.

In *Aze-Dobo'o Kebele of Kadida-Gamela Woreda* the community protested against the allocation of communal land to private investor who wants to plant wet coffee processing

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<sup>248</sup> An Interview with Tadele Iyane, farmer from Aze-Dobo'o kebele, 12 March 2019

<sup>249</sup> FDG, discussion from the participants of Zato-Shodera Kebele, 09 March 2019

<sup>250</sup> An interview with Dessalegn Ergicho: a farmer from Zato-Shodera Kebele, 10 March 2019.

<sup>251</sup> See (n 249)

<sup>252</sup> The Kebele has a total number of 6732 cattle population, Data from Kedida-Gamela Woreda animals and fish resource office, 25 March 2019, confirmed interview result

<sup>253</sup> See (n 249)

industry.<sup>254</sup> The community destroyed even the previously planted coffee processing areas as they are not benefiting them and dumping their wastes in communal grazing areas.<sup>255</sup> The other factor for the dispute is that, the government organs while allocating the communal land did not consult and convince the community.<sup>256</sup> This is a serious problem in the area because the state was not making the community to participate on the matters regarding communal land. They informed during my interview that many youths were arrested due to this fact and the matter remains unresolved.<sup>257</sup>

Insecurity of communal land rights has its own impact on the livelihood of the rural poor. Because the community consider communal lands as “common heritage” there need to be used in common and jointly. The community has to enjoy the benefits accrue from communal land.

Within the words of Daniel;

*Under insecure tenure, rights to land are threatened by competing claims, and can even be lost as a result of eviction. Without security of tenure, households or families are considerably impaired in their ability to secure sufficient food and to enjoy sustainable livelihoods. The introduction of titling (via certification for land rights) positively contributes toward tenure security if it goes beyond mere records of landholdings and parcel locations.*<sup>258</sup>

The majority of the people live below the poverty line in Sub-Saharan Africa. The root causes of poverty include lack or poor management of resources, land degradation, poor land governance,

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<sup>254</sup> See (n 247) and Interview with an Experts at Kembata-Tembaro Zone Office of Investment.

<sup>255</sup> FDG, discussion from participants of Aze-Dobo’o Kebele, 19 March 2019

<sup>256</sup> Ibid

<sup>257</sup> Ibid

<sup>258</sup> See (n 201) p. 114

gender inequality, unequal access to land and tenure insecurity.<sup>259</sup> Land is a scarce resource as we have to use it efficiently. Currently the majority of youths in the study area is landless and the livelihood of the community is at stake. Securing communal land right and ensuring its access effectively will help rural households to generate income and feed their family. Adequate management and developing it, is important for socio-economic development and poverty reduction in addition to benefiting the youth through creating another means of livelihood.

### **3.3.3. Private Encroachment**

The Ashira and Wonko kebeles are the two of 24 rural grass-root level administration units in *Kaca-Birra Woreda*, which are endowed with rich community lands. It was claimed that communal lands in these *Kebeles* constituted more than 3,200 hectares before two decades.<sup>260</sup> The local people use these lands for the purpose of agricultural diversification. Currently, it has been continuously declining. Equally, about 1400 households live in the two and above 1100 individuals depend on subsistence farming through mixed agriculture.<sup>261</sup> Due to rapid population growth and the unavailability of land to the rural youth, communal land is very crucial.<sup>262</sup>

During the interview they confirmed that communal grazing lands are important sources of livestock feed and the community uses them for grazing and other social purposes. Such areas are managed based on the collective action of communities.<sup>263</sup> Especially communal grazing

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<sup>259</sup> Mahashe Chaka and Others, “Good Land Governance is essential for effective administration of land” 2018 World Bank Conference on Land and Poverty, Washington DC March 19-23 Available at <http://www.un.org/sustainabledevelopment/poverty/> Accessed March 09 2019

<sup>260</sup> Interview Conducted with Ashira and Wonko Kebele administrators, at 16 and 17 March 2019 Respectively.

<sup>261</sup> Ibid

<sup>262</sup> FDG, conducted with the participants from Ashira Kebele, 16 March 2019

<sup>263</sup> Ibid: According to them, collective action refers to action taken together by a community or a group of people in order to protect and manage communal lands. It is the management of resources under communal ownership with the developed rules of restrained use and in its observance. Literally, Meinzen Dick (1999) defined Collective action is the formal or informal organization of a group to achieve a common interest which can be instituted through common property regimes. He added; management and conservation of natural resources is said to transpire when

lands are managed by rules and institutions which are well known by the local communities.<sup>264</sup>

The management system is very effective because the resource itself has a demarcated boundary and also organized by group jurisdiction. Every community protects its communal grazing area from external and internal intruders.<sup>265</sup> Some of the rules include individuals should not take the communal grazing land for personal use only, as they are for all and fencing by crossing the boundaries of communal grazing lands boundary is prohibited.<sup>266</sup> The communal lands are essential and this why the community maintained it for long.<sup>267</sup> But the problem is the sizes of these communal lands are diminishing mostly because peasants at the border are expanding their holding from time to time and fencing it with their own private holding.<sup>268</sup>

Illegal appropriation for personal use or trespass to lands under state or community holdings is prohibited.<sup>269</sup> Nonetheless, private appropriation or illegal intrusion on communal lands for personal benefit in Ashira Kebelle is out control.<sup>270</sup> The SNNPR rural land use and administration law prohibits trespass as it recognize private, state and communal rural holdings and allows smallholder farmers to use lands under their possession .<sup>271</sup>

An in-depth interview with Kaca-Birra Woreda court judge<sup>272</sup> was conducted to show the continuous shrinking of communal land in size. He stated that “*there are many causes which are a threat to the existence of communal land. Private individuals are encroaching and fencing it with their own holdings and start cultivation. They do it systematically on a small fragment by*

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genuine common property management emerges as coordinated, rather than independent actions by individual users of common pool resources. The combination of collective action and rights to common property resources also provides mutual insurance, which can act as an empowerment tool for vulnerable and marginalized groups who lack access to resources, Ostron(1992)

<sup>264</sup> See (n 262)

<sup>265</sup> Ibid

<sup>266</sup> Ibid

<sup>267</sup> Ibid

<sup>268</sup> Interview conducted with Gurmamo Malore, a farmer from Ashira Kebelle, 27 March 2019

<sup>269</sup> See (n 201)

<sup>270</sup> See (n 262)

<sup>271</sup> SNNPR Rural Land Use and Administration Proc. No. 110/2007, Article 2 sub articles (13, 14 and 15)

<sup>272</sup> An in-depth interview with Habtamu Tadesse, Judge at Qaca-Birra Woreda Court, Shinshicho, 18 March 2019

*fragment encroachment bases which will be difficult to know by the community on time to stop the action.*” Accordingly, the expansion of their holding by adjacent farmers and occupation of newer plots which previously were totally communal, for farming and residential purpose as the main ones. In this woreda, the existence of private intrusion fact against the integrity of communal lands can be shown by many empirical court cases. In the next paragraphs, the author will present the material facts of the case and the verdicts reached by the woreda court.

In the case between *Abebe Tomas vs. Public Prosecutor* the prosecutor brought a civil action against the defendant for the cessation of nuisance on communal land.<sup>273</sup> The prosecutor of the woreda represents Ashira Kebelle at the matter involves the community at large as the cattle of the community graze. The defendant, who settled adjacent, intruded communal land and then planted bahir-zaf and fenced it with his private holding. At the first instance the court, having heard the testimony of both witnesses. Three eye witnesses from the sides plaintiff confirmed positively that the plaintiff’s action shows an unequivocally the intrusion of the communal land of the rural community of Ashira Kebelle. The defendant introduced his private land holding certificate to show that it was part of his legal holding. Finally the court ordered that the plaintiff to cut the bahir-zaf and evacuate the communal landholding forthwith. In the other cases the court reached on the same conclusion. In case between *Meharu Dula vs Wonko Kebelle*(represented by public prosecutor) in File No.1036/7 and in File No.0231/7 *Mulu Wongelo vs Ashira Kebelle*(represented by public prosecutor) even though the defendants produced a witness to show that it is part of their legal holding, after hearing the neighborhood community members witness, the court verified the illegal holding/ intrusion of communal lands and ordered the them to evacuate the area forthwith.

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<sup>273</sup>Abebe Thomas Vs Public Prosecutor, File No. 0612/6, Kaca-Birra Woreda Court

In the other way, the findings of the court and its decisions are not the same as the way of intrusion differs from case by case. In case between Eyob Malore and one other vs Ashira Kebelle( represented by Woreda Public Prosecutor), the prosecutor instituted a civil case against the defendant by stating that they grabbed 11.94 hectares of communal land illegally and made it to be registered as their private holding.<sup>274</sup> After analyzing the evidences of both parties, the court ruled the on the side of the defendants. Ordering the defendants to leave the contested Communal Lands; amounts to eviction or displacement from their livelihood. The court analyzed the case by invoking Art.40 (4) of the FDRE Constitution. It is his lawful possession and they have protection against eviction from their possession.<sup>275</sup> The court elaborated in his decision:

[“.....አለግባብ ተይዞል የተባለው ይዞታ.....ተከሳሶች ከ15 ዓመታት በላይ ለሆኑ ግዜያዮች ስጠቀሙበት ያለና አጥረው ከይዞታቸው ጋር ቀላቅለው የይዞታ ማረጋገጫ ተሰርቶላቸው.....12 ዓመት የሞለው ባህርዛፍ ተተክሎ ያለበት.....ድንበሩን ለመለየት አስቸጋሪ ....ከይዞታቸው መፈናቀል የለባቸውም.....”<sup>276</sup>]

An interviewee responded that the problem in this regard is that all community lands are not registered. Even registered they are not clearly demarcated and mapped, its size and boundary are not known. This makes difficult for the courts to decide.<sup>277</sup>

### 3.3.4. Public Institutions and Rural Cooperatives on Communal Land

In Kadia-Gamela Woreda Many public institutions were established on communal land. In my key informant interview, almost all interviewee responded that the encroachment by public

<sup>274</sup> Eyob Malore and one other vs Ashira Kebelle, A Civil Case No. 07388, at Kaca-Birra Woreda Court.

<sup>275</sup> FDRE Constitution, Art.40(4)

<sup>276</sup> See (n 274)

<sup>277</sup>See Interview (n 272)

institutions is rampant.<sup>278</sup> They mentioned that schools, for example public schools, once they allocated for communal land, they expand their holding from time to time.<sup>279</sup> Most of the respondents have replied that the amount of livestock they own is declining in the last five years.<sup>280</sup> The main source of feed to the livestock population is communal grazing areas.<sup>281</sup> That means the amount of grazing land and the size of livestock people own are positively related. When the amount of grazing land shrinks, the size of livestock population also decreases.<sup>282</sup>

Poverty alleviation and development strategies in rural Ethiopia encourages the formation of rural small-scale enterprises or cooperatives that can be engaged in activities such as mixed agriculture, environmental rehabilitation and livestock farming.<sup>283</sup> The eligible persons to access and use the enterprises are the landless youth (aged 15-34), farmers who possesses less than 0.25 hectares of cultivable land and unemployed persons.<sup>284</sup> In wonko kebele, more than 10 hectares of communal land is occupied by rural cooperatives, whose members are landless youths.<sup>285</sup> The author observed that some of the groups were engaged in farming and some of the groups rented it to neighboring farmers and the other land remains uncultivated.

An FDG participant discussion showed the enclosed land has not been developed to achieve its primary objective of the programme.<sup>286</sup> Nowadays, communal lands in this area were taken and fenced by these ineffective cooperatives; they lost land on which they rear their cattle.

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<sup>278</sup> Key informant interview with Mathewos Abulla, farmer from Aze-Dobo'o kebele, 19 March 2019

<sup>279</sup> FDG From participants of Aze-Dbo'o Kebele, 19 March 2019

<sup>280</sup> Ibid

<sup>281</sup> Ibid

<sup>282</sup> Ibid

<sup>283</sup> SNNPRS, Rural Job Opportunity and Development Agency Establishment Regulation No. 131/2013; Art.2(5)

<sup>284</sup> Ibid, Art. 2(7) (8)

<sup>285</sup> Interview with Mathewos Detebo, Wonko Kebele administrator, 20 March 2019

<sup>286</sup> FDG from participants of Wonko Kebele, 20 March 2019

### 3.4. Conclusion

This Chapter analyzed both the practical and legal dimensions of communal land rights and its relation with the livelihood. The study revealed that Communal lands in Kembata Tembaro are governed by community norms. Kembata and Tembaro people consider it as inherited from their forefathers. And, they believe that those communal lands are source of all livelihoods, especially for the rural poor. During the study many informants responded that communal land belongs to the community. Regarding their perception on ownership Communal land, most of the informants have replied that it belongs to the community or is communal resource. Some of them of the informants have replied that it is the holding of the state or the government.

The long-standing practice among *Kembata community* is that community lands serve as alternative medium to secure livelihoods. Smallholder farmers in *Kembata-Tembaro Zone* are still engaged in livestock farming and, they reserve plots from small scale farmlands, to fodder (for their cattle). The fodder from community land is thus indispensable owing to the land shortage. Despite these benefits of communal land, in *Zato-Shodera and Azeo-Dobo Kebeles of Kadida-Gamella Woreda* government encroachment is the main challenge in securing livelihood. Government intrusions include appropriation to development projects and land allocation for different purposes. The informants revealed that none of these projects bring the intended benefits to them. This is also the case in *Wonko kebele* of Kace-Bira woreda as the communal land allocated for cooperatives were not developed and some of them were rented to third party by disregarding the aim. In *Ashira kebele* of Kaca-Birra Woreda, private illegal encroachment is rampant. Many individuals enclose much part of the communal landholding for their own personal benefit. Additionally, the failure on the part of government to consult the community

while allocating communal land to investment projects is a factor for dispute and incurring material damage. Generally in its practical aspect, tenure insecurity of communal lands adversely affects the livelihoods of the rural poor thereby eroding social security the economic welfare of the rural poor.

From legal perspective, both federal and regional rural land laws uphold government ownership of land, and communal land is subject to different sorts of encroachments. The Country's commitment in signing normative instruments to observe at international and regional level is not respected in protecting and recognizing property rights in land. The bill of human rights and other soft laws of global and regional level and also other African countries experience, for example Uganda, Tanzania and Ghana tells the state to secure communal land right. The definition of private property in the FDRE Constitution also affects the recognition of communal land rights of the local communities. Therefore, Ethiopian rural land laws do not sufficiently recognize communal holdings and these lands cannot be used for the ultimate benefit of residents in rural communities.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

#### 4.1. CONCLUSION

Rural communal lands are lands, which rural communities possess and use collectively in accordance with community-derived norms, and are areas maintained as the communal property of all community members. It is *res-communis*. Lands for grazing and wildlife, forests and woodlands, mountaintops, sacred localities, lakes and streams within the community lands are usually retained purposely as collective property in which all members have use rights. A right to use this *commons* exists within a community where each member has a right to use the holdings of the community. The commons are available for many to use, however, it grants only privileges for the users and the rights and duties of groups of users in relation to these resources are not defined and enforced according to Hardin's *tragedy of commons*. These are resources over which no property rights have been recognized; open access (*res nullius*) and he argued for the privatization from economic point of view. Ostrom's new common pool resource theory, justifies protecting the commons by underlining its significance for their needs and future generations. Communal land tenure is a typical feature of many developing countries. Lands held customarily in many parts of the world have always been vulnerable to involuntary loss, particularly those that are unsettled or unfarmed; that is, lands normally held collectively by individual communities. The same thing holds true in context of Ethiopia.

Practical aspects of the study indicate that smallholder farmers in *Kembata-Tembaro Zone* are dependent on rural communal land to diversify their livelihood. Despite these benefits of communal land, in *Zato-Shodera and Azeo-Dobo Kebeles of Kadida-Gamella Woreda* government encroachment is the main challenge to the security of communal land. The

allocation of communal land to different purpose without community participation and consultation is now a source of dispute and chaos in the area. The informants revealed that none of these projects bring the intended benefits to them. This is also the case in *Wonko kebelle* of Kace-Bira woreda as the communal land allocated for cooperatives were not developed and some of them were rented to third party by disregarding the aim. In *Ashira kebelle* of Kaca-Birra Woreda, private illegal encroachment is rampant. Many individuals enclose much part of the communal landholding for their own personal benefit. Generally in its practical aspect, tenure insecurity of communal lands are caused by government encroachment, private intrusion for personal benefits and public institutions and cooperatives establishment on communal lands.

From legal perspective, both federal and regional rural land laws uphold government ownership of land, and communal land is subject to different sorts of encroachments. Thus, customary rights are undermined and the state has an overarching role. Tenure insecurity is graver in communal lands because such lands have no formally defined owner. The state does not give due attention to communal land and it often considers it as *res nullius*, thereby rendering it susceptible to distribution as private landholding at the discretion of the government. In addition, Land use rights (or land) per se are not considered as property in Ethiopia for the law confirms that it belongs to the state and the people. Absence of effective registration or legal titling with defined owner, results in lack of compensation when communal lands are expropriated for public purpose. The Country's commitment in signing normative instruments to observe at international and regional level is not respected in protecting and recognizing property rights in land. The bill of human rights and other soft laws of global and regional level and also other African countries experience, for example Uganda, Tanzania and Ghana tells the state to secure communal land

right. Therefore, Ethiopian rural land laws do not sufficiently recognize communal holdings and these lands cannot be used for the ultimate benefit of residents in rural communities.

## **4.2. RECOMMENDATIONS**

Despite the vital role of common pool resources in securing livelihood, *the theory of tragedy of the commons* led the resources to be trapped between dysfunctional land legislation that vests ownership in the state and unrecognized communal tenure administered by customary norms. This situation has led to *de facto* open access regimes that allow unsustainable resource depletion and loss of livelihood of rural communities. In the new thinking, the commons do not exist in norm-less state, and that the concerned communities` rights over the commons must be honored in making decisions regarding such resources. Ethiopian approach most favors the old thinking of state control of the resources that left communal land tenure insecure. Therefore the author recommends the following:-

*Firstly*, the current Ethiopian land governance does not seem to give adequate recognition to the different land tenure systems existing in the country. The current land policy which is mostly the continuation of the socialist Dergue regime abolishes all the previously existing land tenures provides state land ownership over the lands found in the country. The Federal Rural Land Law apparently recognizes three forms of tenure including private, state holding and communal holding, but empowers the government as an owner of land and bestows upon it the power to privatize communal land as it pleases. The rural land laws of the regional states duly recognize the use rights of communal lands. On the other hand, the practical problems relate to considering communal land as ownerless and the government as owner of the all lands, acting as his wish by disregarding the poor. These led to the insecurity of communal land and destabilize its economic

contribution to livelihood of the community. Therefore it is a pressing need to change the land laws that refer communal land into the state ownership sphere.

*Secondly*, Property rights define actions that can be taken in relation to others regarding some ‘thing’. If one has a right, someone else has a commensurate duty to observe that right. As Schlager and Ostrom identify five property rights that are most relevant for the use of common-pool resources, including access, withdrawal, management, exclusion, and alienation. These rights can be exercised if the communities acquire legal personality. Protecting and recognizing property right in land has a lot to do with poverty reduction; otherwise it results in tenure insecurity. Many countries like Tanzania, Ghana and Uganda guarantee the security of communal land through registration and titling formally. Under insecure tenure, on the other hand, rights to land are threatened by competing claims, and can even be lost as a result of eviction. As advocated by Daniel, Desoto and others, the introduction of titling (via certification for land rights) positively contributes toward tenure security if it goes beyond mere records of landholdings and parcel locations. The rural land laws of the Ethiopia specify that landholding certificate for communal land shall be prepared in the name of the beneficiary community and be kept at *Kebele* administration office. The study reveals that all the communal lands were not registered and the effects registration and titling were not effectively implemented. The recent good practices in Ethiopia, *Borena* communal land (pastoral land) has been registered and certified in the name of *Abaa Dheeda* with discussion among communities and government authorities, has to be taken as a lesson. Therefore it is vital to give legal personality to the rural community to exercise its rights over communal land.

*Thirdly*, the study revealed that one of the main factors behind the declining of communal land in the study area was its allocation for investment under the cover of public purpose. But the

investment projects were inefficient to bring benefits to neighboring community and enhance to diversify its livelihood. The Expropriation Proclamation No.455/ 2005 empowers the government to expropriate rural or urban landholdings for 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. Public purpose according to the proclamation means the use of land 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. The purpose of taking communal land is not contestable weather it amounts to public purpose, once the government decides on it. In the existing legal framework no way to discourages unwarranted intrusions by the government. The public purpose is contestable before courts in like Uganda. Therefore it is urgent to re-examine our expropriation laws which contribute for insecurity of communal lands.

*Fourthly*, to protect private encroachment there should the laws that undoubtedly provide for demarcation of communal land such as maps and boundaries. Farmers at the border are expanding their private holding from time to time and fencing which resulting in the deckling of communal land, the act has to be warranted by community norms beside state laws.

Fifthly, community participation in decision making can meaningfully help to increase security of communal land. Often community consultation has to be conducted to provide the appearance of participation before matters affecting communal lands are predetermined by government authorities. This will have positive result in reducing disputes that arise as a result of communal land appropriation for investment.

Lastly, strengthening communal tenure to the commons is considered more than formal registration. Rather it can range from state recognition of customary rights, strengthening of community-based land management authorities, to increased oversight of local land administration. Other countries like Tanzania and Ghana, beside empowering customary authorities to administer land including transaction with investors, there are laws that oblige the government to support the role of these authorities. This approach has to be followed to obtain to protect mismanagement of communal land and to bring sustainable development that will result in reducing poverty and securing livelihood.

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## Appendix 1: Interview guides (questions)

The following interview is to be conducted in the study area and the main purpose is to gather information concerning the role of communal land in securing livelihood and factors causing the loss/extinction of communal land.

### Key Informant Interview Questions: Category of key informants

1. Name.....
2. Profession/Occupation type  
 Crop-farmers     Mixed farmers     Other
3. Income level: high----- middle----- low-----
4. Age composition: adolescent (14-29); ----- (adult) 30-64; ----- elderly (65 & above) -  
-----
5. Gender: male----- female-----
1. What is the main economic activity of the area?
2. Is there communal land in this area?
3. What constitutes communal land?
4. For what purpose people use communal lands?
5. What benefits do CPRs provide for the community in addition to grazing the livestock?
6. Who owns communal lands?
7. Are there demarcations of Communal lands?
8. Is there Certification and Registration of Communal land?
9. In whose name the Communal land was registered?
10. What benefits do CPRs provide for the community?
11. Does the state take communal lands? For what purposes? Any compensation to the concerned villagers?
12. Do local people take part in the management of these Communal lands? How? According to which rules?
13. Does the investment projects established on communal land are beneficiary for the community? How?
14. What kind of measure do you suggest for the continued existence of communal land?

### In-depth Interview Questions With the concerned government Officials/professionals

1. What types of land tenure systems do exist in the community? (State, private, communal?)
2. Do you have any idea about the Security of communal land tenure system?
3. What benefits do you think CPRs provide for the community?
4. What measures do you suggest towards keeping the role of communal land in securing livelihood?

### Focus-Group-Discussion Issues

1. Whom does the community regard as the owner of the land in the current land tenure system?  
(a) The state ( b) the community (c) individuals
2. What are the internal (from the community) and external (out of the community) threats against communal land?
3. How dispute arise in relation to communal land in your vicinity?
4. What measures do you suggest towards keeping the role of communal land in securing livelihood?

## **Appendix 2: List of Interviewees and Key informants**

1. Ashebo Huluqo, Ashira Kebele administrator, a key informant, Qaca-Birra Woreda, 27 March 2019
2. Dessalegn Ergicho: a key informant from Zato-Shodera Kebele, Kedida-Gamela woreda, 10 March 2019.
3. Genedo Abura, a key informant from Aze-Dobo'o Kebele, Kedida-Gamela woreda, 01 April March 2019
4. Gurmamo Malore, a key informant from Ashira Kebelle, Kaca-Bira 27 March 2019
5. Habtamu Tadesse, an in depth-interview, Judge at Qaca-Birra Woreda Court, Shinshicho, 18 March 2019
6. Mathewos Abulla, a key informant from Aze-Dobo'o Kebele, Kedida-Gamela woreda, 19 March 2019
7. Mathewos Detebo, Wonko Kebele administrator, a key informant, Qaca-Birra Woreda, 20 March 2019
8. Mesfin Markos, officer at kedida-gamela woreda Agriculture and rural land administration, 13 March 2019
9. Nigatu G/Hiwot, an interviewee from Kedida Gmela Woreda court, 13 March, 2019.
10. Tadele Iyane, a key informant from Aze-Dobo'o Kebele, Kedida-Gamela woreda ,12 March 2019
11. Tadesse G/Mariam, an expert at Kaca-Bira woreda Agriculture and rural land administration, Shinshicho, 18 March 2019
12. Zekarias Foche, a key informant from Zato-Shodera Kebele, Kedida-Gamela woreda, 26 March 2019
13. Birhanu Ganeto, expert at Kembata-Tembaro Zone Office of Investment, Durame, 14 April 2019

## About the Author



Biruk Tadesse Adeg was born in 6<sup>th</sup> June, 1989 in Kedida-Gamela Woreda, Kembata Tembaro Zone, Southern People's Region; Ethiopia. He completed his primary and secondary education in the Mishikida Makane-Yesus Primary & Junior Secondary School and Durame Senior Secondary & Preparatory School (1988-2000 E.C) respectively. Then after, he was admitted to the Addis Ababa University School of Law in 2001 E.C. After five years of study, he was awarded an LL.B Degree in Law in 2005 E.C.

Having graduated from the law school, he joined the Legal Professionals Training and Research Institute at Hawassa for one and half years. After completing the training successfully, he was appointed as a Public Prosecutor in Kaca-Bira Woreda in Tir. 2007 E.C. After serving one year there, he was promoted to Zonal Justice Department prosecutor. Finally, in October 2017, He was admitted to pursue his masters of law program in Hawassa University. His professional and academic interests include criminal law, property law including land; environmental law and contracts.