

**FORMALISATION OF CUSTOMARY TENURE OR
'INFORMALISATION' OF NON-CUSTOMARY TENURE?
PARADOX IN THE CADASTRAL SYSTEM DEVELOPMENT EFFORTS
IN MOST OF AFRICA**

Melkamu Belachew Moges*

Abstract

Generally, in most African countries, cadastral systems have not developed well. This paper, first, uncovers the critical problem surrounding customary tenure in Africa under the theory the author has introduced 'custom paradox' theory. In the paper, 'custom paradox' theory is considered as a common misunderstanding of customary tenure, and, as such, has contributed to the failure of cadastral systems in most African countries. Second, the paper elaborates on the true characteristics of customary tenure and demonstrates its strong relationship with statutory tenure. In order to best establish the relationship, the author introduces an analytical theory which calls for the 'informalization' of the statutory tenure where the cadastral system legislations are made the reflection of the practices of the African people. A critical desk review of relevant secondary and sometimes legislative documents is mainly used in the paper. In addition, the paper has critically reviewed legal theory in order to cater for the relationship between law and practice and to apply same in the context of the objective of the research. The paper argues that recognition and formalisation of customary tenure is now getting legislative coverage in a few countries of Africa including Ethiopia despite some practical shortcomings. While showing the mechanisms of favorably making custom work in cadastral systems by way of striking a balance between 'modernization' and 'tradition', the paper would contribute to the strengthening of the already existing scholarly work through establishing the casual relationship between the failure of cadastral systems and the misunderstandings about customary tenure in most African cadastral systems.

Keywords: Customary Tenure, Custom Paradox, Cadastral System, Africa, Ethiopia

INTRODUCTION

Cadastral systems, namely, cadastre and land register, are the tools for establishing a formal property system. Hence, many international, regional and sub-regional organizations promote their application. A cadastral system as a tool for formal property system, however, benefits

society if carried out under appropriate conditions.¹ Recognition of customary tenure is one of the essential requirements for the success of a cadastral system.² For cadastral systems and cadastral system legislations to be sustainable, they need to recognize customary practices, i.e. there is the dire need to the ‘informalization’ of the formal tenure system. The most efficient and modern approach towards the recognition and formalisation of customary tenure will be to use objective economic and social criteria to identify and determine the status of already known customary tenure practices and usages, and then legislate them or integrate them in the form of statutory tenure. According to Wily, respecting customary tenure through the legislative mechanism entails taking a number of measures. These are treating customary tenures with equal status to statutory tenure rights; registering them without necessarily converting them into statutory tenure; accepting them as property (private) even if not owned by individuals or not registered; expressing them in different bundles of rights, including, for example, the seasonal rights of pastoralists; respecting them regardless of their being unfarmed and unsettled lands such as forests, rangelands, and marshlands; acknowledging them as including rights permanently affixed to land such as trees and wildlife, and also to local streams and ponds, coastal beaches, and surface minerals that have been extracted traditionally for centuries such as iron and gold; giving them primacy over non-customary commercial investment purposes seeking rights to the same land; supporting them through community based, democratically formed land administration system and local-level customary dispute resolution bodies; controlling them legally where they are unjust to ordinary community members or to vulnerable groups; giving them the same protection as statutory tenures during expropriation and compensation measures; and providing legal provisions in such a way that officials, courts and especially customary land holders may easily understand and apply.³ These measures fundamentally imply formalisation of customary tenure. In this paper, formalisation is

* LL.B. (AAU), M.Sc. (KTH), PhD-Law (UniMelb), Hon. LL.D.(Commonwealth Uni.), Graduate Certificate (UniMelb), A/Professor of Law, Land Policy and Management, The Institute of Land Administration, Bahir Dar University, Bahir Dar, Ethiopia E-mail: melkgrowthf@gmail.com Ph.: +251918761137.

¹ Melkamu Belachew, Modelling Legislation for a Sustainable Cadastral System Ch 4 (PhD thesis, University of Melbourne, Melbourne Law School, 2015); Klaus Deininger & Hans Binswanger, *The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges*, 14 *The World Bank Research Observer* 247, 258–259 (1999). See also Joseph Blocher, *Building on Custom: Land Tenure Policy and Economic Development in Ghana*, 9 *Yale Human Rights & Development Law Journal* 166, 176 (2006).

² See Melkamu, *supra* note 1, at 78–102.

³ Liz Alden Wily, *The Status of Customary Land Rights in Africa Today Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa*, Brief #4 of 5, Nov. 2011, at 2-3.

considered as the process of creating an efficient mechanism for searching for and documenting all property rights, making an inventory of them, screening useful customary rights and then, in principle, integrating them into the (formal) cadastral system in a regular and planned manner.⁴ Due to diverse nature of customary tenures, it is obvious that 'one size fits all' approach may not work. That is, the reality of each community regarding the use and transfer of land rights must be the guide to an effective recognition. Recognition and formalisation of customary tenure avoids the problems of state overriding of customary tenure as well as the problem of adaptation of the formal cadastral system to new circumstances, including new rights which customary tenure entails, problems which Fitzpatrick acutely identified.⁵

In recent times, there is an increasing understanding of the tenure system in the form of 'continuum of land rights approach' to advocate for the recognition/formalisation of customary tenure which could hopefully bring an end to the long-lasting paradox rooted in the 'formal-informal' dichotomy. The International Federation of Surveyors and the UN-HABITAT have pioneered this development. Some cadastral system models which advocated for the recognition of customary tenure in the cadastral system in one or another form include Cadastre 2014⁶; the Core Cadastral Domain Model⁷; the Social Tenure Domain Model⁸ and the Land Administration 'Tool Box' model.⁹

However, research on the importance of formalisation of customary tenure is still scanty which shows the low recognition given to them. Those which have already been carried out are very few in number and, more importantly, they fail to show how the statutory tenure should integrate customary tenure and why there, for long, existed little or no regard to customary tenure. The central objective of this paper is discovering the reason behind the weak relationship

⁴ See International Federation of Surveyors (FIG), FIG Statement on the Cadastre, FIG Publications, 1995, Publication No.11, at No 6.1.

⁵ Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 *The Yale Law Journal* 996, 1012 (2006).

⁶ Kaufmann, J. Steudler, D., *Cadastre 2014: A Vision for a Future Cadastral System*. International Federation of Surveyors (FIG), 1998.

⁷ Peter van Oosterom *et al*, *The Core Cadastral Domain Model* 30 ScienceDirect 627, 627–660(2006).

⁸ Clarissa Augustinus *et al*, *Social Tenure Domain Model Requirements from the Perspective of Pro-Poor Land Management* (Paper presented at Promoting Land Administration and Good Governance 5th FIG Regional Conference, Accra, Ghana, March 8–11, 2006).

⁹ Ian P Williamson, *Land Administration "Best Practice" Providing the Infrastructure for Land Policy Implementation* 18 *Land Use Policy* 297, 303–5 (2001).

between customary tenure (informal tenure) and statutory tenure (formal tenure). In indicating the strong bond that customary tenure has with the formal or official land tenure and property rights system, the article seeks to bridge the gap between classical legal theories and land administration theory. In doing so, the paper attempts to illuminate the mostly ignored fact that one of the main sources of modern property rights or official tenure systems is the custom and the tenure that originates from it. The paper does so with analysis of the status of customary tenure within various African states, including a more detailed analysis of Ethiopia's experience. A major limitation of the work is that it does not test whether what the land laws in these various countries stipulate is implemented on the ground. This should be done in future research.

One of the objectives of the research is to reveal how misunderstanding on customary tenure has impeded progress of the cadastral system in Africa. To address this objective, a critical desk review, qualitative analysis of secondary data is used to put together the researcher's argument. In a few cases, legislative content analysis is applied to show how the cadastral system has attempted to address customary tenure. The critical review indicates the existing understanding of land tenure and how this understanding is wrong in light of the accepted standards.¹⁰ The idea behind the application of legal theory is that cadastral systems are the result of sound legislative framework and that a sound legislative framework may not be developed without a fair degree of involvement in the theories and philosophies of the law which provide a basic foundation for any thinking about the nature of law and legislation.¹¹ Few quantitative data are also used to show the slow coverage of cadastral system in the African continent in general.

However, Africa being a very big continent, it is very difficult to cover all countries in the continent as well as address all institutional and practical aspects of the cadastral system. Yet, it is possible to delineate the cadastral system in most African countries from other cadastral systems in the world. Africa might well be considered to have its own unique land tenure, which

¹⁰ The accepted standards for successful cadastral system are formulated from a critical investigation of existing cadastral system concept, some cadastral models developed in the field of land administration as well as legal theory or philosophy. Melkamu discovers that there are five essential requirements for a successful or sustainable cadastral system especially in the context of Africa and other Third World places. These are legislation and policy, good governance and political system, institutional capacity, recognition of customary tenure and other land rights, and regular updating of the cadastral system information. Melkamu, *supra* note 1, at 78-102. For a robust discussion of these standards and essential requirements, please see generally Melkamu, *supra* note 1. For a short synthesis or summary See at Ch 9.

¹¹ Melkamu, *supra* note 1, at 7-8.

is the result of the combined and competing tenure rights originating both from indigenous or customary tenure and borrowed private land tenure from colonial history. This leads the continent to aspire for a relatively distinct cadastral system. A method that is chosen to evaluate the success or failure of the cadastral system in Africa and some of the factors that contribute to this status is to make a secondary data desk review analysis based on previously done research. So I have made a review of the research relating to the recognition of customary tenure. On the other hand, the research also applies case study by applying Ethiopia as a case. This is because Ethiopia has been considered as one of the largest, fastest and least expensive cadastral system reforms in Africa.¹² The case study is preceded with the discussion of the cadastral system legislation of a few countries in Africa which have made a positive institutional or legislative coverage of customary tenure in their cadastral systems. This is in order to increase the validity of the argument and conclusions reached in the course of the research as it covers the African continent in general. As Johansson observed, the notion of case study implies a method of research applied on a case ‘as the object of study.’¹³ “A case may be purposefully selected in virtue of being, for instance, information-rich, critical, revelatory, unique, or extreme” or because of the researcher’s intrinsic interest in the case as such.¹⁴ As such, it is inspiring to see how Ethiopia and other few African countries have addressed customary tenure in their cadastral system.

1. JUSTIFICATION TO FORMALISE CUSTOMARY TENURE IN AFRICA

Why do we really need to worry about customary tenure? And what should the relationship be between this tenure and the statutory or formal tenure? This section attempts to answer these questions. As customary tenure, as will be shortly seen, is founded on the notion of custom, we shall first spend a few words on the latter. Custom is a phenomenon of any society as its creation and existence is inherently related to the existence of society. A certain norm, usage, or practice becomes a custom when there is certainty, duration, consistency and widespread conformity to

¹² Sosina Bezu & Stein Holden, *Demand for Second-Stage Land Certification: Evidence from Household Panel Data* 41 Land Use Policy 193, 193–205 (2014).

¹³ Rolf Johansson, Case Study Methodology (Paper presented at Methodologies in Housing Research, Stockholm, 22–24 Sept. 2003) 2.

¹⁴ *Id.*, at 8.

it.¹⁵ Custom exhibits what is going on real life, and is “often central to the lives of the participants”.¹⁶ Custom gives rise to customary rules or customary law. Some of the main reasons that give customary rule its endurance characteristic are its functionalism, utility, rationality, and efficiency.¹⁷ Further, in order to become a customary law or rule, custom needs to attain a binding status or validity.¹⁸ Although we lack a single answer on the question of what determines the validity of custom, the various determinants that have been developed throughout legal history include the consent and sense of obligation of the relevant community, reasonability and necessity of the usage, and compulsion of the community to follow the practice, for instance, by the courts.¹⁹

The notion of custom in the cadastral setting is best understood as customary tenure. Customary tenure is land tenure, according to customary rules which are themselves rooted in the practices of a given community. Customary tenure is often understood to exist outside of the state or official or formal rules.²⁰ A good definition of customary tenure is given by Noronha and Lethem:

The rules accepted by a group of the ways in which land is held, used, transferred and transmitted. These rules may have the ‘force of law’, that is, they may be enforced by the courts of a country, even though they [may be] unwritten and not incorporated, or specifically set out, in any statutes.²¹

So we note that integration of customary tenure in the statutory tenure does not mean the overriding of the former. Formalisation rather entails the strengthening of customary tenure in the form of statute, or as it exists outside statute, or as a matter of devising a mechanism to continuously fetch new customary rights into the statutory form through law making

¹⁵ David J. Bederman, *Custom as a Source of Law* 172 (Cambridge University Press, 1st ed., 2010).

¹⁶ Rikke B. Broegaard, *Land Access and Titling in Nicaragua*, 40 *Development and Change* 149,152 (2009); Bederman, *supra* note 15, at 180.

¹⁷ Bederman, *supra* note 15, at 181.

¹⁸ *Id.*, at 172.

¹⁹ *Id.*, at 173.

²⁰ Chukwudozie Ezigbalike *et al.*, *Cultural Issues in Land Information Systems* (Position paper commissioned by the UN Food and Agriculture Organisation, Rome, Italy, 1995) 4 (citations omitted).

²¹ Raymond Noronha & Francis J. Lethem, *Traditional Land Tenures and land use Systems in the Design of Agricultural Projects* (World Bank Staff Working Papers Number 561,1983).

procedures. It must be noted, therefore, that formalization does not always require incorporation of the customary tenure within the statutory tenure, although such system would be the better one for the sake of uniformity, generality and regular application of the law. Adequate legislative and institutional mechanisms can be devised to manage customary tenure on its own right. Be that as it may, legislation for a successful and sustainable cadastral system should satisfactorily formalize customary tenure and devise the ways whereby such formalisation is undertaken in a regular or continuous way. In fact, we need not only worry about formalizing existing tenures but also we need our cadastral laws be the true reflection of the reality on the ground, i.e., the good practices and attitudes of the people as regards land. Imposing property rights in a top-down reform process is dangerous as it compromises the enjoyment and protection of those rights.²²

Despite the lack of clear criteria for identifying registerable land rights (and restrictions and responsibilities), I argue that all rights, restrictions and responsibilities that fall under similar basic parameters should be addressed in a cadastral system through formalisation. This formalisation must include the rights, restrictions and responsibilities within the customary tenure. According to Knight²³, there are five reasons for the formalisation of customary tenure in Africa. First, it gives laws and legal systems direct meaning, utility and applicability to people’s daily lives. Second, it creates or provides customary governance systems which can fulfil a gap in state administration playing different roles as community administrator, judge, land allocator, property registrar, and so on. Third, the continued existence of customary tenure and statutory tenure side by side with each other in an irregular balance weakens the validity and power of both which brings undesired outcomes. Fourth, it is necessary to ensure against a weakening of vulnerable groups’ land rights such as that of pastoralists which arises from growing land

²² Michael Ochieng Odhiambo, *Improving Tenure Security for the Rural Poor Kenya, Tanzania and Uganda – Case Studyvi* (FAO, 2006). Philippe Lavigne Delville, *Registering and Administering Customary Land Rights: Can We Deal with Complexity?* in Klaus Deininger *et al* (ed), *Innovations in Land Rights Recognition, Administration, and Governance* 42–43 (The World Bank, 2010); Land Tenure Committee, *Land Governance and Security of Tenure in Developing Countries* (French Ministry for Foreign and European Affairs, 2009) cited in Delville at 26; Fitzpatrick, *supra* note 5, at 1012–1013; Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere else* 174–199 (Black Swan, 2000); Ian Williamson, *Using Cadastres to Support Sustainable Development* 8 (FIG – International Federation of Surveyors, 2010).

²³ Rachael S. Knight, *Statutory recognition of customary land rights in Africa An investigation into best practices for lawmaking and implementation* 5–7 (2010) (for the Development Law Service FAO Legal Office Food and Agriculture Organization of the United Nations Rome).

scarcity throughout Africa due to population growth, increased international investment, the development of new commodity markets, climate change, and so on. Finally, to allow customary systems to flounder in the realm of illegality deprives the poor of state sanction for and protection of their basic rights and tenure security. Therefore, formalisation or recognition of customary tenure is essential to put in place a sustainable cadastral system.

2. THE CUSTOM PARADOX AS MAIN CAUSE OF FAILURE OF CADASTRAL SYSTEM IN AFRICA

Cadastral systems, especially those in the Third World countries, have been characterized by serious deficiencies.²⁴ A most important feature of the deficiency is related to the fact that many countries' cadastral systems fail to integrate customary property rights into the non-customary ones or otherwise formalize them. Most often, cadastral systems are said to better fit into private or individual land tenure. Fitzpatrick rightly observes that the degradation of customary tenure and norms, often due to such state antagonism and illegitimacy, is at the heart of modern property rights failures in these nations.²⁵ The choice of individual tenure over customary tenure itself has undermined the progress of the cadastral system development. While Western European countries have on average more than 95 percent of their land registered or put under the cadastral system²⁶, most of the land and the land holding (up to 90%) in many Third World countries in general is held outside of the formal tenure regime.²⁷ This proves that the cadastral system in the latter has generally failed.

²⁴ See, e.g. H W O Okoth-Ogendo, *The Last Colonial Question: An Essay in the Pathology of Land Administration Systems in Africa* 6–9 (Paper presented at Workshop on Norwegian Land Tools Relevant to Africa, Oslo, Norway, 3–4 may 2007); Delville, *supra* note 22 at 25,26.

²⁵ Fitzpatrick, *supra* note 5 at 1047.

²⁶ Schmid, H. C. U and Hertel, C, *Real Property Law and Procedure in the European Union* (General Report, Final Version. European University Institute Florence/European Private Law Forum Deutsches Notarinstitut Wurzburg, 2005) (citation omitted).

²⁷ Brett J Miller, *Living Outside the Law: How the Informal Economy Frustrates Enforcement of the Human Rights Regime for Billions of the World's most Marginalized Citizens*, 5 *Northwestern Journal of International Human Rights* 127, 128(2006); Jane Hutchison, *Land Titling and Poverty Reduction in Southeast Asia: Realising Markets or Realising Rights?* 62 *Australian Journal of International Affairs* 332(2008); Liz Wily, *Land Rights Reform and Governance in Africa how to make it Work in the 21st Century?* 2 (United Nations Development Programme, 2006); Sandra F Joireman, *Enforcing New Property Rights in Sub-Saharan Africa: The Ugandan Constitution and the 1998 Land Act* 39(2) *Comparative Politics* 463, 465(2007); Jean-Philippe Platteau, *Land Reform and Structural Adjustment in Sub-Saharan Africa: Controversies and Guidelines* 232–42 (Food & Agric. Org. of the U.N., Econ. & Soc. Dev. Paper 107, 1992) 152; Sholto Cross Ladder, *A Comparative Study of Land Tenure Reform in Four Countries: Uganda, Tanzania, Malawi and Kenya* (Working Paper No. 31, December 2002).

For long, many people held that customary tenure is inconsistent with a modern cadastral system and, as a result, should not be recognized by the modern cadastral system.²⁸ The main reason given as to why customary tenure may not be covered in a modern cadastral system is that it gives ownership rights to a group rather than to individuals and as such cadastral reform in such situation will not bring about common benefits of a cadastral system such as promoting credit access, investment and economic development.²⁹ For example, Place and Hazell see no need for ambitious cadastral projects in Sub-Saharan Africa for this reason.³⁰ Similarly, Birgegård, based on research in Kenya, does not believe in tenure reform and land titling in Africa where customary tenure is dominant.³¹ For these authors, cadastral system projects fail because of the very existence and prevalence of customary tenure itself.³²

Although as mentioned earlier, in many African countries, customary tenure is generally outside the cadastral system, the view that a cadastral system will not work in these places is erroneous and paradoxical. The most major reason for the failure of the cadastral systems in Africa is not really the existence of customary tenure itself but the failure of the cadastral systems to recognize customary tenure. While noting that the failure of cadastral legislation to incorporate customary tenure was a problem that also plagued developed nations in the past, De Soto argues that this is a cause for expansion of informal tenure in developing countries in present days. More precisely he says, extra-legality or informality “is what always happens

²⁸ Stig Enemark, Building Land Information Policies (Paper presented at UN, FIG, PC IDEA Inter-Regional Special Forum on the Building of Land Information Policies in the Americas, Aguascalientes, Mexico, 26–27 October 2004) 5 (emphasis added); See also Carol M Rose, Invasions, Innovation, Environment in D Benjamin Barros (ed), Hernando de Soto and Property in a Market Economy (Ashgate, 2010) 32–35; Kate Dalrymple, Expanding Rural Land Tenures to Alleviate Poverty (PhD Thesis, University of Melbourne, 2005) 98,100; Sandra F Joireman, Where There is No Government: Enforcing Property Rights in Common Law Africa (Oxford University Press, 2011) 48.

²⁹ Mika-Petteri Törhönen, *Sustainable Land Tenure and Land Registration in Developing Countries Including a Historical Comparison with an Industrialised Country, Computers*, 28 Environment and Urban Systems 545,573–574 (2004).

³⁰ Frank Place & Peter Hazell, Productivity Effects of Indigenous Land Tenure Systems in Sub-Saharan Africa,75 *American Journal of Agricultural Economics* (1993) cited in *Id* at 573.

³¹ L E Birgegård, Natural Resource Tenure — A Review of Issues and Experiences with Emphasis on Sub-Saharan Africa (Swedish University of Agricultural Sciences, 1993) cited in Törhönen, *supra* note 29 at 573.

³² See e.g. Ben Cousins, *Embeddedness Versus Titling: African Land Tenure Systems and the Potential Impact of the Communal Land Rights Act 11 of 2004*,16 *Stellenbosch Law Review* 488, 498 (2005) (citations omitted); Dalrymple, *supra* note 28 at 100.

when governments fail to make the law coincide with the way people live and work’’.³³ Most of the arguments against recognizing customary tenure are essentially based on unwarranted assumptions. The wrong assumptions and misunderstandings regarding customary tenure and how it relates to formal cadastral system development can best be understood in the conception of what I call the ‘custom paradox’.

A question worth asking now is: what drives many individuals and researchers to a paradoxical or wrong view towards customary tenure? In the opinion of the author, there are two possible reasons. First, there is a wrong conception of the components and objectives of cadastral systems themselves in the context of underlining the inherent relationship between custom or customary tenure and the formal system. That is, there is little understanding of how statutory or formal property rules base on or should base on customary tenure. This is especially due to the fact that the sciences of property law and land administration systems have been developing on separate directions without the one considering the other. The second is related to ideological biases. The African and other Third World countries’ land tenures are, albeit unfairly, considered unfit to the capitalist economic ideology where the formal individual land tenure system is said to flourish. That means, seen from outside, these nations’ land tenure arrangements are deemed as non-capitalist economies, unsuitable for the formal property system. It is, at this point, necessary to unleash the various wrong views against customary tenure and show how and why wrong they are. In other words, we need to show how those wrong views are really paradoxical and hence unacceptable.

Now the central question that needs to be answered is: what are these wrong assumptions and misunderstandings about customary tenure in Africa, which can depict the content of the ‘custom paradox’? There are four main areas in which ‘the custom paradox’ can be visibly noted. First, the arguments do not often give adequate recognition to the position custom already has and the role it already has been playing in the legal systems of the world. As noted above, custom is a phenomenon of any society. This is true not only in places where customary tenure is dominant, but also in those areas where it is not. Thus recognition of customary tenure is in line with the actual experience of developed legal systems— the common law and civil law systems.

³³ De Soto, *supra* note 22 at 96.

Indeed, custom is the foundational element of these legal systems.³⁴ Blackstone, in his commentaries, espoused the idea of the common law as an expression of the ‘general customs’ of the entire people of England as recognized and developed by the courts.³⁵ For him, custom was the hallmark of the English common law, verging on a sociological compact and a set of reciprocal obligations between the rulers and the people.³⁶ Similarly, Twining argues that the traditional notion of the common law is custom and that this was the standard form for older writers.³⁷ To mention a particular example, custom played an important role in establishing English ‘copyhold’ for easements and servitudes in real property, as was shown in the Prescription Act of 1832.³⁸

Custom has likewise played a role in the legal development of Civil Law legal systems. In the Roman law, ‘‘custom, like statute, was a possible source of *lex* [law], on the grounds that both custom and statute expressed the people’s will’’.³⁹ A few renowned theorists of the Historical School of Thought such as Ehrlich from Austria and Savigny from Germany have advocated the use of custom in their legal systems with a profound positive influence. Ehrlich’s theory as explained by Friedmann was that ‘‘the centre of gravity of legal development lies not in legislation nor in juristic science, nor in judicial decision, but in society itself’’.⁴⁰ Friedmann also presented Savigny’s view on the role of custom for the development of law:

[L]aw grows with the growth, and strengthens with the strength of the people and finally dies away as nation loses its nationality...the sum therefore of this theory is that all law is originally formed in the manner in which in ordinary, but not quite correct, language customary law is said to have been formed, i.e., that is first developed by

³⁴ See Bederman, *supra* note 15 at 176; Jeremy Webber, *The Grammar of Customary Law*, 54 *McGill Law Journal* 579, 582 (2009). De Soto also claimed that the law in these legal systems ‘did not come from dusty tomes or official government statute books’ but ‘is a living entity, born in the real world and bred by ordinary people long before it got into the hands of professional lawyers’. De Soto, *supra* note 22 at 189.

³⁵ William Blackstone, *Commentaries on the Laws of England* (1765–1769) 72–74 cited in Bederman, *supra* note 15 at 30–31. See also Brian Simpson, *The Common Law and Legal Theory in William Twining* (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986)8, 18–21.

³⁶ Bederman, *supra* note 15 at 31.

³⁷ Twining, *supra* note 35 at 18.

³⁸ Bederman, *supra* note 15 at 38.

³⁹ Amanda Perreau-Saussine and James B Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* 204, 223 (Cambridge University Press, 2007).

⁴⁰ W Friedmann, *Legal Theory*248 (Stevens & Sons, 5th ed, 1967).

custom and popular faith, next by jurisprudence, everywhere therefore by internal silently operating powers, not by the arbitrary will of a law-giver.⁴¹

Friedmann summarizes the complete essence of the Historical School of Thought.⁴² First, law is found, but not made. Essentially, the growth of law is an unconscious and organic process and is therefore of subordinate importance as compared with custom. Second, lawyers become relevant to represent popular consciousness about law, formulate technical, legal principles and bring into shape what they find as raw material. ‘‘Legislation follows as the last stage; the lawyer is therefore a relatively more important law-making agency than the legislator’’.⁴³ Finally, laws are of universal validity or application as each person, not developing its own legal habits due to its peculiar language, manners and constitution.

Customs have also a profound position in legal theory and in the minds of the leading legal theorists. Thus Hart, who is a veteran English classical legal theorist and one whose work on legal theory concerned profoundly of a municipal state,⁴⁴ as opposed to a rural community, surprisingly but just simply regards customs as ‘primary rules of obligation’. Hart has succinctly put this as follows:

It is, of course, possible to imagine a society without a legislature, courts or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behavior in terms of which we have characterized rules of obligation. A social structure of this kind is often referred to as ‘custom’; but we shall not use this term, because it often implies that the customary rules are very old and supported with less social pressure than other rules. To avoid these implications we shall refer to such a social structure as one of primary rules of obligation.⁴⁵

⁴¹ *Id.*, at 210–211 (citation omitted).

⁴² *Id.* See also Roger Cotterrell, *The Sociology of Law: An Introduction* 21 (Butterworths, 2nd ed, 1992).

⁴³ Friedmann, *supra* note 40 at 211.

⁴⁴ H. L. A. Hart, *The Concept of Law* 77 (Oxford University Press, Amen House, London E.C.4, 1961).

⁴⁵ *Id.*, at 89. When Hart says ‘custom is not in the modern world a very important ‘source’ of law’ and that ‘it is usually a subordinate one’, he does not mean that custom is not important or even that it is less important than state

A critical reading of many of the other legal theories and philosophies which constitute the backbone of all modern laws that prevail everywhere today also give custom its rightful place though not always in a clear and simple manner. For example, Bederman, who has produced the most authoritative publication on 'custom', claims that there is the whole bundle of positivist positions within the Western and English common law legal tradition that have sustained custom as a source of legal obligation for millennia.⁴⁶ The problem is such link between custom and official law is unknown in the field of land administration.

Second, the view that customary tenure recognizes group rights and as a result cannot accommodate modern cadastral development has two major flaws. First, cadastres can be classified into those which work under the condition of customary and public ownership of land on the one hand, and those which can be implemented under the condition of private ownership on the other.⁴⁷ In this sense, the development of a cadastral system is flexible enough depending on the type of tenure and ownership in question. Second, the level of social embeddedness in customary tenures should not be exaggerated. Even with little support from the state, customary tenure itself has gradually developed much room for private appropriation of land in the form of individual land use, if not always in the form of ownership, and this tendency is growing so much so that today the distinction between customary tenure and statutory tenure is blurred.⁴⁸ Based also on empirical study of land rights in different African countries, many authors have shown that the evolutionary process ultimately tends towards individualization and formalization in response to population pressure, agricultural commercialization, and technological change.⁴⁹ Moreover, group ownership is not an invention only of customary tenure regimes or rural communities. It is a well-known form of land tenure in the developed and urbanized world too.

law! What he actually means is that, as he has made it clear, the law making authority may at any time deprive a certain, particular customary rule of its status as rule, at 44.

⁴⁶ Bederman, *supra* note 15 at 170, 179.

⁴⁷ Melkamu, *supra* note 1 at 30–36.

⁴⁸ Robert E Smith, *Land Tenure Reform in Africa: A Shift to the Defensive*, 3 *Progress in Development Studies* 210, 219–20 (2003).

⁴⁹ Shem Migot-Adholla *et al*, *Indigenous Land Rights Systems in Sub-Saharan Africa: A Constraint on Productivity?* 5 *The World Bank Economic Review* 155, 171–172 (1991); John Hunter, and Carl Mabbs-Zeno, *African Land Tenure*, 23 *Agricultural Administration* 65, 118 (1986); Törhönen, *supra* note 29 at 554; Peter Larmour, *Policy Transfer and Reversal: Customary Land Registration from Africa to Melanesia*, 22 *Public Administration & Development* 151, 154 (2002) (citation omitted).

For example, strata title or title in condominium buildings, and other jointly owned properties such as parks is commonplace in advanced cadastral systems.⁵⁰

Third, the argument that bringing customary tenure within a cadastral system fails to bring advantages to communities is also unfounded. In the first place, a cadastral system, in general, brings about many advantages such as enhancing tenure security, facilitating the credit market, promoting investment and so on.⁵¹ For that matter, a cadastral system is, as noted, a central, minimum component of land administration and land management which fulfills a range of functions. It is difficult to imagine any good government and state that does not prioritize land administration and land management in its development agenda; good land management is partly possible through registration of all types of tenures, be it private, customary, etc.⁵²

Finally, the argument against cadastral reform in customary tenure communities is unconvincing on other grounds. A cadastral reform is not a complete answer to a variety of ills; it is necessary but not sufficient for solving many problems of under-development.⁵³ More precisely, a number of conditions need to be considered if a nation is to establish a sound cadastral system. I strongly hold that five essential requirements need to be met for the success of a cadastral system, namely, good governance and political system, institutional capacity, recognition of customary tenure, updating, land legislation and policy.⁵⁴ In light of this, cadastral reform in countries where most of these conditions do not apply may not be a panacea for every ill. However, it can still serve as a tool for improved land management.

3. GOOD PRACTICE IN FORMALISING CUSTOMARY TENURE IN AFRICA

Failure to integrate customary tenure within cadastral system or failure to ‘informalise the formal system’ results, as we have argued, in the failure of cadastral systems. This failure has resulted in a number of negative consequences in many parts of Africa. One negative consequence is that

⁵⁰ See, eg, *Commons Registration Act 1965* (Eng); *Land Reform Act 2003* (Scot) Pt 2; *Owner’s Corporation Act 2006* (Vic).

⁵¹ Melkamu, *supra* note 1 at 36–47.

⁵² See Williamson, *supra* note 22 at 4.

⁵³ Törhönen, *supra* note 29 at 574; Smith, *supra* note 48 at 220.

⁵⁴ See *supra* foot note 10.

the non-recognition drives the people out of the formal or official property system.⁵⁵ This adversely impacts on the economy by fostering discontent, corruption, poverty and so forth.⁵⁶ Non-recognition also leads to destructive conflicts and violence like the conflict which happened in Zimbabwe in 2005.⁵⁷ It also results in, among other things, indeterminate boundaries, weak land administration, tenure insecurity, landlessness and homelessness, and overcrowding, as has been evident in Ghana in recent years.⁵⁸ Fitzpatrick, on his part, argues that if customary tenure is not recognized in a proper manner, it will stand in parallel or overlapping with formal cadastral system in an imbalanced manner which makes the enforcement of the cadastral system problematic.⁵⁹

Although cadastral systems in Africa are usually a failure story mainly due to lack of adequate recognition of customary tenure or formalization based on many wrong or paradoxical assumptions, there are success stories too which highlight the fact that the process of formalization of the customary land tenure has already begun – at least ten countries in Africa recognize customary tenure.⁶⁰ The practice of integration of customary tenure in a few countries and regions in Africa demonstrates that legislative and institutional mechanisms have been put in place to recognize and formalize customary tenure.⁶¹

In the West African countries of Côte d’Ivoire, Guinea, Benin and Burkina Faso, Rural Land Maps (*plans fonciers ruraux*) (‘PFR’s) were used to recognize customary tenure in the cadastral system. This cadastral system is regarded as ‘innovative’ mainly because it reflects “the pragmatic principle of starting from existing and locally acknowledged rights” in contrast

⁵⁵ See De Soto, *supra* note 22 at 177, 183.

⁵⁶ *Id.*, at 95.

⁵⁷ Michael Wines, Zimbabwe Police Resume Drive to Raze Slums 168 (New York Times, 2005).

⁵⁸ Republic of Ghana, Ministry of Lands and Forestry, National Land Policy 169 (2007).

⁵⁹ Fitzpatrick, *supra* note 5 at 1012. For other problems see Fitzpatrick: at 1015. Daniel concludes that contested or inappropriate interactions between laws of formal/state institutions, on the one hand, and norms, and agreements of the informal institutions, on the other hand, produce open access rather than secure property rights: at 1013.

⁶⁰ For a summary of the status of customary tenure in 35 of Sub-Saharan Africa’s 51 mainland and island states, see Wily, *supra* note 3.

⁶¹ See Frank Byamugisha, Transforming Africa’s Agriculture Securing Land Tenure and Easing Access to Land, Background Paper for African Transformation Report 16 (2016) (Joint research between African Center for Economic Transformation (ACET) and Japan International Cooperation Agency Research institute (JICA-RI).

with the French colonial legacy that favors only recorded rights.⁶² The PFRs aim to identify all rights and record rights on which there is a local consensus. Delville notes:

[The PFRs] rely on a will to identify and map the existing rights, at parcel level, whatever their origins may be. At the village level, a systematic survey process, which allows for public contestation of the proposed registration of rights, and a flexible and effective mapping system are set up. This leads to a simplified “cadastre” whose objective is to materialize rights over lands that are accepted at the local level on a consensual basis. The methodology is based on parcel-level field surveys in the presence of rights holders and their neighbors. The socio-land survey identifies rights holders and the rights they hold.⁶³

The PFRs thus constitute a ‘bottom-up’ method of creating property rights based on the acknowledgement of existing diverse rights as they have evolved through generations as opposed to a ‘top-down’ method coming from narrow conceptions of the government.⁶⁴ They are participatory, more decentralized and less costly than the classic public land administration starting at the village level.⁶⁵ They may also involve legislation which takes into local rules and practices.⁶⁶

Another West African country, Ghana, has started to demarcate, map, and register Stool/Skin lands since 2005, in the names of traditional authorities in line with the 1999 national land policy and Ghana’s Constitution, using funding from the Land Administration Project.⁶⁷ The first phase covered 10 areas and started as a pilot using a mix of Total Stations and ‘GPS’ surveying equipment while the second phase of the project is now scaling up this effort. To

⁶² See generally Delville, *supra* note 22 at 25–43. Another innovative method exists in Namibia where communal land rights are made to be administered by the Namibian Communal Land Administration System (NCLAS) concurrently with other authorities. See generally Donatha Kapitango & Marcel Meijs, Land Registration using Aerial Photography in Namibia: Costs and Lessons in Deininger, Klaus *et al*, *supra* note 22 at 68–86.

⁶³ Delville, *supra* note 22 at 28.

⁶⁴ *Id.*, at 30.

⁶⁵ *Id.*, at 38.

⁶⁶ *Id.*, at 10 (citation omitted).

⁶⁷ Byamugisha, *supra* note 61 at 9.

demarcate boundaries, it deployed Alternative Dispute Resolution (ADR) techniques using mediators to help traditional authorities to agree on boundaries before surveying.

Another interesting example is Uganda. This country made legislative reforms to the effect that customary land tenures are able to be integrated into the formal system. One major piece of legislation was the Land Act of 1998. Joireman articulates the contents of this legislation as follows:

The Land Act of 1998 brought about a transformation of the titling, dispute resolution systems, and basic land law for Uganda. The law created a mechanism for customary land to be formally recognized and then titled. It captured contemporary economic thought regarding private property rights, insofar as there was a clear focus on creating security and titled freehold where it had not existed previously. There was also provision for the creation of formalized customary tenure and the eventual transition of customary tenure to titled freehold. In addition to the potential for the titling of customary land, the Land Act also sought to increase tenure security by providing legal rights of occupancy to squatters.⁶⁸

Similarly, in Tanzania, the process of surveying and registering village lands in Tanzania was accelerated in line with the Village Land Act 1999, which empowered village authorities to determine the use of land and allocate it to households within the villages and to investors from outside village communities.⁶⁹

Another African country, Mozambique, has dealt with formalizing customary land rights through a process known as 'community land delimitation'.⁷⁰ The Technical Annex to the Land Law defines delimitation as "identification of the boundaries of the areas occupied by local communities including the entry of the information into the National Land Cadastre."⁷¹ The process of delimitation clearly identifies both the community and the boundaries of the land it

⁶⁸ Joireman, *supra* note 27 at 465.

⁶⁹ Byamugisha, *supra* note 61 at 9.

⁷⁰ *Id.*

⁷¹ *Id.*

holds based on ‘sketch maps’ unlike Ghana and Tanzania which require a more costly detailed survey of boundaries. The ‘sketch maps’ and boundaries are agreed upon with neighboring communities. As of early 2010, 231 communities, representing less than 10 percent of Mozambican ‘rural communities’, had been delimited and given certificates; but the scale is increasing from time to time.

These examples show that customary tenure land rights can be formalized to empower the group owners to take further steps to endorse and enable the regularization of individual land rights within the communities. As such, these cases represent the kinds of practices that the rest of Africa should follow. Ethiopia is also advancing towards being a good story regarding the integration of customary tenure into the mainstream cadastral system. The following section shall turn to the case of Ethiopia.

4. THE STATUS OF FORMALISATION OF CUSTOMARY TENURE IN THE ETHIOPIAN CADASTRAL SYSTEM

4.1 Efforts at Registration of Customary Tenure

In general, land administration in Ethiopia, like much of Africa, is based on rudimentary practices and customary rather than formal institutions. However, the country has undertaken a massive systematic land certification or land registration since 1998 successfully covering a large part of the country which exceeds 50 percent.⁷² More than 25 million parcels have been registered in the rural areas of the country at an impressive scale, pace, and cost-effectiveness. However, the status of recognition of customary tenure in the Ethiopian cadastral system is low especially when we see the extent of land holding certificate provided for holders of this tenure.⁷³ This is even more so with respect to the pastoralist and semi-pastoralist lowland areas of Ethiopia.⁷⁴ This might be due to the historically weak land administration in the country in

⁷² *Id.*, at 1.

⁷³ Wily, *supra* note 3.

⁷⁴ Keeley *et al*, Large-scale land investment in Ethiopia: How much land is being allocated, and features and outcomes of investments to date case of Ethiopia Addis Ababa (2013).

general and the desire to disregard customary tenure in pastoralist communities in particular.⁷⁵ Therefore, scaling up the registration program in Ethiopia would go a long way to protecting customary tenure as especially investors engage in developing abundant uncultivated land in the quest for transforming agriculture.⁷⁶

Interestingly, the land administration system in Ethiopia recognizes customary tenure as one of the three land tenure types, namely, private, communal and government holdings.⁷⁷ For example, the FDRE land law defines ‘holding right’ as:

the right of any peasant farmer or *semi-pastoralist and pastoralist* shall have to use rural land for purpose of agriculture and natural resource development, lease and bequeath to himself, his family or other lawful heirs, and includes the right to acquire property produced on his land thereon by his labor or capital and to sale, exchange and bequeath same.⁷⁸

The Constitution and the land law also provides that Ethiopian pastoralists have the right to free land for grazing and cultivation, to the immovable property and other permanent improvements they build on the land, the right to transfer the land through such means as lease, mortgage and inheritance, as well as the right not to be displaced from their own lands.⁷⁹ In all these circumstances, we see that pastoralist holding has equal status with peasant holding.⁸⁰

⁷⁵ See Dessalegn Rahmato, Customs in Conflict: Land Tenure Issues among Pastoralists in Ethiopia 10–20 (Draft document, Forum for Social Studies, Addis Ababa November 2007).

⁷⁶ Byamugisha, *supra* note 61 at 21.

⁷⁷ See The Revised Rural Land Administration and Use Determination Proclamation, 2017, Proc No 252/2017, *Zikre Hig*, Year 22, No 14, Art. 6 (hereinafter ‘ARLAUP’) and the Rural Land Administration and Land Use Proclamation, 2005, Proc. No, 456/2005, *Fed. Neg. Gaz.*, Year 11, No.44, Art. 6 (hereinafter ‘FRLAUP’) respectively. It is to be noted that less common classifications also exist such as common holding and NGO holdings (development and social organizations). See eg Regulation of the Oromia Rural Land Administration and Use, 2012, No.151/2012, Arts. 14(2) & 15(15). In fact, it is also possible that ‘common holding’ is easily confused with ‘communal holding’. See at Art 15(7) & (8).

⁷⁸ FRLAUP, Art 2(4) (emphasis added).

⁷⁹ Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, Proc No 1/1995, *Fed NegGaz.*, Year 1, No.1, Art. 40 (3) (5) & (7) (hereinafter ‘FDRE Constitution’); FRLAUP, Art. 5(1)(a), 8; ARLAUP, Art. 9; Proclamation to Amend the Proclamation No. 56/2002, 70/2003, 103/2005 of Oromia Rural Land Use and Administration Proclamation No. 130 /2007, Art.6(1) & 9.

⁸⁰ FDRE Constitution, Art.40(4).

Due to the unique features of customary tenure concerned authorities need to develop a land registration system that addresses all these features within the broader cadastral framework or a separate registration system, as deemed appropriate, based on a detailed study. The national land law and the legislative framework in almost all regions provide for recognition and formalisation of customary tenure through registration and certification systems on equal footing with other tenure, i.e. individual and state tenure or holding. Proclamation 456/2005 specifically stipulates that “[t]he sizes of rural lands under the holdings of private persons, communities, governmental and non-governmental organizations shall be measured as appropriate using cultural and modern measurement equipments” and shall be given cadastral maps showing their boundaries.⁸¹ The communal or customary land holders shall be given holding certificate that indicates the name of the beneficiaries, size of the land, land use type and cover, level of fertility and boarders, as well as the obligation and right of the land holder.⁸² So this law provides a general framework for the protection of land tenure including communal tenure by which the regional laws can be guided to provide their own similar and more detailed provisions.⁸³ Accordingly, regional land administration and use laws provide for the registration of customary tenure in their respective proclamations and regulations adopted to implement them.⁸⁴ Let us see how the different regional land laws recognize customary tenure.

The Amhara National Regional State. The governing land law in Amhara region is the Revised Rural Land Administration and Use Determination Proclamation No. 252/2017 of the Amhara National Regional State and the Revised Rural Land Administration and Use System Implementation, Council of Regional Government Regulation No. 159/2018. Article 33 (1) of the Proclamation stipulates that a map is prepared for any rural land held in private, communally, by the state or non-state parties after measurement by traditional or modern means. The map will

⁸¹ FRLAUP, Art. 6(1) &2.

⁸² FRLAUP, Art. 6(3).

⁸³ FRLAUP, Art. 17.

⁸⁴ ARLAUP; State of Southern Nations, Nationalities and Peoples Land Administration and Use Proclamation No. 110/2007, Debub NegaritGazeta No. 110; Southern Nations, Nationalities and Peoples Rural Land Administration and Use Regulation No. 66/2007;Tigray National Regional State Rural Land Administration and Use Regulation No. 85/2014; Proclamation to Amend the Proclamation No. 56/2002, 70/2003, 103/2005 of Oromia Rural Land Use and Administration Proclamation No. 130 /2007; Regulation of the Oromia Rural Land Administration and Use, 2012, No.151/2012; The Benishangul Gumuz Regional State Land Administration and Use Regulation; Afar National Regional State Rural Lands Administration and Use Proclamation No. 49/2009, Somali Regional State Rural Lands Administration and Use Proclamation No. 128/2013.

be given for them with landholding certificate. Article 33(2) states that a mark indicating their boundaries for private, communal and government holdings being measured with different surveying materials are made as the case may be. Article 34(1) stipulates that any measured rural landholding is registered in the land file which is established for this objective. Article 35(1) claims that a landholding certificate containing the land list, being prepared in his name and photograph is attached will be given to any rural landholder through the pertinent wereda rural land administration and use office. Specifically, Article 25(9) provides that communal landholders will be issued landholding certificate containing their names. According to Article 36(1), the type of registration is systematic and mandatory.

Southern Nations Nationalities and Peoples Region. The governing laws are the state of Southern Nations, Nationalities and Peoples Land Administration and Use Proclamation No. 110/2007 and Rural Land Administration and Use Regulation No 66/2007. Article 6 (1) of the Proclamation provides that rural lands under the holdings of individuals, communities, governmental and non-governmental organizations shall be measured using cultural and modern measuring equipments. The land size, land use and level of fertility shall be registered in the data base center by the competent authorities. Sub-Article 2 adds that rural land holdings measured shall be given cadastral maps showing their boundaries. Sub-Article 3 states that rural land holders shall be given land holding certificate which describes the size of the land, land use type and cover, level of fertility and borders, as well as the rights and obligations of the holders. Sub-Article 12 specifically proclaims that a land holding certificate for communal lands shall be prepared in the name of the beneficiary community.

Oromia Region. The governing laws are Oromia Rural Land Use and Administration Proclamation No. 130 /2007 and Oromia Rural Land Administration and Use Regulation No.151/2012. Article 15(1) of the Proclamation stipulates that rural lands under the holdings of private, communities, governmental and nongovernmental organizations shall be measured in accordance with their size, land use, and fertility status. Sub-Article (2) states, these land holdings shall be surveyed with Geo-referenced boundaries and maps shall be prepared for them. Sub-Article 3 states that rural land holding data, including the current holder, its boundaries, status, potentials, and the rights and obligations of the holder shall be registered and be availed

for utilization. Sub- Article (4) dictates that any holder of rural land shall be given a holding certificate describing the size of holding, use and coverage, fertility status and boundary, and the rights and obligation of the holder. Specifically, Sub-Article (16) stipulates that for the communal lands, the holding certificate shall be given in the name of the community using the land jointly. Elaborating on communal lands, Art 15 (7) of the Regulation says that the common holdings of pastoralists or semi- pastoralists or farmers, like grazing land, forest, water points, ponds etc, shall be certified by the name of the users. According to Sub-Article 8, certificate of common holding shall be kept with the representatives of the users or kebele administration. Article 6 (3) of the Regulation provides that holding certificate shall be issued for the holding determined for investment purposes.

Tigray Region. The governing laws are the Tigray National Regional State Rural Land Administration and Use Determination Proclamation No. 239/2014 and Tigray National Regional State Rural Land Administration and Use Regulation No. 85/2014. Article 27 (1) of the Proclamation stipulates a rural land use and administration system shall be in force in the region that identifies any land, farm land, non-farm land, residential house, field, forest, degraded land, mountain which replaces the traditional surveying and land record keeping system. Article 27 (4) stresses that the land administration and use system shall be supported by modern technology in order to register, keep and distribute information on rural land in a fast and sustainable manner. Similarly, Article 46 (1) & (2) of the Regulation provides that all rural land in the region shall be made to have information through modern surveying and registration applying Orthophoto, GPS, Total Station and the like. Sub-Article 2 states that a land holding certificate shall be issued to the land holders supported by map in order to solve disputes and disagreements that arise between land users due to absence of modern land surveying and registration. According to Article 47 (5) of the Regulation, the land holder name, the boundary of the land, the fertility level of the land and other similar information must be registered in a permanent registration book before the land holding certificate and map is issued to the land holder. Article 47(1) of the Regulation state that land holding certificate shall be given to governmental and non-governmental organisations who hold rural land. Sub-Article 2 stipulates that information on mountains, gorges, forests and reserved lands shall be registered or kept and a holder of such lands may be given a land holding certificate after two years based on assessment of his/her

performance on the land. Sub-Article 6 states that the land holding certificate shall be given in the name of the association in the case of communal land used in common. Article 45 of the Regulation provides that an investor on agricultural land shall be given land holding certificate, site plan and map.

Afar Region. The pertinent law referred to in this study is the Afar National Regional State Rural Lands Administration and Use Proclamation No. 49/2009. Article 6(1) provides that the communal lands that are held communally by pastoralists shall be surveyed, registered and certificate of holdings shall be issued in the name of the community using such communal lands. Sub-Article 2 provides that communal land holding certificate shall be deposited with the representative of the holder community or clan of the land. Article 10 governs registration of land holding of agro-pastoralists. It states that land holdings of agro pastoralists that are held communally or individually shall be surveyed, and registered using traditional or modern means of surveying and measurement equipments as the condition demands. The surveying and registration of the land holdings shall indicate the area, the land use and their degree of fertility. After such information is gathered it shall be registered and deposited in the information centers that will be established at various levels in the region. Sub-Article stipulates that maps that show the boundary demarcations of all land holdings surveyed and measured shall be prepared. Sub-Article 3 provides that every land holder shall be issued with land holding certificates which shall show the size of the holding, land use of the holding, degree of fertility of the holding, neighbouring boundaries of the holding; and rights, duties and responsibilities of the land holder. Sub-Article 9 focuses on agro-pastoralists that use land in groups such as grazing land. It thus proclaims that agro pastoralists shall be issued with a land holding certificate for their common grazing lands that they communally use. But the use of this sub-provision is not clear given the previous provisions on registration of both communal/pastoral holding and individual holding of agro-pastoralists. The Somali land law, having appreciated this redundancy, has not put it.

Somali. The pertinent law referred to in this study is the Somali Regional State Rural Lands Administration and Use Proclamation No. 128/2013. The provisions are identical to those of Afar region. Article 6(1) provides that the communal lands that are held communally by pastoralists shall be surveyed, registered and certificate of holdings shall be issued in the name of

the cooperative associations using such communal lands. Sub-Article 2 states that communal land holding certificate shall be deposited with the chairman of the cooperative associations or committee of representative of the holder community. Article 10 governs registration of land holding of agro-pastoralists. It states that land holdings of agro pastoralists that are held communally or individually shall be surveyed, and registered using traditional or modern means of surveying and measurement equipments as the condition demands. The surveying and registration of the land holdings shall indicate the area, the land use and their degree of fertility. After such information is gathered it shall be registered and deposited in the information centers. Sub-Article 2 stipulates that maps that show the boundary demarcations of all land holdings surveyed and measured shall be prepared. Sub-Article 3 provides that every land holder shall be issued with land holding certificates which shall show the size of the holding, land use of the holding, degree of fertility of the holding, neighbouring boundaries of the holding; and rights, duties and responsibilities of the land holder.

Benshangul Gumuz. The land laws which govern land measurement, land registration and provision of land holding certificate are the Benishangul Gumuz Regional State Land Administration and Use Proclamation No 85/2010 and Benishangul Gumuz Regional State Land Administration and Use Proclamation Implementation Regulation 2010. Article 25(1) states that rural land held individually, in group or in common usage, land held for forestry development, or conserved for any other similar activities shall be measured map shall be prepared for it in traditional or modern way. A special system of enumeration shall be designed and implemented to clearly understand each land. A sign or mark indicating the boundaries of land holdings shall be made on the land. Article 26 (1) states that any land measured shall be registered in rural land and will have map prepared by the competent authority. The Regulation makes it clear that all types of holdings shall be registered. Sub-Article 2 continues to say that the land registration includes the information about the full name of the holder, the size of the land, the condition of acquiring holding, the rights and duties of the holder, and other necessary information. Article 27(1) provides that any person granted rural land shall be given the land holding certificate in which the detail of the land is registered prepared by his name and photograph fixed there on. Article 22 (11) of the Regulation states that with respect to communal lands used by more than one kebele, the name of the holders or users shall be written in registration book and land

holding certificate shall be prepared in the name of the beneficiary community and be kept at kebele administration office.

4.2 Challenges to Customary Tenure Protection in Ethiopia

Customary tenure is under high risk of disappearance in Ethiopia. As customary land rights are based on a group land holding such as clans and sub-clans, the territorial boundaries of each clan or sub-clan are often fluid and contested since they depend on natural land forms such as hills, valleys, lakes/ponds, streams, etc.⁸⁵ Boundaries may also be contested due to population pressure, recurrent environment stress, public investments in infrastructure, etc.⁸⁶ Further, the tenure system is based on mobility of livestock and humans to move from one resource point to another which requires passage right to be worked out between the groups in question. The tenure system may also allow overlapping use of the land. Thus, a clan may allow its territory to be used by another clan temporarily by agreement and on the expectation that the favor will be reciprocated at some time in the future.⁸⁷ As another example, farming rights may be exercised within pastoral economies where farming individuals in such cases will have full use rights of the plots they farm, including the right to sell the property to other members within the clan.⁸⁸

In the next part, we aim to investigate the extent to which attempt is made by the legislative framework to protect communal land tenure aside from the measure of land registration. Looking at this matter, four approaches are evident. The first group of legislations gives strong protection to communal tenure by, in principle, preventing conversion of communal land into private land. The second group provides protection for communal tenure, but they permit the conversion of communal land to private holding. The third group provides for the protection of communal land, but keep silent on whether communal land can be converted into private land. The last group of legislations provides little or no protection to communal tenure.

In the first group, we find Afar and Somali land laws. Grazing lands that have been used and accessed by communal land holders (pastoralists and agro-pastoralists) shall be identified and delimited and accorded full status. The right of communal land holders of over grazing lands

⁸⁵ Dessalegn *supra* note 75 at 16.

⁸⁶ *Id.*

⁸⁷ *Id.*, at 17.

⁸⁸ *Id.*

has no time limit. Communal pastoral lands shall not be transferred into private holdings nor can they be leased to investors save the power of the government, as owner of all lands, to transfer communal holdings into private holdings as deemed necessary and in consultation and in agreement with pastoralists. However, communal land holders have the right to voluntarily settle as sedentary farmers under resettlement programs. Governmental, non-governmental, and social and economic institutions shall have the right to use rural lands subject to priority to the interest of communal land holders. Women communal land holders have equal rights with men to access and use grazing lands. The customary rights of the orphans, elderly; the handicapped; and other infirm persons to use communal lands is recognized and protected. A person who is the age of 18 and above has the right to free access to farm lands where such person intends to engage in sedentary farming. However, given the provision that communal holding may not be changed into private holding, the question of where such land for individual sedentary farm might come from is not clear. Communal land holders shall get equitable compensation when their holding is expropriated.

In the second group, we find land laws which guarantee the tenure security of communal tenure while permitting the conversion of communal land to private holding. To this group belong Amhara, Tigray and the South. These provisions are based on the national law which states that '[g]overnment being the owner of rural land, communal rural land holdings can be changed to private holdings as may be necessary'. Article 9 of the Amhara Land Law provides that any person's rural landholding is protected by law and as such the land holder is not obliged to leave his land without his consent except by the provisions of the law. However, the law permits conversion of communal land to private land albeit indirectly. Hence, Article 50 provides that the Land Administration and Use Committee has the duty to assure that dividing a communal land for private use is supported by the kebele resident population. The Tigray and South land laws provide for the conversion of communal land into private land more clearly and directly. The conversion will be implemented through the consultation of the residents and in a manner that does not impact negatively on nearby farm lands, in line with the master plan or in the absence of a master plan upon study by an expert to the effect that the change does not cause problems. However, forest and swampy communal lands may not be converted in Tigray. In all

three regions, the manner of expropriation and payment of compensation for communal lands is not clear at all, leaving these lands to wide abuse by government.

In the third category, we find the Oromia land legislation. This law is silent on the issue of whether communal land may be converted into private land. However, it has other clear provisions which help protect the tenure. Article 15 (6) of the Proclamation provides that any rural land holder shall be given a life time certificate of holding. Article 6 (5) further states that any peasant or pastoralist or semi pastoralist shall not be evicted from his holding and his holding shall not be transferred to anybody or organization due to any liability or execution of judgment. Article 6 (10) and (11) stipulate that the rural land use right shall be terminated only if that land is required for more important public uses upon payment of compensation, and as much as possible, upon giving equivalent land for the individual or group. Further, Article 10 rules that the government can rent out customary land which is not held by the peasants or pastoralists or semi-pastoralists and that any such lease agreement may not have an adverse impact on the peasants, pastoralists or semi pastoralists. So even if the conversion of communal tenure into private tenure is possible in the region due to the federal law, the Oromia law appears to aim for stronger protection to communal land than that of Amhara and Tigray.

In the last category is Benshiangul Gumuz region. Article 29 (2) of the Proclamation, especially the English version, provides clearly that communal lands found in the region shall be changed into private grazing possession gradually. Undoubtedly, this region's law intends to prohibit communal grazing and communal land holding in a gradual process. Sub-Article 1, on the other hand, provides that gully, damaged, degraded, sloppy and mountainous lands shall be, if necessary, changed into private possession based on detail regulations and community acceptance and be used for grazing, forest and planting perennial crops. While these provisions encourage private grazing, it is also possible that they allow other farm activities including sedentary farm activities such as crop cultivation.

In summary, Ethiopia, like several other African countries, has already started the process of addressing customary tenure in its cadastral system that enhances formalisation of the tenure and all rights, restrictions and responsibilities associated with it. The national land law and the

legislative framework in most regions provide for recognition of customary tenure through registration and certification systems on equal footing with other tenure, i.e. individual and state tenure or holding. The communal or customary land holders shall be given holding certificate that indicates the name of the beneficiaries, size of the land, land use type and cover, level of fertility and borders, as well as the obligation and right of the land holder. But there are significant challenges posed by legislation which directly or indirectly permit conversion of communal land into private holding. A fair evaluation or investigation of the quality of the process of integration of customary tenure to the official tenure, and the practical implementation of the legislative declarations already made remains to be seen. Further, the practical implementation of legislative pronouncements that allow wide conversion of customary tenure into individual tenure and the empirical assessment of the reality on the ground where we see the terrible encroachment of the latter remain big matters for further research intervention.

CONCLUSION AND RECOMMENDATION

In Africa, customary tenure has not been adequately recognized in the cadastral system which ultimately makes the whole cadastral system very weak, illegitimate and unenforceable. This is partly due to the custom paradox. The central argument of ‘the custom paradox’ is that customary tenure gives ownership rights to a group rather than to individuals and as such cadastral reform in such situation will not fit into the modern conception of a cadastral system. The custom paradox is triggered by wrong misconception and unwarranted assumptions regarding the components and objectives of cadastral systems. In this regard, the lack of clear legal knowledge on the inherent relationship between custom or customary tenure and formal system and ideological biases against customary tenure stand out as outstanding reasons.

However, in recent times this tenure has started to be recognized thanks to the work of few critical thinkers with better knowledge of the African way of using land and committed politicians who started to question the idea that individual tenure is the only viable land tenure and the consequent appreciation of this fact by international players including the World Bank or its associates. Customary tenure is being recognized in a number of African countries including Ethiopia. However, generally, formalisation of customary tenure in these countries is at the level

of legislative framework and has limited practical coverage. With respect to our case study in particular, there are four main limitations within this recognition and formalisation. First, the legislative recognition given to customary tenure in farming communities of, for example, Amhara, Tigray, Oromia and South regions of Ethiopia, opens the room for wide tenure insecurity due to provisions allowing, expressly or impliedly, uncontrolled conversion of customary or communal tenure to individual tenure. Even in communal tenure communities, existing restrictions and prohibitions on conversion can easily be challenged given the national law allowing the conversion. Second, even including in pastoralist and semi-pastoralist communities, the existing provisions or rules on customary tenure governance are still not detailed enough. For example, they do not provide for rules on how new and existing customary tenure rights are identified or known outside of the land holders, such as to the land administrators, investors, and the like. Third, existing legal provisions do not provide for the mechanism of integration of customary tenure rights with the statutory land tenure in a regular and sustainable manner. To that extent, the 'informalization' of the formal tenure is now the required theory or model both in Ethiopia and the rest of Africa. This model, it should be emphasized, does not imply the conversion of the formal or the statutory cadastral system into informal system, but it boldly calls for the proper integration of customary or informal tenures into the latter via the process of formalisation. Fourth, there is, so far, rare chance for existing positive legal provisions in all regions to be implemented on the ground; or, at least, there is no or little evidence on this. This can mainly be witnessed by the lack of land holding certificate being given, in practice, to most communal land holders in Ethiopia, and the wide opportunities provided for conversion of communal tenure into individual tenure. That is, the law and practice is not matching in terms of safeguarding customary tenure and implementing this on equal status with the private land holding tenure. Therefore, I recommend that these limitations be avoided urgently through sound land policy directions, revision of rules as well as empowering the institutions of land administration at all levels to enforce these recommendations.