

**Foreign Direct Investment in Farmland and Land Rights of Pastoralists in
Ethiopia: a Quest for Balance**

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Declaration

I, **Elizabeth H/Mariam**, hereby declare that this thesis is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

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Approval Sheet

This is to certify that the Thesis entitled *Foreign Direct Investment in Farmland and Land Rights of Pastoralists in Ethiopia: a Quest for Balance*, has been prepared by **Elizabeth H/Mariam**, and submitted in partial fulfillment of the requirements for Masters of Constitutional and Public Law complies with the regulations of the University and meets the accepted standards with respect to originality and quality.

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Abstract

The FDRE Constitution gave pastoralists communal use right and protection against displacement, however, in subsidiary land laws, the Government has adopted a contrary position and declared itself the owner of rural communal lands which it gives and takes back as it deems fit. One effect of this is manifested in relation to foreign large-scale farmland investment and the Government has already allocated large areas of pastoral lands for the purpose of the investment in a way that is affecting the right and interest of pastoralists. Triggered by these, various studies have analyzed the investment and argued for the land right of pastoralists and against the expropriation of pastoral lands for the purpose of the investment. However, no single study has tried to see from development perspective, whether there is a way the investment and right of pastoralists can complement rather than contradict each other, as it has been the case so far. Thus, the main issue addressed in this study is whether these two concepts can find a middle ground when analyzed from the perspective of pastoralists' right to development and the obligation of the Government towards pastoralists' and the nation as a whole. By analyzing the relevant legal frameworks with empirical data and interview responses; this study contends the reason for contradiction so far lies in the Government's failure to adhere to the legal requirements rather than the simple act of pastoral land expropriation for the purpose of investment. Specifically, the major findings are, the decision to and the manner of land allocation disregards the occupancy and landholding right of pastoralists; is not based on a study that compares the viability of pastoralism or the investment for each instance, thus purely over privileging the latter and denying the former a chance to be considered as one viable land use; is driven by the unfounded perceptions and targets of the anti-pastoralism thinking and the aim of imposing the Government's own notion of development on pastoralists than the legitimate aim of development and development activities and the manner of allocation goes against the procedural right to development and the procedures for expropriation. Therefore, if the Government makes the necessary shifts by adhering to the relevant laws', a balance can be struck between the investment and land right and interest of pastoralists. Such a balanced understanding is important as pushing for the investment at the expense of the right of pastoralists' and vice versa, is leading to the destruction of both as experience to date shows.

List of Tables

Table 1: Large Scale Farmland Investments (> 500 ha) in the Country (1992-2013)

Acronyms

ADLI- Agricultural Development Led Industrialization

AILAA- Agricultural Investment Land Administration Agency

CAPRI- Collective Action and Property Rights

DBE- Developmental Bank of Ethiopia

DRD- Declaration on the Right to Development

EARI- Ethiopian Agriculture Research Institute

EHAIA- Ethiopian Horticulture and Agricultural Investment Authority

EIC- Ethiopian Investment Commission

EPaRDA- Enhancing Pastoral Research and Development Alternative

EPRDF- Ethiopian Peoples' Revolutionary Democratic Front

ESCR-Net - International Network for Economic, Social and Cultural Rights

FAO- Food and Agricultural Organization

FDI- Foreign Direct Investment

FDRE- Federal Democratic Republic of Ethiopia

FPIC- Free, Prior and Informed Consent

GDF- GRIPS Development Forum

GTP- Growth and Transformation Plan

ICESCR- International Covenant on Economic, Social and Cultural Rights

ILO- International Labour Organization

LANDac- Land Governance for Equitable and Sustainable Development

LDPI- Land Deal Politics Initiative

MoA- Ministry of Agriculture

MoFA- Ministry of Federal Affairs

MoFED- Ministry of Finance and Economic Development

MoFPDA- Ministry of Federal and Pastoralist Development Affairs

MoLF- Ministry of Livestock and Fisheries

MRG- Minority Rights Group International

PASC- Pastoralist Affairs Standing Committee

PASDEP- Plan for Accelerated and Sustained Development to End Poverty

PFE- Pastoralist Forum Ethiopia

SDPRP- Sustainable Development and Poverty Reduction Program

SNNP- Southern Nations, Nationalities and Peoples

UN- United Nations

UNDP- United Nations Development Programme

WB- World Bank

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Chapter 1: Introduction

1.1. Background of the Study

Since time immemorial pastoral lands in Ethiopia have been held under clan based customary communal tenure system which, vests land ownership and possession over a specific area in a specific pastoral group, to the exclusion of others.¹ However, starting from the 19th century Emperor Menelik II conquest and incorporation of the lowlands into feudal Ethiopia state, the rulers have disregarded such tenure, labeled the land as ‘no-man’ land and claimed formal ownership of it.² Though, the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution (the Constitution) broke the trend and made all land in the Country the common property of the Ethiopian people and gave pastoralists communal use right and protection against displacement,³ in the 2005 Federal Rural Land Administration and Land Use Proclamation (the Federal Rural Land Proclamation) the Government has adopted a contrary position and declared itself the owner of rural communal lands which it gives and takes back as it deems fit,⁴ once again leaving the land question of the Country’s pastoralists’ unanswered.

Since the time of Emperor Haile Selassie, one of the areas where the effect of the legal status of pastoral communal lands were manifested was in relation to large-scale commercial farming, including those undertaken by foreign investors. This is due to the fact that the regimes targeted the lowland areas for the location of such investments, affecting pastoralists as they were

¹ Abebe Mulatu & et al (2014), “An Approach to Securing Pastoral Land Rights in Ethiopia” <<https://www.conftool.com/>> (accessed 15 April 2016), pp. 3 and Mohammud Abdulahi (2007), “The Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities”, *Int'l J. on Minority & Group Rts*, 14, pp. 85 - 125, <<https://chilot.files.wordpress.com/.../>> (accessed 27 January 2016).

² Wibke Crewett & et al, ‘Land Tenure in Ethiopia: Continuity and Change, Shifting Rulers, and the Quest for State Control’ (2008), CAPRI Working Paper No. 91, <<https://www.ideas.repec.org/s/fpr/worpps.html>> (accessed 15 December 2016), pp. 6 - 9; Berihun Adugna Gebeye (2016), “Unsustainable the Sustainable: An Evaluation of the Legal and Policy Interventions for Pastoral Development in Ethiopia”, *Springer open journal*, 6:2, pp. 1 - 14, <<https://www.springeropen.com/journals>> (accessed 27 March 2016) and Muradu Abdo (2013), “Rural Commons and the Ethiopian State”, *Law, Social Justice & Global Development*, pp. 1 - 49, <<https://www2.warwick.ac.uk/.../srul1.pdf>> (accessed 26 September 2016).

³ Lemessa Demie Anbesa, ‘Ethiopian Pastoralist Policy at the Crossroads: Further Marginalization or Revitalization?’ in Yohannes Aberra & Mahmud Abdulahi (eds.), *The Intricate Road to Development: Government Development Strategies in the Pastoral Areas of the Horn of Africa* (2015), <www.gbv.de/dms/zbw/834816709.pdf> (accessed 1 March 2016), pp. 16 - 71 and The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 40, Proc. No. 1, *Neg. Gaz.*, Year 1, no. 1.

⁴ Federal Rural Land Administration and Land Use Proclamation, 2005, Art 2 (12 & 13) & Art 5 (3), Proc. No. 456, *Neg. Gaz.*, Year 11, no. 44.

displaced or their migration patterns for pasture and water blocked by the investments.⁵ Similarly, the current Government which actively promotes and encourages foreign large-scale farmland investment (the investment) has already allocated large areas of land especially following the new farmland rush,⁶ most of which is located in the lowland pastoral areas affecting pastoralists in various ways.⁷

Therefore, like past regimes, the current Government focus is on the investment ignoring the issue of pastoralists. Such position has attracted the interest of a number of studies that have analyzed the pull factors, features, magnitude and impacts of the investment in general and on pastoralist in particular⁸ and argued for the land right of pastoralists using different approaches, believing the lack of formal recognition of pastoral communal lands is the reason why such lands are being subjected to appropriation. While this thesis believes proper legal recognition is the first crucial step in the right direction, it also believes law by itself is not a panacea for all the land problems of pastoralists, including appropriation for the purpose of the investment. This is

⁵ For detail on the imperial and *Derg* regimes see for instance, Chala Dechassa & Terefe Tolosa (2015), “The Contribution of Agriculture to Development: A Critical Review in Ethiopian Context”, *The International Journal of Social Science*, 32:1, pp. 54 - 66, <<https://www.tijoss.com/.../6chala.pdf>> (accessed 29 July 2016); Ren’e Lefort, ‘The Great Ethiopian Land-Grab: Feudalism, Leninism, Neo-liberalism...’ (2011), <<http://www.opendemocracy.net/ren>> (accessed 27 December 2016); Steven Davies (2008), “The Political Economy of Land Tenure in Ethiopia”, University of St. Andrews, Thesis Submitted for the Degree of PhD, <<http://research-repository.st-andrews.ac.uk/>> (accessed 6 February 2017), pp. 187 and Berihun, cited above at note 2, pp. 6 & 7.

⁶ Kerstin Nolte & et al, ‘International Land Deals for Agriculture. Fresh insights from the Land Matrix: Analytical Report II’ (2016), <www.landmatrix.org/> (accessed 8 December 2016), pp. 17 & 18 and Bekele, M.S. (2016), “Economic and Agricultural Transformation through Large-Scale Farming: Impacts of Large-Scale Farming on Local Economic Development, Household Food Security and the Environment in Ethiopia”, Leiden University, <<http://hdl.handle.net/1887/43731>> (accessed 1 January 2017), pp. 52, 61, 64 & 65 - 67.

⁷ See for instance, Abebe & et al, cited above at note 1, pp. 11; Bekele, cited above at note 6, pp. 63 & 70; Daniel Behailu (2015), “Large-Scale Land Acquisition in Ethiopia- Towards Attracting Foreign Direct Investment” *JLAEA*, 3:1, pp. 279 - 295; Giulia Barbanente & Emma Aisbett (2016), “Large-Scale Land Acquisitions and Rural Development: Empirical Evidence from Ethiopia” <<https://www.conftool.com/>> (accessed 6 December 2016), pp. 10; Fana Gebresenbet (2016), “Land Acquisitions, the Politics of Dispossession, and State-Remaking in Gambella, Western Ethiopia”, *Africa Spectrum*, 51:1, pp. 5 - 28, <www.africa-spectrum.org> (accessed 15 September 2016); James Keeley & et al, *Large-Scale Land Deals in Ethiopia: Scale, Trends, Features and Outcomes to Date* (2014), <www.Pubs.iied.org/1257511ED> (accessed 29 June 2016), pp. 13, 15 & 46 and Dessalegn Rahmato (2011), “Land to Investors: Large-Scale Land Transfers in Ethiopia” <www.landgovernance.org/.../> (accessed 15 June 2016), pp. 6 - 7.

⁸ For instance see the studies by Bekele, cited above at note 6; Daniel, cited above at note 7; Giulia & Emma, cited above at note 7; James & et al, cited above at note 7; Dessalegn, cited above at note 7; Tsegaye Moreda (2016), “Large Scale Land Acquisitions, State Authority and Indigenous and Local Communities: Insights from Ethiopia”, *Third World Quarterly*, 38:3, pp. 698 - 716, <www.tandfonline.com/doi/full/10.1080/01436597.2016.1191941> (accessed 5 January 2017) and Tom Lavers, ‘The Role of Foreign Investment in Ethiopia’s Smallholder-Focused Agricultural Development Strategy’ (2011), LDPI Working Paper 2, <www.plaas.org.za/sities/.../WP%2002.pdf> (accessed 29 June 2016), pp. 5 & 14.

because even if the Government were to correct the contradiction in the Federal Rural Land Proclamation which is creating a problem on the land right of pastoralists, it may in practice continue to deny recognition for their occupancy. So there is a need to probe the underlying notions behind the legal provision that shows why the Government still fails to adhere to the constitutionally guaranteed land right of pastoralists if one is to effectively argue against any wrongs in such notions and for the recognition of the land right of pastoralists, which most of the studies have not tried to do.

Moreover, as experience to date shows, the focus only on one aspect of the phenomena (whether on the land right of pastoralists or the investment) is putting the two issues at a contradiction, entailing a danger for both the investment and pastoralists. As the stance of the Government is still intact regarding the investment and considering it is touching a very sensitive issue in Ethiopia, the issue of pastoral land, there was a need to investigate whether or not these two concepts can find a middle ground or are something that will always stand in contradiction as it has been the case so far; by analyzing them from the perspective of the right to development of pastoralists as a group and individuals and the obligation of the Government towards pastoralists and the nation as a whole. To the knowledge of the researcher, no study has tried to fully assess the investment and land right of pastoralists from such perspective and try to search for balance, triggering for the conduction of this study.

1.2. Statement of the Problem

In relation to the appropriation of pastoral communal lands for the purpose of foreign large-scale farmland investments, three main issues pop out. One is the legal status of land communally held by pastoralists. Two is the current status and future implication of such investments. Three, what is inherent in both is the issue of development, of the people of Ethiopia as a whole including pastoralists on one side and that of the pastoralists both as a group and individuals on the other, that all need proper balancing. Thus, the focus of this thesis is on the analysis of the communal landholding right of pastoralists in the national legal framework; its effect in relation to the investment and try to find the balance between the seemingly polarized issues of pastoralists land right and the investment by analyzing them from the perspective of the right to development of pastoralists as a group and individuals and the obligation of the Government towards pastoralists and the nation as a whole.

1.3. Objective of the Study

The study raises two issues; the land right of pastoralists and foreign large-scale farmland investment in the Country. While the Government focuses on the investment and ignores the issue of pastoralists, others focus on assessing the impacts of the investment so far and challenge the expropriation of pastoral lands for the purpose of the investment. These two positions suffer from extreme focus on one aspect of the phenomena, but experience to date has shown such thinking is putting the two issues at a contradiction. Thus, the main objective of the study is finding the balance between the seemingly polarized issues (land right of pastoralists and the investment) by tackling them from the perspective of pastoralists' right to development both as a group and individuals and the obligation of the Government towards pastoralists and the nation as a whole. Based on this, the study has forwarded the following specific objectives;

- To assess the current legal status of pastoralists communal landholding; identify the problems and continuities from the past; the underlying thinking behind the legal framework and the wrongs in such thinking; the effect of the legal status in relation to the investment and identify the best approach to argue for the land right of pastoralists in Ethiopia.
- To examine the past and present stance of the Government regarding the investment; the details, status and impacts of the investments focusing on those located in pastoral areas and establish the relationship between such investments and the land right of pastoralists.
- To identify the reasons for contradiction between the investment and land right of pastoralists by testing the justifications, perceptions and aim behind and manner of Government allocation of pastoral lands to foreign farmland investors against the human right approach to development and the legal requirements for expropriation as provided in the Constitution and subsidiary laws.
- To point to the necessary shifts that should be made in order to struck a balance between the land rights of pastoralists and the investment.
- To shed light on the divergent views within the pastoral community about land and livelihood and indicate how the issue of development should be entertained.

1.4. Research Questions

Based on the above objectives, the study has raised and addressed the following questions.

- What is the legal status of pastoral communal lands in Ethiopia from past to present? What are the continuities from the past? What are the real reasons and messages behind the legal status? Are they founded? What is the effect of the legal status in relation to the investment? From which perspective the right to land of pastoralists could be best argued in Ethiopia?
- What is the past and present stance of the Government regarding the investment? What are the details and impacts of the investment to date and implications for the future? What is the relationship between the investment and land rights of pastoralists?
- What are the justifications, perceptions, aim behind and manner of Government allocation of pastoral lands to foreign farmland investors? What are their contradiction when analyzed in terms of the right to development of pastoralists and the legal requirements for expropriation? What are the shifts the Government has to make to create the balance between the investment and right and interest of pastoralists?
- Is there a change in perception of land and livelihood within the pastoral community?
- In whose developmental ideology are the pastoralists supposed to develop?

1.5 Significance of the Study

Foreign large-scale farmland investment is a hot and debated issue in Ethiopia. The Government is set in the belief of the investment, ignoring the issues being raised by studies and affected communities. It is true that the Government has to re-evaluate its approaches towards the investment; however it is not something that is going to be cancelled out from its dictionary altogether, at least any time soon. On the other side, the investment is touching a very sensitive issue in Ethiopia, pastoral land right. And the Country's history is evident of what happens when aggravation over land escalates. A Pastoralist elder recently expressed the gravity as “the coming generation might rise with the motto land to the pastoralist.”⁹ Thus, focusing only one side of the

⁹ A joint Amharic Publication by the Ministry of Federal and Pastoralist Development Affairs (MoFPDA), Somalia Region and Pastoralist Forum Ethiopia (PFE), ‘The 16th Ethiopian Pastoralist Day’ (25 January 2017), Addis Ababa, pp. 31, (translation mine).

coin (either on pastoralists land right or the investment), is going to lead to the destruction of both. This study has thus tried to show the shifts the Government has to make so that the two issues can complement rather than contradict each other. However, the study recognizes the complexity of the issues and does not aim to provide all the answers but rather provide the base for other studies to explore the issues in depth.

1.6 Research Methodology

The study raised two issues; the land right of pastoralists and foreign large-scale farmland investment and find the balance between the two by tackling them from the perspective of pastoralists' right to development. For these purposes, it has examined the relevant domestic and international laws related to land right, farmland investment and the right to development. In addition, the study has examined various national and international books, articles, journals, reports and Government policy documents that are believed to be relevant to the objective of the research. It also includes primary data obtained from the Ethiopian Investment Commission and Ministry of Livestock and Fisheries. To get the facts on the ground, the study has also conducted semi-structured interviews with key officials and experts in the relevant Federal Government offices like the former Agricultural Investment Land Administration Agency, Pastoralists Affairs Standing Committee, Ministry of Federal and Pastoralist Development Affairs and Ethiopian Agriculture Research Institute; pastoral development experts found in organizations that works for the development of pastoralists and pastoralists from different regions of the Country and happens to be in Addis Ababa for a short duration.

1.7 Scope and Limitation of the Study

The study is concerned with foreign large-scale farmland investments in pastoral areas, specifically on pastoral communal lands. Thus, it does not deal with investments undertaken by foreign investors in other parts of the country and those undertaken by local investors and the Government, including on other communal lands. However, most of the discussions presented here will have significance for those investments and communal lands too.

Due to time constraints the study is geographically limited to resources found in the Capital city Addis Ababa. However, adequate information was gathered for the study through primary and secondary sources.

1.8 Organization of the Study

This study contains five parts. Chapter one provides an introduction and background of the study.

Chapter two gives general overview of Ethiopian pastoralists; the pastoralism and customary communal ownership systems and the human right approaches to land rights in the international human right arena. The main part discusses the legal status of pastoral communal lands under the three successive regimes, focus being on the current. And it identifies the continuities in the claim of the State over pastoral lands; the problems in the land laws of the country and the effects on the right of pastoralists.

Chapter three assesses the background, current trends and status of foreign large-scale farmland investment in the Country, focusing on those in the lowland areas, specifically affecting pastoralists. By so doing, it makes the connection between the investment and land right of pastoralists.

Chapter four is all about trying to find the balance between land right of pastoralists and foreign farmland investment, by tackling the issue from the perspective of pastoralists' right to development and the obligation of the Government towards pastoralists and the nation as a whole. For this purpose, the responses from interviewees and data obtained from recent empirical studies have been analyzed in terms of the legal frameworks for land and development rights as provided in the Constitution and subsidiary laws of the Country.

Chapter five provides the concluding remarks along with proposed recommendations.

The overall conclusion and recommendation is that; one, when an argument is made for the land right of pastoralists a focus should be on the constitutional provision that provides pastoralists communal land use right and protection against displacement and probing the perceptions behind the lack of formal recognition of pastoral landholding in subsidiary laws, thus to effectively argue against any wrong ones. Otherwise formal recognition on paper alone will not guarantee tenure security. Two, the reasons why and the manner how the Government is pushing foreign large-scale farmland investments in pastoral areas goes against the right to development of pastoralists and the legal requirements for expropriation, thus negatively affecting pastoralists

and creating contradiction between the investment and the right of pastoralists. Thus, in order to struck a balance, the Government should align its justifications, perceptions and aim behind and manner of transferring pastoral lands to foreign farmland investors with the requirements of the right to development, land and expropriation of lands for investment purposes as provided in the Constitution and subsidiary land and expropriation laws. And basing decisions on studies than perceptions one has can go a long way in creating the balance.

Chapter 2: Legal Frameworks for Land Rights of Ethiopian Pastoralists

2.1 Introduction

Pastoralism is “a system of mobile livestock production that makes wide-ranging use of grazing lands in arid and semi-arid environment that does not uphold sustainable crop cultivation.”¹⁰ People who are engaged in such production system, called pastoralists, are found in millions all over the world and in greatest number in Africa, including Ethiopia. One of the major problems traditional pastoralists share is lack of formal recognition of their communal land right.¹¹ In Ethiopia too, since imperial times, although the country has undergone political and development ideology changes, its legal and policy stance against pastoralists has remained more or less the same and the State claim over pastoral lands continued uninterrupted. The current Constitution has given pastoralists communal use right and protection against displacement but subsidiary laws have gone in contrary which significantly affects pastoralists land rights as this thesis tries to show from farmland investment angle.

After giving a brief overview of Ethiopian pastoralists, the chapter first discusses land right in the international legal arena. The next and main parts dwell on the legal status of land communally held by pastoralists and how it affects them. Finally, summary will be drawn.

2.2 General Overview of Ethiopian Pastoralists

Pastoralists are found in most of the regional states, the majority being in the typical arid and semi-arid lowland parts of Somali, Afar, Oromia and Southern Nations, Nationalities and Peoples (SNNP)¹² and others in Gambella, Benishangul-Gumuz and Tigray regions. They

¹⁰ Yohannes & Mahmud, cited above at note 3, pp. 1.

¹¹ Martin Lopez (2016), “The Rights of Pastoralist Peoples. A Framework for their Recognition in International Law”, *The Age of Human Rights Journal*, 6, pp. 83 - 107, <<http://www.revistaselectronicas.ujaen.es/index.../2329>> (accessed 28 August 2016); FAO, *Improving Governance of Pastoral Lands: Implementing the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2016), Governance of Tenure Technical Guide no. 6, <www.fao.org/3/a-i5771e.pdf> (accessed 25 September 2016), pp. 5 & 11 and UNDP, ‘Integrated Dry Lands Management’ (2015), Proceedings of the High Level Policy Forum, Semera, Afar Regional State, 6 - 7 March 2014, <www.undp.org/.../> (accessed 15 September 2017), pp. 6.

¹² Lemessa, cited above at note 3, pp. 19.

comprise 29 different ethnic groups; accounting for 12% of the total population of Ethiopia in 61% of the total land mass of the country.¹³

Traditional pastoralists are categorized as nomadic (that solely relies on mobile livestock production); transhumant (in addition often have a permanent base and produce some crops primarily for own consumption) and agro-pastoralists (settled pastoralists who cultivate sufficient areas to feed their families, but livestock production in nearby grazing areas is still a valued part).¹⁴ All three are found in Ethiopia, the majority being nomadic,¹⁵ thus livestock is their primary source of livelihoods although increasingly many are “adopting agro-pastoral livelihoods in response to several natural and policy-induced constraints.”¹⁶ Their mobile livestock production is dictated by the climate of the area, characterized by ‘variable and unpredictable rainfall’ and ‘high temperature’ making the quality and availability of main pastoral resources like pasture and water unpredictable and sedentary mode of crop production difficult or impossible.¹⁷

For pastoralists, land consists of the resources required to sustain mobile livestock production such as “pastures, watering points and the movement corridors that linked together seasonal grazing areas, pastoral settlements or encampments.” And have socio-economic, cultural and spiritual significance.¹⁸ Since time immemorial pastoral lands in Ethiopia have been held under clan based customary communal tenure, whereby ownership and possession rights are vested in the whole members of a given clan. Access and use is regulated through traditional rules and

¹³ A joint Amharic Publication by the MoFPDA, PFE and Pastoralists Affairs Standing Committee, ‘Ethiopian Pastoralist Day’ (January 2017), Addis Ababa, pp. 3, (translation mine) and Mohammed Yimer ‘Sedentarization and Drought Resilience: Government Strategies to Support Pastoralist Livelihoods in Ethiopia’, in Yohannes & Mahmud, cited above at note 3, pp. 244 - 274.

¹⁴ FAO, ‘Pastoralism in the New Millennium’ (2001), Animal Production & Health Paper No. 150, <<http://www.fao.org/docrep/005/Y2647E/Y2647E00.HTM>> (accessed 30 January 2016).

¹⁵ Abebe & et al, cited above at note 1, pp. 3.

¹⁶ WB, ‘Ethiopia: Pastoral Community Development Project: Phases I and II’ (2016), Project Performance Assessment Report No. 104210-ET, <<https://ieg.worldbankgroup.org/.../ppar>> (accessed 1 January 2017). For detail on the constraints, See, Abebe & et al, cited above at note 1, pp. 6 - 12.

¹⁷ Tigistu Gebremeskel & et al (2016), “Woreda (District) Participatory Land Use Planning in Pastoral Areas of Ethiopia: Development, Piloting and Opportunities for Scaling-Up” <<https://www.conftool.com/.../>> (accessed 15 April 2016), pp. 5 & 7.

¹⁸ FAO, cited above at note 11, pp. 103 & 104.

regulations and administered by customary institutions headed by traditional elders.¹⁹ Though such communal ownership rights have legitimacy under the customary rules of tenure, such tenures have not gained any legal recognition, which makes their existence *de facto*.²⁰

2.3 Land Right under the International Legal System

In international human rights law, there is no such thing as the right to land, rather land has for long been treated as one form of property and governed by such provisions. Moreover there is no comprehensive legal document that deals with issues concerning land right; is largely left to domestic frameworks.²¹ However, due to the importance of land for the realization of various human rights and the grave violations that arise in relation to it, there is a growing consensus that treating land as simply one form of property is not enough. As a result, through interpretation of the existing provisions, individual and group based arguments for land right are being forwarded.²² These include, access to land and security of tenure for the realization of the right to an adequate standard of living encompassing housing, food, water and health rights, which are necessary for the realization of the right to life; the right to work, to enjoy one's own culture; to self-determination; to sustainable development and environment and land as part of the right of women; indigenous peoples, minorities and other people who rely on the land, including pastoralists.²³

Such understanding can significantly contribute to the status of land right. However, as those forwarding them also agree, they alone cannot provide for the needed effective protection of land

¹⁹ Abebe & et al, cited above at note 1, pp. 3 and Mohammad, cited above note 1, pp. 90 - 91.

²⁰ Habtamu Ouma (2015), "Customary Land Ownership and Its Impact on Government Interventions: The Case of Peri-Urban Areas of Jig-Jiga Town", Addis Ababa University, Thesis Submitted for the Degree of Masters of Arts in Sociology, <www.aau.edu.et/.../3.Habtamu%20ouma.p> (accessed 15 September 2016), pp. 90.

²¹ Robin Ramsahye, 'The Human Right to Land: A Case of Too Many Rights Spoiling the Broth or a Recipe for Justice?' (2016), <www.Voelkerrechtsblog.org/the-human-right-to-land/> (accessed 1 November 2016) and Jeremie Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land' (2013), <www.conectas.org/en/actions/sur-journal/issue/18/1000434-land-rights-as-human-rights-the-case-for-a-specific-right-to-land> (accessed 1 November 2016).

²² *Ibid.*

²³ As constrained by word limit, the thesis will not go in depth of these approaches rather reference is made to Robin, cited above at note 21; Jeremie, cited above at note 21; MRG & University of East London (2015), 'Moving towards a Right to Land: The Committee on Economic, Social and Cultural Rights' Treatment of Land Rights as Human Rights', <www.minorityrights.org/.../MRG_Rep_> (accessed 31 January 2017), pp. 5 - 15 and Thea Gelbspan & Vijay K. Nagaraj, 'Seeding Hope? Land in the International Human Rights Agenda, Challenges and Prospects' (2012), ESCR-Net Working Paper, <<https://www.escr-net.org/ESCR->> (accessed 29 January 2017), pp. 1-10.

right, calling for a law that clearly articulates the right of people and obligation of States in relation to land. Though a number of soft laws are taking the initiative, due to the complexity of the issue and the various challenges surrounding it, is a long way before a specific right to land is recognized in a binding international instrument. Nevertheless the hope of its realization is stronger now than ever.²⁴

Amongst binding international human right instruments, only the International Labour Organization (ILO) Convention No. 169 of 1989 on Indigenous and Tribal Peoples' Rights specifically mentions pastoralists and provides for the recognition of their rights of ownership and possession over the lands which they traditionally own or use or occupy.²⁵ However, in the specific case of Ethiopia, arguing for land right of pastoralists from indigenous perspective does not seem to be the effective way. First, Ethiopia is not a party to the Convention.²⁶ Second, the peoples' ownership of land concept embedded in the current Constitution, as will be discussed in the next part, does not allow to argue for pastoralists ownership right over specific part of the Country's land. Thus, the approach to follow should be to argue for the respect of their constitutionally recognized communal use right supporting it by the human right approaches as Ethiopia is a party to most of the core international human right instruments and had also incorporated various human right provisions in the Constitution.²⁷

2.4 Pastoralists Land Right under the National Legal system

2.4.1 Imperial Times

Starting from the 19th century Emperor Menelik II conquest and incorporation of the lowlands into feudal Ethiopia state, the rulers disregarded the pastoral customary communal tenure and claimed formal ownership of pastoral lands.²⁸ Emperor Haile Selassie strengthened such claim

²⁴ Martin, cited above at note 11, pp. 88 - 89 & 98; Robin, cited above at note 21 and Thea & Vijay, cited above at note 23, pp. 4, 5, 11 & 12.

²⁵ Martin, cited above at note 11, pp. 86. See also International Labour Office, 'A Manual on the ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169)' (2003), <pro169.org> (accessed 28 December 2016), pp. 29 - 34.

²⁶ ILO, 'Countries that have not Ratified the Convention', <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::O:11310:P11310_INSTRUMENT_ID:312314:NO> (accessed 31 January 2017).

²⁷ The Constitution, cited above at note 3, See chapter three.

²⁸ Wibke & et al, cited above at note 2, pp. 6 - 9.

through various land laws that meant to modernize the land tenure systems of the country in favor of State and private tenure.²⁹ Pastoral lands were labeled as ‘unsettled’ or ‘permanently uncultivated’, thus as ‘no-man lands’ that belongs to the State. For instance, Art 130(d) of the 1955 Constitution states,³⁰

All property not held and possessed in the name of any person, natural or juridical, including all land in escheat, and all abandoned properties... and all grazing land... are State domain.

The above provision was reinforced by Art 1194 of the 1960 Civil Code of Ethiopia (the Code) that made lands not privately owned, part of the State domain.³¹ However, pastoral tenure operated *de facto* with State tolerance till the State developed interest over pastoral areas realizing its potential for various economic activities,³² including large scale irrigated farming.

2.4.2 Derg Regime

The *Derg* regime through the Public Ownership of Rural Lands Proclamation abolished all the previous tenures including customary, and declared all rural land the collective property of the Ethiopian People,³³ Thus, all lands including pastoral lands fall under the *de facto* control of the State which made the situation no better for pastoralists.³⁴ However, it gave them “*possessory rights over the lands they customarily use for grazing or other purposes related to agriculture.*”³⁵ However, contrary to this, throughout its regime claimed pastoral lands as vacant,

²⁹ For detail, see *Id.*, pp. 10 and Daniel W. Ambaye (2015), “Land Rights and Expropriation in Ethiopia”, Royal Institute of Technology, Doctoral Thesis, *Springer Theses*, <www.springer.com/gp/book/9783319146386> (accessed 21 December 2016), pp. 48 - 52.

³⁰ Berihun, cited above at note 2, pp. 7.

³¹ Though the Code gave minimal recognition for the use of customary communal lands by communities, it was ignored in practice. See, Muradu, cited above at note 2, pp. 12 & 19 - 20 and the Civil Code of the Empire of Ethiopia, 1960, Art 1493 (2) & 1498 - 1500, Proc. No. 165, *Neg. Gaz.*, Year 19, no. 2.

³² Johan Helland (2006), “Pastoral Land Tenure in Ethiopia” <<https://www.mpl.ird.fr/Helland.pdf>> (accessed 15 December 2016), pp. 9, 10 & 14 - 15.

³³ Public Ownership of Rural Lands Proclamation, 1975, Art 3 (1 & 2), 6 (3), 20 & 21, 25, 32, Proc. No. 26, *Neg. Gaz.*, Year 34, no. 26. But the pastoral customary tenure continued to operate *de facto*. See, LANDac, ‘Food Security and Land Governance Factsheet: Ethiopia’ (2016), LANDac Factsheet Mali, <www.landgovernance.org/20160608> (accessed 27 January 2017), pp. 4.

³⁴ Berihun, cited above at note 2, pp. 7.

³⁵ The 1975 Rural Land Proclamation, cited above at note 33, Art 24.

to be used for settlement projects and other economic activities.³⁶ The claim was strengthened by the 1987 Constitution which recognized only State, cooperative and private ownership and declared all natural resources, in particular land, minerals, water and forest as State property.³⁷ Moreover, its long term plan was settling pastoralists for farming purposes.³⁸ Thus, at the end the regime was no different from its predecessor.

2.4.3 Current Status

Till the Constitution making, Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) Government continued with the *Derg* land policy.³⁹ Concerning land ownership, Art. 40 of the FDRE Constitution declares,

*The right to ownership of rural land and urban land, as well as of all natural resources is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia.*⁴⁰

Within the framework of common ownership, pastoralists are given “*a right to free land for grazing and cultivation as well as the right not to be displaced from their own lands.*” Thus, like peasants they have usufruct right without time limit, termed ‘holding right’, that gives all rights except sale and other means of exchange.⁴¹ The Constitution has made a progress as it is the first Constitution that explicitly gives pastoralists use right and protection against displacement.⁴² However a cumulative reading of Art 40 (3) and (5) shows, it has not recognized pastoralists’ customary communal tenure system which vests land ownership and possession over a specific area in a specific pastoral group, to the exclusion of others. This is because it made every Nation, Nationality and People the common owners of all lands, including pastoral within the territory. On this point, the thesis agrees with the explanation forwarded by Muradu;

³⁶ Muradu, cited above at note 2, pp. 20.

³⁷ The Constitution of the Peoples Democratic Republic of Ethiopia, 1987, Art 12 - 15, Proc. No. 1, Neg. Gaz., Year 47, no 9.

³⁸ The 1975 Rural Land Proclamation, cited above at note 33, Art 27. The plan was to settle all pastoralists in 1982. See, Abebe & et al, cited above at note 1, pp. 8.

³⁹ Daniel W., cited above at note 29, pp. 63.

⁴⁰ The Constitution, cited above at note 3, Art. 40 (3).

⁴¹ *Id.*, Art. 40 (3 - 5) and the Federal Rural Land Proclamation, cited above at note 4, Art 2 (4) & 7 (1).

⁴² Lemessa, cited above at note 3, pp. 39.

Collective ownership implies the ownership of each and every nation, nationality and people touches upon each and every particle of the Ethiopian territory. In the course of this collective ownership scheme, none of these ethnic groups considered as part of this collective scheme can localize their ownership interest and assert that they are owners, either in sole or joint, of a specific resource. Hence, there is nothing in this text that makes different communities in Ethiopia owners of the specific resources. To say that communities are collective owners of land and natural resources found in Ethiopian territory irrespective of the specific location of such resources and to say that such communities are owners of the specific resources they customarily utilize are different things. The Constitution stands for the former but not for the latter. It is true that the Constitution gives primacy to peasants and pastoralists when it comes to access to land for settled agriculture and pasturing.... But the usufruct right over their land is a general one; it is not related to any specific plot of land.⁴³

Of course, the above understanding may not be supported by all as there is no agreement on the tenure type adopted by the Constitution and land ownership is localized by most.⁴⁴ However, a look at the Federal Rural Land Proclamation affirms that customary tenures are not recognized. The Proclamation in its preamble admits the existence of pastoral customary tenure, but clearly shows its intention of replacing it as it states “...encourages private investors in pastoralist areas where there is tribe based communal landholding system” as one of its purpose.⁴⁵ Moreover, the way it defines State and communal holding shows it is making itself the owner of all customarily held communal lands, including that of pastoralists’, to be then give to communities, which in effect is creating a new concept of communal holding. It defines State holding as “*rural land*

⁴³ Muradu, cited above at note 2, pp. 16.

⁴⁴ In literatures and some laws (e.g. Art 5 (3) of the Federal Rural Land Proclamation), it is mostly expressed as ‘State or Government’ or ‘public or collective’ ownership. In laws and literatures of other countries these terminologies are used interchangeably and at other times to mean different tenures. According to Daniel, “‘State or Government ownership’ seems to denote the ownership of land by the political body, a central or municipal level, while ‘public or collective ownership’ seems to signify the ownership of land by all the people or by the local community.” Of course *de facto* they all mean the same, as citizens will only have use right and it is the Government, which holds the ultimate administration and allocation power, as also the case in Ethiopia. See Daniel W., cited above at note 29, pp. 33 - 35 and the Constitution, cited above at note 3, Art 40 (3), 51 (5), 52 (2) (d) & 89 (5). The disagreement about Ethiopia’s land tenure system seems to emanate mostly from interpretational differences of Art 40 (3) and such practical considerations.

⁴⁵ The Federal Rural Land Proclamation, cited above at note 4, See Preamble.

demarcated and those lands to be demarcated...and includes forest lands, wildlife protected areas, state farms, mining lands, lakes, rivers and other rural lands” which basically means all lands minus those held in private and defines communal holding as, “rural land which is given by the government to local residents for common grazing, forestry and other social services.”⁴⁶ Thus, “.... ‘Communal land’ is given by the Government in the sense of not recognition but creation of the commons... the classic sense of ‘communal land’ has been statutorily abolished.”⁴⁷

On another note, the land right of pastoralists recognized under the Constitution is significantly weakened. The Constitution leaves the details on the implementation of pastoralists use right to subsidiary laws.⁴⁸ Given the difference in the nature of landholding by peasants and pastoralists, one would expect such laws would make detail provisions regarding the contents of the landholding rights of both. But the Federal Rural Proclamation is peasant focused. This by itself affects the pastoralists right as it leaves uncertainty on how their constitutionally guaranteed right could be implemented. What is more, it contains provisions that pose a threat to the right of pastoralists. The major one is Art 5 (3) that states, “*Government being the owner of rural land, communal rural land holdings can be changed to private holdings as may be necessary.*”⁴⁹ This provision is contradictory to the Constitution that makes the People of Ethiopia, not the Government, the owner of all lands in the Country. Of course the Constitution *de facto* makes the Government owner as citizens only have use right and it is the Government, which holds the ultimate administration and allocation power. But *de jure* is one thing and *de facto* another. The right holders are the Ethiopian people and what the Government has is “*the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development.*”⁵⁰

⁴⁶ *Id.*, Art 2 (12 & 13).

⁴⁷ Muradu, cited above at note 2, pp. 11.

⁴⁸ The Constitution, cited above at note 3, Art 40 (5).

⁴⁹ The Federal Rural Land Proclamation, cited above at note 4, Art 5 (3).

⁵⁰ See the Constitution, cited above at note 3, Art 40 (3), 51 (5), 52 (2) (d) & 89 (5) and also Daniel W., cited above at note 29, pp. 33 - 35

Moreover, those engaged in farming and use private plots and those engaged in pastoralism and use communal grazing lands are given the same constitutional right and protection with regards to the use of such lands. But Art 5 (3) of the Federal Rural Land Proclamation makes communal holders not enjoy the same right and security as private holders. While the Government is at least legally required to follow expropriation procedures if it wants to allocate a private holding to an investor or use it for other public purpose, there is no requirement in the case of communal holding as it does not fall under the act of expropriation; simply the Government gives, the Government takes.

The regional rural land laws, including those dominated by pastoralists are basically similar with the Federal Rural Land Proclamation when it comes to pastoralists land right. For one the majority is peasant focused and almost all provide similar definition to communal and State holding. And almost all contains a verbatim copy of Art 5 (3) of the Federal Rural Land Proclamation.⁵¹ Thus, despite the constitutional guarantee, current land laws are actually no different and pastoralists right no better from the past.

2.5 Effect of the Land Provisions on Pastoralists Right

The land provisions discussed above might have different effects on the land right of pastoralists. But to stay within scope, here the discussion will focus on the effect in relation to farmland investments, the detail of which will be discussed in the next chapter. Researchers that argue for the land right of pastoralists believe that lack of formal recognition of communal lands is the reason why such lands are being subjected to appropriation for farmland investments. Of course it is true that the legal framework makes it easy and even legal for the Government to allocate pastoral lands to investors. To begin with, the ultimate land administration power lies with the

⁵¹ For instance see, Southern Regional State Rural Land Administration and Use Proclamation, 2007, Art 2 (14 & 15) & 5 (14), Proc. No. 110, *Debab Neg. Gaz.*, Year 13, no. 10; Benishangul Gumz Regional State Rural Land Administration and Use Proclamation, 2010, Art 2 (14 & 15) & 6 (3), Proc. No. 85, no. 1 and The Revised Amhara Regional State Rural Land Administration and Use Proclamation, 2006, Art 2 (5 & 7), Proc. No. 133, *Zikre Hig*, Year 11, no. 18. The Oromia Rural Land Administration and Use Proclamation, 2007, Proc. No. 130, *Megeleta Oromia*, Year 15, no. 12, seems to give a relatively better protection to communal holdings as for instance it do not have a similar provisions to Art 5 (3) of the Federal Rural Land Proclamation, See Art 2 (4 & 5) & 11. The Afar Region Rural Land Administration and Use Proc. No. 49/2009, though is pastoral focused, nevertheless contains almost similar provisions to Art 5 (3) of the Federal Rural Land Proclamation, see Art 2 (16 & 18), 5 (9) & 11 (16). However, the provisions for pastoral communal lands have not yet been implemented. See, Sisay Awegichew & et al (2016), "Improving Security of Rights to Resources through Participatory Rangeland Management in Ethiopia" <<https://www.conftool.com/>> (accessed September 2016), pp. 4.

Government and it has also the mandate to allocate land for investors.⁵² Moreover, it has declared itself the owner of communal lands. The cumulative effect being, giving it power to easily and legally appropriate communal, including pastoral lands, without the need to establish public purpose (‘as it may think necessary’) and pay compensation, as expropriation laws do not provide for the valuation method of communal lands.⁵³

Mohammud even goes as far as saying “the rationale behind the 2005 Proclamation is that the communal landholding system of pastoralists hinders private investment and thus, in order to encourage investment, such a tribe-based traditional system of landholding should, at best, be eliminated or at least be denied legal recognition.”⁵⁴ The fact that the Proclamation was promulgated after the Government’s agricultural policy focus shift to commercial farming⁵⁵ and that majority of large-scale farmland investments are located in pastoral areas⁵⁶ as will be discussed in the coming chapter, may support his allegation. Similarly around the world communal lands of communities operating mostly without a legal status are targets for investment purposes.⁵⁷ In the face of all these, researchers are right to focus on formal recognition.

The solution forwarded by most is the recognition of pastoralists’ customary communal tenure system⁵⁸ and or others go for challenging the tenure system adopted by the Constitution that established *de facto* State monopoly, as citizens only have use right and it is the Government,

⁵² The constitution, cited above at note 3, Art 40 (6)

⁵³ See, Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation, 2005, Art 2 (3), 7 & 8, Proc. No. 455, *Neg. Gaz.*, Year 11, no. 43 and Payment of Compensation for Property Situated on Landholding Expropriated for Public Purposes Council of Ministers Regulations, 2007, Reg. No. 135, *Neg. Gaz.*, Year 13, no. 36. Even though the expropriation laws were to provide valuation methods, would not be much help for communal holders in general and pastoralists in particular as the Constitution provides compensation only for immovable property built and permanent improvements brought on the land by ones labor or capital, not to the loss of land use right, which usually excludes the chance of compensation for pastoralists that use the land mostly in its natural state. See, the Constitution, cited above at note 3, Art 40 (2 & 7).

⁵⁴ Mohammud, cited above at note 1, pp. 122.

⁵⁵ Muradu Abdo (2014), “State Policy and Law in Relation to Land Alienation in Ethiopia”, University of Warwick, Thesis Submitted for the Degree of Doctor of Philosophy in Law, <<https://go.warwick.ac.uk/74132/.../WRAP>> (accessed 15 September 2016), pp. 139.

⁵⁶ See for instance, Abebe & et al, cited above at note 1, pp. 11; Daniel, cited above at note 7, pp. 279, 285, & 293; Fana, cited above at note 7, pp. 7 & 11; Giulia & Emma, cited above at note 7, pp. 10 and James & et al, cited above at note 7, pp. 25.

⁵⁷ FAO, cited above at note 11, pp. 17.

⁵⁸ The detailed one in this regard is the article by Mohammud, cited above at note 1.

which holds the ultimate administration and allocation power. This thesis does not support the first solution as it goes against the people's ownership under the Constitution. Moreover, even customary tenure recognition cannot be a total guaranty against land alienation, as recognized commons in other African countries are still targeted for allocation to investors.⁵⁹ This also shows tenure security⁶⁰ is the result of different factors than just tenure type. A Government may choose to respect the occupancy of communities even without giving them formal recognition and on the contrary may also arbitrarily infringe upon ones legally held land, even under a private tenure.⁶¹ Thus a person with no tenure right might enjoy security while one with the highest tenure right may not. Of course this is not always the issue, the effort here is to show one should not be assumed to automatically result in the other, there are other issues to consider, thus those that focus on the second solution should also keep these in mind.

Legal recognition of communal use right in a country that respects the tenure right of its citizens has different significance. Of course, "no tenure right, including private ownership, is absolute. All tenure rights are limited by the rights of others and by the measures taken by States necessary for public purposes."⁶² As stated by Abebe, "There is no doubt that everywhere in the world Government needs land of some sort for various public purposes and one of the popular ways Government gets land is through land expropriation procedures. Thus, land expropriation is inescapable fact that every landholder should accept..."⁶³ However, it puts communal lands on equal footing with individual ones and controls the arbitrariness of States' actions and for the communal holders, provides legal basis for action.⁶⁴

In the specific case of pastoralists, legal protection has also additional significance as the lack of formal recognition of their land emanates from anti-pastoralism view of Governments'. So, the

⁵⁹ FAO, cited above at note 11, pp. 17.

⁶⁰ Is the "certainty that a person's rights to land will be recognized by others and protected in case of specific challenges" including from the Government. See, FAO, 'Land Tenure and Rural Development', <www.fao.org/docrep/005/y4307e/y4307e05.htm> (accessed 10 March 2017).

⁶¹ *Ibid.*

⁶² FAO, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' (2012), pp. 6.

⁶³ As quoted in Habtamu, cited above at note 20, pp. 101.

⁶⁴ FAO, cited above at note 11, pp. 89.

issue goes beyond land right, to how the Government sees these people and their production system. Thus, “legal acknowledgement demonstrates the intention of the State to recognizing pastoralism as a viable land-management system.”⁶⁵ Of course sorting out the detail of pastoral use right is not an easy task given the nature of the pastoralism production system.⁶⁶ But such considerations should neither limit the Government nor serve as a justification to not search best ways to do that and the good experience of some countries show it is possible.⁶⁷

2.6 Chapter Summary

For pastoralists, land consists of the resources required to sustain mobile livestock production which includes pastures, watering points, movement corridors and settlement areas. Since time immemorial such pastoral lands in Ethiopia have been held under clan based customary communal tenure, whereby ownership and possession rights are vested in the whole members of a given clan, to the exclusion of others. Though such ownership rights have legitimacy under the customary rules of tenure, such tenures have not been given any legal recognition in past and current Constitutions and land laws of the Country, making their existence *de facto*. The current Constitution was commendable for giving pastoralists communal use right and protection against displacement. However, the right is significantly limited by the Federal Rural Land Proclamation which is peasant focused and declared the Government the owner of rural land and gave it power to change communal rural land holdings to private holdings as may be necessary.

After the Constitution, the Government did not embark on claiming all peasant lands and start assigning new plots. It might have made distribution and redistribution but generally the peasants have continued to exercise use right over the lands they have been using. In the same token pastoralists have lived on and used their lands for generations, thus there was no reason to treat them differently. So, why did it continue to do? While this thesis believes proper legal recognition is the first crucial step in the right direction, it also believes law by itself is not a panacea for all as even with legally recognized tenure, the Government may ignore it or can still

⁶⁵ *Id.*, pp. 64 & 65.

⁶⁶ *Id.*, pp. 5. This technical guide has discussed in detail the practical challenges faced in the governance of pastoralists communal tenure and how countries can work around it.

⁶⁷ See Lemessa, cited above at note 3, pp. 48 & generally FAO, cited above at note 11.

expropriate with wide public purpose definition and insignificant compensation.⁶⁸ Thus, there is a need to try to uncover the veil and see the real reason why the Government is still failing to make specific laws despite constitutional guarantee and constant criticism, which this thesis in part tries to do.

⁶⁸ See, the Expropriation Proclamation and Regulation, cited above at note 53.

Chapter 3: Foreign Direct Investment in Farmland in Ethiopia

3.1 Introduction

The former chapter has identified the problems in the legal status of pastoral communal lands and tried to give indications to its effect. This chapter attempts to make the connection between such legal status and foreign farmland investment undertaken in the Country. To this end, it aims at giving a general overview of Foreign Direct Investment (FDI) in farmland in Ethiopia, focusing on those in the lowland areas, specifically affecting pastoralists.

3.2 FDI in Farmland in Ethiopia

3.2.1 Background

Both the imperial and *Derg* regime had the vision of developing the Country mainly through agriculture but believed in large-scale mechanized commercial farmers that produce high value export crops, than subsistence farmers. While the imperial regime entrusted the task mainly to foreign investors, the socialist *Derg* did not believe in the role of private sector, rather nationalized their investment and relied on producer cooperatives and State farms. However, both targeted the lowland areas, affecting pastoralists as they were displaced or their migration patterns for pasture and water blocked by such investments.⁶⁹

3.2.2 The New Farmland Rush

Even if foreign large-scale farming is not new to Africa, recent phenomena like the 2008 global financial crises and the increased demand for food and bio-fuels, among others have created a renewed interest in Africa's arable land, mainly those in Sub-Saharan Africa, including Ethiopia, which is perceived to be 'abundant' and 'unused'.⁷⁰ Thus, despite arguments against the

⁶⁹ For detail see, Berihun, cited above at note 2, pp. 6 & 7; Chala & Terefe, cited above at note 5, pp. 55 - 60; Ren`e, cited above at note 5; Steven, cited above note 5, pp. 187; Bekele, cited above at note 6, pp. 51, 52, 57 & 58; Fana, cited above at note 7, pp. 10 and Muradu, cited above at note 55, pp. 71.

⁷⁰ Dereje Teklemariam & et al (2016), "How Sustainable Is Transnational Farmland Acquisition in Ethiopia? Lessons Learned from the Benishangul-Gumuz Region", *sustainability*, 8:213, pp. 1 - 27, <www.mdpi.com/2071-1050/8/3/.../pdf> (accessed 8 February 2017) and Iwona Janczyk (2016), "Large Scale Land Acquisitions - the Opportunity or Threat for the Developing World?", *World Scientific News*, 57, pp. 513 - 518, <<http://psjd.icm.edu.p/psid/element/bwmetal.element.psjd-eb429bf4-1dab-488a-999f-2711c08b>> (accessed 15 February 2017). Weak land tenure security of the local population, that facilitate access to large tracts of land for investors is also identified as another significant pulling factor, for instance Ethiopia is mentioned as an example for this, See Kerstin & et al, cited above at note 6, pp. 20. For other pull factors, See Tsegaye, cited above at note 8.

existence of such land⁷¹ the majority of the investment is taking place in Africa.⁷² However, the current Ethiopian Government plan to attract investors is not something born out of the newly rush, but was there since coming to power. However, it used the opportunity presented as evidenced by the fact that the majority of the deals were concluded after 2007/2008.⁷³

3.2.3 The Current Government Attitude and Attempts to Attract the Investment

Since its early days, the Government has been guided by Agricultural Development Led Industrialization (ADLI) development strategy, despite criticism against it. Initially in the ADLI, agriculture, specifically small holder farming was thought to be the way to economic development, in and by itself and leading the way to industrialization; by enabling the Country achieve food self-sufficiency and provide the needed capital, labor, raw materials and market for the industry.⁷⁴

However as a result of various factors, after 2000 the Government shifted its focus to export oriented commercial farmers, believed to transform the Country's agricultural sector and bring accelerated economic growth.⁷⁵ The subsequent development plans were formulated based on this modification to ADLI. Generally their focus was on commercialization of the agricultural sector to produce high value export crops by supporting the development of commercial farming, among others by leasing out farmlands to investors and expecting farmers to make the shift to

⁷¹ Bram van Helvoirt & et al (2016), "Responsible business? The Contribution of Foreign Land-Based Agribusiness Investments to Local Sustainable Development in Africa" <<https://www.conftool.com/>> (accessed 15 April 2016), pp. 19.

⁷² Kerstin, cited above at note 6, pp. 9 & 16.

⁷³ Bekele, cited above at note 6, pp. 52, 61, 64 & 67 and Mulugeta Gebrehiwot Berhe (eds.), *A Delicate Balance: Land Use, Minority Rights and Social Stability in the Horn of Africa* (2014), (accessed 1 March 2016), pp. 310.

⁷⁴ Steven, cited above at note 5, pp. 193 - 198 and GDF, 'Democratic Developmentalism and Agricultural Development Led Industrialization', <www.grips.ac.jp/.../7final_Report_ch5.p> (accessed 29 July 2016), pp. 108, 109, 133 & 136.

⁷⁵ The major factors were, EPRDF party internal crisis in 2001 that led to the adoption of the developmental state ideology which focuses on fast economic growth than democracy; failure of the smallholders focus strategy to bring the demanded accelerated economic growth; the 2005 national election that made the party shocked and betrayed by the peasant masses whom was it focus since inception, and turn into 'model farmers' and especially into large-scale private investors (foreign investors being the capable ones for the job) to bring economic growth to be used as a new legitimization of its political power. For detail see, Ren'e, cited above at note 5 and Muradu cited above at note 55, pp. 102, 103, 106, 107, 127, 128 & 136 - 138. Others also raise pressure of donors like the World Bank for agricultural commercialization, see, GDF, cited above at note 74, pp. 110.

commercialization.⁷⁶ As a result, the Government attempted to attract the investment by providing large-scale lands with favorable conditions.

The Federal Government through the Ministry of Agriculture (MoA) (the former Ministry of Agriculture and Rural Development) had taken the mandate for the allocation and administration of land above 5000 ha and the respective regional states are responsible when it is less and not part of the land they submitted to the Federal land Bank.⁷⁷ However starting from 2012 Gambella and Benishangul Gumz regions were prohibited even from transferring such land sizes.⁷⁸

3.2.4 Details on the Investment

Private investors and private and Government owned corporations from different capital rich but land scarce countries have invested in the sector, however as the recent data obtained from Ethiopian Investment Commission (EIC) shows, in terms of the size of land acquired investors from Indian and Saudi Arabia are the leading ones.⁷⁹ Their primary target is on the crop than livestock sector.⁸⁰

In terms of magnitude, there is no consistency in data presented by different research papers.⁸¹ Despite the discrepancy in actual size, almost all the researchers referred in this thesis agree large

⁷⁶ See, Government of Ethiopia (2002), ‘‘Ethiopia: Sustainable Development and Poverty Reduction Program, 2002 - 2005’’, (SDPRP) (Addis Ababa: MoFED), pp. 36, 37 & 41; Government of Ethiopia (2006), ‘‘Ethiopia: Building on Progress - A Plan for Accelerated and Sustained Development to End Poverty, 2005/06 - 2009/10’’, (PASDEP), vol. i, (Addis Ababa: MoFED), pp. 44, 46, 47 & 67 and Government of Ethiopia (2010), ‘‘Ethiopia: Growth and Transformation Plan (2010/11- 2014/15)’’, (GTP I), vol. i, (Addis Ababa: MoFED), pp. 22 - 23, 45 - 47 & 54 - 55. See also, Bekele, cited above at note 6, pp. 60 & 61 and GDF, cited above at note 74, pp. 110 & 111.

⁷⁷ See, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, 2010, Art 19 (1) (o) & (2), Proc. No. 691, *Neg. Gaz.*, Year 17, no. 1. The 5000 threshold was set by a directive (No. 29/09) issued by the Council of Ministers, which also established a specific directorate for the task, the Agricultural Investment Land Administration Agency (AILAA) (the former Agricultural Investment Support Directorate) within the MoA, which was later confirmed by Regulation No. 283/2013. Various reasons related to problems in the regional states and the objective of setting uniform standard is given for the power transfer. See Daniel, cited above at note 7. See also, Dessalegn, cited above at note 7, pp. 10 - 12.

⁷⁸ LANDac, cited above at note 33, pp. 6. Reasons given concerning the two regions were the existence of corruption and poor land management. See Bekele, cited above at note 6, pp. 64.

⁷⁹ List of Licensed FDI projects (in Agricultural Sector) since October 29, 1995 - March 08, 2017, obtained from the EIC, on file with the author. See also, Bekele, cited above at note 6, pp. 67 and Dereje, cited above at note 70, pp. 2. For detail investing countries profile, see GRAIN, ‘‘The Farmland Grab in 2016: How Big? How Bad?’’ (2016), Annex 1- Land deals 2016, <www.grain.org/article/entries/5492> (accessed 8 December 2016), pp. 41 - 44.

⁸⁰ GRAIN, cited above at note 79, pp. 41 - 44 and James & et al, cited above at note 7, pp. 32. The Government also provides larger land for investors that are interested to invest in crops than livestock. See Dereje, cited above at note 70, pp. 9.

⁸¹ Reasons raised includes, ‘‘poor access to reliable information, the time periods the different estimations covered and land size considered’’. See, Bekele, cited above at note 6, pp. 65. And also, the variation in the size of land mentioned in the contract and

areas of land have been leased out to foreign investors. For instance according to the 2016 land matrix data, Ethiopia is among the top 20 targeted countries in the world; specifically ranking 3rd in number of concluded deals (i.e. 64) and 7th in area size agreed under the contract (i.e. 988,079 ha) and from Africa countries, ranks 1st in both aspects.⁸²

Table 1: Large scale farmland investments (> 500 ha) in the Country (1992-2013)⁸³

Region	Land size (ha)	No. of projects	No. of projects by foreigners	Land acquired by foreigners (ha)	Proportion of FDI out of total (%)	Regional distribution (%)*
Afar	47,744	48	8	25,150	52.7	2.3
Somalia	22,762	16	9	13,400	58.9	1.1
Tigray	109,318	397	36	57,030	52.2	5.2
Amhara	171,772	1,290	28	34,720	20.2	8.1
SNNP	311,502	1,408	50	207,316	66.6	14.7
Benishangul Gumz	600,254	306	41	243,350	40.5	28.3
Gambella	399,491	304	14	225,012	56.3	18.8
Oromia	458,292	929	85	193,432	42.2	21.6
Total	2,121,135	4,698	271	999,410	47.1	100

*Calculated as land transferred in each region divided by total land transferred to investors in the Country
Data Sources: Data sets of AILAA, EIC, Regional Investment Bureau, Regional Environmental Protection and Land Administration Bureau

As the above table shows, even though the numbers of foreign deals are less in number compared to the Country's total farmland investments, they acquire more than half of the size of land under the investment in each region except in Amhara and Oromia. This is because foreign investors are provided bigger size of land compared to the domestic ones (the average being

official documents and what is actually delivered, poor management and upgrading of data resulting in inaccuracy of figures. See, James & et al, cited above at note 7, pp. 22 - 23.

⁸² Kerstin, cited above at note 6, pp. 17 & 18.

⁸³ Bekele, cited above at note 6, pp. 65 - 67. This compilation was chosen for its relative comprehensiveness as it includes deals > 500 ha; between 1992 - 2013; includes all the investment regions; organized from various relevant offices at both the regional and federal level and helps to compare the magnitude of foreign deals to the total investments in the Country (undertaken by domestic investors and the Government itself).

3,688 ha vs. 479 ha)⁸⁴ arguing they are the ones better equipped to make a successful investment.⁸⁵

3.3 The Relationship between the Investment and Land Right of Pastoralists

Foreign farmland investments are located both in the high and lowland areas. However, the majority of the land and all that allocated by the federal Government are in the lowland predominately pastoralist areas.⁸⁶ This comes as no surprise considering the Growth and Transformation Plan (GTP) I had made an explicit plan to undertake large scale farming by “private investors in lowland areas where abundant extensive land exists.”⁸⁷ Even before the plan, the Federal Rural Land Proclamation explicitly provide encouraging private investors in pastoralist areas as one of its purpose.

The Government alleges the lands provided to investors are out of the vast tracts of ‘**unoccupied**’ or ‘**empty**’ or ‘**unused**’ or ‘**idle**’ or ‘*underutilized*’ lands, though such labeling is frequently contested.⁸⁸ There is no agreement as to how much land is actually ‘unused’. In one hand, the Government expresses ‘unused’ from settled agriculture perspective; by deducting the cultivated land from the total land suitable for cultivation at a given time.⁸⁹ According to recent figures out of the total 1.14 million ha of the Country’s land, 74.3 million ha are suitable for agriculture, but only about 24% are being cultivated.⁹⁰

The other way, ‘unused’ land is identified is through satellite images. This was how in 2009 AILAA identified close to 3.6 million ha of ‘unused’ land mostly in the lowlands (in Gambella (829,199), Benishangul Gumz (691,984), SNNP (180,625), Afar (409,678), Oromia (1,057,866)

⁸⁴ *Id.*, pp. 66.

⁸⁵ Dessalegn, cited above at note 7, pp. 12.

⁸⁶ See for instance, Abebe & et al, cited above at note 1, pp. 11; Daniel, cited above at note 7, pp. 279, 285, & 293; Fana, cited above at note 7, pp. 7 & 11; Giulia & Emma cited above at note 7, pp. 10 and James & et al, cited above at note 7, pp. 25.

⁸⁷ GTP I, cited above at note 76, pp. 47 & 54.

⁸⁸ Tsegaye, cited above at note 8 and Tom, cited above at note 8, pp. 5 & 14.

⁸⁹ Bekele, cited above at note 6, pp. 62; Dessalegn, cited above at note 7, pp. 6 & 10 and Tom, cited above at note 8, pp. 14 & 15.

⁹⁰ EIC, ‘Ethiopia at a glance’, <<http://www.investethiopia.gov.et/why-ethiopia/ethiopia-at-a-glance>> (accessed 10 January 2017) and Assefa Mulugeta (2016), “Ethiopia’s Experience in Reconciling Foreign Direct Investment with Small hold Farming” <www.unctad.org/...CI_MEM2_2016_Kondal> (accessed 28 October 2016), pp. 3, 4 & 10.

and Amhara (420,000) regional states), which they ‘voluntarily’ transferred to the Federal Land Bank.⁹¹ However such identification is contested as the satellite images identifies only cultivated lands and was seldom verified with the help of ground-testing. Therefore, both calculations disregard other significant communal land uses, which in the case of lowlands are those used by pastoralists and shifting cultivators (grazing, forest and bush lands) and leads to the argument that there is abundant unused land, to be handled out to investors without affecting the right of others.⁹² Moreover in the specific case of pastoralists, the use of such terminologies shows the disregard for the rotational land use system of pastoralists and also implies that the Government regard such land use as essentially ‘unsustainable’ or ‘inefficient.’⁹³ Therefore, in many cases the terminologies do not represent the reality and the lands transferred were actually part of the locals’ livelihoods.⁹⁴

Various reasons are forwarded as to why the lowlands are targeted. The Government raises the existence of vast amount of empty land suitable for the expansion of large-scale farming and the economic advantage of putting such lands to use.⁹⁵ Researchers on the other hand points to the shaky legal status of communal land holders that make them easy prey than private holders and a sparsely populated but fertile land with access to river water which makes it also demandable by investors. Some also argue the investment is used as a political instrument to exert control over such peripheral lands and integrate them to the center, as was also the case in the past.⁹⁶

3.4 Significance of the Investment

Around the world, including Ethiopia the impacts of land acquisitions by foreign large-scale farmland investments is a debated issue; despite some positive impacts being reported it is

⁹¹ Bekele, cited above at note 6, pp. 62 & 63 and James & et al, cited above at note 7, pp. 13 & 15. Some regions were said to be reluctant and had to be pressured to transfer the lands, See also Dessalegn, cited above at note 7, pp. 11.

⁹² Bekele, cited above at note 6, pp. 63 & 70; James & et al, cited above at note 7, pp. 13, 15 & 46; Dessalegn, cited above at note 7, pp. 6 - 7; Fana, cited above at note 7, pp. 15 and Tsegaye, cited above at note 8.

⁹³ Tsegaye, cited above at note 8 and Daniel, cited above at note 7, pp. 282.

⁹⁴ James & et al, cited above at note 7, pp. 45.

⁹⁵ GTP I, cited above at note 76; Daniel, cited above at note 7, pp. 282 and Muradu, cited above at note 55, pp. 253.

⁹⁶ Daniel, cited above at note 7, pp. 282 & 285 - 286 and for the political justification generally See Fana, cited above at note 7 and Tsegaye, cited above at note 8.

generally agreed the loss outweighs the gains and are given the name ‘land grab’.⁹⁷ To go in line with scope, here the state of the investment in Ethiopia is briefly assessed in light of some of the Government’s professed key objectives.

Even though large parts of the land given to investors are in the start-up phase,⁹⁸ various empirical studies have analyzed the impacts to date and made predictions. The conclusion is that anticipated benefits have not yet be realized at all or as expected as most of the investors have not met their contractual deadline and started operation and others developed far less than what they acquired, one reason being lack of capacity.⁹⁹ And even given full operation there are many reasons why the benefits will not likely be realized as expected, starting from their very contradictory nature. In addition they are criticized for other, like social and environmental impacts.¹⁰⁰ Having this in mind, the additional failure reasons for each anticipated benefits are as follows.

❖ *Creates job opportunities, particularly in the concerned localities*¹⁰¹

Especially in the lowlands, mechanized than labor intensive farms are promoted,¹⁰² thus employment opportunities are minimal. By alleging shortage of local expertise, investors employ expatriates; mostly leaving to nationals the seasonal daily labor works with low wage rates. And mostly in the lowlands, even such jobs go to others outside the locality. In the case of

⁹⁷ The term is generally used to explain deals concluded in violation of human right standards and principles and affect rather than benefit the local communities. For detail impacts from economic, social, cultural, environmental and human rights perspective, See Kerstin, cited above at note 6, pp. 37 & 39 - 51 and Iwona, cited above at note 70, pp. 514 - 517 and for Ethiopia See, Giulia & Emma, cited above at note 7, pp. 2 & 6 - 9; Daniel, cited above at note 7, pp. 290 - 293 and generally Bekele, cited above at note 6.

⁹⁸ Kerstin, cited above at note 6, pp. 17 & 18.

⁹⁹ Dereje, cited above at note 70, pp. 13. For other reasons see LANDac, cited above a note 33, pp. 9 and Government of Ethiopia (2015), “Ethiopia: Growth and Transformation Plan (2015/16 - 2019/20)”, (GTP II), vol. i, (Addis Ababa: MoFED).

¹⁰⁰ Azeb W. Degife (2017), “The Intricacies of Large Scale Agricultural Investment in Gambella Region, Ethiopia”, <<https://www.conftool.com/>> (accessed 22 March 2017), pp. 5 and Daniel, cited above at note 7, pp. 291-292.

¹⁰¹ Azeb, cited above 100, pp. 10.

¹⁰² Fana, cited above at note 7, pp. 11.

pastoralists, the cultural difference between pastoral and agricultural lifestyles is raised as one reason for this.¹⁰³

❖ *Promotes food security*¹⁰⁴

However, the Government encourages production for export and raw materials for industries. But ironically local demand is met through imports by spending the foreign currency earned.¹⁰⁵ Moreover the food security of those employed in the investments may increase despite its quality as a result of the increase in purchasing power, but it is the reverse for those directly affected but not benefited by the investments. In the case of pastoralists the partial or total loss of grazing land, transit corridors and access to water affects their food security as the land was their main source of employment and food.¹⁰⁶

❖ *Transfer of capital and earning of foreign currency*¹⁰⁷

Foreign investors are allowed to borrow a significant percentage of their capital from Ethiopian banks, which may not always be paid back.¹⁰⁸ Moreover, the investors and their expatriate employees are guaranteed the right to repatriate their profit along with various payments collected in relation to their business and employment respectively, in convertible foreign currency.¹⁰⁹ In this way the capital and currency earned through export may not stay in the

¹⁰³ Adil Yassin (2014), “Transnational Large Scale Agricultural Firms in Gambella Regional State, Ethiopia: Local Potentials, Opportunities and Constraints for Market Linkage and Contractual Farming Schemes”, <www.future-agricultures.org> (accessed 24 September 2016), pp. 16 & 28; Azeb, cited above at note 100, pp. 10 and Investment Proclamation, 2012, Art 37, Proc. No. 769, Neg. Gaz., Year 18, no. 63.

¹⁰⁴ Azeb, cited above at note 100, pp. 8.

¹⁰⁵ *Id.*, pp. 10 & 15; Adil, cited above at note 103, pp. 14 - 16; Daniel, cited above at note 7, pp. 290 and Council of Ministers Regulation on Investment Incentives and Investment Areas Reserved for Domestic Investors, 2012, Art 7, Reg. No. 270. Neg. Gaz., Year 19, no. 4.

¹⁰⁶ Bekele, cited above at note 6, pp. 129 - 164; Daniel Behailu, cited above at note 7, pp. 290 and James & et al, cited above at note 7, pp. 44 & 50.

¹⁰⁷ Dereje, cited above at note 70, pp. 2 and Azeb, cited above at note 100, pp. 8.

¹⁰⁸ Between 2008 - 2013 alone, 1.3 billion Ethiopian Birr was said to be loaned to 11 large-scale foreign farms, See the data in Bekele, cited above at note 6, pp. 74 - 75.

¹⁰⁹ The Investment Proclamation, cited above at note 103, Art 26.

country.¹¹⁰ Dessalegn also warns against the dependency in foreign capital, as “in the long run, is bound to lead to national as well as economic dependency.”¹¹¹

❖ ***Increases public revenue***¹¹²

However, land lease prices are extremely low.¹¹³ Moreover, investors are entitled to exemptions from income tax for the first five years which is extended for those investing in mainly pastoralist areas (Gambella; Benishangul-Gumuz; Afar, Somali, Guji and Borena Zones in Oromia and various zones in SNNP regions). And can also carry forward losses incurred during such periods. Exemptions also extend to customs duty on imports of machinery and equipment¹¹⁴ and tax for most of the exported products.¹¹⁵ So, one can imagine the amount of money forgone than collected.

❖ ***Transfer of know-how and technology to smallholders***¹¹⁶

Its achievability is questionable given the huge incompatibility between the two actors in terms of knowledge, capacity and type of crops produced.¹¹⁷ Particularly, the chance of integration is zero for pastoralists who are engage in a whole different production system; but the Government would argue they will once they are settled and start practicing farming the highlanders’ way, which raises its on issues.¹¹⁸

❖ ***Upgrade the overall standard of living in local communities, through the development of infrastructures being one***¹¹⁹

¹¹⁰ Foreign currency also escapes the country when machineries and inputs for the investment are imported taking advantage of the custom duty privileges, Adil, cited above at note 103, pp. 21.

¹¹¹ Dessalegn, cited above at note 7, pp. 27.

¹¹² Dereje, cited above at note 70, pp. 3.

¹¹³ *Id.*, pp. 12.

¹¹⁴ Investment Regulation, cited above at note 105, Art 5 - 15 and its Amendment, Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation, 2014, Reg. No. 312, *Neg. Gaz.*, Year 20, no. 62.

¹¹⁵ James & et al, cited above at note 7, pp. 38.

¹¹⁶ Bram & et al, cited above at note 71, pp. 11.

¹¹⁷ *Id.*, pp. 12 & 19 - 20.

¹¹⁸ Bekele, cited above at note 6, pp. 86 - 87.

¹¹⁹ *Id.*, pp. 63 and Dereje, cited above at note 70, pp. 2 - 3.

Since building of infrastructure is a contractual right given to the investors, they were generous in promise but not so in implementation. In fact, lack of infrastructure is constantly raised as one of the reasons why the investments could not materialize.¹²⁰ Moreover, through the change of grazing and cultivation areas to large-scale farming, the locals and regional economies generally incur losses despite the latter gaining new but minimal incomes in the form of land rates and income tax.¹²¹ The locals were affected and displaced without any or significant compensation to create alternative livelihood or being compensated by the jobs created, as explained above. Thus, the benefits gained accrue to investors and to the national economy in terms of for instance increased foreign exchange earnings, but how much of these benefit actually trickles down to those that stand at the losing side is questionable given the low status they are put in.¹²²

To add one finale note on the issue of significance, the major justification the Government uses to allocate lands (as huge as 100,000 ha, for more than 50 years, for a single investor), is that the “investments have benefits that are untapped in previous forms of land uses.”¹²³ However, the Government to date has not made a study to identify the possible options for the use of the Country’s different land types.¹²⁴ This was also confirmed in an interview with one official in Ethiopian Agriculture Research Institute (EARI), who added the Government organ responsible for farmland investments did not also make a feasibility study.¹²⁵ This shows the Government is playing a dangerous guessing game.

3.5 Is there a Change in Government Perception towards the Investment?

Local people directly affected by the investment have been showing their discontent to the extent of attacking and burning farmlands, incidents which even lead to death at different times and places.¹²⁶ The major one was the burning of private farmlands in the 2016 political unrest.¹²⁷

¹²⁰ Bekele, cited above at note 6, pp. 89; Daniel, cited above at note 7, pp. 293 and Dereje, cited above at note 70, pp. 10 & 12.

¹²¹ Bekele, cited above at note 6, pp. 72 - 83.

¹²² *Id.*, pp. 105 - 128; Tom, cited above at note 8 and Bram & et al, cited above at note 71, pp. 9 & 12.

¹²³ Bekele, cited above at note 6, pp. 74 & 92 and Daniel, cited above at note 7, pp. 286.

¹²⁴ Dessalegn, cited above at note 7, pp. 27.

¹²⁵ Interview with an Official in EARI, who wish not to be named, (April 2017, EARI Head Office, A.A).

¹²⁶ Daniel, cited above at note 7, pp. 293 and Bekele, cited above at note 6, pp. 101 - 103.

Also, the investments were not as successful as anticipated by the Government as most of them are not operational; out of the total 759 approved foreign agricultural investment projects, only 289 are operational, the rest are in the pre-implementation and implementation stage.¹²⁸ However, despite everything the Government stance against private farmland investments is still intact as reflected for instance in GTP II, that is going to guide the country till 2020. Though the plan has given more emphasis to smallholders than the former one, notes that “so far, the level of private investment in agricultural development is still at a low level relative to the Country’s potential, natural resources endowment and suitable land available for agriculture,”¹²⁹ and plans to change this scenario by enhancing the promotion of and allocation of land to large-scale domestic and foreign farmland investors. It specifically identified additional land for the investment and plans to raise the total land allocated to investors to 3.1 million ha by the end of 2019/20 and to increase the land under the Federal land bank.¹³⁰

Interview with an expert from EIC also confirms that the Government still promotes commercial mechanized farming especially export oriented or import substitution ones and allocates land to investors. What is different from 2012 onwards is that, there is more follow up and monitoring of the investors. As a result, there are instances where the regional or federal land administration office took back the land that was given to the investor or gave them warnings.¹³¹ Also data obtained from the Commission shows that until this day (the latest being March 8, 2017) licenses for FDI Agricultural investors have been issued.¹³² The land administration offices were also revising and canceling contracts and taking precautions in signing new ones; one being minding the amount of lands transferred at one time.¹³³

¹²⁷ “In the October 2016 political unrest an estimated 24 foreign companies have been attacked and suffered losses accounting in millions.” See, FDI Intelligence, ‘Violent Protest Could Spell the End of Ethiopia’s Impressive Upward Economic Trend’ (2016), <www.fdiintelligence.com/News/Political-unrest-hits-Ethiopia-FDI> (accessed 15 February 2017).

¹²⁸ Data from EIC, cited above at note 79.

¹²⁹ GTP II, cited above note 99, pp. 126.

¹³⁰ *Id.*, pp. 26, 71, 78, 82, 100, 104, 120, 127 & 132.

¹³¹ Interview with Redate Feleke, an Expert from Agricultural Investment Projects facilitation and Aftercare team, EIC, (April 2017, EIC Head Office, A.A).

¹³² Data from EIC, cited above at note 79.

¹³³ Adil, cited above at note 103, pp. 19 and Bekele, cited above at note 6, pp. 68 & 92.

The Prime Minister himself has recently expressed that increasing private sector participation in the agricultural sector would be prioritized.¹³⁴ Moreover, even though the Developmental Bank of Ethiopia which is the major financier had suspended loan provisions a year ago, it lifted the moratorium on loans to commercial farmers on January 27, 2017. Of course, the reason it had stopped in the first place was “a controversy involving financial maladministration in Gambella region”,¹³⁵ than due to the Government change of heart about the investments. Moreover, this year a new institutional arrangement has been made at the Federal level regarding agricultural investment. The AILAA and Ethiopian Horticulture Development Agency have been merged together and formed the Ethiopian Horticulture and Agricultural Investment Authority (EHAlA) directly accountable to the Prime Minister office. The aim was to give these sectors more focus and make them more successful.¹³⁶ Once the internal institutional arrangement is done, the new Authority will resume allocating farmland to investors.¹³⁷

3.6 Chapter Summary

Even if foreign large-scale farming is not new to Africa, recent phenomena like the 2008 global financial crises and the increased demand for food and bio-fuels, among others have created a renewed interest in Africa’s arable land, mainly those in Sub-Saharan Africa, including Ethiopia, which is perceived to be ‘abundant’ and ‘unused’. However, in Ethiopia even before this, the imperial and *Derg* regimes believed in the power of large-scale commercial farmers to bring development, though the latter did not believe in the role of the private sector. The current Government has inherited such belief and used the opportunity presented by the 2008 rush to attract foreign investors by allocating large-scale lands with favorable conditions. And one constant target for such investments is the lowland pastoral areas as also been the case in the past. This act is an extension of the shaky legal status of pastoral communal lands as all the three regimes claims ownership of pastoral communal lands.

¹³⁴ MoFA, ‘PM Hailemariam Attends the World Economic Forum at Davos, Switzerland’ (2017), <www.mfa.gov.et> (accessed 15 March 2017) and The Ethiopian Herald, ‘Ethiopia: Increasing Private Sector Agri Engagement key in GTP II’ (2015), <www.allafrica.com/stories> (accessed 15 March 2017).

¹³⁵ Addis Fortune, ‘Ethiopia: DBE Unfreezes Commercial Farm Loans’ (27 January 2017), <www.allafrica.com/stories/201702020642.html> (accessed 15 February 2017).

¹³⁶ Interview with Gizachew Tilhaun, officer at the now EHAlA (the former AILAA) (April 2017, at the Head Office, A.A).

¹³⁷ *Ibid.*

However, the Government claims it only allocates ‘unused’ or ‘unoccupied’ or ‘underutilized’ lands so the interest of no local community is affected but on the other hand the investments have benefits untapped by previous land uses. However, the way it calculates and identifies unused lands totally disregards other important communal land uses including pastoralism, except settled agriculture. Therefore, in many cases the terminologies do not represent the reality and the lands transferred were actually part of the locals’ livelihoods including pastoralists. Moreover, the various empirical studies that have analyzed the significance of the sector so far have reported the loss outweighs the gain. Local people directly affected by the investment have also been showing discontent to the extent of attacking and burning farmlands, like what happened in the 2016 political unrest.

The Government itself admits the sector is not performing as expected but instead of re-examining its stance against the investment, it attributes different reasons for the non-performance and has made a plan in GTP II to enhance the promotion of and allocation of land to large-scale domestic and foreign farmland investors. It specifically identified additional land for the investment and plans to raise the total land allocated to investors and to increase the land under the Federal land bank. It has also made a new institutional set up regarding farmland investment at the federal level to strengthen the sector. Though some changes in follow up of investors have been put in place after 2012, the EIC is continuing as usual in promoting and licensing foreign farmland investments. Once the necessary institutional set up is finalized the now Ethiopian Horticulture and Agricultural Investment Authority will also resume with the task of land allocation for investors. Thus, the threat to pastoral lands is very likely to continue.

Chapter 4: Foreign Farmland Investment and Land Rights of Pastoralists: a Quest for Balance

4.1 Introduction

This thesis raises two issues; the land right of pastoralists and foreign large-scale farmland investment. What is at the center of both is the issue of development. However, while the Government focuses on the investment and ignores the issue of pastoralists, others focus on the land right of pastoralists and challenge pastoral land expropriation for the purpose of the investment. These two positions suffer from extreme focus on one aspect of the phenomena, but experience to date has shown such thinking is putting the two issues in a contradiction. Thus, this chapter tries to find the balance between these seemingly polarized issues by analyzing them from the perspective of the right to development.

Development used to be equated with mere ‘economic growth.’¹³⁸ However, the new human development approach has shifted the focus to developing the capacity of individuals so they can have the freedom to live the kind of lives they value. The articulation of development as a right has further built upon this and created a human right approach to development, which focuses not only on achieving the outcome but also on the way it was achieved.¹³⁹ The FDRE Constitution has adopted this development approach under Art 43 and incorporated other human right provisions and national policy principles and objectives¹⁴⁰ relevant to the right. Also the relevant provisions of international human right instruments ratified by Ethiopia are made part of the right and the right should be interpreted in manner conforming to international instruments adopted by Ethiopia.¹⁴¹ Thus, this chapter has analyzed the issues and the data collected in line with these legal frameworks.

¹³⁸ Report of the Secretary - General, ‘The Emergence of the Right to Development’ in UN Publication, *Realizing the Right to Development, Essays in Commemoration of 25 Years of the UN Declaration on the Right to Development* (2013), <www.ohchr.org/.../> (accessed 25 December 2016), pp. 7 - 16.

¹³⁹ Arjun K. Sengupta, ‘Conceptualizing the Right to Development for the Twenty-First Century’, in UN Publication, cited above at note 138, pp. 67 - 87.

¹⁴⁰ Which provides important guarantees for citizens expressed in the form of Government obligation and principles that guide the interpretation of other fundamental human rights, see the Constitution, cited above at note 3, Art 85 - 92.

¹⁴¹ Since Ethiopia is party to the major binding human right instruments and adopted the Declaration on the Right to Development, they form part of the Constitution in one way or the other by virtue of Art 9 (4) & 13 (2) of the Constitution, cited

4.2 Foreign Farmland Investment and Land Rights of Pastoralists: a Quest for Balance

The Government has the duty to respect the constitutional land right of pastoralists. But the issue does not stop here. All the Country's resources including land are the common property of the people of Ethiopia and the Government has the duty to hold them on behalf of the people and deploy them for their common benefit and development, through legitimate land investments being one.¹⁴² Thus, it is always going to need land. In addition, given the population has reached 104 million and is expanding at the rate of 2.45%¹⁴³ while the land remains fixed, it cannot ignore 61% of the land inhabited by pastoralists. In the face of all these, arguing for an absolute right of pastoralists not to be displaced from their land is not sound.

Thus, the question could not be whether pastoral land should be expropriated or not but rather for what purpose and under what conditions should it be expropriated. It is within this background the following discussions analyzes the stories from the Government and pastoralists' side with the law and identify the points of contradictions and necessary shifts to find a balance between the right of pastoralists and the investment.

4.2.1 Reason, Perception and Aim behind Pastoral Land Appropriation

i. Is the reason legitimate?

The Government has the power to expropriate pastoral communal lands for public purpose if it believes it should be used for better development project to be undertaken for instance by farmland investors. This is tested by the ability of the investment to ensure direct or indirect benefit to the people (thus neither equal nor less benefit than the former land use) and consolidate socio-economic development.¹⁴⁴ The Government claims to adhere to such legal requirements by alleging the land it transfer is 'unoccupied' or 'unused' or 'underutilized' and the investments have multifaceted significance untapped by previous land uses. However, as

above at note 3. See also, Abdi Jibril, "The Right to Development in Ethiopia" <www.academia.edu/.../> (accessed 27 January 2017), pp. 1.

¹⁴² The Constitution, cited above at note 3, Art 89 (5) & 40 (6).

¹⁴³ World Meters, 'UN estimates as of April 27' (2017), <www.worldometers.info/world-population/ethiopia-population/> (accessed 27 April 2017).

¹⁴⁴ The Constitution, cited above at note 3, Art 40 (6 & 8) and the Expropriation Proclamation, cited above at note 53, Art 2 (5) & 3 (1).

discussed in the previous chapter, a number of empirical studies showed such lands were being occupied and used by pastoralists. The interviewees of this study also assert the same. For instance, one informant explained, “there is no single land in Afar not occupied by the community or clan, the land identified as an investment land in the region land use plan and that reserved for the Federal land bank is where the pastoralists live and use but the Government totally disregards them and claims the land has no legal owner even if the pastoralists may graze their cattle on it.”¹⁴⁵ Similarly another informant stated that all the land in Somali is communally held by a clan.¹⁴⁶ And an expert working with pastoralists in South Omo Zone of the SNNP region recalling on his personal field observations explained since the land of pastoralists is extensive and communally held; it may seem unoccupied for external parties but is actually designated by them for different purposes.¹⁴⁷

The Government cannot also justify ‘underutilized’ land approach as it has not conducted studies to quantify the total economic contribution of the pastoralism system and what it can contribute if given the proper support to develop and on the other hand about the feasibility of the foreign investment, not even after seeing the sector is not performing as expected.¹⁴⁸ Moreover, as discussed in the previous chapter, so far the loss outweighs the gains from the investment; given the manner it is undertaken now, will also not likely bring the anticipated benefits and are negatively affecting the local population including pastoralists. On the other hand, various studies contend that the mobile and adaptive pastoralism production system is the only sensible and sustainable way of using the Country’s harsh rangelands. Others also compare the economic and environmental significance of pastoralsim with other land uses like mechanized crop cultivation and industrialized ranching and contend the former is more profitable and less environmentally risky.¹⁴⁹ But the Government has not bothered to inquire whether such findings

¹⁴⁵ Interview with informant ‘A’, a Pastoralist from Afar Region, (April 2017, A.A).

¹⁴⁶ Interview with informant ‘B’, a Pastoralist from Somali Region, (April 2017, A.A).

¹⁴⁷ Interview with Mohammad Ali, Executive Director of Enhancing Pastoral Research and Development Alternative (EPaRDA) (April 2017, EPaRDA Head Office, A.A).

¹⁴⁸ Interview, cited above at note 125.

¹⁴⁹ See for instance, the studies mentioned at Abebe & et al, cited above at note 1, pp. 10 and Berihun, cited above at note 2, pp. 4 & 10.

are true or not. In the face of all how can the Government justify the legal requirements of public purpose are met?

The next question is, thus, as to why have Ethiopian Governments continuously labeled pastoral lands and preferred large-scale farming. The perceptions behind can be inferred from various instances that show adherence of the regimes to the anti-pastoralism view; which considers it as an ‘archaic’ mode of life and ‘unviable’ system that has to be transformed to agriculture and then to industrialization, a path set by the ‘*Unilineal Evolutionary theory*.’¹⁵⁰ To begin with, the Country is founded on crop production and till today the majority of the population rely on it as its livelihood, thus, starting from the incorporation of the lowlands the focus of the highland rulers and people has been on its farm areas and show disinterest to engage in the pastoral production system.¹⁵¹ Continuing with this, the imperial and *Derg* regime attempts were focused on changing pastoralism and pastoralists to the sedentary farming system and peasant lifestyle, respectively, through settlement projects, against the pastoralists wish and despite being a failure since initial and believed the vast land that is being wasted under the system should be deployed to other uses especially large-scale irrigation agriculture. Despite alleging otherwise, the current regime’s heart has not significantly changed from the past,¹⁵² as reflected for instance in the land laws, development policies and speeches of higher Government officials.¹⁵³ The interviewees also assert similar things.¹⁵⁴ The fact that policy designers at the center are people with peasant background has contributed for the continuity of such biased perception.¹⁵⁵

¹⁵⁰ For the details on the anti (notably ‘*Unilineal Evolutionary*’, ‘*Cattle Complex*’ and ‘*Tragedy of the Commons*’ theories) and pro-pastoralism theories and views, See, Lemessa, cited above at note 3, pp. 18, 19, 28 - 32 & 35; FAO, cited above at note 11, pp. 13 & 18 and UNDP, cited above at note 11, pp. 117.

¹⁵¹ Johan, cited above at note 32, pp. 9 & 10.

¹⁵² For detail discussions, See, Berihun, cited above at note 2, pp. 6 - 11; Lemessa, cited above at note 3, pp. 16, 18, 20 & 36 - 41; Bekele, cited above at note 6, pp. 60; UNDP, cited above at note 11, pp. 117 and Solomon Desta, ‘Pastoralism and Development in Ethiopia’, *Economic Focus* (7 July 2006), Vol. 9, No. 3, pp. 12 - 20, <https://www.eaecon.org/...> (accessed 30 October 2016).

¹⁵³ See, for instance those cited at Muradu, cited above at note 2, pp. 29; Berihun, cited above at note 2, pp. 9 and James & et al, cited above at note 7, pp. 10, foot note 6.

¹⁵⁴ Interview with informant ‘A’, cited above at note 145; interview with informant ‘B’, cited above at note 146; interview with informant ‘C’, an Ex-pastoralist from Somali Region, (April 2017, A.A) and interview with informant ‘D’, an Elderly Pastoralist from Somalia Region, (April 2017, A.A).

¹⁵⁵ Interview with informant ‘D’, cited above at note 154.

Of course the present regime has made improvements with regards to setting a short-medium term plan to improve the traditional pastoralism system.¹⁵⁶ The interviewed Excellency also pointed to the establishments of pastoral offices at the regional and Federal level as an indication of recognition of pastoralism by the current Government unlike past regimes.¹⁵⁷ On this note, one of the informants observed, given the fact that people assigned in these institutions do not have a pastoralist's background or enough knowledge about pastoralists and pastoralism, how much change can it really be?¹⁵⁸ The informant has a point given the land laws and development policies affecting pastoralists are being formulated and applied despite the existence of such claimed changes and offices.

ii. Is the perception legitimate?

The anti-pastoralism view has been repeatedly refuted by empirical studies,¹⁵⁹ as also the case in Ethiopia. The system serves as the main source of employment and food for the Country's pastoralists. The majority of livestock are in the hands of pastoralists,¹⁶⁰ making the Country owner of the largest livestock population in Africa.¹⁶¹ The majority of the exported live animal and meat is supplied from pastoral areas as international customers are interested only in the lowland breeds¹⁶² and the data obtained from Ministry of Livestock and Fisheries (MoLF) shows the livestock export contributes significantly to the Country's economy.¹⁶³ Pastoral areas are also the major suppliers for the domestic urban market¹⁶⁴ and provide ox for plough to the

¹⁵⁶ Tewolde Woldemariam & Fana Gebresenbet, 'Socio-Political and Conflict Implications of Sugar Development in Salamago Wereda, Ethiopia' in Mulugeta, cited above at note 73, pp. 117 - 144.

¹⁵⁷ Interview with his Excellency, Honorable Mohammed Yesuf, Member of House of Peoples' Representative and also Chairman of the Pastoralist Affairs Standing Committee (PASC), (April 2017, PASC office, A.A).

¹⁵⁸ Interview with informant 'D', cited above at note 154.

¹⁵⁹ Lemessa, cited above at note 3, pp. 19 & 31 - 32.

¹⁶⁰ Tigistu & et al, cited above at note 17, pp. 8.

¹⁶¹ MoFPDA & et al, cited above at note 13, pp. 21.

¹⁶² Interview with Samrawit Mekonnen and two others, Livestock Marketing Experts in MoLF, (April 2017, MoLF Head office, A.A) and Interview with Meaza kelemeworke, officer at Ethiopian Livestock Traders Association (April 2017, at the Office of the Association, A.A).

¹⁶³ Data from MoLF Office shows from 2010 - 2016 alone live animal worth 713,377,975 USD was exported, "Five years (2010 - 2016) Live Animal Export Report Quantity in Number and Income in million US Dollar", on file with the author.

¹⁶⁴ Interviews, cited above at note 162.

highlanders¹⁶⁵ and during the GTP I period, the livestock subsector accounted for 7.9% of the GDP.¹⁶⁶ The system has also ecological significance, such as carbon sequestration and biodiversity conservation, a benefit that extends to the world.¹⁶⁷

However, the total economic contribution of the pastoralism system is greatly underestimated since most of the livestock trade happens in informal borderline markets not captured by official data; the economic value of other rangeland and livestock products and services are not either measurable in economic terms or properly measured, while researches estimates them to be in millions.¹⁶⁸ The pastoralists themselves also attest to the profitability of the system;¹⁶⁹ as explained by one informant, “since it’s profitable, even those that left the locality for instance to study and work in urban areas buy cattle and send it to their relatives who look after them.”¹⁷⁰ Another explained “you can sell or eat maize only once but will get various returns out of cattle; one camel alone is worth a lot.”¹⁷¹ Therefore, if the Government intension is purely economic, it does not make any sense to totally disregard pastoralism and push for farmland investment at its expense. Despite this the Government considers pastoralism as “‘a primitive, unproductive way of life doomed to extinction, an economic dead end that poses no credible alternative to modern, technologically advanced and input-dependent forms of irrigated agriculture’ and comparisons with these state projects are a foregone conclusion.”¹⁷²

Of course the above discussion is not meant to romanticize the pastoralism production system which is often the case in pro-pastoralism arguments. It is in traditional stage and faces its own

¹⁶⁵ Interview with Tezera Getahun, Executive Director of Pastoralist Forum Ethiopia, (April 2017, PFE Head Office, A.A).

¹⁶⁶ GTP II, cited above at note, 99, pp. 26.

¹⁶⁷ Interview, cited above at note 125.

¹⁶⁸ *Ibid.*

¹⁶⁹ Interview with informant ‘A’, cited above at note 145; interview with informant ‘B’, cited above at note 146, interview with informant ‘D’, cited above at note 154; interview with informant ‘E, an Agro-pastoralist from Afar, (April 2017, A.A); interview with informant ‘F’, an Agro-pastoralist from Gambella, (April 2017, A.A) and interview with informant ‘G’, a pastoralist from Somalia, (April 2017, A.A).

¹⁷⁰ Interview with informant “F”, cited above at note 169.

¹⁷¹ Interview with informant ‘G’, cited above at note 169.

¹⁷² Berihun, cited above at note 2, pp. 10.

problems, but it has also contribution and potential, even though the tendency of the Government is to think of only the former ignoring the latter two.¹⁷³ The argument rather is that as long as it shows potential, it should be considered as one viable production and land use system and given support to develop as “normally performance of a given sector justifies a continued policy support”¹⁷⁴ in order to cope with the demand of time. If so, both the pastoralists and the Country can benefit.¹⁷⁵ This was also what the interviewed pastoralists demanded.¹⁷⁶ However, what the Government is offering as an ultimate plan for pastoralists is settlement which it aims to achieve by providing other non-pastoral livelihood options, irrigated farming being the core.¹⁷⁷ But what makes farming the better choice given the majority of the peasants’ are not benefiting from it?¹⁷⁸ It is because the Government has bad perception that it did not fully explore other options related to pastoralism, for instance using the camels to attract tourists in a manner the Arab countries are benefiting.¹⁷⁹

Moreover, the call for support does not mean pastoralism is to be preferred in every circumstance. A study is not made to compare whether the pastoralism livestock production or other rangeland use options including irrigation farming is the viable option at given instances.¹⁸⁰ Such studies, if done, might reveal other land uses might be more feasible than pastoralism for a specific circumstance thus consideration of the national interest might justify the land use change. The argument is thus that decisions should be made based on study not guided by some perception one has.

¹⁷³ Interview with informant ‘C’ & ‘D’, cited above at note 154.

¹⁷⁴ Yohannes & Mahmud, cited above at note 3, pp. 3.

¹⁷⁵ Interview cited above at note 125; interview with informant ‘B’, cited above at note 146 and interview with informant ‘D’, cited above at note 154.

¹⁷⁶ Interview with informant ‘B’, cited above at note 146 and Interview with informant ‘G’, cited above at note 169.

¹⁷⁷ Interview with his Excellency, cited above at note 157.

¹⁷⁸ Interview with informant ‘B’, cited above at note 146 and interview with informant ‘G’, cited above note 169.

¹⁷⁹ Interview with informant ‘D’, cited above at note 154.

¹⁸⁰ Interview, cited above at note 125.

iii. Is the aim legitimate?

According to the human right approach to development, development attempts should focus not only on achieving economic growth and increasing per capital income but also on developing the capacity of individuals so they can have the freedom to live the kind of lives they value. The Constitution also adopts this approach and provides the “*basic aim of development shall be to enhance the capacity of citizens for development and to meet their basic needs.*”¹⁸¹ As the previous chapter elaborates, the Government alleges large-scale farmland investment produces benefits for the pastoralists but the reality is different; they are instead losing their land without the means to create alternative livelihood or being compensated by the jobs created by such investments. Those interviewed from both sides also confirm the same. Those from the Government side said, the Government encourages all investments to be pro-pastoral and are benefiting them.¹⁸² But the pastoralists raise many reasons why this is not really so; “lack of operation of the investments after getting the land; the lack of proper knowledge and training for them to benefit from the skilled jobs created by the investments and the inability of the labor jobs to benefit them as much; the fact that the investments do not complement or go together with their livelihood. If for instance they were engaged in processing livestock products, the community could have benefited by being their supplier.”¹⁸³ Another one explained, “the investors are interested to produce cash crops for export than engage in areas related with livestock, so the community does not benefit from their products; they are not labor intensive so creates minimum labor works; only insignificant percentage of the pastoralist community even gets such jobs as some agricultural labor works needs much physical power which the community is not used too, thus people from other communities gets the job. But on the other hand the community sacrifices many things for such investments as they need large land and cause environmental damages, among others.”¹⁸⁴ Similarly, pastoralists in South Omo are unable

¹⁸¹ The Constitution, cited above at note 3, Art 43 (4).

¹⁸² Interview with Shanko Dessalege, Research, Study, Development and Resource Mobilization Director General at MoFPDA, (April 2017, MoFPDA Head Office, A.A) and interview with his His Excellency, cited above at note 157.

¹⁸³ Interview with informant ‘G’, cited above at note 169.

¹⁸⁴ Interview with informant ‘A’, cited above at note 145.

to benefit due to lack of skill to engage in such investments.¹⁸⁵ Generally, the investment is not undertaken in a manner that considers or guarantees the interest of pastoralists; rather is taking the progress of pastoralists backward.¹⁸⁶

The lack of benefit is one of the major causes of resistance of the investment by the pastoralist community.¹⁸⁷ The fact that “every time pastoralists around the Country meet with higher officials the question they raise is for investments to be conducted in such a way that ensures their participation and benefits”,¹⁸⁸ is also an indicator of such situations. Of course, the investments might benefit highlanders found in such lowland areas as their livelihood is farming¹⁸⁹ and the national economy as the interviewees also mentioned¹⁹⁰ but a benefit for one should not come at the expense of the other; rather the Country’s resources should be deployed for the common benefit and development of all.¹⁹¹ In fact what the Government should have done was provide special assistance to pastoralists as they are least advantaged in economic and social development,¹⁹² for instance in their effort to develop the pastoralism production system so as to improve their overall economic condition, rather than creating pressure on them.

The Government’s policy stance towards pastoralists and the investment discussed so far shows the investment in such areas are not intended to develop the capacity of pastoralists and to meet their basic needs, but are an extension of the anti-pastoralism thinking. But there is no reason why development of pastoralists has to follow a liner path. The farming and pastoralism system

¹⁸⁵ Interview with Mohammad, cited above at note 147.

¹⁸⁶ Interview with informant ‘H’, an Ex-pastoralist from Afar Region, (April 2017, A.A); interview with informant ‘A’, cited above at note 145 and interview with informant ‘G’, cited above at note 169.

¹⁸⁷ Interview with informant ‘G’ cited above at note 169; interview with informant ‘H’ cited above at note 186 and interview with informant ‘A’, cited above at note 145.

¹⁸⁸ Interview with Tezera, cited above at note 165.

¹⁸⁹ Bekele, cited above at note 6, pp. 104.

¹⁹⁰ Interview with informant ‘A’, cited above at note 145; interview with informant ‘B’, cited above at note 146; interview with Mohammad, cited above at note 147 and interview with informant ‘G’, cited above at note 169.

¹⁹¹ The Constitution cited above at note 3, Art 89 (2) & (5).

¹⁹² *Id.*, Art. 89 (4)

had existed side by side for generation and they can be made to complement each other,¹⁹³ than using the former to cancel out the latter. But the interviewed official alleges “Government voluntarily encourages pastoralists to settle where there is potential which is along river basins. But, the aim is not transforming pastoralists to farmers; support is given to them to commercialize their livestock production and farming is provided as an alternative way of life than being mandatory.”¹⁹⁴ However, like empirical studies, the pastoralists and one of the officials questions the voluntariness, aim, benefit, viability and sustainability of the settlement project and suspects the Government is using settlement as an excuse to take land for investment purposes.¹⁹⁵ Specifically, one of the informant said “the Government thought is on changing pastoralists to farmers, it does not support us so that we can modernize the pastoralism system in its own way and continue with it.”¹⁹⁶ Tested against the aim of development provided under the Constitution, such motives of the Government contradict the right to development of pastoralists.

4.2.2. The Manner of Pastoral Land Appropriation

The Government has the duty to formulate national policies and undertake development activities,¹⁹⁷ but as the same time “*Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.*”¹⁹⁸ For the realization of the right, the Constitution has put a duty on the Government to promote the participation of people.¹⁹⁹ The African Commission elaborated such right as the right to an ‘active, free and meaningful participation’ in development endeavors and as imposing a duty on the State to get the ‘free, prior and informed consent’ (FPIC) of all the

¹⁹³ Interview with Dr Taffese Mesfin, Senior Pastoral Resource Person, (April 2017, PFE Head Office, A.A) and interview with Tezera, cited above at note 165.

¹⁹⁴ Interview with Shanko, cited above at note 182.

¹⁹⁵ Interview, cited above at note 125; Interview with informant ‘A’, cited above at note 145; interview with informant ‘D’, cited above note 154 and interview with informant ‘H’, cited above at note, 186. See also the arguments in Abebe & et al, cited above at note 1, pp. 8 - 10; Berihun, cited above at note 2, pp. 10 - 12 and Lemessa, cited above at note 3, pp. 16 & 49.

¹⁹⁶ Interview with informant ‘A’, cited above at note 145.

¹⁹⁷ The Constitution cited above at note 3, Art 89 (1).

¹⁹⁸ *Id.*, Art 43 (2) & 35 (6).

¹⁹⁹ *Id.*, Art 89 (6).

people to be affected (not indirect participation through their representatives in parliament) by the policies and projects.²⁰⁰

The realization of such right has a direct relationship with the development model adopted by a Country. Even though the Constitution does not prescribe a specific model, it is clear that it rejects the top-down one as it puts participation at the center of the right. But paradoxically the Government adopted the developmental state model, in which the key features include, relative state autonomy at the centre especially in terms of formulating and implementing national policies; in a binding manner; independent of competing social forces and in accordance with what is perceived as best for the Country by the managers of State power, which results in the dictation of developmental process rather than consultation.²⁰¹ Thus, the participation right of all Ethiopian people including pastoralists is put under question mark by this development model.

Those from the Government side allege investment is undertaken after the pastoralists are made to have their own say and accept it.²⁰² But in practice since the Government claims ownership of communal lands and alleges it allocates only vacant lands, it does not try to get the FPIC of pastoralists.²⁰³ One informant said, “there is no thinking that our land should not be touched at all, but it is when the Government acts like the land has no owner the problem begins; the identification is made without paying regard to the holding right of the community, its needs and benefits.”²⁰⁴ When asked about the pastoralists land issue, his Excellency respond, “solving the land issue is always included in a plan and can get a solution when the land is transferred from communal to private holding, thus if the pastoralists are settled a law can be formulated. And the issue of those who wants to continue with communal holding will also be considered.”²⁰⁵

²⁰⁰ Abdi, cited above at note 141, pp. 10 - 11 and See also Art 2 (3) of the Declaration on the Right to Development (DRD), UN General Assembly Resolution 41/128, A/RES/41/128, 4 December 1986.

²⁰¹ Gedion G. Jalata, ‘An African Developmental State: Ethiopia’s Emergent Experience’ (2015), Regional Conference on Building Democratic Developmental States for Economic Transformation, Pretoria, South Africa, 20 - 22 July 2015, pp. 8.

²⁰² Interview with Shanko, cited above at note 182.

²⁰³ Bekele, cited above at note 6, pp. 92.

²⁰⁴ Interview with informant ‘H’, cited above note 186.

²⁰⁵ Interview with his Excellency, cited above at note 157.

Even in the instances the Government alleges to make consultation, it does not meet the legal requirement. One informant explains the situation as follows;

*Sometimes the Government claims to talk with clan leaders or few village elders it selects as representatives of the community and who are said to give their consent to the transfer of the land. But the community always objects when the land is taken saying these people do not represent them as they did not vote for those elders and they did not consult them first. By tradition, community issues especially land issues cannot be decided even by the clan leader alone; but with the participation of the community.*²⁰⁶

The other way the pastoralists are said to participate in development matters that concerns them is through their representatives in parliament, some of whom are also members of the Pastoralist Affairs Standing Committee. Though alleged to articulate the pastoralists' issues through periodical reports from responsible Government organs and personal observation and dialogues with the pastoralists in their field visits,²⁰⁷ given the domination of the parliament and executive branch by a single political party, it is hard to imagine these people going against the stance of their party to defend the pastoralists. The fact that it was said "no large-scale farming have displaced pastoralists, no complains so far"²⁰⁸ is telling of such facts.

Moreover, consent said to be given through their representatives, either in parliament or in traditional institutions, is not same as direct participation and do not fulfill the legal requirement. The dictation of what is best for the pastoralists rather than consultation is one of the major reasons pastoralists resist ideas coming from the Government. One informant said "policies and projects are formulated and designed by some official or university educated person and imposed on the people than make them participatory, but the knowledge of the people is crucial in such aspects to consider local contexts."²⁰⁹ Thus, the problem lies in the fact that the Government does not start from acknowledging the knowledge and contribution of pastoralists.²¹⁰ The people

²⁰⁶ Interview with informant 'A', cited above note 145.

²⁰⁷ Interview with his Excellency, cited above note 157.

²⁰⁸ *Ibid.*

²⁰⁹ Interview with informant 'B', cited above note 146.

²¹⁰ Interview, cited above at note 125 and interview with informant 'G', cited above note 169.

know better about their area than someone sent from the Government claiming to know everything just because he/she has a certificate of some sort.²¹¹

Moreover, expropriation is allowed only after the payment of compensation; “*commensurate monetary or alternative means of compensation, including relocation with adequate State assistance.*”²¹² But through subsidiary laws, the Government has put the issue of compensation of communal lands out of the equation. Nevertheless, it claims compensation is paid to the clan leaders, admitting there were instances where the community did not benefit from such payments.²¹³ Informants from Afar explained, Compensation is not paid to the community, but we hear of payment of a different amount made to clan leaders and some noisy powerful people in order to silence them, but nothing has reached the community.²¹⁴ Similar things are reported in some other places.²¹⁵ But all these cannot be taken as ‘compensation’ in the legal sense. The lack of compensation or alternative land is raised as one reason for the resistance of the investment.²¹⁶

4.3 In Whose Developmental Ideology are the Pastoralists Supposed to Develop?

The Constitution provides for the right to sustainable development. This should be understood in line with Art 22 (1) of the African Charter which expresses it in the form of “*economic, social and cultural development of people with due regard to their freedom and identity.*”²¹⁷ The Declaration on the Right to Development adds political development and creates the connection between the right and self-determination,²¹⁸ which includes the right of people to freely pursue

²¹¹ Interview with informant ‘G’, cited above at note 169.

²¹² The Constitution, cited above at note 3, Art 44 (2).

²¹³ Interview with his Excellency, cited above note 157.

²¹⁴ Interview with informant ‘A’ cited above at note 145; interview with informant ‘E’, cited above note 169 and interview with informant ‘H’, cited above note 186.

²¹⁵ Abebe & et al, cited above at note 1, pp. 5.

²¹⁶ Interview with informant ‘A’, cited above at note 145 and Interview with informant ‘H’, cited above at note 186.

²¹⁷ Abdi, cited above at note 141, pp. 8 and African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986), Art 22 (1).

²¹⁸ The DRD, cited above at note 200, Art 1 (2).

their economic, social and cultural development.²¹⁹ This right is also incorporated under Art 39 of the Constitution. The central issue in these provisions is that development should come from within (by choice) not from above.

One of the reasons why the interest of pastoralists and the investment is seen as something contradictory is the way the pastoralists are portrayed and their relationship with the investment is articulated by researches and how the Government interprets such positions. The argument for pastoralists` right from indigenous people perspective tends to portray resistance of the investment as a reflection of not wanting to be detached from their land and traditional livelihood system as it is also their way of life. The Government attacks such positions by saying those who want pastoralists to remain as they are the anthropologists.²²⁰ This was also stressed by the Official from MoFPDA who said, “Those who want to always maintain pastoral way of life contribute nothing but want to make pastoralists tourist attraction for their own personal profit, it is inhumane, entirely wrong.”²²¹ And use such counter arguments to justify it is working for the good of pastoralists as the investment will bring changes that will benefit pastoralists.

Of course, there is nothing wrong in trying to undertake other economic activities in pastoral areas to make the pastoralists beneficiaries of socio-economic developments. In fact they have a constitutional right to improved living standards.²²² But what it tends to forget is that the law does not give it the right to dictate what these people want or what is best for them rather impose a duty on it to develop their capacity so they can have the freedom to decide the kind of life that is worth living for them. As interpreted by the African Commission, “development is not simply the state of providing, for example, housing for particular individuals or peoples; development is

²¹⁹ Art 1 (1) of International Covenant on Civil and Political Rights, (adopted 16 Dec. 1966, G.A. res 2200(XXI), UN GAOR, 21st Sess., Supp. No. 16, UN doc A/6316, (1966), 993 U.N.T.S. 3 entered into force 3 Jan. 1976) and International Covenant on Economic, Social and Cultural Rights (ICESCR), (adopted 16 Dec. 1966, 993, U.N.T.S. 3, Annex to G.A. res 2200(XXI, entered into force 3rd Jan. 1976).

²²⁰ A 2011 Speech of the former Prime Minister as recalled in an interview with Mohammad, cited above at note, 147.

²²¹ Interview with Shanko, cited above at note 182. This is also how it is expressed by regional Governments’, See Tewelde & Fana, cited above at note 156, pp. 132.

²²² Abdi, cited above at note 141, pp. 7; Universal Declaration of Human Rights, (UNGA Res 217 A (III) [10 December 1948] GAOR 3rd Session Part 1, Art 25; the ICESCR, cited above at note 219, Art 9, 11 & 12 and the Constitution cited above note 3, Art 90.

instead about providing people with the ability to choose where to live.”²²³ Thus, pointing to for instance some infrastructure that was achieved as a result, cannot justify how that goal was achieved; the process is as important as the outcome.

However, as discussed in chapter two, arguing from indigenous perspective is not viable as Ethiopia is not a signatory to the ILO Convention No. 169. And even the African Commission identified only the Afar, Borana, Kereyu, Nuer, and Somalis pastoralists as indigenous,²²⁴ while there are many more pastoralists located in the Country. Moreover, to argue for the land right of pastoralists from indigenous perspective tends to disregard the interest of the rest 88% of the Ethiopian population whom are common owners of 61% of the land at the hand of pastoralists and the interest of highlanders that are located in pastoral areas. Thus all interests must be considered than focusing on one side. Thus, what should be demanded is for the pastoralists to be treated equally and their rights and interests to be considered the same as every other Ethiopian citizen.²²⁵

Moreover, the tendency to talk about pastoralists from a group perspective tends to disregard the change the pastoral community is undergoing and the divergent views emerging about land and livelihood. Culture is not static; it evolves in response to various factors. In an ever changing and interconnecting world, no one can remain insulated from the effect of globalization. The response from informants confirms these assertions. One informant explained, “The Afar community does not resist investment basing only on spiritual and cultural grounds. If you explain and they understand that the investment will have benefits, they will not resist and will not hesitate to use the land. It is due to such wrong thinking the Government does not go down to the people and consult them.”²²⁶ Another agro-pastoralist from Gambella explains “we do not resist farmland investment in our land simply because; we know that is how development is

²²³ Obiora Chinedu, ‘A Regional perspective: Article 22 of the African Charter on Human and Peoples’ Rights’, in UN Publication, cited above at note 138, pp. 373 - 384.

²²⁴ Abdi, cited above at note 141, pp. 11.

²²⁵ See, the Constitution, cited above note 3, Art 25.

²²⁶ Interview with informant ‘A’, cited above at note 145.

achieved. But it must not be in all the places our cattle's graze on."²²⁷ An expert explains the case in South Omo as, "the community is willing to use the land for other uses, for instance farming, but first wants to see the benefits."²²⁸ In connection with this, another expert explained, "back in the days pastoralists were very much attached to their land and the pastoralism system, they did not want the earth to be touched; believing only chicken scratches the earth and what was gained from farming was immaterial when they can get milk and meat from pastoralism. But now it is changing as they get exposed to other communities' and start consuming for instance *enjera*."²²⁹ What was observed in the response of interviewees was that the pastoral community is more open to accept changes to its traditional way of life if it is beneficial and are given proper time to acquaint, unless the change relates to religion.²³⁰ One agro-pastoralist stated "I became a pastoralist not because I was born to be one, but because that was what my surrounding allowed me to be; and then me and my family started to cultivate land on the side because we saw it was possible and good."²³¹

Thus, the issue is not whether the pastoral community should change or not but rather in whose ideology and pace should it change? Change within a pastoralist community is the cumulative effect of various internal and external factors as explained by the interviewees.²³² However, researches that wrote about farmland investments tend to focus on the negative change that result as a consequence of Government policy and projects that undermines the land right of pastoralists like foreign large-scale farmland investment. Of course, the Government by forcing the pastoralists to change against their wish is violating their constitutional right and should be challenged. But change is also necessitated by nature and instigated by the free choice of the

²²⁷ Interview with informant 'F', cited above at note 169.

²²⁸ Interview with Mohammad, cited above at note 147.

²²⁹ Interview with Taffese, cited above at note 193.

²³⁰ Interview with Informant 'A', cited above at note 145; interview with informant 'B', cited above at note 146; interview with informant 'D', cited above at note 154; interview with informant 'E' cited above at note 169 and interview with informant 'H', cited above at note 186.

²³¹ Interview with informant 'E', cited above at note 169.

²³² Interview, cited above at note 125; interview with Mohammad, cited above at note 147; interview with Tezera, cited above at note 165; interview with Taffese, cited above at note 193 and interview with informant 'D', cited above at note 154.

pastoralists themselves.²³³ The trend of change can be seen in relation to those who want to still maintain the system and are not willing to engage in other systems; those who are completely moving out of pastoralism and those maintaining the system and diversifying their source of income. There are pastoral communities who still do not want to think life outside of pastoralism, which for instance considers land as a mother and could not bear the idea of digging the land for farming. These people attach the land more value than just economical and see the pastoralism system as a reflection of their identity.²³⁴ An elderly pastoralist from Somalia explained, “there are pastoralists even after losing most of their cattle, do not want to move out of the system and engage in other economic activities, so when they are offered farming, they use it as a temporary strategy to make money and buy livestock to return back to pastoralism.”²³⁵ Such similar case was raised concerning the kerryu pastoralists, “when they were given land to farm, rather than engaged in it, they made a share cropping arrangement with Amhara people and bought camels with the return of their share.”²³⁶ Also, a research conducted regarding pastoralists in Oromia shows that many pastoralists still prefer to continue their pastoral way of life.²³⁷

On the other hand, there are those increasingly moving out of pastoralism and engaging in other economic sectors. Education has been the constant powerful tool raised as a reason for change. Now more and more pastoralist children are getting educated, their view of their environment is changing and aspiring for a life out of pastoralism.²³⁸ The growth of population is also another factor that is making the pastoralists think of other livelihood options. For instance, almost half of Borana pastoralists do not own their livestock but herd that owned by the rich pastoralists;²³⁹

²³³ Interview with Mohammad, cited above at note 147; interview with Tezera, cited above at note 165; interview with Taffese, cited above at note 193; interview with informant ‘A’, cited above at note 145 and interview with informant ‘D’, cited above at note 154.

²³⁴ Interview with Tezera, cited above at note 165.

²³⁵ Interview with informant ‘D’, cited above at note 154.

²³⁶ Interview with Tezera, cited above at note 165 and interview with Taffese, cited above at note 193.

²³⁷ Abebe & et al cited above note 1, pp. 2, 14 & 15. Similarly, there are pastoralists in South Omo, who would not leave pastoralism even if given a private plot, interview with Mohammad, cited above at note 147.

²³⁸ Interview with a staff of Pastoralist Welfare Organization, working in Somali Region, (April 2017, at the Head office, A.A) and interview with, all the Pastoralists and pastoral development experts mentioned above.

²³⁹ Interview with Taffese, cited above at note 193.

such lack of enough livestock to absorb the pastoral labor force was raised by one Borana traditional leader who expressed other options are needed to fill the gap.²⁴⁰ Moreover, more and more pastoralists are being attracted by the city life and moving and engaging in other economic sectors.²⁴¹

The women are also acting as a catalyst of change as they are seeking more economic freedom or independence. For instance, women pastoralists in Somalia region are moving to the peri-urban areas and engaging in other income generating activities like small retailing shops, animal fattening and crop selling.²⁴² One ex-pastoralist explained the dynamics in Somalia region as follows, “we see the change often in younger generation; in the elders and leaders we see a tendency to maintain the system and entertaining other options; in women the trend is change through education and business creation. In terms of change women are more open. This shows pastoralists are flexible and can go with change.”²⁴³

One expert explained the dynamics in South Omo as, “the new generation is changing and showing an increasing willingness to engage in other economic sectors, for instance they are becoming agrarians and business men but elders’ interest incline on protecting the system; thus, the question of the young and old generation is varying.”²⁴⁴ The change in Afar was explained by one as, “things are changing; it was considered a shame to go to school, sell camel or engage in labor works but no more, now it is appreciated as long as the result is good.”²⁴⁵ However, instead of totally moving out, what is observed is a tendency to maintain the system and look for addition income sources, farming and trading is the constantly mentioned ones by the interviewees as these are what the pastoralists usually exposed to.²⁴⁶ Thus, some part of the

²⁴⁰ Interview with Tezera, cited above at note 165.

²⁴¹ Interview, cited above at note 125 and interview with Taffese, cited above at note 193.

²⁴² Interview, cited above at note 238.

²⁴³ Interview with informant ‘C’, cited above at note 154.

²⁴⁴ Interview with Mohammad, cited above at note 147.

²⁴⁵ Interview with informant ‘A’, cited above at note 145.

²⁴⁶ Interview with informant ‘E’, cited above at note 169; interview, cited above at note 125 and interview with Taffese, cited above at note 193.

family might move to small towns and the rest continues with the pastoralism production system; usually movement and settlement might seem contradictory, but practically it is diversifying ones livelihood.”²⁴⁷

When pastoralists from all over the Country meet with Government officials, they always express their interest to continue living their life as a pastoralist.²⁴⁸ The interviewed pastoralists also declare as the livestock production system is profitable, they do not want to abandon it but rather modernize it and undertake other income generating activities on the side.²⁴⁹ Two pastoralists explained, even the elders in Afar understand change must come, relying on mobile livestock production alone is not possible given the environmental conditions like the recurrent drought and over grazing of the land and thus are searching for ways to diversify their livelihood; mainly by shifting to agro-pastoralism.²⁵⁰ Pastoralists in other parts of the Country also believe change should come and are trying to diversify their livelihood.²⁵¹ The Constitution also supports such divided view in livelihood among the pastoralist community as it gives every individual the right to choose and pursue his means of livelihood and to engage freely in economic activity.²⁵²

The above discussion make it clear that the views of pastoralists is not as similar as presented and thus consultation is important to make an informed decision and one that reflects the interest of pastoralists. Moreover, the investment if undertaken for the right reasons and in the right manner can help those pastoralists that are moving out of pastoralism or are looking for ways to diversify their livelihood. But they should be given the chance to change in their own pace; trying to hasten the development process is pushing the pastoralists to poverty than improving their life. One way or the other change is inevitable, but it cannot come over night²⁵³ Moreover,

²⁴⁷ Interview with informant ‘C’, cited above at note 154.

²⁴⁸ Interview with Tezera, cited above at note 165.

²⁴⁹ Interview with informant ‘A’, cited above at note 145; interview with informant ‘B’, cited above at note 146; interview with informant ‘D’, cited above at note 154 and interview with informant ‘E’, ‘F’ & ‘G’, cited above at note 169.

²⁵⁰ Interview with informant ‘A’, cited above at note 145 and interview with informant ‘E’, cited above at note 169.

²⁵¹ Interview with Mohammad, cited above at note 147; interview with Tezera, cited above at note 165 and interview with Taffese, cited above at note 193.

²⁵² The Constitution, cited above at note 3, Art 41 (1 & 2).

²⁵³ Interview with informant ‘B’, cited above at note 146; interview with informant ‘D’, cited above at note 154 and interview with informant ‘E’, cited above at note 169.

whether one wants to stay being a pastoralist or not should be his choice. Even if the right to development is articulated as a group right, what constitute people are individuals. Thus, it is a right that every human person individually and as part of a group enjoys. This is also how the DRD articulates the right and the use of the ‘word’ nationals as opposed to Nation, Nationality and People in Art 43 (2) shows the Constitution itself recognizes the dual nature of the right.²⁵⁴ Thus, instead of just the interest of certain individuals and groups, all pastoralists should be given a voice to decide in how they want to live their life. Therefore, a balance should be struck between the above two stances by listening to the voices of pastoralists and adhering to the above discussed constitutional and subsidiary laws’ provisions.

4.4 Chapter Summary

The aim of this chapter was to investigate whether the land right of pastoralists and farmland investment can find a middle ground or are something that will always stand in contradiction. And by analyzing the issue using the data collected and the legal framework of the right to development and the legal requirements provided for expropriation of landholdings, the chapter concludes the reason for contradiction lies in the fact that the Government is not adhering to the right of pastoralists and its obligation as custodian of the resources of the country. Specifically the issue has been analyzed in terms of the justifications, perception and aim behind and manner of pastoral land taking for foreign large-scale farmland investment purposes and have found out all are not in line with the law. Concerning the justification, even if the Government alleges the land being taken is not being used, that is not actually the case; even though it uses the ‘underutilized’ land approach, it does not have a study or empirical fact to back up the allegation. Thus, it cannot justify public purpose.

Concerning the perception various acts and policies of the Government have showed the Government is guided by the anti-pastoralism view and the manner the investment is undertaken in such areas is a manifestation of such thinking and undertaken with the target of changing the pastoralism production system. This aim goes in contradiction to the aim of development conceived in the Constitution. Moreover, the manner such farmland investments are undertaken

²⁵⁴ See, Art 43 (2) of the Constitution, cited above at note 3 and the DRD, cited above at note 200.

does not respect the procedural right to development provided under the Constitution and also contradicts the legal requirements provided for expropriation of landholdings. Such violations by the Government are the reason why those pastoralists, who does not object the idea of investment in their lands, object and resist the investments. Therefore, if the Government aligns its thoughts, targets and acts in line with the law, the balance between the investment and the interest of pastoralists could be maintained. In fact, the investment if done right can provide opportunities for those pastoralists wishing to move out of the system or are looking for additional income generating activities to diversify their livelihood.

Chapter 5: Conclusion and Recommendations

5.1 Conclusion

For time immemorial, Ethiopian pastoralists have held pastoral lands under their clan based customary communal tenure, whereby ownership and possession rights are vested in the whole members of a given clan, to the exclusion of outsiders. However, the State, since its incorporation of such lands in the 19th Century, has disregarded such tenures and labeled the land ‘no-man’ land that belongs to it. Such thinking has transcended centuries and found itself a place in the current land laws of the Country.

The only exception in this uninterrupted trend was the FDRE Constitution which made all land the common property of the Ethiopian people and gave pastoralists communal use right and protection against displacement. However, in the 2005 Federal Rural Land Administration and Land Use Proclamation, the Government has adopted a contrary position in declaring itself the owner of rural communal lands which it gives and takes back as it deems fit, once again leaving the land question of 12% of the Country’s pastoralist population unanswered. Though the legal framework has various implications, in this study the effect in relation to foreign large-scale farmland investments was singled out for analysis. The lack of formal recognition has made it easy and even legal for the Government to allocate pastoral lands to investors without the need to follow expropriation procedure. Thus, the Government is intentionally denying recognition to make the way for appropriation of communal lands.

Researchers have argued for the land right of pastoralists from different approaches. One is from indigenous right perspective, which calls for recognition of their customary communal tenure system, which nevertheless is not effective in our context as Ethiopia is not a signatory to ILO Convention No. 169 on Indigenous and Tribal Peoples’ Rights; the only binding international instrument that specifically mentions pastoralists and provides for the recognition of their rights of ownership and possession over the lands which they traditionally own or use or occupy. Moreover, the peoples’ ownership of land concept embedded in the Constitution does not allow arguing for pastoralists’ ownership right over specific part of the Country’s land.

Others blame the tenure system adopted by the Constitution that established *de facto* State monopoly; as citizens have only use right and the ultimate land administration and allocation power lies with the Government. However, while tenure type may play its own role for tenure security, the issue is not as black as white. Whether a Government chooses to respect or ignore the occupancy of a given community depends on its willingness to respect their human right than just their having a formal title or not. Thus, even private tenure may not provide one with tenure security. Therefore, there is a need to go beyond and probe the reasons why the Government fails to give answer to the pastoralists land question all these years? Like peasants that are allowed to continue to exercise use right over the lands they have been using, pastoralists have lived on and used their lands for generations, thus why treat them differently? Whatever wrong perceptions are driving the State needs to be examined and argued against. Otherwise, even if the Government decides to give effect to pastoralists' constitutional land right on paper, will not mean pastoralists tenure security will be automatically guaranteed as it can still target their land ignoring its own laws or can still expropriate with wide public purpose definition and insignificant compensation provided under the expropriation laws. As rightly put by the former American President, "Laws alone would not be enough, Hearts must change."²⁵⁵ Thus, this study has tried to stress the need to focus on also the reasons than just the problems in the legal frameworks concerning pastoralists land right and attempted to show the bad perceptions that are lurking behind the laws and how they are not justified.

Concerning the land right approach to focus on, the Constitution has put pastoralists in equal footing with peasants that use private plots and provides for other human rights provisions specifically socio-economic ones that demand access to land and security of tenure for their realization. If such provisions are strictly adhered to pastoralists land right would have a solid guarantee. This show the constitutional provisions at hand are strong enough to protect the right of pastoralists as individuals and group and thus focus should be on utilizing them.

Since the aim of this study was on creating the balance between the investment and land right of pastoralists, it has gone one step further from asserting their right. All the Country's resources including land are the common property of the People of Ethiopia and the Government has the

²⁵⁵ Former American President Barack Obama, Farewell Address, Chicago, America, 11 January 2017, aired live on CNN.

duty to hold them on behalf of the People and deploy them for their common benefit and development, through legitimate land investments being one. Thus, the focus of this study has turned from arguing for the absolute protection of pastoralists land use right to challenging the underlying notion that is making them target for foreign large-scale farmland investment; that also leads to their wrong alienation and allocation to such investments; the manner of taking such lands that is making the pastoralists' vulnerable and affected by such investments.

By gathering the stories from both the Government and pastoralists' side, the study has analyzed the wrongs from the points of justification, perception, aim and manner of pastoral land expropriation. What this study concludes at the end is, the cause for resistance of the land taking for the purpose of foreign large-scale farmland investment lies in the Government's failure to adhere to the legal requirements rather than the simple act of the land taking as summarized briefly below.

Justification:

The problem lies in the fact that the Government alleges the land it allocates are those 'unused' or 'unoccupied' while in actuality such lands are being used and occupied by pastoralists. Thus, the resistance comes from the Government's lack of recognition of and respect for land right of pastoralists. Thus, to create balance, the Government should start from acknowledgement of the landholding right of pastoralists. Of course, sorting out the details on the implementation of pastoralists use right is not an easy task given the nature of pastoral landholding and use. However, a willing and dedicated Government can find a way.

The Government also alleges it allocates only 'underutilized' lands. However, it has not to date made a study to quantify the total economic contribution of the pastoralism production system and what it can contribute if given the proper support and the feasibility of the foreign farmland investment, even after seeing the latter is not performing as expected. Thus, the Government instead of making an informed decision is purely over privileging the investment and is denying pastoralism a chance to be considered as one viable land use. Thus, the allegation of pastoral lands as 'underutilized' has disregarded the contribution the system is making to the livelihood of pastoralists, the Country and even the world and also disregards the little benefits the

investment have brought so far and its negative impacts both on pastoralists and the Country. This is also one reason why the pastoralists resist the act of the Government. Thus, if it wants to create balance, the decision should be based on a study that compares the viability of pastoralism or foreign large-scale farmland investment for each instance.

Perception and Aim:

Various acts of the Government in relation to the investment and the issue of pastoralists show it is driven by the perception and aim of the anti-pastoralism thinking, that considers pastoralism as a backward and unsustainable way of life and production system that needs first to be transformed into farming. However, the viability of the system can be gathered from the various contributions it is making and also from what the pastoralists can attest. The aim of the Government that is guided by such wrong perceptions and targets in mind goes against the aim of development and development activities provided in the Constitution and subsequent laws; which is enhancing the capacity of citizens for development; meeting their basic needs and achieving public purpose. The investment in the contrary is directly affecting the pastoralists without compensating them or making them beneficiaries.

Thus, if the Government needs to create balance, it should abandon unfounded perception and judge things as they are now and will likely be in the future through the conduct of studies. And it should align the investment with the aim of building the capacity of pastoralists and improving their livelihood together with the rest of the Ethiopian population rather than imposing its own notion of development on the pastoralists.

Manner:

One of the reasons for the resistance of the investment comes from the manner in which the Government identifies and takes the pastoral lands as if they have no owners. Thus, if the Government wants to create balance it should recognize the communal landholding right of pastoralist and make them owners of the developmental process. The pastoralists should be allowed to have meaningful say as group and individuals about the policies and projects that are going to affect them and a chance to provide solutions for their own problem, including in the case of foreign-large scale farmland investments.

Consultation becomes all the more important as there is a growing change in perception of land and livelihood in the pastoral community. As the interviewees of this study show, consultation through their representatives either in parliament or in traditional institutions is not effective to get the true concerns and wants of the people. The study has discussed the three trends of change within the pastoral community that are necessitated by nature and instigated by the free choice of the pastoralists themselves; wanting to maintain the system and unwilling to engage in other economic activities; completely moving out of the system and diversifying livelihood while still maintaining the system. Thus, through consultation of all people such divided views of pastoralists about land and livelihood can come to the light and given the proper place in an attempt to bring development, than overlooking individual interests in the name of some perceived group interest.

Therefore, if the Government makes the above mentioned shifts the foreign farmland investment and land right of pastoralists will stop always standing in contradiction and in fact the investment (given it is done properly) can provide opportunities to those pastoralists that want to move out of pastoralism system or diversify their livelihood, while at the same time bringing benefit to other citizens and the Country as a whole.

5.2 Recommendations

Based on the abovementioned discussions and findings, the writer would like to recommend the following:

- 5.2.1** Instead of arguing for the land right of pastoralists from indigenous right perspective, focus should be on utilizing the constitutional provisions which recognize the communal land use right of pastoralists and the socio-economic rights, which when interpreted purposefully and in line with international human right instruments calls for access to land and security of tenure for pastoralists.
- 5.2.2** The Government should adhere to the Constitutionally guaranteed communal land use right of pastoralists and amend the 2005 Federal Rural Land Administration and Land Use Proclamation to incorporate detailed provisions concerning the content and implementation of the communal landholding right of pastoralists; and repeal the provisions that pose a threat to such right specifically Art 2 (12 & 13) and Art 5 (3) as they contradict Art 40 of the Constitution.
- 5.2.3** The Government should first consider the benefits and ramifications of each foreign large-scale farmland investment and make sure the investment is conducted in a manner that respects the human right of individuals and groups and in a manner that can truly enhance their development, instead of blindly accepting every foreign large-scale farmland investment.
- 5.2.4** The Government should correct the wrong justifications ('unused' or 'unoccupied' or 'underutilized') it uses to transfer land from pastoralism to the foreign large-scale farmland investment by giving due recognition and respect to the occupancy and land right of pastoralists; making a land use study in each instance to identify whether pastoralism or the investment or another land use system is more viable, including those related with the pastoralism system.
- 5.2.5** Instead of repeating the same mantra about the pastoralism production system, the Government should make a study to quantify the contribution of the system and those

it can make if given the proper support and change any wrong perception not founded on facts.

- 5.2.6** The Government should test its aim of allowing foreign large-scale farmland investments on pastoral lands against the human right based approach to development adopted by and the goal of public purpose provided under the Constitution and subsidiary laws.
- 5.2.7** Instead of imposing its own notion of development on pastoralists, the Government should use the avenue of participation and consultation, to find out the different wishes and concerns of pastoralists both as a group and as individuals and use development projects including foreign large-scale farmland investments to enhance the capacity of pastoralists so they can make an informed and willing choice in how to live their life. Attempts to build their capacity through education should also be made as education is the most powerful tool one can have to decide about one's life.
- 5.2.8** When the Government wants pastoral lands for legitimate foreign large-scale farmland investment purposes, the manner of taking should respect the procedural right to development of pastoralists; only against the payment of compensation and or allocation of a substitute land enough to enable them to create at least same if not better life than they used to have.
- 5.2.9** More researches need to be undertaken so the true voice of pastoralists both as a group and individuals can be heard and understood by others and the Government.

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Annex

Interview Guide Questions to Concerned Government Officials

I. Regarding Land Policy and Transfer

1. Why Pastoralists communal landholding do not have tenure guarantee to date despite what is provided under the Constitution?
2. Is consultation with the pastoral community made when farmland investment is to be undertaken on pastoral lands? If yes, how is it made?
3. How do pastoralists react when a farmland investment is about to be undertaken on their land? Why?
4. Is compensation paid when pastoral lands are appropriated for farmland investment purposes?
5. How the pastoralists view on development is policies and projects that affect them gathered and included in the process?
6. Are the pastoralists benefiting from farmland investments undertaken on their land or locality? Any complains so far?
7. Is there a study undertaken so far to identify the possible options for the use of the Country's different land types? What about to quantify the total economic contribution of the pastoralism system and compare it with other land uses including foreign large-scale farmland investment?
8. What is the total contribution of the pastoralism system? Specifically, what is the contribution of the pastoralists' livestock to the Country's economy?
9. Was there any wrong perception about pastoralism and pastoralists from the Government side that is now changing?

II. Regarding Settlement Policy

1. What is the purpose of the settlement/villagization project undertaken in pastoral areas? How is it undertaken? The results so far? How does the community intake the projects?

Interview Guide Questions to Pastoralists and Pastoral Development Experts

I. Regarding Land

1. The Government claims the land it transfers to large-scale farmland investors is one that is 'unoccupied' or 'unused' by pastoralists, how do you respond to that?
2. What are the reasons the pastoral community resist farmland investments on its land?
3. Is consultation undertaken when the Government expropriates pastoral communal lands for farmland investment purposes? Is compensation paid?
4. Is consultation undertaken before the Government implements policies and projects in your area?
5. Do you think the Government has wrong perceptions about pastoralists and pastoralism? What makes you say that? Do you think the Government thought is justified or not, why?
6. Do you feel the Government gives enough attention and support for the improvement of the pastoralism production system? Are there any changes from the past that you are observing?
7. Is the pastoralism livestock production system profitable? Do you think its potential is fully explored by the Government? What problem does it face? Do you think it deserves support from the Government? In what ways?
8. Are the pastoralists benefiting from farmland investments undertaken on their land or locality? How?

II. Regarding Settlement policy

9. Is there a settlement program undertaken in your specific locality or region? What is your and your community's view of the projects?

III. Regarding Livelihood Perception

10. What value do you and your community attach to land?

11. Is there a change in view of land and livelihood among the pastoral community? If yes, how do you explain the trend from different generations' and groups perspective? What is the cause of such changes?
12. When the community does become open or resistant to change? Why?
13. How do you personally and your community feels when the Government took your land and gives it to investors? Do you and your community resist farmland investment in your area out of spiritual or cultural reasons? What changes are observed through time in this regard?
14. What is your personal wishes and plan regarding the pastoralism production system?
15. Can the pastoralist community in Ethiopia be taken as indigenous people?