CUSTOMARY LAND RIGHTS IN AFRICA: A SURVEY AND SELECTED CASE STUDIES FROM EAST AFRICA

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ABSTRACT

Land right, particularly in the context of Africa, is inextricably linked with the right to food and other basic necessities. However, an aspect of land rights, i.e., customary land rights, has remained little understood, misconceived, and largely neglected by researchers and development actors. In the conventional literature, customary rights are often associated with the so-called "tragedy of the common" and with inefficiency in the uses of agricultural land. This paper critically investigates the conventional concept of customary rights, discusses alternative approaches to our understanding of these rights, and reviews the dynamism and resilience of customary institutions under pressure from internal and external forces of change. The survey reinforces the argument that customary land laws be recognized and scaled up so that they operate side-by-side with statutory laws. What emerges from the survey is that legal pluralism be put in place to accommodate the diverse interests of marginalized peoples, minorities, and the poor.

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INTRODUCTION

The Research Problem and Objectives

Land rights, particularly in the context of Africa, are inextricably linked with the right to food and other basic necessities. In particular, customary land rights, which define access to a considerable proportion of total agricultural land in sub-Saharan Africa, are inextricably linked to the livelihoods of the rural poor including marginalized peoples (such as peoples living in pastoral areas and minorities).

However, since the colonization era, customary land rights in Africa, with few exceptions, have been treated with contempt and are little understood by policy makers and development actors. For example, Ethiopia's land proclamation of 1975 and Uganda's Land Act of 1998 largely ignored the role of customary rights in the development process. Further, customary rights in Africa are largely misunderstood and are often considered as obstacles to rural development.

In Ethiopia, the debate on land tenure, which has been characterized by a strife of making dichotomy between state control and private ownership of land, has paid little attention to the role that could be played by customary institutions in resolving conflicts and in improving the livelihoods of the poor in the pastoral areas of the country (which covers about half of the total land area).

Moreover, customary rights have received limited attention from researchers, who are often obsessed with those concepts having limited relevance to the African conditions. Based on the Western notion of property rights, the limited literature on tenure in Africa has either created confusion about the concept and economic role of customary rights or largely neglected them. The standard approach to the analysis of property rights has failed to enlighten us on the true features and dynamism of customary access rights in sub-Saharan Africa. The existing literature can

be considered as thin, incomplete, and unbalanced. Specific types of rights, such as those in pastoral areas are rarely treated in the literature. More specifically, it can be argued that, in the conventional literature, customary rights are misconceived, misunderstood, and are considered as irrelevant to the development process.

The misconceptions about customary land rights in Africa pertain to the three fundamental issues of economic development, i.e., issues of efficiency (economic growth); equity (including issues of poverty reduction); and environmental sustainability.

The efficiency issues have focused on whether or not customary rights encourage investment in land and whether they can create incentives to improve agricultural productivity. A large chunk of the conventional literature holds those customary rights (often known as "communal" access to land), in contrast to the freehold systems, do not provide smallholders with incentives to improve efficiency in resource allocation. For example, a recent policy briefing of the International Water Management Institute (IWMI 2003:4) makes the following assertions:

> *The African smallholder ... suffers from the disadvantages of communal land ownership with insecure tenure. The present tenurial arrangement does not provide much room and incentive for uninterested farmers to sell out and for interested and capable ones to expand their holdings. Nor does it lead to the emergence of flexible rental markets in irrigated land, thus keeping it from achieving its full productive potential. Often, the lack of clarity amongst the plot holders about what their rights precisely are seems more problematic than the absence of ownership. Inability to offer land as collateral for obtaining credit works as another disadvantage (IWMI 2003:4).*

Thus some authors (e.g., Dorner 1972; World Bank 1972; Harrison 1987) suggest that customary rights should give way to individual

ownership of land, an arrangement thought to be more conducive to economic growth than "communal" control of land. The implications of this argument are that the individualization of land titles *per se* would lead to economic growth by providing farmers with incentives to invest and adopt new technologies. Using relatively recent literature, this article questions the conventional views concerning the merits of titling versus the continuation and scaling up of customary rights in the context of sub-Saharan Africa.

The equity aspects of customary rights have received little attention in the conventional literature until late 1990s, when poverty reduction strategy papers (PRSPs) of the World came to the fore front of the development dialogue. This article suggests that, in contrast to the free hold system (which is likely to be biased in favor of powerful rural and urban elite), customary access rights accommodate the interests of the poor and those of minorities, as well. This is so because customary rights are not only flexible, but are also capable of providing mechanisms by which the poor can access land.

The debate concerning the environmental sustainability of resources accessed through customary rights has focused on Hardin's (1968) thesis of the tragedy of the commons. According to Hardin and his numerous followers, "communal" access to resources, in contrast to private ownership (or public control), is likely to lead to over-exploitation and eventual depletion of natural resources. Hardin and his devoted followers put forward such a bold assertion because they have failed to make a distinction between the concept of open access regimes and that of common property resources (CPRs). In line with the newly emerging literature (e.g., Toulmin and Quan 2000), this article questions the validity of the notion of the tragedy of commons and contributes to the argument that, under normal conditions, traditional societies employ time-test institutional mechanisms to control the free-rider problem in the use of CPRs.

In addition to the issues of efficiency, equity, and sustainability of customary rights, it is also possible to raise issues of evolution and/or transformation of customary rights. In this light, subscribe to the argument that customary rights, far from being rigid and change-resistant, are flexible and dynamically adjustable to changing circumstances, including market expansion, population pressure, and state intervention. The initial transformation of customary rights in Africa was brought about by colonialism, a system that left a lasting imprint on land tenure and enter-ethnic relations in rural Africa. In discussing the dynamic aspect of customary rights, this article questions the relevance of the notion of land titling to the African conditions.

METHODOLOGY AND SOURCE OF DATA

Customary institutions in Africa have received limited attention from donors, policy makers, and researchers. Let alone national surveys, there are very few reports and publications on customary rights in the region. While the available literature on customary rights in Africa is dominated by anthropologists and legal experts, very few economists are interested in the investigation of customary rights. Moreover, doubt, a quantitative analysis of customary rights in the region is constrained by paucity of data and information. Accordingly, a study of customary land rights in Africa is bound to rely on review of the available literature.

This study benefits from the case study approach, in addition to a review of the relevant literature. Accordingly, information for the study draws on official reports, wherever possible, in addition to a review of the relevant literature. A case study, defined as "an intensive study of a specific individual or specific context" (Trochim 2004: 161), would enable the researcher to illustrate general propositions. Because case studies are based on detailed data and information about a specific context, it is possible to gain a deeper understanding of the research question.

Moreover, case studies enable the researcher to show how institutional arrangements assume varying forms depending on location-specific arrangements. However, case studies have some limitations. It may be difficult to reach general conclusions on the basis of findings generated through case studies drawn from heterogeneous groups.

A related problem is that there is little consensus among scholars regarding the logic of indigenous institutional arrangements in Africa. For example, lawyers restrict their analysis to the legal aspect of customary rights, while social scientists (except economists) focus on the social and cultural aspects of the subject. Economists have shown interest in indigenous land tenure arrangements in developing countries only very recently. Moreover, the assumptions of conventional economic theory have limited relevance to indigenous institutional arrangements. That is, perhaps, why the recent literature on land legislation in developing countries is dominated by a strand of the New Institutional Economics, i.e., the theory of property rights in place of orthodox neoclassical economics (see Migot-Adholla et al. 1991, Ostrom 1998, Platteau 1996 Toulmin and Quan 2000). In this paper it is the institutionalist approach that we follow to analyze land tenure arrangements in Africa. Obviously, it is understandable that adherents of alternative approaches such as legal experts may not be comfortable with such an approach.

The case studies for this paper are drawn from Uganda, Kenya, and Tanzania. These countries, although they differ in certain respects, share common colonial history, economic backgrounds and the Swahili language, which is widely spoken in the sub-region. In the sub-region, colonial rule has significantly impacted customary land rights and undermined the cultural bonds that used to foster tolerance and understanding between different ethnic groups In addition, the study draws on a case study from Rwanda, a former Belgium colony, to illustrate specific features of a country that has experienced one of the most horrible incidences of genocide the world has ever seen. The origins of the genocide is often traced to the divide-and-rule-policy of the colonizers, who often left no stone unturned to exploit, to their advantage,

age-old mistrusts arising from competition over increasingly scare agricultural land.

The rest of this paper is organized as follows. First, it addresses conceptual issues concerning customary rights using review of the limited literature and case studies from selected East African countries (sections two and three). Following this, the paper investigates whether or not the argument of titling of "communal" lands is economically feasible in the African context (section 3). Next, the paper attempts to show how customary rights were disrupted and partly destroyed under pressure from colonial rule and how colonialism sowed the seeds of current enter-ethnic conflicts in Africa by creating ethnic-based reserve units in areas selected for colonial settlements.

Given the great diversity of African economies and paucity of data and information on customary rights, it is difficult to generalize about tenure arrangement in the entire continent. The conclusions derived from this survey are limited to the situation of those East African countries covered in the study.

CONCEPTUAL ISSUES

The Western Notion of Property Rights

"Property rights" assumes different meanings depending on the way it is defined. The Western notion of rights provides a standard definition, which has limited relevance to the African conditions. In Africa, property rights are complex as discussed in this paper.

"Property Rights," according to Bell (1991) include a bundle of characteristics which comprise exclusivity, inheritability, and enforcement

mechanisms. Property rights thus define the uses which are legitimately viewed as exclusive and define who the owner of these exclusive rights is. According to one author, the term "property right" refers to "...all actors' rights, which are recognized and enforced by other members of society, to use and control valuable resources"(Libecap 1996:31). Another study defines "property rights" as "...the formal or informal rules that delimit an individual's or group's rights over the assets that they possess, including the rights to consume, obtain income from, and alienate the assets" (Lin & Nugent 1995:2310).

Based on the Western notion of property rights, the conventional literature identifies four categories of rights. These are: (a) private property (usually defined in terms of exclusivity and transferability); (b) common property (which includes a right to use something in common with others); (c) state property (which refers to the property owned outright and used exclusively by agents of the state or public property over which the state exercises governance); and (d) open access (which is the null condition of no property claims or a state of "non - property"). Each of these has a defined owner (such as individual, collective, citizen and none). Owners have rights (such as socially acceptable uses, exclusion of others, etc.) and duties as well (such as avoidance of socially unacceptable uses).

Open access, which is often confused with the notion of common property in line with Hardin's (1968) assertions about the so-called tragedy of the commons, occurs only under conditions where resources are over-exploited due to lack of cooperation among members of a group. An indiscriminate application of the notion of the tragedy of the common to the African condition has been increasingly questioned in more recent literature (e.g., see Toulmin and Quan 2000).

The standard approach to the conceptualization of property rights has limited relevance to the very complex conditions of Africa (see below). The new institutionalist school proposes alternative approaches, including the one proposed by Ostrom (1990,1998).

Ostrom's Approach

The complexity of property right regimes can be demonstrated using an approach developed by Ostrom (1998), who distinguishes between five types of rights ranging from the simplest to the most complex one. Accordingly, Ostrom distinguishes between the following types of property rights:

1. **Access:** The right to enter a defined physical area and enjoy non-subtractive benefits (e.g., hike, canoes, sit in the sun).

2. **Withdrawal:** The right to obtain resource units or products of a resource system (e.g., catches fish, divert water to own field).

3. **Management:** The right to regulate internal use patterns and transform the resource by making improvements.

4. **Exclusion:** The right to determine who will have an access right, and how that right may be transferred.

5. **Alienation:** The right to sell or lease management and exclusion rights.

Corresponding to the five rights identified above, Ostrom distinguishes between the following five types of right holders:

1. **Authorized entrants:** Refers to those users who can get access to a resource in a very limited sense, like a person who buys an operational right to enter and enjoy the natural beauty of a park, but who do not have a right to harvest forest products (or remove the flowers from a park).

2. **Authorized users:** Refers to those users who can access a resource and also withdraw products. Operational rules allow authorized users to transfer access and withdrawal rights either temporarily through a rental agreement, or permanently when these rights are assigned or sold to others.

3. **Claimants** possess the operational rights of access and withdrawal plus the right of managing a resource. Claimant's rights also include decision-making power concerning the construction and maintenance of facilities as well as the authority to devise limits on withdrawal rights. But claimants do not have the right to exclude others from the use of a resource or the right to alienate (or transfer) a resource.

4. **Proprietors** hold the same rights as claimants with the addition of the right to determine who may access and harvest from a resource (i.e., the right to exclude others). Most of what is known as "common property" regime falls in this category. However, proprietors do not possess the right to sell their management and exclusion rights even though they most frequently have the right to bequeath it to members of their family. In this sense, we can redefine the *usufructs* rights of Ethiopian peasants and designate them as "proprietors". Customary tenure system often grants bundle rights except the right to alienate a resource.

5. **Owners** possess the right of alienation (the right to transfer an asset to others, subject to certain restrictions) in addition to the bundle of rights held by a proprietor.

The following table summarizes the bundles of rights and type of right-holders identified by Ostrom.

Table 1: Bundles of Rights Associated with Positions

Rights	Owners	Proprietors	Authorized Claimants	Authorized users	Authorized Entrants
Access	X	X	X	X	X
Withdrawal	X	X	X	X	
Management	X	X	X		
Exclusion	X	X			
Alienation	X				

Source: Ostrom (1998)

In the institutionalist literature (see Alchian 1977, Eggertsson 1990). Ostrom's approach is proximate by what is known as *partitioned* rights, which refers to:

> *The fact that, at the same time, several people may each possess some portion of the rights to use the land: a) may possess the right to grow wheat on it, b) may possess the right to walk across it, c) may possess the right to dump ashes and smoke on it, and d) may possess the right to fly an airplane over it (Alchian 1977, quoted in Eggertsson 1990:39).*[1]

Thus, Ostrom has shown that, in reality, there are various forms of rights and different categories of right holders. For Ostrom, simplistic classifications of rights (such as state versus private ownership) have limited value for policy analysis. Moreover, Ostrom questions the commonly held view that defined right is specific to private ownership only. As we have seen above, rights could be defined without necessarily

being private. What makes private ownership different from other types of access is the right to sell or buy land.

Ostrom's approach, though a landmark in the evolution of approaches to the analysis of property rights, is inadequate in one sense: it assumes defined property right regimes, although, in some cases, access rights may remain fuzzy as outlined below.

Fuzzy Access Rights

Fuzzy access rights are comprehensively defined by Scoones (1994:27) in terms of overlapping claims, flexibility of rights, and negotiations:

> *Overlapping claims to resources, shifting assertions of rights and continuous contestation and negotiation of access rules dominate tenure arrangements in uncertain environments. The solution is not to impose particular tenure types on a variable setting; whether these are uniquely communal or private they are unlikely to work. Instead, the need for flexible tenure arrangement must be recognized... Customary tenure systems operate shared and overlapping forms of tenure rights in such settings as maintaining strict boundaries is usually untenable.*

Based on certain assumptions, Goodhue and McCarthy (2000:60) showed that, under certain conditions, traditional fuzzy access rights result in higher incomes with low variance than does conventional common access. With reference to economic activities in pastoral areas, they noted that:

> *Under certain conditions, the traditional fuzzy access rights results in higher total returns than does conventional common access. Further, the traditional system may reduce the variability of herders' returns. Both private-property rights and conventional common-property rights limit herders' ability to respond to weather shocks exposit. Fuzzy access rights that adjust in response*

to rainfall shocks enhance the value of mobility in terms of lower variance of returns.

In brief, the main features of fuzzy access rights (which are discussed in detail in Dejene 2004) include: overlapping claims, flexible and multiple rights, flexible physical boundaries separating contending pastoral groups, bundles of rights and duties, and differentiated territorial units. The case study on pastoral areas amply illustrates these features. However, the concept of fuzzy access rights is by no way adequate enough to explain all aspects of customary rights. For example, even in pastoral areas, fuzzy access rights are not relevant to mode of access to resources in which the labor of individuals is invested. In this light it is interesting to revisit the conventional notions of "communal" control of resource and common property resources (CPRs).

Common Property Resources (CPRs) and Communal Control of Land

To avoid confusion between the terms "common" rights and "communal" control, we adopted the following definition (Ostrom 1990:30, Cousins 2000:152). "**Common pool resources:** are **public goods** which are used simultaneously or sequentially by different users because of difficulties in claiming or enforcing exclusive rights. On the other hand, the term "**communal**" means, in the great majority of cases a degree of **community control** over who is allowed into the group, thereby qualifying for an allocation of land for residence and cropping, as well as rights of access to and use of the shared resources. Groups often employ time-tested institutional mechanisms (such as the *geda* system of the Borana Oromos) to control and manage common pool resources such as rangelands. Here, institutions are required to restrict alienation of land to outsiders, and thus seek to maintain the identity, coherence and livelihood security of the group and its members. Because the group has put in place an effective institutional mechanism, it is capable of avoiding the so-called tragedy of the commons in the uses of CPRs.

Following de Janvry and Sadoulet (2001), we identify the following potential advantages of CPRs:

- Efficiency gains derived from potential economies of scale (i.e., economies of size);
- Efficiency and equity gains from the use of indivisible or lumpy natural resources (e.g., vast grazing land) and investments (such as deep wells);
- The possibilities of internalizing externalities over a large geographical unit (e.g. watersheds with joint upstream and downstream interests in controlling soil erosion, and other forms of interlinked interests among individuals in the watershed);
- Possibilities for geographical risk spreading when the location of rainfall is erratic;
- Possibilities for reducing high costs of dividing resources and high costs of enforcing individual property rights;
- Equity reasons derived from generally greater access to resources for the poor under CPR than in private regimes; and
- Preservation of community relations, which have other benefits such as mutual insurance, information sharing, and political representation.

However, holding of resources under CPR may generate negative consequences: individuals may fail to respect traditional rules regarding the use of CPRs and the free-rider problem may emerge giving rise to over exploitation of resources. Such negative externalities could take place under conditions of institutional failure (i.e., possible breakdown of

indigenous mechanisms) and when CPRs are put under a public control arrangement that neglects local participation in the management of CPRs.

Coming to the term "communal", we note that many authors characterize land tenure in Africa as "communal" although authors like Bruce (1988) and Cousins (2000) think that this is, in some respects, a misnomer. The term "communal" implies ownership of all resources and collective production, which are rarely found in labor. In the African case, "communal" tenure may incorporate in itself individual possession of residential areas, arable land and common pool resources by a household or by a sub-group within a larger group (Cousins 2000).

According to some authors (e.g., Bruce 1988, Cousins 2000), what is often referred to, as "communal tenure" in Africa is, in fact, **a mixed tenure** consisting of multiple right-holders and differentiated rights. The case studies presented in this paper demonstrate this point.

Under communal tenure (or mixed tenure), community membership bestows access rights to its members. Access to land via community membership (i.e., access via common property resources) involves community management of natural resources such as grazing land; community forest and fisheries. Community management mechanisms involve time-test institutional arrangements (such as the *geda* system in the Borana area of southern Ethiopia) and cooperation among community members (de Janvry and Sadoulet 2001).

By way of conclusion, we note that, partly because of great diversity of African economies and differences in historical backgrounds of the land man relations in each country, it is difficult to identify a single conceptual framework that can guide the analysis of customary land rights in the region. Therefore, the conceptual framework of this paper draws on a combination of the several approaches reviewed above. However, these approaches are not adequate enough to explain the multiple dimensions of customary rights including their dynamic aspects, which is partially

treated in one of the case studies (i.e., the case of Rwanda) presented below.

CASE STUDIES OF CUSTOMARY RIGHTS

The following four case studies are meant to illustrate some of the propositions raised above. The cases of Uganda and Rwanda demonstrate that, in a complex setting (such as that of Africa), various forms of customary rights coexist side-by-side with statutory laws and with other types of rights, which are shaped by historical factors. Further, the case of Rwanda shows that the relative importance of the various acquisition mechanisms in a country could change over time consequent to increased population pressure over land and growing scarcity of land. A case study from Tanzania illustrates the possibilities that customary rights often assume different forms depending on the specific conditions of a country. The case of pastoral areas provides concrete evidence of fuzzy access rights in settings characterized by temporal and spatial imbalances in the distribution of resources (such as water sources) and by mobility of peoples and animals. The Ethiopian case illustrates the resilience of customary rights under conditions where statutory laws provide nationally uniform rights.

The Case of Uganda

Customary rights in Africa are complex and often coexist with other types of rights, which are shaped by historical factors. The case of Uganda demonstrates this point. In Uganda one can distinguish between four types of customary rights co-existing with freehold and state ownership (see Table 2). Uganda has different right-holders, including chiefs, church organizations, individuals, groups, clan heads, and the state. There are also different types of rights emanating from several tenure arrangements. For example, the *butaka* system provided the right of clan members to be

buried on the *butaka* land, the right to use land in exchange for rent, and the right of the clan head to inherit land. As indicated in Table 3, customary rights in Uganda have been influenced by both colonial policies and post-independence developments.

Table 2. The Complexity of Property Rights in Land: The Case of Uganda

No.	Local Name or type of tenure	Right holder	Type of right	Time (period) right originated	Descriptions/ Comments
1.	*Mailo*	Colonial agents, Buganda Chiefs and Church organi-zations	Transferable, negotiable, and marketable rights	The *Buganda* Agreement of 1900	•The land Reform Decree of 1975 converted Mailo land into long-term leaseholds. • A predominant from of tenure • Individual right granted to a minority, the eliteThose actually cultivating the land became tenants (like the *gult* system in Ethiopia)
2.	Customary holdings	Groups	Customary rights consisting of a complex and diverse spectrum of rules and customs •	Pre-colonial origins but have existed to the present day	• The term "customary" refers to traditional tenure patterns.

3.	*Butaka*	Heads of clans or of sub-clans	Members of the clan have rights to be buried on Butaka land; the clan head can allocate *usufructs* rights in exchange for rent. Right not inherited, but passed on to the successor of the clan head	Clan ancestral land pre-dating colonial times	• *Butaka* tenure was neither strictly collective, nor could it be described as private ownership.
4.	*Obweseng eze*	The individual or a chief	Individual hereditary rights stem from long undisputed occupation and /or grant by the king, i.e. by the Kabaka. Right can be inherited by children and right carries no political duties	Has precolonial origins	• Royal recognition given by planting of a bark-cloth tree locally known as *mutaba* on the piece of land by the royal messenger
5.	Freehold	The individual	"Full private ownership that is free of any obligation to the state other than the payment of taxes and observance of land use controls imposed in the public interest.	The Crown Land Ordinance of 1903 introduced the first freehold estates under colonial protectorate	• The Land Reform decree of 1975 converted freehold land into Long-term leaseholds.
6.	Public land	The State	The land Reform Decree of 1975 vested all land in Uganda in the state to be administered under the Ugandan Land Commission.	Originally, the Governor of the protectorate held all land in Uganda in trust "for the Uganda People"	

Sources: Barrow and Roth (1990), Bangambah (2001), Government of Uganda (1998), MISR (1989).

The Case of Rwanda

The case of Rwanda demonstrates different types of access to land co-exist as indicated in the following table. In Rwanda, customary access mechanisms included inheritance and donation of land to the poor. In addition, through time, Rwanda adopted non-customary access mechanism including land purchase, state allocation, land lease systems, land loan arrangements, and acquisition via the clearing of forestland.

Intra-family transfers constitute one of the mechanisms through which land is transferred to individuals[2]. It involves inheritance and inter-vivo (i.e., per-mortem) transfers, both of which can be designated as inter-generational transfers. Two basic issues emerge from the traditional intra-family transfer of land. First, there is the question of who gains access to land and who is excluded and, hence, what are the poverty and equity implications of these transfers? Second, one wants to know under what terms and conditions the land is received, and hence whether or not it will be possible for the new users to cultivate the land efficiently (de Janvry and Sadoulet 2001).

One weakness of intra-family transfer mechanisms (and of market-based transfers, as well) is that customary rights often discriminate against women as well-demonstrated by the case of Rwanda:

> *According to customary land tenure systems in Rwanda, only men had the right to access land. Upon marriage, young women had to leave their families to join their husbands who inherited land from their parents. In her new family, a woman could not inherit her husband's property... a woman could inherit land only when she had neither male children nor living male relatives of her deceased husband. However, the widow has the right, to use her late husband's land as long as she stayed in her husband's house and raised their children (Bigagaza et al. 2002:66).*

However, the legislation of November 1990 made it clear that men and women are equally entitled to inherit land from their parents.

In Rwanda, the relative importance of the various acquisition mechanisms has changed over time as indicated in the following table. Acquisition through the traditional ways (i.e., inheritance and donation) has declined in importance, while acquisition through land purchase and through clearing of forest gained increased importance. Also, the relative importance of land acquisition through state allocation has declined over time as land became increasingly scarce under ever-deepening population pressure. Eventually the state had no free land to allocate to smallholders as the average size of family holding eventually reached uneconomic size. The average size of the family holding in Rwanda declined from hectares per farm family in 1949 to 2 hectares in the 1960s, 1.2 hectares in the early 1980s and 0.7 hectares by the early 1990s (Bigagaza et al. 2002).

The case of Rwanda demonstrates the argument that, under conditions of population pressure and market expansion, customary relations in accessing land evolves into market relations. Accordingly, Bigagaza et al. (2002: 66) note "purchase of land are increasing and are now the primary mode of land acquisition". Moreover, in Rwanda, government is no longer able to allocate large areas of land to smallholders because there is no more free land for distribution purposes. As indicated in the following table, state allocation accounted for 15.5 percent of the total allocation of all land owned for more than 25 years as compared to a mere 2.6 percent of the total allocation of all land owned for less than 10 years. On the other hand, land purchase accounted for a mere 2.4 percent of the total land owned for more than 25 years, but for as much a 20.4 percent of the total land owned for less than 10 years. This suggests that relative recent years have seen increased land markets and increased clearing of forestland for cultivation purposes.

However, land acquisition via land market has its own limitations: few peasants have the ability to purchase land on the market. Accordingly,

customary access mechanisms, such as land donation and temporary land loan, continued to be used along with market-based transfer mechanism, though their relative importance declined over time.

Table 3. Evolution of Land Acquisition over Time (in percent of total plots)

Mode of acquisition	Land owned for more than 25 years	Land owned for less than 10 years	Changes over time
Land purchase	2.4	20.4	Increased
Clearing of forests	1.6	4.7	Increased
Inheritance	72.2	67.5	Deoreased
Land donation	8.3	4.7	Decreased
State allocation of land	15.5	2.6	Decreased
Total	100	100	

Source: Bipagaza et al. 2002

The Case of Tanzania

Customary rights often assume different forms depending on the specific conditions of a given locality within a country. For example, in the Iringa district of Tanzania four types of customary rights existed side by side in addition to rights sanctioned by formal laws and village authorities. These are: a) indigenous customary rights; b) customary rights rooted in non-

indigenous customary rules and norms; c) rights secured through informal transactions (such as sharecropping); and d) rights of access to common pool resources (such as grazing land) Odgaard (2002).

In Tanzania, *usufruct* rights to a particular plot of land is secured most often when an individual can successfully demonstrate that he has invested his labor in the land. To possess land, "the peasant must actually live on it and labor it" (Hobsbawn 1985). Referring to the case of the Iringa district of Tanzania, Odgaard (2002:78) noted, "in general customary rights may be retained if the land is used, and if it is obvious that it is being or has recently been used." In other words, *usufruct* right is, in general, conditional on whether own "labor is mixed with the resource of nature" or not (Hobsbawn 1985). A study of customary rights in Lesotho has reinforced the labor theory of rights (see Thabane 1998).

Further, differential access to labor can partly explain why household engage in land transaction (such as sharecropping). Labor deficit households may rent out their land to labor surplus households. Referring to the case of the Iringa district of Tanzania, Odgaard (2002:81) observed that:

> *People having more land than they are able to cultivate by their own means are interested in letting other people use their land, while at the same time being able to derive extra income from the arrangement. This is the reason why renting and borrowing arrangements are so widespread.*

Labor investment can also be used to partly explain why pastoralists are often forced to give way to agriculturalists whenever competition over land intensifies. Pastoralists, unlike settled people, make little investment in land (except water wells). As a result they lack concrete structures or physical capital to support their claim to particular pieces of land. Referring to the case of the Iringa district of Tanzania, Odgaard (2002:81) noted that, "very few pastoralists leave visible investment on the land

they use and, therefore, generally do not gain more permanent rights to it."

In some cases the existence of a burial place may be taken as a justification for legitimate land claims. For example, in the Iringa district of Tanzania the culture of the Hehe people sanctions that the presence of graves provides "strong justification for making land claims", which is not immediately disputed (Odgaard 2002:78).

The Case of Pastoral Economies: Mobility and Complexity of Rights

In pastoralist systems, a high degree of mobility of livestock and humans is necessary because of spatial and temporal variability of resource availability. Seasonal movement of livestock may exploit resource made available through predictable environmental fluctuations. Stock movement may take place in response to unpredictable rainfall fluctuations, disease outbreaks, a breakdown of water points and range fires. Thus, it is possible that mobility increases the overall carrying capacity of rangelands characterized by a wide range of seasonal difference in pastoral resources.

Because of seasonal movement of livestock and claims put forward by heterogeneous ethnic and social groups (e.g., clans, sub-clans, families), it is difficult (or, possibly, less advantageous) to clearly define property rights. Rather rights often lack clarity, or would remain fuzzy. In general, boundaries may not be clearly demarcated as noted by Cousins (2000:159):

> *For pastoralists, "opportunistic" herd movement over long distances is essential across territories in which boundaries are flexible and negotiable, rather than clear and unambiguous. This allows them to maintain the large herds, which constitute their main source of livelihood.*

In pastoral areas, lack of clarity in the definition of physical boundaries is often mirrored by a corresponding fuzziness in the definition of social boundaries (Cousins 2000). Social groups, like neighboring ethnic groups, clans, sub-clans, and families, often intermix and lay claim to the same resource (such as grazing land and water points). In addition, pastoral groups manage overlapping territories by maintaining buffer zones and fallback areas (Niamer-fuller 1994). Further, some -lams may use a resource consistently from year to year but for different lengths of time, while others may use it only occasionally (Goodhue and McCarthy 2000).

In some pastoral areas, boundaries separating contending groups may be clearly demarcated but resources can be shared. The following example from the Afar area[4] of Ethiopia illustrates how accesses to resources are negotiated between primary and secondary right-holders who share resources:

> *The Afar are conscious of territorial boundaries (though these are considered flexible) since every tribe and clan has its own clearly demarcated territory that is guarded by scouting parties called giba. Grazing land is divided among the clans and sub clans within a tribe in accordance with customary law. One clan is not allowed to use the resource of the other without their knowledge and prior consent. Clan resources are often shared. Resource sharing is the basis of strong traditions of reciprocity among Afar (Flintan and Imeru 2002:280).*

Multiple rights and duties are conspicuously evident in pastoral areas, where hierarchies of rights are common and where there are different types of users and levels of rights. In particular, it is possible to distinguish between: a) primary users having highest priority within the territory; b) secondary users having seasonal access to resources; and c) "tertiary users" having infrequent access to resources dictated by

difficulties (Cousins 2000). Also, interlocked levels of rights may exists as in the case of French-speaking West Africa.[3]

With reference to the Borana area of Ethiopia, Helland (1999:9) notes that: "kin groups or other social formations in Borana did not attempt to claim exclusive rights to particular tracts of land within the larger area under Borana control. Ownership to water resources, however, is much clearly defined"

In pastoral areas, tenure regimes provide "bundles of rights and duties", disaggregated by:

- Resource type (e.g., grass, shrubs, trees, stream water, ground water, wild animals);
- Resource use (e.g., grazing, cutting of thatch grass, harvesting of fruit, tree felling, lopping of branches, livestock watering, irrigation, hunting);
- Resource users (e.g., individuals, families, sub-groups; primary rights-holders, secondary rights-holders or temporary users, men, women),
- Season of use (e.g., dry season, wet season-wet season, in drought years only); and
- Nature and strength of rights and duties (e.g., exclusive use, shared use, permanent rights, temporary rights, rates of use, boundaries of resource use) (Cousins 2000:155-57).

Based on multiple rights to pastoral resources, in general, it is also possible to distinguish between five types of territorial units (Niamir-fuller 1994):

i) the customary territory belonging to the tribe;

ii) flexibly defined annual grazing areas within the territory, with priority use by several clans, sections or sub-sections;

iii) dry season bases where a specific group, such as a sub-clan, is the primary user and others are secondary or tertiary users;

iv) key sites within the dry season base; and

v) group or individual resource/areas, such as trees, where a household or group of households are primary users.

Under certain conditions, access rights in pastoral people may give rise to negative externalities (such as over exploitation of resources and conflicts). However, pastoral societies have developed indigenous institutional mechanisms to deal with these problems. They have put in place culture-specific rules, regulations and norms to regulate the use of resources (i.e., grazing land and waterholes). In the Borana area of Ethiopia the *geda* system is traditionally used to resolve conflicts arising between different groups having fuzzy rights to grazing land.

However, these institutional mechanisms can be eroded over time due to internal factors (such as population pressure), external factors (such as state intervention, expansion of commercial farms, donor / NGO interventions), and due to ecological and climatic factors (such as drought and bush encroachment). The demise of indigenous institution may also lead to violent conflict.[4]

The foregoing case studies have demonstrated certain aspects of customary rights in Africa. In the following two sections we will present a review of issues of titling of land held under customary rights and attempt to show

how colonialism impacted customary rights in Africa and it sowed the seeds of resource-based conflict in the region.

The Case of Ethiopia

In Ethiopia, the historic proclamation of 1975 banned private ownership of land and made all rural land public property. The current constitution also confirmed that land is public property. Therefore, one may wonder whether customary rights are relevant to the Ethiopian case.

It is a common belief that the institution of customary land rights is irrelevant to Ethiopia simply because the historic legislation of March 1975 (and the current Constitution of the Country) has done away with customary rights such as the *rist* system (i.e., *usufruct* right to land based on inheritance) and the *gult* system (i.e., the right to collect tributes and to administer justice), which used to be the dominant form of access to land in the northern part of the country, in particular. However, this author proposes that the institution of customary rights is still relevant to Ethiopia because of the following reasons:

i) In the pastoral areas of the country (which cover half of the country's land area) customary rights, such as the famous *geda* system of the Borana Oromos, are still practiced widely.

ii) Some forms of customary access rights (such as inheritance, land lending practices, land and labor exchange arrangements, etc.) are still operational even in the highlands, where formal laws are believed to be effectively implemented.

Partly because many researchers and policy makers think that customary rights are irrelevant to post- 1975 Ethiopia, the current debate on the land question in Ethiopia has been obsessed with the dichotomy between state ownership of land versus private ownership. Very few people raise the relevance of access sights in pastoral areas to the on-going debate. Of

those engaged in the debate, few appreciate that people in the pastoral areas access land mainly through customary arrangements. This is the truth although parts of the pastoral areas of Ethiopia are spontaneously evolving into individualization of land under internal and external pressure (Swallow and Kamara 2000).

Therefore, it is high time to enrich the debate on land tenure in Ethiopia by recognizing the existence of customary rights in allocating resources between alternative needs. Accordingly, the following points are in order:

- The current debate on land tenure in Ethiopia has come to a dead end. It is high time to appreciate the futility of attempting to implement uniform tenure arrangement in a country of great contrasts and diversity. Access rights should be time and place specific. It is high time to harmonize customary laws with statutory laws of the country.

- There is a need to document, understand and scale-up customary access rights (and related institutions) prevailing in the pastoral areas of Ethiopia.

The Evolution of Customary Rights: Is Titling Feasible in the Context of Africa?

Customary land management has been perceived as an obstruction to development because of the insecurity of land rights deemed to be inherent under such arrangements, and the view that land is too strongly associated with non-monetary cultural values in Africa (see, for example, Dorner 1972, World Bank 1974, Harrison 1987). Customary tenure is believed to provide poor incentives for land investment by the farmer, and cannot be the basis for access to credit nor enable a market in land to develop, which could ensure its allocation to the most efficient users. On the other hand, conventional economic literature asserts that individualized titles provide

security and incentive for increased investment in land. Access to credit is often mentioned as an additional advantage of individualized titles.

However, recent literature casts doubt on the above-mentioned pessimists' view of customary tenure, which, in reality, is more complete and less inimical to economic growth (Quan 2000:35). The introduction of individualized titles, by contrast, has in practice benefited powerful private interests, creating opportunities for land concentration in the hands of political and other local elites. There is no clear evidence to show that land titling has led to greater agricultural growth. Migot Adholla (1991) has shown that "at best there is weak relationship between individualization of land rights and yields in the regions surveyed". The links between formalized, individual property rights, on the one hand, and the emergence of land markets and the availability of credit on the other, have also been questionable (see Platteau 2000). In many cases, improvements in the supply of credit, to which land titles supposedly enable greater access, have simply not been forthcoming for small holders.

Moreover, titling has, in some cases, led to increased landlessness and poverty among low-income farmers (Quan 2000:37). The case of Kenya amply demonstrates that individualization of title per se seldom leads to agricultural growth. Rather, individualization may lead to social problems. In the words of Africa's best-known authority on land tenure:

> *Studies... suggest that individualization of title per se seldom leads to a revolution in agriculture... As it is, we were simply told by colonial agronomists that tenure reform was necessary, and we believed it. The result has been, at most, a disruption of the social systems of many groups in the country and, at best, no appreciable change at all (Okoth-Ogendo 1976:183).*

One of the criticisms leveled against customary tenure systems is the assertion that the absence of land markets impedes agricultural

development. However, authors like Lawry (1993) and Saul (1993) demonstrate, to the contrary, that land transfers are commonplace between customary landholders and outsiders in African countries such as Lesotho and Burkina Faso. Their case studies highlight the flexibility of customary tenure systems by showing how land borrowing[5] and leasing arrangements accommodate the needs of landless farmers and commercial farmers in areas with different population densities. Lawry (1993), in particular, demonstrates how sharecropping and leasing provide ample security to farmers in densely populated areas of Lesotho. Where there are temporary imbalances in factors, such as a household short of labor because of illness or labor migration, there are usually indigenous arrangements to redress the balance.

Contrary to what many authors think, customary rights are far from being rigid; they are often flexible and subject to change in response to the penetration of market forces, population pressure, state intervention, etc. In this sense, one should be cautious not to equate the term "customary" with "traditional". Thus, Okoth-Ogendo (2000:133) underlined that customary land tenure is an organic system, which responds to a range of internal and external pressures, such as technology, population growth, and new economic opportunities just like any other.

However, over the long-term, customary rights may change both in form and content mainly due to population pressure, market expansion, state intervention, and due to expansion of commercial enterprises like commercial farms, logging and mineral exploitation.

There can be two ways in which African customary land tenure arrangements have been modified i.e., through spontaneous evolution and through public sector involvement. In the case of spontaneous evolution, growing population pressure and increasing market penetration, have given rise to gradual but significant changes in land tenure systems. These have involved the enhanced individualization of tenure, a higher incidence of land sales (first disguised, then increasingly in the open),

increased use of money in connection with land loans, and a shift from matrilineal to patrilineal inheritance patterns (Boserup 1965, Nornoha 1985, Downs and Reyna 1988, Migot - Adholla et al. 1991, Bassett and Crummey 1993).

Some authors argued that under the impulse of market forces, customary arrangements might evolve into individual holdings. Hence, the label "evolutionary theory of land rights" (ETLR) is given to this doctrine (Platteau 1996). It should be noted that public authorities still have an important role to play under this theory, as autonomous changes in land rights need to be supported by government intervention to formalize and consolidate these newly emerging rights. Below, the Ethiopian case (1900-1975) illustrates this point.

The "evolutionary theory of land rights" is based on the notion of scarcity of land. As land scarcity increases, people demand greater tenure security. As a result, private property rights in land tend to emerge and, once established, to evolve towards greater measures of individualization and formalization.

Customary modes of land transfer through gifts, exchanges, loans, renting, pledges or mortgages maybe intensified and sales of land may take place in some areas. At first, sales could be sanctioned only among members of the group, but later may spread to outsiders with the approval of the group or its head (Bruce 1986: 38-40). With greater integration of rural areas into the market economy and growing population pressure, the above-mentioned modifications in African customary land tenure arrangements were accelerated during the post - independence period, a topic we briefly consider below.

An important feature of post-independence development was the interference of the state in customary arrangements. In Africa, the state may claim primary right of ownership of land, while occupants are entitled to secondary rights. Accordingly, Cousins (2000:155) notes that:

> *In most African countries, land held under communal tenure is legally owned by the state and the occupants have, in law, only a secondary right access and use. When resources become more valuable (e.g., wildlife in the context of lucrative eco-tourism, or land newly under irrigation), or new high value resources are discovered (e.g., minerals), then often the state asserts its primary rights.*

In African countries where strong states existed, customary rights were, to some extent, subjected to the authority of the state. For example, with reference to pre-colonial Burundi, Oketh and Polzer (2002:122) noted that:

> *The land tenure in Burundi has always been controlled from the center. During the pre-colonial period, all land belonged to the Mwami or the king, to dispense and distribute at his pleasure. He held the right to distribute as well as dispossess owners as he deemed fit.*

Land dispute may be one reason for the state intervention in customary arrangements. In addition, revenue concerns may encourage governments to legalize spontaneous individualization processes. That is, governments may enact land laws in order to generate more revenue for the treasury. Administrative reforms may include a formal registration of private land rights and fully-fledged land titling procedures.

In some cases, the formal laws of the state may fail to transform customary laws. Customary arrangements, though fairly dynamic and flexible, tend to persist over time in spite of the presence of formal laws. Referring to the case of Lesotho, Thabane (1998:10) underlined that none of the formal laws really took root in the rural areas. He further noted that "Rural dwellers (both chiefs and commoners) continued to relate to land pretty much in the manner that their fore bearers did in the past". Similarly, in Kenya, an authority on land tenure in the country concluded

that there was "an attempt by society to protect traditional rights of access irrespective of what the new legal regime prescribed".

The Partial Destruction of Customary Rights: The Impact of Colonialism

As noted by Toulmin and Quan (2000), an "understanding of current tenure issues in sub-Saharan Africa requires a backward look" at the way colonial authority affected access to and management of land. Colonialism has remained one of the ways by which customary rights and corresponding institutions were partially destroyed and transformed into new forms.

Following forceful acquisition and expropriation of native land, colonial powers attempted to partially destroy customary rights and subjected them to European laws. Thus, McAuslan (2000:80), with reference to British colonial rules notes that:

> *Without exception, the British colonial authorities assumed full rights of jurisdiction over all land in every dependency as far as land matters were concerned. All existing customary land laws were subordinated to the received law and so all existing rights of land were at the mercy of the incoming power.*

In some cases, colonial laws partially replaced customary rights, dispossessed the natives, and made Africans tenant of the colonial state as demonstrated by the case of Uganda[6]:

> *In Uganda, outside the mailo land in Buganda, all land was declared to be Crown land and available for allocation, via freehold or leasehold. Those actually occupying Crown land under temporary tenure, that is, all Ugandans except those on mailo land*

> *could be moved off when it was leased. This received law trumped customary law, and Ugandans became tenants at will of the state.*

British colonial rule denied legal pluralism and imposed a uniform law (that is English land law) on the colonized people irrespective of variations in the culture and historical backgrounds of the colonized countries. The British colonial rules rejected "any notion of a hierarchy of land laws within a country" and imposed on the native people "one law based on one philosophy which can apply to all land and all people" (McAuslan 2000:89)[7].

In Africa, colonialism distorted existing customary rights and social relations and undermined the economic base of independent development by expropriating the best land, imposing hut tax, and displacing people with a view to creating cheap labor for the mining sector and export-oriented agriculture. In Tanzania, Tenga (1987:40) noted, "hand in hand with the taxation system laws were enacted whereby the peasant was obliged to cultivate a minimum acreage of export crops". Referring to the case of Kenya, Okoth-Ogendo (1976:154) noted that:

> *The demands which the establishment of a colonial economy placed upon African society were to prove an important element in the* ***dislocation of tenure arrangements*** *and the deterioration of land use in the African areas of Kenya. The two most important of these were the acquisition and ownership of land considered 'suitable' for European settlement, and the subsequent need for a continuous supply of cheap and dependable labor for plantation agriculture [emphasis added].*

By creating artificial shortages of land, colonial authorities were able to ensure continuous supply of labor for plantation agriculture. In Kenya, between 60 and 70 percent of all migrant labor came from those parts of western and central Kenya in which there were acute land shortages (Okoth-Ogendo 1976:158).

Colonial authorities grouped Africa into **ethnic-based reserve units** far removed from European centers or from any lands likely to be opened up for European settlement. In Kenya, indigenous peoples like the Masai (then occupying the Central Rift Valley) were removed *en mass* from their traditional grazing lands and were restricted to "native" reserve areas. Today, the Masai people are restricted to less than two-thirds of their original rangelands. "Native reserve" created the necessary conditions for the mobilization of cheap labor for the modern sector of the Kenyan economy. The idea of fixed ethnic boundaries became embedded in the land relations of African communities in Kenya (Okath-Ogendo 1976:155). Thus, colonialism made its own contribution to the current problems of ethnicity and conflicts raging on the continent.

Using "human pressure" (such as the system of employment registration) harsh contractual arrangements and oppressive working conditions and progressive tax, colonial authorities were able to mobilize sufficient and cheap labor, on a continuous basis, for work on settlement farms. Further, colonial authorities discouraged the emergence of independent market economy in Kenya through stifling policies and restrictive land legislation acts. Referring to the Kenyan case, Okoth-Ogendo (1976:156) noted that:

> *The labor (supply) was further enhanced by restricting the development of African areas, prohibiting cash crops, and failing to provide essential infrastructure although Africans were heavily taxed. ... the working conditions of farm laborers were by no means enviable. Once on the farm, they were compelled by a formidable array of contractual obligations reinforced by criminal penalties, to stay on the farm. Besides this, non-resident (i.e., seasonal) laborers were prohibited from bringing their families into labor camps and prosecution of relatives for trespassing was common during the colonial period. Resident laborers were required to undertake work for the farmer for a period of not less than one hundred and eighty days in one year.*

In Africa, colonialism meant not only the loss of the best land to white settlers, but also, in some cases, expropriation of a substantial proportion of available agricultural land. For example, in South Africa, in 1958 as much as 89 percent of the land under indigenous production system was lost to white settlers, who accounted for only 19.4 percent of the total population in 1960. In Zimbabwe and Botswana (in 1958) almost half of the agricultural land was lost to white settlers, who accounted for 7.1 and 2.8 percent of the total population, respectively (Hendricks 2000). Under such conditions, it is presumptuous to talk of surplus land.

In general, colonization created two distinct forms of land holding. In southern Africa, with few exceptions, the land grabbed by white settlers was held under freehold title, while land reserved for native Africans was held under various forms of customary tenure (Hendricks 2000).

In southern Africa colonial expropriation of the best land militated against the emergence of an independent peasantry. Rather, by dispossessing the natives, it created a labor reserve for employment in the modern sector of the economy.

One interesting consequence of colonialism in Africa was that, by expropriating the best land, it created shortages of land and thus, raised the value of land. Referring to the case of Lesotho, Thabane (1998:5) noted that:

> *The arrival of white settlers seeking to expropriate large chunks of Basotho's land across Mohokare brought on an added sense of the importance of land to Basotho.... This tended to make land scarce and therefore a resource, which it was critical to acquire at the expense of other competitors.*

Colonialism laid the foundation for current civil strife in Africa and has sown the seeds of conflict by using land as a means for drawing wedge

between various ethnic groups as well demonstrated by the case of Rwanda:

> *There is a long history between land and politics in Rwanda. Land was used during the colonial era to divide the Rwandan population along ethnic lines. When the Belgiun colonizers came to Rwanda they favored the Tutsi for administration, in effect establishing a governing class of mainly Tutsi[8]. The Tutsi governing class ... exploited their authority by seizing cattle and land from other Tutsi and Hutu peasants... During and after the period of colonial rule, the governing class in Rwanda, once again, used land to polarize the Hutu and Tutsi ethnically (Bigagaza 2002).*

However, colonial powers did not totally disregard customary rights. When it suited their purpose, they recast it to fit the roles required by colonial administration. Colonial powers adapted customary rules and made them part of the colonial apparatus to be exercised by traditional chiefs, upon whom the colonialists conferred considerable powers to implement their policies of indirect rule at the local level (Toulmin and Quan 2000).

CONCLUDING REMARKS

This paper has attempted to shed light on the conceptual issues and economic importance of customary land rights in Africa with a view to drawing implications for the land question in Ethiopia. More specifically, the paper has attempted to review the scanty literature on customary rights in selected East African countries in terms of the three major objectives of development, i.e., efficiency in resource allocation, equity in accessing resources, and sustainability in resource use. Regarding efficiency questions, the review has cast doubt on the argument of the liberal school that the freehold system is superior to customary arrangements in terms of

agricultural productivity. With respect to the equity question, there is strong evidence supporting the argument that customary rights, because of the existence of multiplicity of rights and diverse access mechanisms, can accommodate the diverse interests of the members of the community, including the poor. Regarding sustainability issues, the paper has shown that the free-rider problem is not an inherent part of customary rights. The so-called tragedy of the common would occur only when external and internal forces undermine relevant indigenous institutions of traditional society and when traditional leaders and elders lose, under internal and external pressure, their authority.

Customary rights, far from being thrown to the dust bin of history, are relevant to current development issues in Ethiopia because of, at least, two reasons: a) customary rights are still widely practiced in the pastoral areas of Ethiopia (areas which account for more than half of the country's land area and for 10-12 percent of the total population), and b) some forms of informal access mechanisms (such as inheritance, land lending and share-cropping) are still widely practiced in the highlands.

This study has suggested that, neither public ownership nor private ownership is directly and fully relevant to rangelands management. Rather, a system of legal pluralism is relevant to Ethiopia. Customary rights need to be recognized and scaled up in order to enable them operate side by side with statutory laws. In a country of great contrasts and diversity, it is not advisable to try to implement uniform land policy in contrasting agro-ecological regions. In particular, the contrasts between the pastoral areas and the highlands should be appreciated by policy makers. There is a need to recognize the place of customary rights in determining patterns of resource allocation and conflict resolution in pastoral areas.

Policy makers and NGOs should recognize and support indigenous institutions involved in the regulation of fuzzy rights, which are particularly relevant to resources (e.g., water sources) often shared by

contending pastoral groups. For example, funding should be available for the purpose of upgrading traditional water wells. One can also add that policy makers should recognize and work with indigenous institutions in resolving conflicts arising among contending ethnic groups in pastoral areas. Local authorities should better look for ways of making use of indigenous institutions and practices rather than replacing them with externally imposed blueprints.

Our knowledge of the strength and limitations of customary rights in Africa is still limited. In particular, indigenous institutions of pastoral groups of East Africa have received limited attention from researchers. Obviously, it is difficult to recognize and scale up indigenous institutions without first understanding their nature, potentials, and limitations. Hence further research is required to improve our understanding of indigenous institutions involved in the management of land and other resources in Africa in general and in Ethiopia, in particular.

NOTES

1. But Alchian (1977) argues that *partitioned* rights are transferable, i.e., *partitioned* right can fit into a system of private property. But, customary rights never presuppose private property, i.e., fuzzy access rights are not transferable.

2. Note that there are other ways of accessing land, other than through customary access arrangements, e.g., access to land in emerging land markets; access via land sales market; and access via land rental markets (de Janvry and Sadoulet 2001).

3. According to Delville (2000), cultivation right in French - speaking West Africa, apart from the territorial control exercised by the land chief, are exercised at different interlocked levels. First, all bush land cleared by a lineage is controlled by the head of the lineage. Second, a holder may delegate cultivation rights to an

individual, under a system of what is known as *droits delegues* (i.e., secondary rights). Third, when the same piece of land supports different resources (e.g., crops, pasture, and timber), specific rules of appropriation and use are used side by side with respect to each type of resource. For example, specific rules apply to the use of trees or pasture. Another example is that a plot that is controlled by an individual during the cropping season may turn into common use by community member after the crop is harvested.

4. How the interplay of external and internal factors destroys the institutional basis of fuzzy property rights and leads to continuous conflict over resources and anarchy is demonstrated by the case of Somalia. In their incisive study of conflict in Somalia, Farah et al. (2002:342) noted that: "lack of known mechanisms for sharing resources has worsened conflict because different sub-clans move across a wide area with no clearly marked boundaries". In Somalia, colonial rule and post-independence dictatorship undermined customary laws and uprooted one clan in order to resettle another. Consequently, "it became extremely difficult for different clans and sub-clans to meaningfully negotiate on important matters, including resource access and control, independently of central authority", which is no more there.

5. Land borrowing refers here to mean one of the many rights to transfer interest in land to others through lending the land along traditional lines. Farmers may practice this when they do not need land for cultivation or when they face temporary imbalances in factors such as a household short of labor because of illness or labor migration. Borrowing land is often part of a wider relationship between two families or lineage, and the desire to keep such a relationship going ensures that such arrangements are frequently renewed or not easily brought to an end. Use rights over borrowed lands can often be bequeathed to descendants.

6. In Uganda, this colonial law was retained after independence until the enactment of the constitution of 1995 and, "in fact the positions of customary land-holder worsened after the passage of the land reform of December of 1975.

7. Later after independence, many African governments adopted the Western notion of rights (such as the neglect of customary rights and encouragement of the freehold system).

8. The Belgium colonizers further exacerbated the situation by introducing ethnic-based compulsory identity cards in 1931.

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