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Rural Commons and the Ethiopian State

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Abstract

This article examines the legal status of rural commons, a crucial aspect of the land question in Ethiopia. To this end, it analyzes the Rural Land Administration and Land Use Proclamation No. 456[1], 2005, Article 5(3), which provides that "Government being the owner of rural land, communal holdings can be changed to private holdings as may be necessary." This legislative stipulation has received some treatment in literature, which generally recommends its nullification on the ground of unconstitutionality. Yet, to the present writer, this legislative provision cannot be merely brushed aside as contrary to the tenets of the current Ethiopian Constitution. Instead, there is a need to appreciate the underlying historical belief behind such provision that declares rural commons as the property of the state.

The article suggests a need to develop a perspective that caters for the interests of both the community and the state taking into account current diverse needs and developments within and outside the community and the state. This requires an articulation of the terms 'customary land tenures' and 'community' in a manner which considers the inequalities hidden behind the social embeddedness of land rights.

Keywords

Ethiopian Constitution, Communal Land, Customary Land Tenure, Tragedy of Commons, Land Transfers, Law and Modernisation

Introduction

This article examines the legal status of rural commons, a crucial aspect of the land question in Ethiopia. To this end, it analyzes Article 5 (3) of the 2005 Rural Land Law[1] that provides that ``Government being the owner of rural land, communal holdings can be changed to private holdings as may be necessary.`` This legislative stipulation has received some treatment in literature, which opts to see its nullification on the ground of unconstitutionality. Yet, to the present writer, this legislative provision cannot be merely brushed aside as contrary to the tenets of the current Ethiopian Constitution. Instead, there is a need to appreciate the underlying historical thinking behind such provision that declares rural commons as the property of the state.

As shown in this article, the state`s claim over the commons is based on a long standing historical thinking that any land and landed resource not privately enclosed is deemed to be part of the state domain; the state thinks that it is the owner of communal lands. The state`s claim is not a benign one - the claim to title over the commons is not merely symbolic or is made in order to protect the interests of members of the people with full acknowledgment of their traditional title. It is rather a radical claim in the sense that the state`s control over the territories especially in southern Ethiopia meant gross expropriation of communal lands, i.e., resources are made part of the government domain without invoking ordinary expropriation procedures which would require the state the recognition of the claims of the concerned peoples, establishment of public purpose and payment of compensation. The state`s claim over the commons shows that the current land tenure of Ethiopia has not de-linked itself from past land tenure systems of the country.

The argument here is thus that there is a need to delve into history, both that of Ethiopia and other countries, to fully grasp the nature, justification and implication of this declaration of the rural commons as part and parcel of government domain to the disregard of the claim of the people who critically rely on those commons for their livelihoods. The argument here is not that the state should not take land from the people for various purposes. What is challenged here is the manner in which the state has been taking lands from the people in order to satisfy its need for land as well as the underlying property notion behind this taking. This radical state title over the commons, in addition to its encapsulation in the above legal provision, is reflected in government policies, plans and current practice of leasing out large amount of farmlands of the state to meet energy and food security needs of capital rich but land and water scare countries.

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[1]Rural Land Administration and Land Use Proclamation No. 456, (abbreviated as the 2005 Rural Land Law) 2005, *Fed. Neg. Gaz*. Year 11th Year 44.

Such massive land transfers are being made on the arguments that the lands so transferred are `unoccupied` or `barren` or `empty` or `unpopulated` or `underutilized`, that the food and tenure security of the local populations is not affected, and that such lands leased out to agribusiness are part of the 75 million hectares of cultivable fertile land (out of which only about 18 million hectares is being cultivated by peasants) and that improvement of such underutilized lands transferred to investors would bring about immense benefits including technology transfer, employment and infrastructure development. In this process, the state`s approach has been to totally reject customary rules pertaining to communal lands, which are considered inimical to modernization and impose on the people a particular notion of property in order to promote its own conception of modernization. The focus on the article is to examine the treatment by the Ethiopian state of land and landed resources held by agriculturalists and pastoralists but with special emphasis on the fate of rural commons in possession of the latter. The article draws on case studies on rural commons. And it also highlights a recent complaint filed on behalf of the Anuak people in Gambella, south western Ethiopia, alleging that the state is using funds by World Bank and UK Department for International Development to force them off their farmland in connection with an ongoing villagisation program and which the Bank`s accountability panel referred to the Bank for investigation.

Part I examines the meaning and significance of communal land, showing the redefined nature of the commons in literature and their critical importance for the livelihoods of rural poor. Part II considers the historical development of the radical title asserted by the state over the rural commons in Ethiopia. And Part III searches for possible justifications for this overriding state claim based on the history of Ethiopia and some comparative experience. Such justifications have to do with the ideas of *imperium*, *dominium* and civilizing pre-modern people and the legal doctrines of improvement and of trusteeship derived from such concepts.

I. The nature and significance of the commons

This part briefly explains the nature, and theories, governance approaches as well as significance especially for rural poor of the commons, which are understood in this article to mean natural resources such as grazing land and forests held and used for a variety of purpose by members of a given community and sometimes even by members of several adjacent communities.

1.1 The commons under the `old` and new thinking

One may categorize perspectives on the commons broadly into two, namely the `old` and new thinking. The former is articulated by Hardin and his followers using the famous expression-the tragedy of the commons-whereas the latter is developed by Ostrom and her followers. This sub-section provides a brief account of the way the two paradigms appreciate the commons.

Under the `old` thinking about the commons, Hardin`s piece entitled `The Tragedy of the Commons` comes to the surface. Hardin has argued in this article that the commons which include grazing land belong to everyone and thus ultimately to no one, which, to him, definitely invites desecration of these resources. Hardin assumes in this article that the commons are open for every Tom, Dick and Harry and that the commons without distinction are unmanaged.[2] To Hardin, a better policy option to this recipe for disaster is private property, private enclosure of some, though not all, of the commons. Hardin says,[3]

…the rationale herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another…and another…But this conclusion is reached by each and every rational herdsman sharing a commons. Therein is the tragedy…Freedom in the commons brings ruins to all…We might sell them off as private property. The tragedy of the commons is…averted by private property.

Hardin gets support from Crowe who cites England's enclosure movement intended to avert `` a tragedy of overgrazing and lack of care and fertilization which resulted in erosion and underproduction…``[4] Conceptually, the old thinking about the commons as embodied in Hardin`s piece is not nuanced. Under the old thinking, communal lands are considered as conferring no individual access to and control over resources, necessarily requiring collective

[2] Garrett Hardin has made this modification to his un-qualifying term `the commons` three decades after his seminal article: ``To judge from the critical literature, the weightiest mistake in my synthesizing paper was the omission of the modifying adjective "unmanaged." In correcting this omission, one can generalize the practical conclusion in this way: "A 'managed commons' describes either socialism or the privatism of free enterprise. Either one may work; either one may fail: 'The devil is in the details.' But with an unmanaged commons, you can forget about the devil: As overuse of resources reduces carrying capacity, ruin is inevitable." Garrett Hardin, Extension of ``The Tragedy of the Commons``, Science Vol. 280 No. 5364 (1998) at 683.

[3] Garrett Hardin, The Tragedy of the Commons, Science Vol. 162 (1968) at 1244 and 1245; in relation to some resources having the nature of universal access such as the atmospheric air and the high seas, Hardin prescribes regulation based on `mutual coercion`. (1247) For the early critique of Hardin version of the tragedy of the commons, see Beryl Crowe, The Tragedy of the Commons Revisited (The Tragedy of the Commons Revisited), Science New Series, Vol. 166 No. 3909 (1969) at 1103-1107.

[4] See Beryl Crowe, The Tragedy of the Commons Revisited cited above at 1103.

use, and the rules governing such resources were seen as prohibiting land transfers to outsiders. The commons were likened to resources under the state of open access, i.e., no property case.

That attitude has now changed in literature. It is now a stereo-type to consider common property regimes as involving only collective production, as conferring the entire set of rights only to the group, as involving no tradability and being regulated by no norms and thus akin to open access resources.[5]

The new thinking, which Ostrom has popularized, involves in nuanced conceptualization of the commons and it no more views the commons as resources left in norm-less condition.[6] Bruce says the concept of common property is often characterized by diversity of tenure regimes.[7] This means communal land tenure does not necessarily mean that members of the community would undertake production collectively. Production or use of the commons is not necessarily collective. Production is individual in some portion of the commons and it is collective in other portions. And common property does not mean that ``the entire bundle of rights is given only to group as a whole…``[8] Communal property is property right held by a group and the nature of the property the group may enjoy can be ownership or rights less than ownership such as usufruct or lease.[9] Bromley succinctly puts common property as representing ``...private property for the group.``[10] Common property is ``property of a group held as a common pool resource that group members use simultaneously or sequentially.``[11] Communal land and other associated natural resources are ultimately controlled by the concerned community or clan to the exclusion of non-members.[12] Members do have individual and/or common access to those resources. The members transfer these access rights to their descendants.[13] There are occasions where communal resources are transferred to outsiders either in the form of sale or lease or outsiders are given access to communal resources in the form of sharecropping arrangements.

Ostrom argues that the world is replete with non-tragic use of the commons and thus the issue is not whether the commons are feasible or how faster we shall privatize the commons but under what conditions and at what scale the commons can be feasible.[14] The direction we should go is

[5] See Rogier van den Brink *et al* cited below at 5-7.
[6] Elinor Ostrom, Governing the Commons, the Evolution of Institutions for Collective Action, (Governing the Commons) (Cambridge: Cambridge University Press, 1990)
[7]John Bruce, African Tenure Models at the Turn of the Century: Individual Property Models and Common Property Models, (??) 2000-1 (abbreviated as African Tenure Modes) See also John Bruce, Do Indigenous Tenure Systems Constrain Agricultural Development?, in Land in African Agrarian Systems (eds. Thomas Bassett and Donald Crummey (eds.) (Madison: The University of Wisconsin Press, 1993) at 20-1, 23 & 35-56.
[8]See Rogier van den Brink *et al* cited below at 6.
[9] See Bruce, African Tenure Models cited above at 12.
[10] See Bromley D. (1992) as quoted by Bruce in African Tenure Modes cited above at 19.
[11] See Bruce, African Tenure Models cited above at 21-2.
[12] Abebe Mulatu, Compatibility between Rural Land Tenure and Administration Policies and Implementing Laws in Ethiopia, (abbreviated as Compatibility) in Land Law and Policy in Ethiopia since 1991 (Muradu Abdo, ed.): Continuities and Changes, Ethiopian Business Law Series Vol. 3 (Addis Ababa: Addis Ababa University, Faculty of Law, 2009) at 3-4.
[13] Ibid.
[14] See Elinor Ostrom, Governing the Commons cited above.

not towards exclusion but towards finding an appropriate level or mix of governance of the commons to prevent spill over by outsiders and to prevent exploitation of some members from within.[15] Bruce contends that recent scholarship on common property as well as lessons learned from common resource management projects disprove the theory of the tragedy of the commons and confirm the prospect for prudent use of natural resources communally. He remarks that project experiences ``almost always encourage greater control of resource use by local communities.``[16] Development practitioners have observed that ``local communities sometimes manage their resources effectively, even under substantial pressure.``[17] The literature on the commons has concluded that in common property,

> a group with limited membership, the right to exclusive use of the resource, the opportunity to regulate resource use by group`s members has the incentive [to manage its resources effectively], because the costs and benefits of disciplined, sustainable use are internalized by the group.[18]

It is not always the case that there is ``some necessary connection between common property as a legal regime and the nature of the resource, when in fact many resources can be managed as individual or as common property.``[19] Yet, ``there are certain resources that by their very nature are less conveniently partitioned for management by households than by others.``[20] ``The costs of individualizing are high and it may be impractical…`` in respect of pastures and forests.[21] ``Herders who can no longer move to accommodate highly variable rainfall patterns need to establish source of water for each discreet grazing unit…the costs of establishment are too high for small stockowners`` and enclosure of grazing land in such situation also results in denial of access to many small stockholders.[22] In forests, ``there are protection, management and opportunity costs associated with long term investment in trees, and these can more easily be borne by a community…``[23] Bruce writes:

> Common property is regarded as an efficient solution in forestry... [There] is the need to maintain access to critical resources for the many rather than for the few, and especially to preserve the access of the rural poor. In some cases, the survival of minority peoples depends on the safeguarding of those communities` rights over their lands and forests. [24]

[15] Lee Anne Fennels, Ostrom`s Law: Property Rights in the Commons, International Journal of the Commons, Vol. 5 No. 1 (2011)
[16] See Bruce, African Tenure Models cited above at 20.
[17] Id., at 19.
[18] Ostrom E. (1986) as quoted in Bruce African Tenure Models cited above at 19; see also Tesfaye Rural Land and Evolving Tenure cited below at 54-5.
[19] See Bruce, African Tenure Models cited above at 20.
[20] Id., at 19.
[21] Ibid
[22] Id., at 20.
[23] Ibid.
[24] Ibid.

Van den Brink *et al* describe the advisability of maintaining some resources in common and the emergence of a new consensus about the manner in which the commons are expected to be treated:

> …livestock production systems based on nomadism…[is]…rational response to economic conditions. In semi-arid and arid areas, rainfall variability, and hence the avail-ability of water and fodder, may be so high, that livestock production will be based on a system which allows the herd to move over great distances. The spatial mobility of pastoral systems…exploits the economic benefits associated with flexibility—a benefit which can be shown to increase with increased rainfall variability. Pastoralists do not want fences because they know that their potential grazing area, given highly-variable rainfall, would be very large, and probably, given the regularity of serious droughts, the fence could never be large enough…In order to prevent overgrazing and conflict, these pastoral access rights are not "open access," but specific rights restricted to a well-defined number of property right holders. The areas where such property rights apply are not "unused" or "vacant." What pastoralists want are property rights that match their activities: access rights and rules to prevent over-use of the resource. Pastoralists would like their historic economic rights to be respected by the state and farming communities. The new consensus therefore recommends that governments create the possibility of resolving such potential conflicts and support dialogue so that communities can find ways of deciding together how the bundle of property rights should be allocated and enforced.[25]

Hardin`s approach, which goes for privatization rather than governance of the commons, is not dead at least in the Ethiopian context. Ostrom`s seminal work together with a growing literature on the commons has seriously interrogated the tragedy of the commons thinking. But progress in literature is one think; practice is another. An entrenched thinking that echoes for the dismantling of the commons in favor of exclusive private property cannot be buried easily especially when it suits the interests of the elites. It is a convenient device to justify grabbing the commons.

In sum, the new thinking sees the commons as a complex resource arrangement whereby some portions are used collectively and simultaneously while some other portions are accessed by members of the concerned group even privately and still some other commons must remain communal because of dictates of climate and economics. And further that the commons do not exist in norm-less state, and that the concerned communities` rights over the commons must be honored in making decisions regarding such resources.

1.2 Significance of the commons

[25] See van den Brink *et al* cited below at 10-11; see also Tesfaye Rural Land and Evolving Tenure cited below at 54.

One finds pockets of communal lands in densely populated sedentary rural parts of Ethiopia. One also finds communal holdings among those who practice shifting cultivation in the western portion of Ethiopia as well as vast expanses of common lands in the pastoral parts of the country. These lands and land related resources located in the highlands and lowlands of Ethiopia are being used by peasants, pastoralists and those who practice shifting cultivation to augment and/or sustain their livelihoods. Members of the relevant communities access such resources both individually and in common. As to who shall have access to these lands and under what conditions are determined pursuant to customary tenure rules and principles.

In the highland areas of Ethiopia the commons are essential because the private landholdings are not big enough to sustain the peasant`s life. Land degradation and population increase with lack of off farm opportunities have made these private holdings minuscule. For example, the average cultivable land holdings in the densely populated parts of the country, which are inhabited by two third of the total population, is less than one hectare. Yet, it is asserted that two hectares of good quality land is needed to sustain a household with an average of five members.[26] In this situation, rural people use the commons to undertake a variety of life sustaining economic activities such as animal grazing, gleaning, and firewood and honey collection, on top of the commons being used as places of burial and of cultural and religious rites and festivities.

The commons are inextricably linked to the livelihood of the rural poor. Thus there appears to be an intrinsic-principal relationship between a peasant`s private land holdings and the commons the peasants access. In some cases, because of the minuteness, the low quality of the private farm holdings and rainfall variability, the benefits the poor obtain from common lands might by far exceed those obtained from private land possessions. In fact, under these circumstances, continued access to commons might turn out to be main livelihood assets while the private holdings might be appendage thereof. In pastoral areas that house about 10 to 20 percent of the population and constitute about 60 percent of the total land mass of Ethiopia, land is used principally for pasturing and thus people`s survival in these areas primarily depends on access to pasture lands and water points. Hence, it is fitting to join with Tesfaye who rightly asserts, ``The rural households at large benefit from these environmental goods and services [common resources], but the poor are disproportionately more dependent.``[27]

II. Legal Status of communal lands in Ethiopia: Past and Present

This section considers land laws, concepts, policies, and the available literature regarding the commons to show the attitudes of past and present governments towards such common resources. It first examines the legal status of the commons from the perspective of the present

[26] Dessalegn Rahmato…
[27] Tesfaye Teklu, ``Rural Lands and Evolving Tenure Arrangements in Ethiopia: Issues, Evidence and Policies, *FSS Discussion Paper No*. 10, (abbreviated as Rural Land and Evolving Tenure) (Addis Ababa: Forum for Social Studies, 2003) at 54.

government followed by an examination of the way the imperial government and the Derg saw the commons. The section closes with a consideration of the underlying shared attributes of the three successive governments with regard to the commons.

2.1 Legal status of the Commons in Ethiopia at present

Are the commons given legal recognition in the country? Is there such a thing as communal land tenure as a matter of state law and policy? As will be shown below, the state practice of tagging the commons as state domain has continued unabated. Such practice has now been made more pronounced in national and state constitutions, laws, policies and actions of the state. The Constitution defines private property as:

> any tangible or intangible product which has value and is produced by the labor, creativity, enterprise or capital of an individual citizen… Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvement he brings about on the land by his labor or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it. [28]

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

The state has emphasized on many occasions that there is a huge amount of fertile vacant land in the southern parts of the country. For example, the rural development strategy of the Federal Government states that the availability of vast fertile yet vacant land in low land parts of the country. It has also proclaimed the existence of pockets of unoccupied lands in densely populated areas.[29] This narrative is repeated in other major state strategy documents. As considered below, high ranking senior government officials recently have used terms such as ``barren areas`` or ``unutilized lands`` apparently to emphasize the availability of land of a significant size to be leased out to agribusinesses.

The tone of successive rural land laws is not in favor of a full recognition of the rural commons. The 1997 Rural Land Law provided that regional land laws should provide for demarcation of communal land for grazing, forests, social services and other uses with the participation of the

[28] See the FDRE Constitution Proclamation No. 1, (abbreviated the FDRE Constitution) Article 40 (2& 7) 1995, *Fed. Neg. Gaz.* Year 1, No. 1.
[29] ADLI…

community. Yet, this law did not provide for payment of compensation for improvements on communal landed resources in cases where peasants and `nomads` lose their land rights due to government initiated land distribution suggesting that the commons were to be taken without compensation where the state needed them. This 1997 Rural Land Law defines land rights of peasants and `nomads` to suggest that their land use rights is conditioned upon land demarcation in the sense of individual farm plots destined for sedentary agriculture and that it is only in that context that one`s land possession gets the blessing of the government with its implication for payment of compensation for labor related improvements thereon upon expropriation and government initiated-distribution.[30] This legislation seemed to have taken a positive step in recognizing the commons as belonging to the relevant community. Nevertheless, this apparent step forward was nevertheless undermined in this very legislation when it conflated a community, as it is the case in the current rural land legislation, with a *kebele*-the lowest government administrative unit in the country.

Under the 2005 Rural Land Law, the government has made the country`s historical heritage in regard to communal land quite patent. quoted in the introductory part of this article, Article 5/3 of this law says ``Government being the owner of rural land, communal holdings can be changed to private holdings as may be necessary.`` The preamble of the same land law states one of its aims is to encourage ``private investors in pastoralist areas where there is tribe based communal holding system.`` This legal provision, in practice, means primarily giving communal land holdings to private investors. The 2005 Rural Land Law defines state holding expansively as ``rural land demarcated and those lands to be demarcated…and includes forest lands, wildlife protected areas, state farms, mining lands, lakes, rivers and *other rural lands.*``[31]

More telling in this regard though is Article 2/12 of the legislation under consideration, which defines communal holding as rural land which is *given by the government* to local residents for common grazing, forestry and other social services. (Emphasis supplied) As the italicized phrase shows `communal land`` is given by the government in the sense of not recognition but creation of the commons. Thus, the classic sense of `communal land`` has been statutorily abolished. The same law also introduces the concept of minimum private holdings which is described as ``rural land privately held by peasants and semi-pastoralist and pastoralists, sending the message that what is given recognition is private landholdings not communal ones.[32]The law finds it difficult to recognize the concept of communal land as a separate form of land holding. It rather jumbles it with the notion of private holding prevalent in the sedentary mode of cultivation.

This concept of individualization of land holding is reinforced by the 2005 Expropriation Law which speaks exclusively in terms of taking of private land holdings. It appears that the communal holdings of pastoralists, for instance, are not given recognition in their existing forms

[30] See Rural Land Administration Proc. No 89, 1997, Articles 2/4, 6/6 and 6 (7-9), *Fed. Neg. Gaz.* Year 3 No. 54.
[31] See Article 2/13 of the 2005 Rural Land Law cited above.
[32] See the Amharic version of Article 2/11 of the 2005 Rural Land Law cited above.

but only when pastoralists transform their ways of life into sedentary farming. The Regulations passed to implement the 2005 Expropriation Law makes ``*lawful* possession of the expropriated land holding `` a precondition for receiving compensation.[33] Here the term `lawfully` means adducing evidence of the acquisition of private landholding pursuant to state law. Thus it looks that any land other than the one held by private persons pursuant to state law constitutes state holding. This rendition of the rural land law exceedingly enlarges the size of state land to the detriment of communal holdings. This spells the juridical death of the commons in the eye of the state.

The 2005 Rural Land Law apparently recognizes three forms of tenure including private, state holding and communal holding, but it strikes at the heart of the third land typology when it sees the government as an owner of land and bestows upon it the power to privatize communal land as it pleases. This in effect means this land law has recognized only two holdings: land is held either by private persons individually or by the state. This is consistent with the individualistic tradition embodied in the Civil Code of Ethiopia, which recognizes essentially two domains: land in the private domain and land in the state domain. The term ``essentially`` is used here because, in the Code, the communal tenure has received a treatment, but it is a temporary treatment conditioned considerably by an expansive form of the repugnancy clause; the Code recognized the commons provided customary rules pertaining to them would not retard the economic progress of the concerned community, offend the principles of natural justice and morality and that the exercise of land right by an individual member of the community would not be subject to unreasonable conditions.[34] Even this attenuated form of the commons cannot stand now because subsequent land laws have superseded those provisions of the Code regarding the rural commons.[35]

One might argue that one should not make a fuss out of these state legal regimes because people on state lands are in effect enjoying *de facto* effective control. But the argument is that these laws give the state the power to assert that these people are mere squatters using the lands without any legitimate title, when the state seeks to take these common resources, it can take them away without being obliged to pay compensation or seek consultation with the people. In fact, the argument in favor of the state would run that the people in such cases should vacate the lands thankfully. This means legally speaking their claims are founded on stilts. The most important objection though is the underlying thinking behind the lack of recognition of communal tenure regimes on the part of the government: the implicit attitude that either these people possess no tenure rules or if they have them, these people's laws are not law proper.

[33] This is based on the Amharic version of Article 22 of Payment of Compensation for Property Situated on Landholding Expropriated for Public Purposes, Council of Ministers Regulations, No. 135, 2007, *Fed. Neg. Gaz*. No. 36 Year 13.
[34] Articles 1498, 1499 and 1500 of the Civil Code of the Empire of Ethiopia, Proclamation No. 165, 1960, *Neg. Gaz.* Year 19th No. 2,
[35] One of such subsequent superseding legislation is the land law under scrutiny in the present article.

Some have argued regional land laws have taken a positive step to recognize communal holdings citing as an example the 2003 Rural Land Law of the Southern State[36], which is now repealed and replaced by the 2007 Rural Land Law of the same state. A careful reading of the 2003 Rural Land Law of the Southern State did show an acknowledgement of the rights of communities over their lands. And the 2007 Rural Land Law of the Southern State has not taken a positive step in accepting communal land possessions because on the one hand it appears to acknowledge land rights of the community and on the other hand it bestows ownership rights of the commons upon the state in a rather self-contradictory manner. For instance, it defines communal land holding as ``land out of government or individual possession and is being under the common use of the local community as a common holding for grazing, forest, and other social services.``[37] And this same law states rural youths who wish to engage in agriculture shall have the right to get and use rural land which is possessed by the community…``[38] and that land holding certificate for communal land shall be prepared in the name of the beneficiary community.``[39] ``…lands under the possession of community…which are potential for agriculture shall be reallocated to landless youths and peasants who have less farm land.``[40]

So far it looks as if the law in question credits communities with land rights over the commons, even if such common resources are vulnerable to periodic redistribution. The self-contradiction in the land law under consideration begins when it provides that ``Government, being the owner of rural land, can change communal rural land holdings to private holdings as may be necessary``[41] which is a replica of Article 5/3 of the 2005 Rural Land Law of the Federal Government of Ethiopia. To the extent that the 2007 Rural Land Law of the Southern State does recognize communal lands, it contradicts with the Federal 2005 Rural Land Law and it may be argued that the latter trumps the former when conflict arises between such two land laws.[42] And this relationship between federal and regional land laws should be seen in light of the Constitution which empowers the Federal Government to enact land utilization laws while empowering regional states to administer land on the basis of such federal laws;[43] the legislative practice of the Federal Government is based on a broad interpretation of the term `land utilization laws` to include both land use and land tenure rules. One should note also that the

[36]Elias N. Stebek, ``Conceptual Foundations of Property Rights: Rethinking *De Facto* Rural Open Access to Common-Pool Resources in Ethiopia`` (abbreviated as Conceptual Foundations), *5Mizan Law Review1* 1(2011) at 36-7.
[37]The Southern Nations, Nationalities and Peoples Regional State Rural Land Administration and Use Proclamation,(abbreviated as the 2007 Southern State Rural Land Law) Proc. No. 110, 2007, Article 2/14, *Debub Negarit Gazeta*, Year 13 No. 10.
[38] Id., Article 5/4.
[39] Id., Article 6/11.
[40]Id., Article 9/4.
[41] Id., Article 5/14; see also Article 5/16, for identical stipulation, of the Afar Region Rural Land Administration and Use Proc. (2001 E.C) (unpublished, on file with the author).
[42] This is so if we construe the power of the Federal Government on land matters couched in the Constitution as enacting land utilization laws broadly to include land tenure matters.
[43]See Articles 51/5, 52/2/a and 55/2/a of the Constitution.

repeal clause of the 2007 Rural Land Law of Southern State nullifies any customary land tenure practices in respect of matters it addresses.[44]

Moreover, there is a need to take note of two important conceptual usages in the current rural land laws both of federal and regional origin. First is about the use of the concept of land *distribution* as opposed to *redistribution*. In the legislative practice of the country, the concept of land redistribution is used in cases where the state reallocates land under private holdings of peasants while the notion of distribution is employed to suggest that the land being distributed has never been allocated to anyone before. The implication in the use of the term `distribution` as opposed to `redistribution` in relation to communal property is that the commons belong to the state domain and the state is merely giving out land from its own land bank without taking it from peasants. And finally, the general reluctance or even failure to issue land certificates in regard to communal lands of pastoralists, shifting cultivators, and that of sedentary people while issuing certificates to peasants` private land holdings under the ongoing rural land certification programs of the government appears to be reflective of the age-old thinking of the state that the commons belong to it.[45]

Contrary to the argument advanced above that the commons, both as a matter of law and practice, belong to the state, some argue that land in general and the commons in particular is jointly owned by the people and the state. Such argument rests people`s ownership of land on interpretation of the relevant clause of the Constitution, namely ``land is the property of the people and the state.``[46] For example, Mellese reads this statement to convey two messages. One is to assume that the terms ``state`` and ``people`` are synonyms and thus he reads the statement in question as ``land is public property… which means private ownership of land is prohibited.`` He says this reading of the constitutional phrase does not make sense because it deviates from the straightforward wording of the Constitution, which clearly states that ``the ownership of land is vested in the *people* and the *state*.``[47] To him, the second way of understanding the words ``people and ``state`` should rest on the assumption that the two words imply distinct entities and that the wording of the Constitution in this regard is clear, thus, the golden rule of interpretation shall apply, that is, when the law is clear it should not be subject to interpretation. Based on this the phrase in question should be read to mean ``state and people as two distinct entities`` and to make ``land the joint property of these two entities.`` [48] In other words, land in the country is co-owned by the people and the state.

[44] The 2007 Southern State Rural Land Law, Article 17/2.

[46] See Mellese Damtie, Land Ownership and Its Relations to Sustainable Development (abbreviated as Land Ownership) in Land Law and Policy in Ethiopia Since 1991 (Muradu Abdo, ed.): Continuities and Changes, Ethiopian Business Law Series Vol. 3 (Addis Ababa: Addis Ababa University, Faculty of Law, 2009) at 32.
[47] Ibid.
[48] Ibid.

Further, Mellese claims the Constitutional Assembly, which was elected to ratify the Constitution, debated the question of joint ownership of land by the state and the people and took a position in favor of co-ownership of land by the state and the people of Ethiopia. Unlike Mellese`s assertion, the minutes of the Constitutional Assembly do not dwell on the question of co-ownership of land by the people and the state nor does it consider the connotations of the words `people` and `state.` The minutes of the Constitutional Assembly in connection with deliberation on the property clause, Article 40, are about seventy pages long and confined to the debate about private versus public ownership of land in Ethiopia, almost to the complete disregard of discussions on other dimensions of property.[49]

Mellese nevertheless concludes that subsidiary land laws and government projects fail to acknowledge the people as co-owners of land even if such ownership right is recognized by the highest law of the land and the people`s time immemorial tradition.[50]The implication is since Mellese finds these government laws and projects contrary to the principle of people`s ownership of land as enshrined in the current Constitution, he would go for annulling them.[51] In this regard, he has support from other writers, too. On the constitutionality of government laws and projects that see the government as sole owner of the commons, Abebe and Mohammud concur with Mellese`s argument. Abebe and Mohammud have merely mentioned the unconstitutionality of the government`s ownership claim over communal land and landed resources in the countryside of Ethiopia. Abebe in particular has observed that the provision in the 2005 Rural Land Law which provides for government ownership over communal lands is ``…diametrically opposite to the right of pastoralists guaranteed by the constitution.``[52]

In the face of the state`s claim that 'vast areas of unutilized land' are not included in the people`s constitutional right to land and their immunity from eviction, it might be understandable for the above writers to invoke the argument that the state`s claim is a misreading of the constitutional provision particularly so in view of the people`s reliance on the commons for their livelihood.[53] However, my contention here is that the assertion that the Constitution states that land is co-owned by the people and the state is incongruous with a careful reading of the full text of the appropriate clause. There is a need to reproduce the pertinent provision, which is Article 40/3:[54]

> The right to ownership of rural 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 and shall not be subject to sale or to other means of exchange.

[49] The Minutes of the Constitutional Assembly, (unpublished, on file with the author).
[50] Id., at 37-8.
[51] Id., at 38.
[52] See Abebe Compatibility cited above at 26.

[53] Unfortunately there is no right to constitutional review by the courts! I am grateful to my supervisor for this insight.
[54] See the FDRE Constitution as cited above.

This text shows that the words ``Peoples of Ethiopia`` in the first sentence is amplified in the second sentence to mean ``the Nations, Nationalities and Peoples of Ethiopia``[55] and the concept of ownership used in the first sentence is explained in the second sentence to mean ``common property,`` means collective ownership in this context, especially when one relies on the corresponding Amharic version which uses the word ``yegara``, connoting collective ownership as opposed to joint ownership, which is a type of private ownership. 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.[56]The Constitution provides that these categories of people do have a kind of usufruct right over land and are entitled not to be evicted from the same. But the usufruct right over their land is a general one; it is not related to any specific plot of land. To this effect, a land tenure reform project document submitted to the USAID correctly states: ``…although the Ethiopian constitution grants households usufruct rights to land, it does not grant a specific plot of land…``[57] And even in case where the right to usufruct of peasants and pastoralists gets concrete expression in an allocation of specific resource to them, their continued use of such assigned resource is contingent upon investing labor or capital on it that leads to permanent improvement.[58]

Even assuming, for the purpose of argument, that the people are *de jure* owners of specific resources at their disposal, the status of the government as a manager and `custodian` of land and other resources bestows upon it *de facto* power no less than absolute ownership over such resources. The peoples` ownership of land becomes merely symbolic. It will not be farfetched if one is tempted to compare the status of the government in Ethiopia over land and the governing power of managers of large public corporation in the western economy. Berle and Means argued that there is:

> …divorce of ownership from the control of modern corporation…as a practical matter, stockholders have traded their legal position of private ownership for the role of recipient of

[55] For the definition of these terms, see Article 39/5 of the FDRE Constitution as cited above.
[56] See Article 40/ 4-6 of the FDRE Constitution cited above.
[57] Ethiopia: Strengthening Ethiopian Land Tenure and Administration Program (LTAP): (RAISE: May 9, 2005) at 3-4.
[58] See Article 40/7 of the FDRE Constitution cited above.

> capital returns…shareholders who become merely recipients of ``the wages of capital``… the interests of the directors and managers can diverge from those of the owners of the firm, and they often do so. This separation between ownership and control of a corporation through expanded ownership of the company creates …quasi-public corporation. The characteristics found in a quasi-public corporation are its tremendous size and its reliance on the public market for capital. [59]

In the Ethiopian reality, this government power over resources assumes Leviathan proportion given the lack of democratic practice and of meaningful local level popular participation as well as the historical balance of power over land that governments command.

Now let us move away from the business of examining the legal and constitutional status of the commons in Ethiopia to historicize the issue of ownership of rural commons in Ethiopia.

2.2 Legal Status of the commons in Ethiopia in the past

As we shall see in the paragraphs which follow lack of state legal recognition of the commons has a long history in the country. The two previous governments, the Imperial Government and the Derg, did consider communal property as part of the state domain to be used by the state for any purpose without the need to pay compensation or consult the concerned communities.

2.2.1 Imperial period

During the imperial times, emperors conquered the south to created state land domain of large size and primarily out of communal lands. The size of land in the state domain was estimated to be two thirds of the land in this part of the newly incorporated territories.[60] Once this large state domain was created, the state distributed a portion of this to its non-salaried employees including those who took part in the incorporation expeditions. Later in the 1960s and 1970s, the imperial government used part of the state domain for the purpose of expanding commercial agriculture. The act of including the commons in the state domain was a unilateral act of the state and hence without resort to community consultation or payment of compensation under the theory that conquest meant that the state could prize itself with dominion over `vacant` or `empty` or `unutilized` or at best `underutilized` natural resources. (The underlying justification behind the use of such terminologies shall further be elaborated in due course below.) Berman writes:

> The theory of residual state ownership finds particular support in the Ethiopian tradition of feudal land tenure. While the principle…seems to be generally accepted by scholars that all

[59]Quoted from Murray L. Weidenbaum and Mark Jensen`s New Introduction to the 1991 issue of Adolf Berle and Gardiner Means`s, The Modern Corporation and Private Property, (New Brunswick: Transaction Publishers, 1991) at ix.
[60] See Richard Pankhurst, State and Land cited below at…

> land in Empire was theoretically held of the Emperor and at his pleasure, reverting to him in the event of failure of the tenant to provide adequate service of loyalty.[61]

Pankhrust says the claim that ``the ownership of land in Ethiopia was traditionally vested in the sovereign who could allocate or appropriate it at will`` was ``a highly theoretical affair.`` But Pankhrust admits that ``Ethiopians [specially *gult* holders], who, though they might not theoretically have any permanence of tenure, would under the traditional Ethiopian system seldom or never have been obliged to move from their land.``[62] The quotes from Pankhrust suggest two points. One is Pankhrust impliedly admitted the presence of the overriding principle of radical state title merely contesting its invocation by the state as a matter of fact and second, he was writing about the land tenure system in `traditional Ethiopia``, which means the northern parts of the country, not particularly about the newly incorporated peoples of the south. This in essence does not dispute Berman`s statement quoted above. The above shows a general principle of the overriding nature of the concept of state ownership of land but it does not directly establish the state`s lack of recognition of the commons. Nevertheless, this general principle shows the point that state`s radical title extended even to lands inhabited and actively cultivated by people of sedentary mode of life.

More than this, various laws of the imperial regime acknowledge the existence of an expansive state domain. The 1931 Constitution of Ethiopia, the first written constitution in the country, declared the peoples of the country as the subjects of the emperor with its lands and other resources theoretically owned by the Crown. This constitution recognized the property of the Crown,[63]private property[64] and state property.[65] Thus, to this constitution property meant either that owned by the Crown or private individuals or the state, but not by communities. The exception to blanket designation of the commons as part of the state domain was the one adopted by the 1952 Constitution of Eritrea, which by the time was a federating unit of Ethiopia. This constitution recognized the property rights of the communities in the commons in using, in Article 37, the following words `` Property rights and rights of real nature established by custom … exercised in Eritrea by tribes and the various population groups...`` shall be respected.

The 1931 constitution was revised in 1955, which was named the 1955 Revised Constitution, which in Article 130/d provided that:

[61] See Berman, Natural Resources cited below at 555; see also Richard Pankhurst, State and Land in Ethiopian History (abbreviated as State and Land) (Oxford: Oxford University Press, 1966) at 185.
[62] See Pankhrust, State and Land cited above at 185.
[63] See Article 76 of the 1931 Constitution of Ethiopia.
[64] Id., Article 27.
[65] Id., Article 78.

> All property not held and possessed in the name of any person, natural or juridical,… whether real or personal, as well as all products of the sub-soil, all forests and all grazing lands water-courses, lakes and territorial waters, are State Domain.

In connection with this provision, a commentator said: ``the pastoralists had no rights over their grazing territory…The symbolic significance of this is experienced as the loss of citizenship or, at the very least lower status than the average citizens of the country.``[66] But unlike what is suggested in this quote, the purview of Article 130/d of the 1955 Revised Constitution was not limited to pastoral lands but extended to communal lands in their entirety. This constitutional clause was given concrete expression in Article 1194 of the Civil Code of 1960 (the Code) which declares ``Immovables situate in Ethiopia which are vacant and without a master shall be the property of the State.``[67] Further, within the tradition of its predecessor, the 1955 Revised Constitution acknowledged private property and state property without mentioning communal land and landed resources.[68]

Coming back to the Code, as it stood in 1960s, and stands still now, essentially recognized two classes of property: property in the private domain and property in the state domain.[69] Property in the private domain of a private person and property in the private domain of the state is conceived as a widest right, which essentially means tradable right to *usus, fructus* and *abusus*.[70] Property in the state domain is divided into two, that which is in the public domain and that which is the private domain of the state, and for the purpose of tradability, the latter is equated with property in the private domain of private persons. The land privately owned is supposed to be demarcated and registered in the name of individuals. In the Code, property in the state domain is considered to engulf every property not held by private persons. The Code treated customary tenures as impediments to social and economic progress of the nation in what the elites of the time considered as a dramatically changing world situation and flatly rejected them as a system of norms.

And the Code permitted the use by communities of their communal lands but prohibited them from alienating or mortgaging or charging those lands with an antichresis ``except with the written permission of the Ministry of Interior.``[71] The Code declared that any decision a community makes in respect of its land shall be of no legal effect if it is contrary to ``the provisions of the Ethiopian Constitution, the mandatory provisions of this Code or other Ethiopian laws or made in violation of fundamental rules or procedure or justice.``[72] More

[66] Fecadu Gadamu, The Post-Revolutionary Rethinking of Arid Land Policy in Ethiopia (abbreviated as Post-Revolutionary Rethinking), Nomadic Peoples, Number 34/35, 1994 at 71.
[67] See the 1952 Eritrean Constitution.
[68] See Articles 43-44 & 60 of the 1955 Revised Constitution.
[69] See Civil Code of the Empire of Ethiopia (abbreviated as the Code), Articles 1444 & 1445, Proclamation No. 165, 1960, *Neg. Gaz*. Year 19th No. 2
[70] Id., Articles 1204-1205.
[71] Id., Article 1493/2.
[72] Id., Article 1499.

importantly, this recognition of the commons in its extremely diluted form was ignored in practice by the state. For example, when pressed for redistributive land reform, the Imperial Government frequently pointed to the availability of large amount of fertile but vacant land in the south and it encouraged improvements of such areas via schemes such as farm workers` cooperatives and private commercial farms.

2.2.2 Derg period

The Derg retained land in the state domain it inherited from the imperial regime. The 1975 Rural Land Law was built on the explicit assumption that rural land was to be held either privately by households or collectively by producers` cooperatives or by state farms but not communally. Under this land law, even pastoral communities would use land communally for grazing purposes until the state would make them adopt sedentary mode of cultivation.[73] The Derg continued the tradition of the imperial regime to impose conservation measures on communities. The Derg`s Ten Year Perspective Plan designated the commons as ``vacant lands`` and to be put under full utilization in the form of massive resettlements of people from highland Ethiopia, settlement of the pastoral peoples themselves, expansion of socialist agriculture in the form of expansion of producers cooperatives and state commercial farms. For instance for the pastoralists to develop, they must settle first.[74] To the Derg, pastoralists were compatriots ``…`who follow the tails of their cow` (meaning aimless wanderers who do not plan their movements rationally) and ``who languish in backward socio-economic stages, [who] must [be] liberate[d] from such backwardness.``[75] The 1987 PDRE Constitution accepted three forms of property namely socialist property which included state property which encompassed all ``Natural resources, in particular land, minerals, water and forest``[76] and cooperative ownership,[77] private ownership[78] and other forms of property such as the property of mass associations and personal property.[79] As a matter of law and policy, thus, the Derg left no room for communal ownership of land and landed resources of pastoralists or agriculturalists.

2.2.3 Shared Characteristics of the positions of Ethiopian governments towards the Commons

A commentator remarked that ``Remarkably, there is little to distinguish the explanations put forwarded by governments guided by liberal versus socialist philosophy to justify the appropriation of land by the state.``[80] In this quote the term `socialist` refers to the Derg regime

[73]Article 27 of the Public Ownership of Rural Lands Proc. No 31, 1975, *Neg. Gaz.* Year 34 No 26, which imposes on the government the responsibility to settle pastoralists.
[74] Fecadu Gadamu, The Post-Revolutionary Rethinking of Arid Land Policy in Ethiopia, Nomadic Peoples, Number 34/35, 1994 at 72-3; see also John G. Galaty et al, ``Introduction``, Nomadic Peoples, No. 34/35, 1994 at 9.
[75] Fekadu, Post-Revolutionary Rethinking cited above at 73.
[76] The Constitution of the Peoples Democratic Republic of Ethiopia, Article 13/2, Proc. No. 1, 1987, *Neg. gaz.* 47 Year No 9.
[77] Id., Article 12.
[78] Id., Article 15.
[79] Id., Article 18.
[80] G. Galaty *et al,* Introduction cited below at 5.

while the term `liberal` pertains to the current government. In relation to the commons, one would say the same thing about the imperial regime`s that is widely characterized as feudo-capitalist. As the above recount shows, all the three regimes, though ideologically professed to be different, denied the communities of their land, their customary rules, and their rights over such lands. In the words of a local government official in the highland part of southwestern Ethiopia, ``the [forest] land officially belongs to the state``.[81] Yigeremew, who has researched the commons in the northern part, observes that governments in Ethiopia have always considered themselves as owners of communal land resources.[82] Ayalew observes, in relation to pastoral Ethiopia, that governments have always considered themselves as owners of communal land resources.[83]

Yet the three regimes allowed, by acquiescence, the communities to occupy and use common lands and other natural resources until they needed them for their own ends. When the governments needed those resources, they would be at liberty to put them to such uses without compensation or community consultation. The imperial regime used the lands so acquired in order to build political patronage and expand modern agriculture marked by expansion of large commercial farms in the late hours of the regime while the Derg used those lands for the purpose of undertaking resettlements, villagization and socialist agriculture in the forms of state farms and producers cooperatives while the present state is using these lands for massive large farms both by itself and private investors. All the three governments used lands under state domain for imposed conservation measures, parks and wildlife sanctuaries in a manner that excluded the local people. All in all, the three regimes share such factors as their assumption about the ownership of the commons, the reasons they offered for such position (as we shall see below) and deployment of the commons with detrimental effects on the people dispossessed. It is to be noted that the fragile legal status of the commons in Ethiopia is not unique in the sense that it the dominant mark of the commons in Africa.[84]

III. Justification

Governments in Ethiopia might advance three possible reasons in defense of their claim of ownership and control over rural commons. The first possible justification for such claim might be that the state is intervening in the commons under the dictates of the evolutionary theory of land tenure. In other words, the state is intervening in the commons just to correct possible imbalances in the course of customary land tenure changes. The second reason might be that the state is asserting dominion over rural commons under the guiding hands of the theory of the

[81] Stellmacher and Mollinga, The Institutional Sphere cited below at 61.
[82] Yigremew, Land Administration and Management cited above at 106.
[83] Ayalew, Resource Deprivation and Changes cited above at 38.
[84] Liz Wily, `The Law Is to be Blame`: The Vulnerable Status of Common Property Rights in Sub-Saharan Africa, 42Development and Change2 733 (2011) where she argues that the communal resources in Africa are in the course of their demise as has been the case in the past due this time around to heighten large scale land grabs; Compare this recent more realistic view with her earlier optimistic but appropriately guarded view of land law reforms giving recognition to the commons in Africa as documented in Liz Wily, Reconstructing the African Commons, 48 Africa Today 1 76 (2001).

tragedy of the commons, i.e., such common resources have been reduced to open access resources for a variety of reasons, and that the state is rescuing those resources from depletion. And the third reason could be that the state is guided by the concept of *imperium* and *dominium* and its derivate ideas of improvement, trusteeship and civilizing the people on the commons. Sub-sections 3.1and 3.2, respectively, consider the first two reasons briefly and followed by extensive (including some comparative) coverage in the rest of the section of the third reason.

3.1 Evolution?

The evolutionists argue that land tenures in traditional societies today are evolving over time into individualization owing to such factors as population increase and expansion of commerce.[85] Such individualization of land would clarify and simplify land tenure leading to enhanced efficiency. ``One hopes that in so far as individual rights are tradable, opportunities to trade will, over time, reduce inefficiencies and spread the gains from the property-rights creations…``[86] The basic assumption here is that communal tenures are dynamic as opposed to the old thinking that they are eternally static. For example, Ayalew has documented how the Karrayu people who inhabit in eastern Ethiopia have redefined their traditional land tenure system in the face of decades of land takings by the central government for conservation and commercial farming purposes and intercourses with and demand for farmland by migrants.[87]The Karrayu used to be decidedly pastoral for it was a taboo in their custom to enclose land for private use.[88] People and herds have to make intercourse with nature in the open field and collectively.[89] Now they see themselves as semi-pastoralists since they now cultivate land, create private enclosures for grazing, and transfer land informally even to outsiders.[90]

The evolutionists claim that states need to intervene in order to promote certain ideals (i.e., prevention of oppression and allowing investment by outsiders) which might be undermined if the evolution is left to its own devices. So there is a need for governments to negotiate with the concerned communities or make interventions to meet the objective of making land available for investment activities by outsiders. The state intervention in the course of evolution might be required ``to limit predation or capture and to move out of an evolutionary dead end…``[91] And the state might legitimately, but carefully, intervene in this communal land tenure evolution when there are ``glaring inadequacies (gender discrimination seems the most acute of

[85] Harold Demsetz, Towards a Theory of Property Rights, The American Economic Review, Vol. 57 No. 2 347 (1967); see also Ester Boserup, The Conditions of Agricultural Growth: the Economics of Agrarian Change under Population Pressure (1965)

[86] Karol Boudreaux & Paul Dragos Aligica, Paths to Property: Approaches to Institutional Change in International Development, (abbreviated Paths to Property) (London: Institute of Economic Affairs, 2007) at 47-8.

[87] Ayalew Gebre, Resource Deprivation and Changes in Pastoral Land Tenure Systems: The Case of the Karrayu in the upper Awash Valley of Ethiopia (abbreviated as Resource Deprivation and Changes) in Proceedings of the Workshop on Some Aspects of Rural Land Tenure in Ethiopia: Access, Use and Transfer, (Addis Ababa: Institute of Development Research, 2004) at 6-42.

[88] Ibid.

[89] Ibid.

[90] Ibid.

[91] See Boudreaux & Aligica Paths to Property cited above at 48; see also J. P., Platteau, the Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment, *27Development and Change29* (1996) at 27-86.

these).``[92]Another justified entry point for state intervention in customary tenure rules is to ensure that land dealings by community leaders with investors benefit all members of such a community, not just the elders.[93] Further, there is a need for state intervention in customary land tenure where due to conflicts there is ``a breakdown in the traditional rules and leadership structures``.[94] Further, state intervention in customary land tenure is called for in cases where: there is ``a breakdown in the traditional rules and leadership structures``[95] in the aftermath of wider conflicts, the social fabric of a society is disrupted due, for example, to HIV/AIDs pandemic that may lead to deprivation of access to land by widows[96]and the land rights of immigrants require protection.

Commentators do not have much faith in the evolutionists` call for government intervention in the commons. They think that such entry points might be good pretexts for state land grab. Bruce for one expresses his concern about massive land-grabs by the state under the color of asserting state title over community land and he says that the evolutionists` suggestion for state intervention` ``will be of little significance if such processes cannot be controlled…``[97] Bruce concludes: ``current thinking is less sure of final solutions, more aware of the limits of law and state action, more respectful of indigenous systems, more participatory in its methods and more ready to accept diversity.``[98] At a more general level, in addition to its assumption about universal unidirectional societal growth, this theory has been criticized on the ground that evolution of communal property is simplistic to fully explain property rights cases and that the evolution might lead to the division of land in favor of ``either elites or government officials`` and thus ultimately producing inefficient allocations of land.[99]

Moreover, in the Ethiopian context, the evolutionary theory lacks the power to explain the state of the commons because the theory tenure assumes the people on the ground have *de jure* say over their lands because such land and landed resources thus are their common property as a matter of state law. In the Ethiopian context, the evolutionists are misled by *de facto* land transactions made by the commoners. For instance, the adherents of this theory mistake *de facto* land transfers by communities to outsiders for *de jure* power. But these transactions, in the Ethiopian context, can be undone by the state any time since these land transactions do not have the blessings of the state. Even some of the land transactions which are made by the commoners with full knowledge of the fact that the state has sole despotic power over these resources and they are acting in a preemptory fashion, in the sense they want to earn money through transfer of

[92] See Bruce, African Tenure Models cited above at 25.
[93] Abebe, Compatibility cited above at 4.
[94] See van den Brink *et al* cited above at 13.
[95]See van den Brink *et al* cited above at 13.
[96] Id., at 14.
[97] See Bruce, African Tenure Models cited above at 25.
[98] Ibid.
[99] See Boudreaux & Aligica Paths to Property cited above at 47.

their lands to outsiders before the dominion holder, the state, takes it away from them without any compensation.

Furthermore, the Ethiopian state in relation to the commons is not a neutral party in the sense that it is claiming ownership over any land and landed resources not privately held. In this condition, one cannot expect the state to let evolution take place in relation to the commons with some interventions as the need arises. The state seeks to reallocate the commons by itself and in its own terms not by the terms of the concerned communities. Both in the highland and lowland parts of Ethiopia, though for different reasons, the state sees the commons primarily as resources that meet its current overriding objective of boosting export earnings.

If, from the point of view of the people, the evolutionary theory is not a proper tool to fully explain the legal status of the commons in today`s Ethiopia, what other theories are out there to better explain the situation? This query leads us to examine the tragedy of the commons and the improvement narratives in the sections which follow. The two sub-sections below argue that the concept of modernization with its attendant individualized conception of land rights might be one of the underlying reasons for this confiscatory act of the state. This section in 3.2 deals with the application of the theory of the tragedy of the commons as invoked by the Ethiopian state to justify appropriation of the commons in the highland Ethiopia populated by peasants and then followed in 3.3 by examination of the improvement narrative as a rationale used by the state to appropriate the commons in the low land areas of the country inhabited by pastoralists, and such separate treatment is warranted because of the existence of a distinction in the reasons for the state`s appropriation of communal land resources of peasants and of pastoralists.

3.2 The Theory of the Tragedy of the Commons in Highland Ethiopia

Under the theory of the tragedy of the commons both in its old and new forms as explained in section 1.1, the state would argue that the commons are in danger because such they have become everybody`s resources which in effect means they are no man`s land. As a sovereign, there is a duty on the part of the government to control and govern such resources on behalf of the present and future generations or there is a need to privatize the commons. Or the theory would lead to reinforcement of the historical hegemonic position of the state in relation to these resources for the state would be called upon to `save` these resources from depletion or rehabilitate already desecrated resources both perhaps to the disregard of the interests of the concerned communities. And the theory of the tragedy of the commons would also imply that the commons exist either in the state of no governing norms or at best in the state of collapsed customary institutions.

For example, the Ethiopian state justifies its continued dominion over the commons located in sedentary areas on the ground that such commons are affected by over population of people and animals. To the government, this over exploitation of the commons in the highland Ethiopia has

led to deforestation and land degradation because of conversion of the commons into farming and increase in fuel consumption as well as overgrazing. Hence the argument goes that there is a need on the part of the state to undertake top-down exclusionary conservation measures including establishment of parks and wild life sanctuaries or the privatization of the commons. This articulation of the commons by the state in substance, though not in form, constitutes the tragedy of the commons argument.

Literature has reinforced this state narrative about the commons in the highland areas of Ethiopia. The state gets its ammunition from literature which claims traditional tenure institutions in the settled parts of Ethiopia have collapsed as a result of long decades, if not centuries, of government modernization attempts. Or the claim of the available literature at best is that the customary rules in that part of Ethiopia are so weak that one cannot rely on them for their rehabilitation. And such collapse or weakening of customary rules has left the commons without any governance mechanisms. Hence, this institutional vacuum warrants the state to fill in the void. In other words, the commons have now become open access resources that must be brought back to property regime by the act of the state. Yigremew, based on his case study on communal land resources in two communities in the north western part of the country, states that the state has weakened previously viable community tenure institutions and that it was unable to put in place its own resource management rules and principles.[100] Such communal resources have been unilaterally enclosed for farming purposes by peasants and attempts to evict these `unauthorized occupants` of the commons remained ineffective.[101] In the face of this, he thinks that communal land resources are virtually reduced to open access property and raising the question on the part of some peasants in the study sites about the advisability of privatizing the commons for ``better management and equitable uses``.[102]

Elias argues that in some cases as a result of norm gap, common resources are turned into open access resources, which inevitably leads to the ``tragedy of resource non-sustainability.``[103] Elias regards open access entailing widespread ``deforestation, overgrazing, squatting and resultant resource dissipation…; ultimately conversion of ``many green mountains into sand dunes and rocky landscapes.``[104] Elias further argues that in some situations communities using common resources suffer from lack of tenure regime without specifying the reasons for such void. Elias might perhaps subscribe to what Yigremew and Dessalegn have in mind in justifying the `absence` of traditional norms governing the commons in the highland Ethiopia. Endorsing the justification given by Dessalegn, Yigremew said that ``...customary management systems and institutions which previously have served relatively well have broken down under pressure from political and administrative modernization and have not been successfully replaced while at the

[100] Yigremew, Land Administration and Management as cited below at 114.
[101] Id., at 101-112.
[102] Id., at 114.
[103] Elias, Conceptual Foundations at 40.
[104] Id., at 34 & 40.

same time state custodianship has been a dismal failure and has in many cases led to mismanagement and loss of natural resources``[105]

Elias suggests the possibility of government interventions in those instances without mentioning any example of a community that is currently using resources without any governance regime of its own. . This suggestion is a powerful weapon for the state to intervene because in Elias`s opinion the commons are no more commons but are open access resources, which impairs the sustainability of such resources. The tone of the article appears to be that any well-defined property regime including government generated tenure rules save the commons from ruin. Generally, Elias has invited takeover of communal resources by the state so long as it comes up with more effective tenure rules in a sense of a demonstrable capacity to implement the same. Elias has failed to clearly advocate for the recognition of the communal tenure as a starting point, which suggestion would not necessarily deprive of the state of a say over these resources, but it would make the state one of the actors in respect of the commons, not the only actor, as it has been the case in the country.

Some writers acknowledge current viability of customary tenure practices in some areas but claim that such tenure practices either lack clarity or are weak in their enforcement. Yeraswork says common property resources are surrounded by vague rule systems:

> …which refers to (1) the dubious legal status of the group`s collective claim on the resource. More often than not, common property rights are based on traditionally established praxis, customary law, etc., which are not always sanctioned by the legal apparatus of the modern state, and (2) because the internal regulatory rule system is highly dependent on the social context…**[106]**

Besides, Stellmacher and Mollinga have shown the shortcomings of state and community legal regimes when each seeks to govern the commons to the total exclusion of the other. To illustrate their point, Stellmacher and Mollinga have described two main layers of natural resources tenure regimes in Koma forestry in Keffa Zone, south western Ethiopia. They have shown that state forestry rules and institutions have been imposed from above based on inflated estimation of the capability of the state institutions to enforce and monitor the natural resources.[107] In actuality, these state forest regimes have not ``reached the forests``.[108]

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[105] Dessalegn Rahmato as quoted in Yigremew Adal, Land Administration and Management of Communal Land Resources in the Post-Derg Period: A Case Study in Two Rural Kebeles in Northwest Ethiopia (abbreviated as Land Administration and Management), In Some Aspects of Rural Land Tenure in Ethiopia: Access, Use and Transfer, (Workmeh Negatu and Yigremwe Adal, eds.)(Addis Ababa: Institute of Development Research, 2004) at 114.

[106] Yeraswork Admassie, Indigenous Common Property Resource Management: Cases from Wello and North Shewa in Institutions, Resources and Development in Ethiopia, (Alemu Mekonnen and Dejene Aredo eds.) (Addis Ababa: Ethiopian Economics Association and Department of Economics, 2000) at 25.

[107] Till Stellmacher and Peter Mollinga, The Institutional Sphere of Coffee Forest Management In Ethiopia: Local Level Findings from Koma Forest, Kaffa Zone, (abbreviated as The Institutional Sphere) *2 International Journal of Social Foresty1* 43 (2009) Pp. 46-9. See also Elias N. Stebek, Dwindling Ethiopian Forests: The `Carrot` and `Stick` Dilemma, *2Mizan Law*

These centralized state rules and institutions seeking to govern natural resources in Keffa lack acceptance on the part of the community.[109] They have also shown customary rules and institutions regulating forest resources in Keffa lack effective enforcement mechanism, the deficit in these traditional rules being the exclusion of outsiders who settled there as farmers as a result of the Derg`s resettlement programs even if these new comers do critically rely on use of forest resources.[110] Stellmacher and Mollinga have concluded that the legal regime for natural resources use in Keffa is ``unclear and uncertain``[111] and this uncertainty ``offers, original people and new settlers, little means and incentives to apply future oriented sustainable use and management practices`` and hence promotes depletion and loss of resources.[112] Stellmacher and Mollinga have also argued that traditional rules regulating those resources are still viable but in addition to being ``unclear and uncertain``, their sanction aspect is based simply on social consensus, showing lack of faith in their effectiveness.[113] Yeraswork, and Stellmacher and Mollinga impliedly warn Ethiopia of a possible total and ultimate conversion of common resources into open access resources, which means the state of the tragedy of the commons.

The reasoning that extant customary land tenures are deficient because they suffer from lack of clarity or the state has not recognized them and, consequently, they are weak in their sanction aspect is unconvincing. Lack of clarity is not the inherent attribute of customary tenure systems; vagueness or ambiguity can manifest itself in written state law, too. And it is unsound to argue that traditional land tenure institutions lack teeth to bite just because the state has not backed them with its enforcement machinery. In fact some have convincingly argued that order is possible even in the absence of both legislation and law (i.e., both judge-made and customary laws) because under conditions where the costs of learning about the law and submitting to formal dispute resolution procedures are so high people resort to `common-sense norms`.[114]

More importantly, the argument that deficiency of the customary tenures brings about the tragedy of the commons and thus the need for government takeover of these resources is out of context because the doctrine of the tragedy of the commons in the main suggests individualization, i.e., full individual ownership of open access resources to be governed according to rules enacted by a minimalist state. In other words, the theory of the tragedy of the commons does not ask the state to take over open access resources nor does it solicit state intervention in forms other than protection of private property rights. Even where some proponents of the tragedy of the commons advocate for `definite social arrangements…that

Review2 255(2008) p. 268-269, for discussion on the top-down mentality of laws, regulations, policies, strategies and institutions the Ethiopian state has put in place since 1962 in respect of forests.

[108] Stellmacher and Mollinga, The Institutional Sphere cited above at 46-9.

[109] Ibid., 49-57.

[110] Ibid.

[111] Id., at 63.

[113] See Stellmacher and Mollinga, The Institutional Sphere cited below at 63.

[114] Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes (Cambridge, Mass: Harvard University Press, 1991)

create mutually agreed coercion`[115]to be enforced by government regulatory agencies, they confine it to what they regard as universal environmental goods such as the atmospheric air but not in connection with the commons emphasized in the present Article namely grazing lands and forests and forests resources accessed in common. Some conservative promoters of the tragedy of the commons theory envision solution in the institution of private property even in relation to these universal environmental goods.[116]

In general, here the literature reviewed above argues that customary land tenures over the commons have either disintegrated owing to different factors or when they do exist, they are vague or ambiguous or lack teeth to bite; and that this has brought about the transformation of common property over resources into open access resources and such undesirable scenario welcomes the government to tighten its historical grip on open access resources or take them over from the community or alternatively their privatization.

The state`s invocation of the tragedy of the commons in regard to the commons in highland Ethiopia is not a consistent affair, though. Sometimes the state contradicts itself by deploying the under exploitation of resources in particular forest resources in located in Ethiopia`s highland and with its attendant solicitation for private investment in those forests.[117] For instance, the Ethiopian National Action Program to Combat Desertification states:[118]

> The policy provisions contained in this draft…encourage the development of forests by individuals, organizations and government and the designation of protected forests and productive forests to be administered in accordance with laws to be enacted for each. The draft stresses the need to give security of ownership of forest products to the developer

In addition, the advocacy by government authorities about the existence of pockets of unused rural lands in the highland Ethiopia and attracting agricultural investors to such lands is a testimony to the state`s simultaneous invocation of over exploitation (tragedy of the commons) and under exploitation narratives. The effect for the people is all the same, though: both narratives of over exploitation and under exploitation are deployed by government authorities to exclude local people from the commons.

3.3 The Improvement Narrative in Pastoral Ethiopia

[115] Garrett Hardin, at 1247.
[116]Megan McArdle, Property Rights and the Tragedy of the Commonshttp://www.theatlantic.com/business/archive/2012/05/property-rights-and-the-tragedy-of-the-commons/257549/ (last accessed 22 January, 2013)
[117] Kathleen Guillozet, Livelihoods and Land Use Change in Highland Ethiopia, PhD Dissertation, Oregon State University, (Unpublished, on file with the author) (2011) at 62-63.
[118] Ethiopian National Action Program to Combat Desertification (1998) at 62.

This current sub-section considers the Ethiopian state`s justification for appropriation of the commons in the low land areas of the country inhabited by pastoralists and argues that the concept of modernization with its attendant individualized conception of land rights is an underlying reason for this confiscatory act of the state.

As the history of Ethiopia documents, in the second half of 19th and early 20th centuries, the imperial government`s modernization project aimed to enhance the goal of nation-building was extended to the southern populations. This enabled the imperial state to bring vast `west lands` under its dominion through conquest. The state took it as its mission to `improve` these `empty lands`. The Amharic term ``*tef meret*`` was used to suggest that the land being taken was either unutilized or underutilized while the notion of ``*makenat*`` was used to mean that the unutilized land should be improved and the people therein be brought to the level of civilization under the guiding hands of the state. The use of such `othering` words does not merely suggest that those areas are not populated, but that the areas are not populated with civilized people in the sense they are alien to sedentary mode of cultivation, habit of building permanent dwelling houses and townships. The imperial government`s thinking that the land in these territories was unutilized and that the people had to be made to see the light of civilization was passed onto the Derg and the current government. For example, this sentiment has been expressed recently by Abay Tsehaye, a senior minister in the current government, in responding to critiques directed against a multi-billion dollars export oriented sugar plantation project known as Kuraz Project underway in the pastoral areas of South Omo on about 150,000 hectares of land:

> The farms are in barren areas… the plan is to transform South Omo residents socially, economically and culturally… Groups campaigning against the plans have selfish motives. They want these people to remain as primitive as they used to be, as poor as they used to be, as naked as they used to be, so that they will be specimens for research and an agenda for raising funds… Previously impoverished communities will be "far better off" as they will benefit from irrigated land, improved social services, support from agricultural experts and job opportunities.[119]

The Minister echoed the thinking of the late Prime Minister Zenawi, who, on the occasion of the celebration of the 13th Pastoralists' Day of Ethiopia on 25th of January 2011, said:[120]

> …this area is known as backward in term of civilization… The Ethiopian government will never allow the pastoralist community to remain under poverty and backwardness any more. The livelihoods and living styles of Ethiopian pastoralists should be altered altogether…

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[119] Ethiopia Builds 10 New Sugar Plants As It Aims to Become Leading Exporter, http://www.bloomberg.com/news/2011-09-13/ethiopia-builds-10-new-sugar-plants-as-it-aims-to-become-leading-exporter.html, September 13, 2011 (accessed September 15, 2011).

[120] Livelihoods of Ethiopian Pastoralists: threats and opportunities, (Feb. 2011): http://www.waltainfo.com/index.php?option=com_content&task=view&id=25278&Itemid=82 (accessed September 24, 2011).

Thus, the state is executing the Kuraz Project in order to carry out its historic mission of pulling these people out of the state of backwardness by transforming their `barren areas` into sedentary farming. ``To non-pastoral peoples, land not continually occupied, without a permanent human presence, can be seen as `empty`, `unused`, un-owned` even if it is known that some people are sporadically present and that these people claim kind of ownership.``[121] These people must be forced to develop and be civilized because it is `better`` for them to be in that fundamentally transformed condition. The development of these people and the area would be attained if they first settle and adjust themselves to farming. When they do so, the state shall provide them with social and physical infrastructures; the extra-lands obtained after settlement of these people will be used to introduce commercial farming which would help create jobs and the development of towns in the area.[122] A similar kind of argument was advanced and promises made in 1960s and 1970s when Emperor Haile Sellasie I`s government dispossessed land from Afar, Itu, Karrayu pastoralists who occupy the Awash Valley in eastern Ethiopia.

The use of Amharic terms `zelan`, (i.e., a wanderer), `eregan` (i.e., a herder) and the like portrays the pastoralists as pre-modern `savage people`. They live in a pre-modern state; their mode of life is inimical to rational and orderly modern life the nation aspires for. Thus, the lives of the savages in the low lands of Ethiopia must be brought to order and rationality by the state through the law. In the way, the state does want to make the pastoral people part of its vision of building `one economic community``[123] pronounced in the preamble of the Constitution, and they must not be left outside of it. Inclusive ` one economic community` would be achieved via state laws and policies regarding settlement and investment. It appears that state law, as maiden-hand of transformation of pastoral societies, is given the following role which Goldberg credits to Fitzpatrick.[124]

> Opacity and obscurity…are projected to give way to the light of rational transparency and precision; the chaotic limits of indeterminacy give way to perspicuity of definition; irrationality gives way to the intelligibility of logical regularity; the contingency of inclination gives way to the absolute certainty of rational self-determination…the law is projected as at once the instrument and arbiter of civilization-and order.

[121] Philip Carl Salzman, Afterword: Reflections on the Pastoral Land Crisis: Tenure and Dispossession in East Africa, (abbreviated as Foreword) Nomadic Peoples Journal, No. 34/35 (, 1994): http://cnp.nonuniv.ox.ac.uk/NP_journal/archive.shtml at 2. (accessed April 11, 2013); See also J. Gilbert, Nomadic Territories: A Human Rights Approach to Nomadic Peoples` Land Rights, *Human Rights Law Review* 7:4 (2007) 681, discussing how nomadic peoples have been deprived of land rights on the basis of the doctrine of effective occupation and the incipient but encouraging nature of international human rights law in addressing nomadic mode of life.

[122] At present massive settlement programs are underway in four southern regions namely in Afar, Southern, Somali, Gambella and Beni-Shangul regions aimed at settling more than two hundred thousand households who mainly are pastoralists and the rest being those with shifting mode of cultivation. For instance, see the Sunday October 23, 2011 edition of the Reporter News Paper (in Amharic) about the government`s plan to settle 35 thousand Afar pastoralists in the year 2011/2012 alone http://www.ethiopianreporter.com/news.html (accessed on October 24, 2011).

[123] See the preamble of the FDRE Constitution cited above.

[124] David Goldberg, The Prison-House of Modern Law, *29 Law and Society Review3* 541 (1995) at 543 & 546.

It is sound to be specific about the state`s conception of property in land behind this civilizing mission. This conception of property in the Ethiopian`s state mind looks to be the improvement doctrine, which would claim that the people, in particular the pastoral people, have not developed the land they have been occupying for generations in the sense they have failed to undertake cultivation and construction of buildings and establishment of townships. The pastoralists` use of land for pasturing cattle does not warrant improvement proper and thus such activity alone does not give them land rights over their grazing commons in their entirety. On the other hand, the projects the government carries out or allows private investors to launch on pastoral areas should lead to bestowal of private property. The settlement project would also result in pastoralists making permanent improvements to the individualized plots, and consequently leading to the acquisition of property in land with the blessing of state law for the first time.

Thus, the right to land is obtained after improvements are made on land, mere pasturing, however time immemorial might have been carried on, does not entitle one to property right to land. To the state, private land enclosure of pastoral areas followed by some sorts of sedentary activities would add value to the land, which leads to giving property rights thereon to the improver. This attitude about land improvement has hampered successive governments of Ethiopia from considering the possibility of developing pastoral areas through the development of livestock (e.g., developing traditionally used water points, and supplying them with animal health care facilities and transportation) and facilitation of market for meat and dairy products, that is, development along pastoralists` mode of life.

Ethiopian governments have always invoked the concept of trusteeship, a concept complementary to the doctrine of improvement, as requiring them to control and deploy the `vacant` lands for the maximum benefit of the people of Ethiopian, i.e., the dead, the living and the unborn, including those who are currently occupying these lands without `value addition`. For this thinking, the duty of the state to see to it that the lands` value is enhanced would be fulfilled if the improvement doctrine is implemented. Thus, the 1955 Constitution of Emperor Haile Selassie I, states,

> The natural resources in the waters, forests, land,…of the Empire are a sacred trusts for the benefit of present and succeeding generations of the Ethiopian People. The Imperial Government shall, accordingly, take all such measures as may be necessary and proper, in conformity with the Constitution, for the conservation of the said resources.[125]

The Derg regime`s 1987 Constitution was no exception in invoking the doctrine of trusteeship in relation to use and custody of natural resources of the country.[126] Likewise, the Constitution

[125] See Article 130/b of the 1955 Revised Constitution of Ethiopia. For the interpretation given to Article 130 of the 1955 Revised Constitution of Ethiopia, see Russel Berman, Natural Resources: State Ownership and Control Based on Article 130 of the Revised Constitution (abbreviated as Natural Resources), 3 Eth. J. L.2 551(1966).

[126] The Constitution of the People`s Democratic Republic of Ethiopia (1987).

stipulates that ``Government has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development.``[127] And, unfortunately, even one was to say that this concept of trust is open to dispute, it cannot be argued before regular courts in favor of control of the commons by communities simply because constitutional review is not the mandate of courts in Ethiopia.[128] But these narratives have not worked to the advantage of concerned communities. For example, in invoking the improvement discourse, the state justifies projects carried out on the commons in terms of generation of more public benefits. In particular, the state argues that the commons in sparsely populated lowland parts of Ethiopia would be reserved for large plantations to generate employment for the people, and technology transfer and foreign currency. For the state, those benefit generating investment activities on `empty land` would ultimately lead to civilization of the pre-modern pastoral people.

Setting aside the civilizing mission of the state, yet, such benefits have not materialized. The available literature shows that the service of the state is increasingly made at the disposal of investors as if Ethiopia`s revolutionary slogan "land to tillers" has now changed into "land to investors".[129] In writing about adverse effects of commercial farming on the Afar who inhabit the eastern part of Ethiopia, Bondestam said ``the introduction of cash crop agriculture was made possible by removing the indigenous people from their land, thereby undermining their living conditions.``[130] Another commentator characterized the consequences of state sponsored projects in the pastoral regions of Ethiopia as an attempt to convert the people into ``wage labourer pastoralists.``[131] Bondestam consequently advised the state ``to stop the growth of commercial farming along the Awash Valley, and to concentrate on the continued survival of those Ethiopians who are still alive.``[132] And a recent article has documented the fact that this imperial policy of land expropriation has continued to date unabated with its pronounced underdevelopment of the Afar and Karrayu who have been pushed to the drier fringes of these projects.[133] The result has been pervasive land dispossession and tenure insecurity.

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[127] See Article 89/5 of the FDRE Constitution cited above. One legislative application of the trust under the FDRE Constitution is the Water Resources Management Proclamation declares that water resources of the country shall be put ``for the highest social and economic benefits of the people of Ethiopia.`` Water Resources Management Proclamation No 197, 2000, Article 3, *Fed. Neg. Gaz.* Year 6th No. 25.

[128] ``I think on this basis a 'trust' concept is arguable. Unfortunately, courts (English) have assumed that such 'trusts' are 'political' rather than legal. Equally unfortunately, Ethiopian courts have no jurisdiction. However, as your system of constitutional review is an essentially political process, it may be that if the politics were to change, this could be an important area of development.`` (Supervisor`s comments)

[129] For analysis of current trends in Ethiopia regarding transfer of rural land, including communal resources, to investors, see Dessalegn Rahmato, Land to Investors: Large Scale Land Transfers in Ethiopia (Addis Ababa: Forum for Social Studies, 2011).

[130] Lars Bondestam, People and Capitalism in the North-Eastern Lowlands of Ethiopia (abbreviated as People and Capitalism), *12Journal of Modern African Studies3* 423 (1974) at 439.

[131] Ayele The Alienation of Land Rights cited above at 142.

[132] Ibid.

[133] Bekele Hundie and Martina Padmanabhan, The Transformation of the Afar Commons in Ethiopia, CAPRi Working Paper NO. 87 (2008) at 24-5.

These past state projects appear to be still present with us today. As an indication, in addition to those cases described in this article, one can highlight complaint filed on behalf of people in Gambella, south western Ethiopia, (which is currently the site of a massive large scale commercial agriculture) alleging that the state is using funds dedicated to the Protection of Basic Services (PBS) by the World Bank and the UK Department for International Development to force them off their land under an ongoing villagisation program and which the Bank Inspection Panel has called for an adequate investigation into the complaint.[134] The villagization program supposed to achieve economy of scale in the provision of social and physical services in the area is not disputed by government authorities nor do government authorities deny that a plot of farmland is being allotted to each household instead of their hitherto mobile mode of life founded on river bank cultivation augmented by hunting and gathering. The essence of the compliant, which is still under investigation, relates to whether such authorities are moving unwilling population using the funds coming from these development institutions. And the Panel in calling for investigation into the matter links villagisation and the PBS in saying,

> [Villagisation] is a programme that aims at fundamentally restructuring settlement patterns, service infrastructure and livelihoods, including farming systems, in the Gambella region, and as such constitutes a significant context in which PBS operates. In this sense from a development perspective, the two programmes depend on each other, and may mutually influence the results of the other…[135]

3.3.1 The Improvement Discourse in Britain and in Her Colonies

This bit of the Article briefly traces the development of the improvement narrative in the context of Britain and her colonies, its transplantation, the implications of this narrative and its current relevance. It is shown that the idea of grabbing land from the people in the name of improvement is not something which has been buried; it is still out there alive and kicking. The perception of the Ethiopian state towards resources held by people in manner other than private holdings had also been the experience of Britain and her colonies, where the notions of *imperium* and *dominium* were invoked including the attendant improvement discourse, which was articulated by prominent Anglo-American judges and jurists. This sub-section briefly considers these notions as applied in Britain initially at home and then in her overseas territories including discussion of its adverse effects on the population there and of the contested nature of these concepts.

To McAuslan, the fundamental principle of English land law was:

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[134] William Lloyd George, World Bank told to investigate links to Ethiopia 'villagisation' project, Tuesday 19 March 2013 17.19 GMT, http://www.guardian.co.uk/global-development/2013/mar/19/world-bank-ethiopia-villagisation-project (last accessed April 17, 2013); For some account of Anuak refugees in Kenya, see Clar Ni Chonghaile , Ethiopia's resettlement scheme leaves lives shattered and UK facing questions, Tuesday 22 January 2013 12.14 GMT, http://www.guardian.co.uk/global-development/2013/jan/22/ethiopia-resettlement-scheme-lives-shattered (last accessed April 17, 2013)

[135] Ibid.

> …that the monarch owns all the land in England and derives his or her ownership from being the supreme lord…In practice and law, no distinction was made between conquering the country and acquiring absolute ownership of that country`s land.[136]

McAuslan considers the co-existence of *imperium* and *dominium* as the two fundaments of early feudal land law of Britain. He describes the term *imperium* as assertion of sovereignty by an occupying state over a conquered territory while *dominium* as an absolute ownership claim by the same over the land in that territory.[137] The British extended the principle that control over a given territory entails absolute ownership over that territory first to Ireland and then to others parts of the world. The concepts of *imperium* and *dominium* were extended to overseas territories via statutes, court decisions and reinterpretation customary land tenures.[138] Okoth-Ogendo also says the British colonial power in Africa applied ``The concept of crown ownership and trust holding. ``[139]

The land improvement theory was behind the state`s invocation of the concepts of *imperium* and *dominium*. The British first articulated the improvement discourse and implemented it at home in respect of the enclosure movement as of the seventeen century. The improvement doctrine asserted that lands used communally were either underutilized or just wastelands because of a defective tenure that encouraged the tragedy of the commons. Brace captures the improvers` attitude towards the commons as:

> Those who lived and worked on the common lands were not `improvers` or true husbandmen. It was, for example, impossible to establish trees on the commons because they would either be eaten by livestock or removed for firewood. For the improvers, the commons were wasted, desolate and chaotic. They generated unemployment, idleness… and directly opposed to the ideal of enclosure and increased productivity. The improvers' discourse set up the commons as a kind of state of nature to be transcended by ingenuity and industry. The process of enclosure replaced the chaos of open fields and commons lands with a neat patchwork of hedged fields securely held as private property by virtuous, improving individuals. [140]

These lands had to be transformed into their full potential by investing individual labor on them. This labor investment entails dividing the commons and conferring full private ownership to individual land improvers. ``In improvement discourse, the commons were wastelands not

[136] Patrick McAuslan, Land Law and The Making of The British Empire (abbreviated as Land Law) in Elizabeth Cooke, Modern Studies in Property law Vol. 4, (ed.) (Oxford: Hart Publishing, 2007) at 241.
[137] Ibid.
[138] Ibid.
[139] H. W. O. Okoth-Ogendo, Agrarian Reform in Sub-Saharan Africa; An Assessment of State Responses to the African Agrarian Crisis and Their Implications for Agricultural Development (abbreviated as Agrarian Reform) in Land in African Agrarian Systems (eds. Thomas Bassett and Donald Crummey (eds.) Madison: The University of Wisconsin Press, 1993) at 251-2.
[140] Laura Brace, Husbanding the Earth and Hedging Out the Poor (abbreviated as Husbanding the Earth) in Land and Freedom: Law, Property and British Diaspora,(A. R. Buck *et al*, eds.) (England: Ashgate Publishing, 2001) at. 9.

employed for their full potential and, consequently, labor upon them, that nether effectively improved nor appropriated land, was wasted.``[141] The quality of labor that possesses transformative effect on `barren and fruitless lands`, as opposed to ``passive labor`` being applied by the commoners, was articulated as:

> Transformation of the fruits of the earth required the dedication and creativity of mankind through their calling. The husbandman`s calling was seen as a reflection of a spirit of innovation and enterprise, rather than of passive ownership. The calling became a part of his property because he had to labour on the land and cultivate his seed in order to release their full potential and true value. His calling was central to his self-definition.[142]

The connection between labor and land ownership transformed by labor was established by major thinkers of the time such as Locke who thought that ``virtually the entire value of land derived from the improvements that labor made upon nature`s endowment.``[143] And as Moloney attributed to McCulloch, the latter argued that ``Labour…is the only source of wealth and it is human labour that furnishes a product with an exchange value distinct from its natural utility. Nature`s untamed bounty is gratuitous, and has therefore no value.``[144] Those who occupied the land in its natural state used it passively and without improvement thereby forfeited their right to acquire private ownership.[145]

The people occupying the commons perhaps for generations had not yet obtained ownership over such land because they did not invest in such lands useful labor, and owing to their innate economic behavior, nor would the commoners be able to start investing quality labor on their lands so that they could start acquisition of ownership. Hence, the lands under their occupation remained in its pure state of nature. According to the improvement theory, it was the responsibility of the radical title holder, the state, to facilitate the replacement of these irrational tenure systems by more productive and rational individualistic land tenure which would be beneficial for all.[146] Brace says ``Wild and vacant wastelands were regarded as `like a deformed Chaos` which brought discredit to the commonwealth.``[147] It considered `the manifest destiny`` of Europeans to civilize the rest of the world.`` through, among others, the introduction of private ownership of land.[148]

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[141] A. R. Buck *et al*, Introduction in Land and Freedom: Law, Property and British Diaspora,(A. R. Buck *et al*, eds.) (England: Ashgate Publishing, 2001) at 3.
[142] Brace, Husbanding the Earth cited above at 7.
[143] Pat Moloney, Colonisation, Civilisation and Cultivation: Early Victorians` Theories of Property Rights and Sovereignty (abbreviated as Colonization, Civilisation and Cultivation) in Land and Freedom: Law, Property and British Diaspora,(A. R. Buck *et al*, eds.) (England: Ashgate Publishing, 2001) at 31.
[144]Id., at 24.
[145] Nancy E. Wright and A. R. Buck, Property Rights and the Discourse of Improvement in Nineteenth-Century New South Wales (abbreviated as Property Rights) in Land and Freedom: Law, Property and British Diaspora,(A. R. Buck *et al*, eds.) (England: Ashgate Publishing, 2001) at 104.
[146] Brace, Husbanding the Earth cited above at 5ff.
[147] Id., at 6.
[148] Moloney, Colonization, Civilisation and Cultivation at 24.

This liberal notion of acquisition of land rights that was articulated in Britain as of sixteen century was transplanted to Ireland. John Davies, lawyer and English Attorney-General for Ireland, in justifying the implementation of the improvement discourse in Ireland said:

> …His Majesty is bound in conscience to use all lawful and just courses to reduce his people from barbarism to civility….Now civility cannot be planted among them by this mixed plantation of some of the natives and settling of their possessions in a course of Common law; for themselves were suffered to possess the whole country, …for many hundreds of years past, they would never, to the end of the world, build houses, make townships, or villages or manure or improve the land as it ought to be…when his Majesty may lawfully dispose it to such persons as will make a civil plantation thereon….Again, his Majesty may take this course in conscience because it tendeth to the good of the inhabitants in many ways. [149]

The improvers' thinking was taken to other conquered peoples who were viewed by political economists of European origin as part of societal evolution which would inexorably pass through clearly defined stages.

> Most miserable, on the lowest rung of civilisation, were savages who only gathered the fruits of the forest and the seashore. Superior to them were those who…in pursuit of prey they labored…The domestication of animals marked the transition to the pastoral stage and secured for those societies a less precarious subsistence…The third and most decisive step in the progress of civlisation …is made when the wandering tribes of hunters and shepherds renounce their migratory habits, and become agriculturalists and manufacturers. [150]

To the British colonial enterprise, colonists and settlers had ``the right, under natural law, to seize lands that were unused or uncultivated or simply were not being cultivated fruitfully enough.``[151] According to Wood, this thinking got intellectual backing from prominent thinkers such as Locke, Bentham and Mill. Wood, for example, says:

> …For Locke, America was the model state of nature, in which all land was available for appropriation because, although it was certainly inhabited and even sometimes cultivated, there was no proper commerce, hence no `improvement`; no productive and profitable use of the land and therefore no real property...Locke introduced an important innovation into the res nullius principle by justifying colonial appropriation of unused land without the consent of any local sovereign and that he provided settlers with an argument that justified their actions on the basis of natural law, without any reference to civil authority.[152]

[149] As quoted in McAuslan, Land Law cited above at 245-6.
[150] Moloney, Colonization, Civilisation and Cultivation at 25 quoting McCulloch, a mid 19th century political economist.
[151] McAuslan, Land Law cited above at 259.
[152] E. Meiksins Wood, Empire of Capital, (London: Verso, 2003) at 96-7.

The taking initially applied to what the British colonial power termed as ``waste or unoccupied law`` but later, for example, in the context of Keya, was extended to ``land occupied by native tribes.``[153] Okoth-Ogendo states that colonial settlements in East and Southern Africa were based on ``the supposition that the land was ownerless and therefore open to acquisition by right of conquest of first settlement``[154] and that the natives could not fruitfully use the land because they did not advance in ``the paths of civilization…``[155] In Tanganyika (now mainland Tanzania) and Uganda, the expropriation of such `wasteland land` as was required was conducted on the basis of the supposed residual proprietary power of the colonial sovereign…``[156] Okoth-Ogendo observes that the Europeans viewed the native populations as totally lacking in economic or environmental rationality, which is driven and sustained by ``innate forces.`` As an illustration of this European mind-set, Okoth-Ogendo quotes the following from a report issued in the 1920s in Zimbabwe:

> It cannot be said that the native of Mashonaland is a good agriculturalist, his methods are wasteful and in a way ruinous to the future interests of the country…as a rule the bush country is selected for gardens, generally in the granite formation where the soil is easy to dig and cultivate…No attempt is made to manure the ground, except with wood, ash and weeds which are dug in…it takes about ten to fifteen years for gardens to recover and be again fit for cultivation.…the indigenous population is not interested in production for profit but is concerned only with satisfying a limited range of wants that is almost static in character. [157]

More specifically, in the African setting, like elsewhere, the improvement doctrine pointed to defects in African tenure arrangement. This narrative about land tenure systems of the native people rests on the fundamental proposition that land is communally owned. From this proposition it follows that tenures systems on the ground do not provide tenure security, create excessive land fragmentation, source of incessant disputes, creates land degradation, does not permit land transfers to outsiders and generally undermines agricultural development.[158]

Armed with the doctrine of improvement of unused or underutilized virgin lands overseas, the British colonial state facilitated land selling or leasing or even rewarded squatting on such lands for a variety of `more useful purposes` such as plantations, ranching, settlements, mining, establishment of wild life sanctuaries.[159] On the newcomers the effect of the taking was

[153] McAuslan, Land Law cited above at 257.
[154] Okoth-Ogendo, Agrarian Reform cited above at 250.
[155] Id., at 251.
[156] Id., at 252.

[157] Id., at 254-5.
[158] Id., at 256.
[159] McAuslan, Land Law cited above and see Peter Karsten, `They Seem to Argue That Custom Has Made a Higher Law`: Formal and Informal Law on the Frontier in Land and Freedom: Law, Property and British Diaspora,(A. R. Buck *et al*, eds.) (England: Ashgate Publishing, 2001) at 64 & 78, and see also Okoth-Ogendo, Agrarina Reform cited above at 252.

acquisition of freehold title or at least long time lease right while the effect on the natives was extinguishing their customary titles and reducing their status in relation to often marginal lands reserved for them as mere occupants over which they had no right to transfer to others and from which the state could evict them at will[160] and ``…in essence, liberal capitalist notions of property as a tradable commodity squeezed aside notions of property that emphasized non-commodifiable concepts of personhood that were antipathetic to commodificaiton.``[161]

The effect of the commodity approach to property law was not limited to replacing alternative forms of land rights; but it went beyond tenure replacement to conceive as a person only those who improved land and acquired private ownership thereon.[162] Writing in the context of seventeen century enclosure movement of England, Brace argues that the privatization of land expressed the ``determination to achieve full employment and the emphasis on productivity all involved objectifying the poor, denying them the opportunity to choose their own ends and purposes, treating them as a resource to be owned and exploited.``[163]

McAuslan asserts that the improvement thinking with its attendant tenure individualization, conferment of dominium on the state and land dis-possession from the people is still at large. And this continuation or failure to undo the effects of such dis-empowering practice has been nurtured by international agencies and national governments. McAuslan writes:

> The new globalization has followed the old one too in its involvement with land law and its attempts to develop land laws that displace local laws and to put in place laws based on `best practice` or international norms that can be used to justify such displacement and continue the practice and ideology of strong central government in land management. [164]

And in his recent contribution, McAuslan has stated that,

> **…**there is a push from the international community to bring about a homogenisation of national land laws based on the Anglo-American legal model to facilitate an international land market**…**…[in case of departure] the full weight of the World Bank and the international community has been brought to bear to 'correct' the aberrant departure from pristine market principles**.**[165]

[160] McAuslan, Land Law cited above at 241 & 259.
[161] A. R. Buck, `Strangers in Their Own Law`: Capitalism, Dispossession and the Law (abbreviated as Strangers in Their own Law) in Land and Freedom: Law, Property and British Diaspora,(A. R. Buck *et al*, eds.) (England: Ashgate Publishing, 2001) at 42.
[162] Brace, Husbanding the Earth cited above at 16.
[163] Id., at 17.

[164] McAuslan, Land Law cited above at 240.
[165] Patrick McAuslan, 50 Years of Land Law Change in Eastern Africa: Transformative or Traditional? A Preliminary Assessment (50 Years of Land Law Change) (unpublished, on file with the author (2012) at 128.

McAuslan approves Manji`s position that land reform in Africa caters for the interests of elites and certain international organizations when he says ``… It has been ever thus in land law reform in Africa``.[166]

Furthermore, after reviewing land tenure reform experiences of Botswana, Maldives, China and Indonesia, McAuslan concludes that governments will not ``let go`` of control over land.[167] He says:

> In all countries…the radical title to land is vested in the state…in practice regulation [of land by the state] is more likely to be used for rent-seeking opportunities by officials and to enable governments to continue the old-age practice of depriving the poor of their land as and when the government decides it needs it…The lessons of colonialism where seizure of the land was one of the first steps on the road to domination of the new political entity live on long after colonial control has been relinquished. [168]

McAuslan strengthens this position in a recent work cited above when he states, on the top of external influence in favor of commodification of land with its corollaries of land titling and of abolition of customary tenure, in African land law reforms there still is a ``maintenance or even increase of central government control…and a corresponding continuing ambivalence…of entrusting land management to local authorities and the rural peasantry. ``[169]

McAuslan finds support from Okoth-Ogendo when the latter says that many post independence African governments could not introduce prudent land reform because of two reasons. Okoth-Ogendo gives two reasons for the continuation of colonial land policies and practices in post-independence Africa.

> In the first instance…independence in many of these countries in fact altered the environment of state power in such a manner as to weaken the capacity of government to initiate, let alone radical, policies. The independence constitutions of most of these countries stipulated that the institutions extant at the end of colonialism should survive transfer of power…In the second instance, excessive concern with foreign exchange generation as the primary means of economic sustainability usually meant the status quo ante was to be preferred. [170]

A World Bank Working Paper rightly asserts that ``The root of the insecurity of rural landholders lies in the fact that much of the land they hold is considered state-owned land, and

[166] Manji A., The Politics of Land Reform in Africa: From Communal Tenure to Free Markets (London: Zed Books, 2006)at 132.
[167] Patrick McAuslan, Tensions of Modernity: Law in Developing Land Markets (abbreviated as Tension of Modernity) in Modern Studies in Property Law Vol. III (E. Cooke ed.) (Oxford: Hart Publishing, 2005) at 316.
[168] Id., at 312-13.
[169] Patrick McAuslan, 50 Years of Land Law Change cited above at 129-130.
[170] Okoth-Ogendo, Agrarian Change cited above at 261-2.

national government does not recognize right under customary tenure.``[171] A similar research paper by the AusAID says the heart of tenure insecurity in many developing countries is lack of recognition on land held by communities under customary tenures by respective governments.[172] Thus, the removal of such land tenure insecurity hinges centrally on the recognition of customary land tenures by governments. McAuslan writes:[173]

> Arguably the most important issue in land reform and land law reform is equity and the plight of the poor. A recognition of customary tenure and acceptance that customary tenure can form the basis of land ownership is a major step in the direction of giving rural poor greater security of tenure.

One good indication of the current vitality of the improvement perspective is De Soto`s conception of property. De Soto`s central idea rests on the need to `raise capital` on customary land through the creation of formal property which means individualization of land.[174] His view offers incentive to those who unilaterally privatize the commons when he urges policymakers to convert the dead assets of those living under extralegal tenures into formal tenure system supported chiefly by titling programs. De Soto makes this quite clear when he documents the history of land squatting on `largely vacant outlying territories` in the US.[175] He does not see these squatters or improvers of land in the public domain as people with financial and political clout nor are they land speculators; instead, they are `poor people`. He hails land squatters as improvers of `vacant land` or the `wilderness`. He praises these enlightened men for constructing their own informal property arrangement in open defiance of the formal property system.[176] He urges the sensible politician to be is in `touch with reality to recognize these local arrangements regarding improved land. He advises third world countries to mimic the genius of the US in bringing about economic prosperity attributable to its accommodation of the squatters` interest.[177] De Soto`s conception of property has been embraced by influential international institutions such as the World Bank that claim to have changed their attitudes but their recognition of customary titles is seen as subordinate to the overall unchanging objective. This, I think, is true despite the fact that some have argued that there are contradictory positions within international organizations on the question of the underlying thinking behind land reform.[178] This currency of the dominant position of the state over land is in line with the apt observation of Murphy that ``…not everything can change at once (even in revolutions).``[179]

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[171] Rogier van den Brink *et al*, Consensus, Confusion and Controversy: Selected Land Reform Issues in Sub-Saharan Africa, the World Bank Working Paper No 71 (2006) at 14.
[172] AusAID, Making Land Work: Reconciling Customary Land and Development in the Pacific, Vol. 1, and II, Commonwealth of Australia, 2008).
[173] McAuslan, Tension of Modernity cited above at 316.
[174] I credit this insight to my supervisor, Professor Abdul Paliwala, my PhD thesis supervisor.
[175] De Soto, Hernando, The Mystery of Capital cited above at 118.
[176] De Soto, Hernando, The Mystery of Capital cited above at 129.
[177] De Soto, Hernando, The Mystery of Capital cited above at 156-159.
[178] Chikosa Silungwe, The Land Quesiton in Malawi, Law, Resposibilization and the State (unpublished, PhD Thesis, on file with the author (2010) at 169-172.
[179] Tim Murphy, Include Me Out, *29Journal of Law and Society2* 342 (2002) at 347.

3.3.2 Contesting the Improvement Discourse

The improvement doctrine has been contested right from its inception both in the context of the enclosure movement in Britain and after its application in other parts of the world. The improvement discourse has been attacked mainly in terms of its suppression of alternative vision of property and its adverse effects on the dispossessed populations.

One argument by the opponents of the improvement doctrine is to show the existence of an alternative conception of rights in land that the commodity approach to land sets out to destroy. An aspect of the alternative thinking about land rights is that land is ``only entrusted to humankind, who communally worked as God`s stewards without individual rights of ownership…land`s benefits were a common resource intended to benefit all, especially the poor.``[180] Brace writes:

> It was not enough to improve for the sake of it: land ownership involved a degree of social responsibility which required men to ask themselves whether they were improving their own land at the expense of hurting and damaging the interests of others. [181]

Buck argues that land to indigenous people is conceived equally in two senses, i.e., both in spiritualistic and materialistic terms. Buck argues:

> It is quite natural for the Aborigines…to conceive of the land and its possession in ideological terms, which, for the most part, are not basically ``materialistic`` But it would be quite wrong to ascribe to the Aborigines an extremely idealist-primarily religious-approach to land and its ownership. They were perfectly aware that land was and remained the economic basis of their very existence. [182]

Buck concludes, thus, that:

> …while Australian Aborigines did and do have a spiritual relationship to the land there is also a material dimension to the property relationship which (as much as the spiritual) is (like the customary and the communal property concepts) in opposition to the emergent capitalist definitions of property as a tradable commodity. [183]

The rhetoric of improvement sees the poor, i.e., the unemployed, working class and indigenous people, ``…as a resource to be owned and deployed on projects determined by others.``[184] As a result of the prevalence of the improvement attitude, the people are pushed to margins, deprived of their title over their ancestral lands, command over their labor as well as their civilization. Brace quoting J. Moore says: ``for defenders of the commons, enclosure was defined by the idea

[180] A. R. Buck *et al*, Introduction cited above at 4.
[181] Brace, Husbanding the Earth cited above at 12.
[182] Buck, Strangers in Their own Law cited above at 45.
[183] Id., at p.54.
[184] A. R. Buck *et al*, Introduction cited above at 4.

of `hedging` out the public and the poor, those who were not immediate beneficiaries of enclosure``[185] and Brace cites Winstanley who uses the image of the hedge to ``emphasize the class divisions imposed by inclosures of Land which hedges in some to be heires of Life, and hedges out others.``[186] Brace concludes that the improvement doctrine was informed by:

> a world view which saw native civilizations as a primitive stage in a fictitious historical scheme of development. This mystical world view was so successful that later theorists adopted the terms of the debate without registering the displacement of a civilization. [187]

3.3.3 Extendibility of the Improvement Discourse to the Ethiopian Context

Is there a reason to believe that the improvement discourse applied in a colonial setting relevant to the case of Ethiopia? If so, what are parallels exist between the two? Is the application of the discourse contested by affected people and if so, how? The current sub-section addresses these questions in that order.

Some would reject the improvement doctrine as irrelevant in the Ethiopian situation because that doctrine was applied elsewhere in colonial contexts whereas the populations in the southern Ethiopia did not experience that kind of colonial encounter. This argument about relevance would naturally come from those scholars who see the historical process of bringing the southern populations of today`s Ethiopia under Menelik`s empire as a reunion of peoples who earlier used to be under one empire state but who broke apart owing to internal struggles.[188] Yet, the argument based on reunion of lost brothers is contested by literature that interprets the incorporation of the southern territories in 19th century as amounting to colonialism. [189] It would also be partly attacked by those scholars who position themselves in the middle of the two perspectives on Ethiopian history, i.e., between those who view the process as reunion and those who consider it as the case of colonialism.[190]

Here it is not my purpose to dwell on any of these perspectives. But it seems to me that the three perspectives do not deny that there has been involuntary imperial encounter. As explained above, the nature of the relationship that emerged in that coercive imperial encounter between the empire and the peoples in the south in particular in relation to land was qualitatively similar to

[185] Brace, Husbanding the Earth cited above at 14.
[186] Ibid.
[187] Id., at 16.
[188] For this perspective, Donald L. Levine, Ethiopia`s Nationhood Reconsidered, *Analise Social*, Vol. XLVI (199) 311 (2011) at 313-316.
[189] For this view, see B. Holcomb & I. Sisai, The Invention of Ethiopia, (Trenton: Red Sea Press, 1990) and see also J. Sorenson, Imagining Ethiopia, (New Brunswick, Rutgers University Press, 2001)
[190] For this view, see Merera Gudina, Ethiopia: Competing Ethnic Nationalities and the Quest for Democracy, 1960-2000, the Netherlands: Shaker Publishing, 2003) and see also Kjetil Tronovol War & the Politics of Identity in Ethiopia, (UK: Long House Publishing Service, 2009) at 24-26. For a critical assessment of the two extreme views on Ethiopian history, see also Christopher Clapham, Re-writing Ethiopian History, *Annales dethiopie*, Vol. 18 ann`ee 2002. at 37-54.

the relationship that emerged elsewhere in the colonial context. An attempt to implement state sponsored project of forming `inclusive national culture`,[191] to use the expression of Andreas, privileged some peoples` culture which includes their settled mode of living to the detriment of other peoples of Ethiopia with a different mode of life. In particular, the improvement discourse invoked in Ethiopia is strikingly similar to the one invoked in British colonial experience as described above though with some variations.

Let us then consider the underlying issue of whether similar arguments are used in Ethiopia to promote and justify land expropriation. In other words, the task is to consider the extent to which the Ethiopian experience resembles that which occurred elsewhere, which in effect means to consider the manner in which the improvement discourse gets modified in Ethiopia without necessarily invoking the language of colonization.

Before we move on to the discussion of the similarities, we need to point out two distinctions between the improvement doctrine as implemented elsewhere and the same doctrine as applied here in Ethiopia. The two differences relate to the role of the state in the process of communal property deprivation and the nature of the rights to be acquired by the improver and the quality of governance behind such land right acquisition by developers. First, in the British colonial context, generally the nature of the property right the improver obtained as a prize for his/her labor was freehold while in the current Ethiopia context the improver gets either long term lease or usufruct right both under the Derg and present regimes even though such improver had the chance to full private ownership in pre-revolutionary Ethiopia. Second, in Ethiopia, unlike the improvement theory as implemented in Britain, both at home and in her overseas colonies, the improvers' property land rights were not acquired and enjoyed under the rule of law. In Britain, the commons were converted into secure freehold under successive governments constrained by rule of law which worked in favor of elites and then this system of freehold founded upon such partial as opposed to universal form of the rule of law was propagated to overseas territories.[192]In Ethiopian case, it should be remembered that only starting from the 1931 and 1955 constitutions that we witness a sign of curtailing, even then only loosely and theoretically, the traditional unlimited claim of rulers over the property of even those people who were economically and politically privileged.[193]

Yet, similarities between the improvement discourse as applied in Britain and in her colonies and the same discourse as invoked in Ethiopia loom large. First, the Ethiopian imperial government

[191] Andreas Eshete, Abuses and Uses of Cultural Diversity: African Past and Ethiopian Present (Addis Ababa: a paper presented at the Fifth International Conference on Federalism, December 10, 2010, unpublished: on file with the author) at 6-8.

[192] Paul Johnson, Freeholds and Freedom: The Importance of Private Property in Promoting and Securing Liberty, (Oxford: Blackwell Publishing, 2008) at 32-35; I used to the idea of `partial rule of law to suggest the issue of whether there was rule of law in Britain at the time of the enclosure movement is contentious; it is clear that the law was constantly and frequently abused and used for the selfish purposes by the powerful. More significantly, there was no real democracy in that the vast majority of people did not have voting rights. In particular, colonial improvement theory was undemocratic. I thank the reviewer of this article, Professor Abdul Paliwala, for this important qualification.

[193] See Article 77 of the 1931 Ethiopian Constitution and Article of 60 of the 1955 Revised Constitution of Ethiopia.

invoked notions of *imperium* and of *dominion*. Under the notion of *imperium* the state claimed sovereignty over conquered territories in the south while by invoking *dominium* the state claimed absolute ownership over the land and other resources in the southern territories. In the Ethiopian case, hence, *imperium* led to *dominium*. Second, after the incorporation of the south, the state in Ethiopia invoked the rhetoric of its duty to see to it that ``vacant`` or `barren` `empty` lands are improved for the benefit of the improvers as well as the inhabitants therein. To the state, such improvements of hitherto `unutilized` or `underutilized` lands would be accomplished through settled agriculture and that such land development would make the people see the light of civilization.

Third, in some cases, state facilitated projects pushed, in particular, pastoral people to marginal lands leading to overgrazing and incessant tribal conflicts over scarce water points and grazing lands. The state deploys factors, either produced or exacerbated by itself, such as over population, over grazing, drought and conflicts especially in the pastoral areas as apparently good entry points to advance its hegemonic conception of property through settlement of population and release of the `excess` land for large scale export driven agribusiness, and thus making the people who are already victims of such state projects into villains.[194] In the context of Afar and Karrayu, Bondestam says, this argument based on natural resources depletion owing to over-population of humans and livestock ``is false,`` and he concludes that the problem of over-population was partly created by state initiated or induced commercial developments and conservation measures that pushed people to environmentally non-viable areas, which created artificial over population of cattle and people.[195]

Fourth, the improvement doctrine still survives in the Ethiopian context, in fact with greater force and magnitude as the state enhances its export targets backed by increased global interest in large scale commercial agriculture. Fifth, the Ethiopian state, like those other African governments, has been shackled by self-imposed priority to earn foreign currency by exporting agricultural commodities even if, unlike post-colonial governments in other parts of Africa, the Ethiopia state has never been hand-cuffed by inherited constitutional commitments to maintain liberal notions of property.

Finally and more significantly, one should not consider the people as sitting ducks in the face of this dis-empowering principle of the state which has the effect of enlarging the state land domain at their expense. People have attacked the property attitude of the government towards communal land and landed resources, though not in a systematic and sustained manner. The popular attack ranges from petitioning to higher government echelons to vandalizing projects carried out on their resources without their blessing. For example, people, faced with

[194] See also Okoth-Ogendo, Agrarian Change cited above for the discussion of the idea of treating victims as villains; see also John G. Galaty et al, Introduction cited above at 2.
[195] Bondestam, People and Capitalism as cited below at 430; see also Salzman Foreword cited above at 3.

dispossessions of communal property by local authorities frequently petition to higher bodies contesting those land takings.[196]

Further, people also engage in preemptive informal land transfers to outsiders and enclosure of the commons when they anticipate that the government will take their communal lands. Moreover, people also assert their own version of the improvement doctrine arguing that they themselves possess the ability to improve the communal land as expressed though submissions to the government in relation to investment projects.[197] Still further, failing these acts of contestations and when projects by others including the government go ahead on the commons, local people act in a way that creates a specter of fear in the minds of those who benefited from their lands without their consent. This is evidenced by the invasion of parks, game reserves, state farms and state forests by local people, the evictions of those resettled as outsiders, the dissolution of cooperatives leading to the partition of the land allocated for such cooperatives, and claims for the distribution of state farms.[198] Haunted by this specter of tenure insecurity, many people who resettled on the commons returned to their original villages and others still stay there with recurrent conflicts with the `natives` and with a lingering sense of insecurity of their tenure.

When approached by government authorities tried to sell out their idea of settlement to pastoral people, an unconvinced elder said ``we are not born to dig land, nor is the land created to be dug.``[199] Similarly, another pastoralist when approached by the authorities with a similar settlement program in the name of ensuring food security reacted that even the highlanders who have been digging the land for centuries have not yet achieved food security. [200]All this is an expression on the part of the people that the projects carried out on the expropriated commons are illegitimate.[201] The foundation this act of resistance lies in the claim that the land ``unofficially belongs to the people``.[202]

An example can be provided here to illustrate some of the peoples` actions against imposed projects. The Derg in 1976 created a wild life sanctuary and state farm in Senkelle Wildlife Sanctuary in Arssi, 300km south of Addis Ababa, in about 120 kilometer square land area, which was enclosed and guarded by government rangers to prevent the local people (Arsi Oromo and Sidama) from exercising their age-old rights.[203] The government regarded ``the

[196] Nishizaki, Revisiting Imposed Wilde Life Conservation cited below at 74.
[197] Ayalew, Resource Deprivation and Changes cited above at 14 & 24.
[198] Ibid.
[199] Kabtamu Niguse, Land Tenure And Tenure Security Among Somali Pastoralists: Within The Contexts Of Dual Tenure Systems, LL.M Thesis, School of Law, Bahir Dar University, Ethiopia, Unpublished, on file with the author, 2012) at 93.
[200] Ibid.
[201] Ayele Gebre-Mariam, The Alienation of Land Rights Among the Afar in Ethiopia, (abbreviated as The Alienation of Land Rights) Nomadic Peoples, No. 34/35, 1994 at 144; see also Fecadu Post-Revolutionary Rethinking at 69.
[202] Stellmacher and Mollinga, The Institutional Sphere cited below at 61.
[203] Nobuko Nishizaki, Revisiting Imposed Wildlife Conservation: Arssi Oromo and the Senkelle Swayne`s Hartebeest Sanctuary, Ethiopia, (abbreviated as Revisiting Imposed Wildlife Conservation) 25African Study Monographs2, 61 (2004).

area as no man`s land and ignored the existence of the local people.``[204] In part of this area the Derg established a state farm. In setting up the sanctuary and state farm, the government promised the local people supply of clean water and job opportunities. When the people saw that the government did not deliver on their promises, they put up resistance against this land alienation for commercialization and conservation projects claiming that the sanctuary still belonged to them. The government considered its interest in establishing wild-life sanctuary and the local people's interest in continuing to access the area as mutually exclusive. In setting up the sanctuary in question, the government seemed to have adopted the premise that wild life conservation measures and people`s mode of life cannot co-exist, which was also the thinking behind wild life conservation measures in Eastern Africa as a whole.[205] The affected people expressed their resistance by destroying properties of the sanctuary and of the state farm, in particular in 1991 when the country was in political transition. In the entire course of the projects, the people felt entitled to hunt in the sanctuary and occupy land made part of the sanctuary for cultivation and grazing. After studying the project, Nishizaki concludes: ``It is vital that conservationists understand the structures and customs of the local people in all social, cultural and historical aspects. The local claims and rights to access the land must be recognized and considered in advance in any conservation policymaking processes.``[206]

Conclusion

The entrenched thinking on the part of the Ethiopian state is that land rights exist in the context of a defined tract of land and that such defined plot must be held by a person privately. It categorically classifies land as falling either within the state or private domain. It conceives land outside the private domain as falling invariably within the purview of the state domain. Hence, this state perception does not recognize the commons as belonging to concerned communities. The fact that communities are actually occupying and using these resources ought not to be mistaken for a sign of recognition of their rights by the state. In the eye of the state, it is a *de facto*, but not a *de jure*, occupation in the sense that the communities are using such resources without any legal basis and only until the state needs the resources. For instance, when the state wants a grazing land for its own requirements it can put such land to its own use without invoking the tool of expropriation because the state is not expected to expropriate its `own property`. That is why the late Prime Minister Zenawi said that there is ``no land grab in

[204] Id., at 65.

[205] Martin Enghoff in Wild Life Conservation, Ecological Strategies and Pastoral Communities: A Contribution to the Understanding of Parks and People in East Africa, Nomadic Peoples, No. 25-27, 1990 at 96-8 rightly states that in Eastern Africa wild conservation measures that are still in practice rest on the old thinking that wild life parks and the activity of livestock production by pastoral peoples cannot co-exist; the two should be separated by enclosures guarded by government rangers because that would remove destructive and irrational overstocking.

[206] Id., at 75.

Ethiopia—Not today, not tomorrow.``[207] Thus, rural people are turned into squatters in respect of their access to the commons.

The Ethiopian state has invoked, in substance though not in words, the related narratives of evolution, of the tragedy of the commons and of improvement to justify the categorization of the commons under the state domain and consequently to facilitate the use of such resources as it deems fit. These three theories at the disposal of the authorities seem to share no common ground. The evolutionary thinking recognizes the existence of customary governance but it finds defect in it in discriminating some insiders against and in accommodating outsiders; the theory of the tragedy of the commons on its part presents the commons existing in a situation without governing regime which invites self-interested commoners to take too much out of common resources while investing nothing on it, leading to their ultimate ruin. The improvement discourse sees the commons as idle or at best underutilized. Hence, one can see that their difference lies in the articulation of the entry point for the state in the commons, be it for the purpose of state takeover of such commons for improvement or saving them from desecration, be it by the state itself or through privatization.

However, the three perspectives are alike in one fundamental way: all the three seek to see the commons to be improved- that is a fundamental point shared by the three narratives. For the theory of evolution, to invite an outsider to come in to improve the land whose development is inhibited perhaps by archaic customary tenure practices of the people; the theory of the tragedy of the commons invites us to parcel the commons out to individuals who would take good care of the land; and the improvement thinking encourages us to hand the commons over to developers. These perspectives spouse simplistic economic notion of land rights and thus would have dispossessing effects on the poor and as shown in this article, the three narratives have actually worked to the detriment of concerned communities.

A version of the evolutionary narrative, which has gained currency in literature, including discussion (though not effective implementation) in international institutions, states that traditional legal regimes governing communal property are socially embedded as well as flexible. Its claim is that customary land tenures rules, under the conditions of negotiation and appropriate government intervention, would inevitably evolve into private property, in the process protecting the land rights of various community members.

However, in the Ethiopian context, the evolutionary view of land tenure cannot work because the authorities will probably cling to the *status quo* that regards the commons as already part of the state property. For the evolutionary theory to make sense, it requires the state to recognize the land rights of the people in the commons by at least partly renouncing its long standing and

[207] http://transformingethiopia.wordpress.com/2011/08/23/part-iii-meles-says-no-land-grab-in-ethiopia%E2%80%94not-today-not-tomorrow/(acessed October 22, 2012)

inherited rejectionist approach to customary land tenure rules. But it is difficult if not impossible for the state to surmount its historically rooted hegemonic position over what it considers vacant land. For one thing, there is this stubborn subsistence of the status quo on the prudent use of the commons in Ethiopia. And for another, overcoming the status quo is quite difficult because such status quo is nurtured by international organizations which in name advocate, through their `new` evolutionary theory, for the co-existence of communities` conception of land and that of the government. These institutions in practice adhere to the commodity notion of land. The hollowness of the co-existence implicit in the modified form of the evolutionary theory and skepticism about real change in thinking by international institutions has long been expressed. Peters says:

> …although the World Bank and other agencies now subscribe to the new evolutionary property rights theory, they retain the old premise that `[l]and titling is seen as the major avenue promoting land reform and security of tenure, as enabling farmers to have access to collateral through which they can gain credit. …The difference…`is that there is now less emphasis on the directive role of the state and more on general `framework of institutional reform in which civil society plays a greater role in the administration of land.[208]

This article is not echoing that view which romanticizes customary land tenure institutions, leading to the suggestion that the commons should always be used by the communities themselves in the manner they have been using for ages to the complete disregard of the interests of the state. That claim would definitely be a non-starter for the Ethiopian state. The state cannot afford to adhere to the total recognition of the customary tenures because the state needs land for investment purposes and in some situations the customary system of rules may not fully protect some members of the concerned communities.

In this context, I think there is a need to formulate an alternative perspective that must, among others, address two matters. First, there is a need to develop a perspective that caters for the interests of both the community and the state taking into account current diverse needs and developments within and outside the community and the state as well as sees land not merely as an economic asset as the improvement approach does nor as purely social asset as done by those who glorify customary land tenures, i.e., conceiving land as involving both economic and social relations. The latter point is captured as: "…(L)and tenure is a social relation and that relations over land have therefore to be seen as embedded in broader matrices of social, [economic], cultural and political relations.``[209]This must anchor on the fundamental point of the acknowledgement both of the land rights of the communities and the state`s interest to make interventions in the tenure systems of communities when the need arises. This approach needs to articulate the respective interests of communities and state in the commons as a complex process

[208] Peters, Inequality and Social Conflict cited above at 276.
[209] Peters Pauline, Inequality and Social Conflict over Land in Africa (abbreviated as Inequality and Social Conflict) *4 Journal of Agrarian Change 3* 269 (2004) at 278.

not merely as a contingent linear progression of the commons into individualized tenure because ``…individualization…is not necessarily what will spontaneously occur in a community based on access to a specific resource, such as grazing land in pastoral communities…``[210]

Second, our attempt to develop an alternative theory must articulate the terms `customary land tenures` and `community`. In other words, our theory must help us appreciate the sense in which we are prepared to recognize these terms. We must give due emphasis to the inequality hidden behind the social embeddedness of land rights. Peters suggests questions of who negotiates with whom and with what effects must be answered.[211] He also suggests that ``stories so well told about inclusionary practices about land-use and about the ability of `small-acts` and small people to out-maneuver the powerful must be complemented and modified by stories of differentiation, displacement and exclusion.``[212] Are we prepared to recognize customary land tenures rules as mere ``…extension of formal regulation, its mere mask or agent``?[213]Goldberg says:[214] ``… the myth of law`s rule, rather than being challenged, is sustained by the effectiveness, by almost equally mythic ``success`` of popular justice. Popular justice, while assuming an oppositional identity, is not so much a mode of resistance as a complement to law`s rule, delivering where the rule of law is of necessity silent. `` And we need to ask if our theory is prepared to recognize the idea of a community in the sense of ``…a construct of colonial experience and of the degradation of community in transitions to capitalism…``[215] and the end result of which is ``… a reduced and contained 'native' or 'peasant' community, the diversity and complexity of which have been denied.``[216]

[210] Sandra Joireman, Property Rights and Political Development in Ethiopia and Eritrea (1941-74) (Oxford: James Currey Ltd, 2000) at 31; see also Tesfaye Teklu, Land Scarcity, Tenure Change and Public Policy in the African Case of Ethiopia: Evidence of Efficacy and Unmet Demands for Land Rights, (http://printfu.org/ethiopia+land+policy, accessed October 29, 2011) at 1.
[211] Id., at 279.
[212] Id., at 305-6
[213] Peter Fitzpatrick (1992) as quoted by Paliwala in Writing by Firelight cited above at 15.
[214] Goldberg, The Prison-House of Modern Law cited above at 555.
[215] Peter Fitzpatrick (1992) as quoted by Paliwala in Writing by Firelight cited above at 16.
[216]Ibid.