

CONCEPTUAL FOUNDATIONS OF PROPERTY RIGHTS:

RETHINKING *DE FACTO* RURAL OPEN ACCESS TO COMMON-POOL RESOURCES IN ETHIOPIA

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Abstract

This article, *inter alia*, attempts to highlight some major concepts and theories on property and the rationales and elements of property rights. It also briefly deals with the distinction between property rights on the stock of resources and its flows, and indicates the downsides of open access in the *efficient* utilization and *sustainability* of common-pool resources. Where *de jure* public property becomes *de facto* open access, certain common-pool resources in the rural areas of Ethiopia (such as forests) are exposed to encroachment, unlawful logging and overgrazing. The article attempts to show that it is usually impossible to effectively exclude persons from the use and overconsumption of common-pool resources in Ethiopia in the absence of well-defined and effectively implemented public property regime, or unless the property rights of indigenous communities and collectives such as peasant associations are duly recognized and clearly defined so that the right holders can have vested interest in the preservation, protection and development of these resources.

Key words:

Property rights, rural open-access, common property, public property, common-pool resources, Ethiopia.

Introduction

According to Article 40(3) of the Constitution of the Federal Democratic Republic of Ethiopia, “the right to ownership of rural and urban land, as well as natural resources is exclusively vested in the State and in the peoples of Ethiopia” and “shall not be subject to sale or to other means of exchange.” One of the fundamental issues that can be raised in relation to public property of rural land and natural resources is whether it has the impact of open access to a significant part of these resources. Addressing this issue is essential because publicly owned resources can be susceptible to *de facto* open access where the

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law either does not adequately recognize the collective land rights of communities (who traditionally claim customary exclusive rights) or peasant associations, or where it becomes unable to effectively control access or exclude withdrawals of resources (such as trees).

Sections 1 and 2 deal with the emergence of property and highlight some theories including Hobbesian, Lockean and Marxist conceptions of property. Section 3 briefly discusses the rationales, categories and key attributes of property rights. It highlights the range of entitlements to property rights in relation to access, withdrawal, management, exclusion and alienation. The section also briefly presents the elements of assurance, duration and breadth as attributes of property rights. Section 4 deals with the distinction between property rights on the stock of resources and its flows, and it briefly addresses the risk of overconsumption in common-pool resources with particular attention to the tragedy of the commons, the downsides of open access and the modes of ownership that are in tune with the efficient utilization and sustainability of different types of common-pool resources. And finally, Section 5 discusses the necessity of rethinking whether a significant part of publicly owned resources in rural Ethiopia have become open access.

1. Social Evolution and First Appropriation as Sources of Property

Finnis notes that title deeds were not attached to land and other focal instances of property¹ when these resources came to existence. The notion of property was attached to these resources in the course of socio-economic evolution. Pre-modern conceptions of property were predominantly communitarian and they were influenced by the custom and values that prevailed for many generations.

The notion of land ownership was unknown to earlier human societies of hunter-gatherers. In light of the sparse population and abundance of resources, “no individual could possibly care much for any particular spot of ground”.² Hunters needed extensive areas for their means of subsistence which can now be considered as “large enough [for the subsistence of] many thousand agriculturalists”.³

As hunter-gatherers gradually started domestication of animals, and eventually “became shepherds feeding herds which they had previously tamed”

¹ John Finnis (1980), “Natural Law and Natural Rights” at 187 n. 30. (in Gary Chartier, 2009, *Economic Justice and Natural Law* (Cambridge University Press), p. 32.

² Thomas Hodgskin (1832), *Natural and Artificial Right to Property Contrasted* (Republished by Augustus M. Kelley. Publishers, Clifton, 1973), p. 64

³ *Ibid.*

they still needed “extensive territories, though not equal to those required by the hunters”.⁴ After the emergence of agriculture, however, “a comparatively small space sufficed to supply each one with the means of subsistence”, and it is mainly after this period that people “fixed their habitations, and around them fixed landmarks, each one appropriating as much land” as was necessary to “supply his family with food.”⁵

The acquisition of land in Europe until the downfall of the Roman Empire, for example, was limited to the needs of the family and the ability to cultivate until the Empire’s northern conquerors introduced their pre-agricultural “habits of life” to land appropriation. Even if agriculture continued in the Roman Empire, the new rulers kept their habits of having herds of cattle and swine. As “each chief required a large space to supply himself and his family and followers with food,” land was appropriated “not according to what quantity each man could dig by his hand, but rather according to the quantity his horse could gallop around”.⁶

Various views are forwarded regarding why and how property rights in land emerged. The major views include the factor of efficiency (and transaction cost) and the principle of first appropriation.

1.1- Factors of efficiency and transaction cost in the genesis of property

Demsetz discusses the impact of commercial fur trade in the indigenous communities of North America and he states that exclusive property rights emerged owing to the adverse impact of overhunting under the setting of open access. Under such circumstances, there is the need for well-defined rights with regard to access, use, control, withdrawal and alienation along with the subsequent duties of protection and development of the resources.

Demsetz⁷ states the absence of private ownership in land in various communities which hunted for food. In these communities, the same act of hunting by others (i.e. externalities) does not affect the needs of every member of a community to hunt for subsistence as long as the resources are abundant and other variables remain unchanged. Demsetz used the studies conducted in North American communities for his analysis. He observes that after the emergence of commercial fur, there was an increase in the value of furs which

⁴ *Ibid.*

⁵ *Ibid.*, p. 65.

⁶ *Ibid.*, p. 71, for the quotes in the paragraph.

⁷ Harold Demsetz (1967), “Toward a Theory of Property Rights”, *The American Economic Review*, Vol. 57, No. 2, Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association. (May, 1967), pp. 347-359.

led to a sharp increase in the scale of hunting. This caused the quest for private hunting territory. Allotted territories thus emerged and the fur trade encouraged “the husbanding of fur-bearing animals” and this “requires the ability to prevent poaching and this, in turn, suggests that socioeconomic changes in property in hunting land will take place.”

withdrawals from common pool resources mainly incur benefits and the cost involved is minimal. However, when a person resorts to excluding others from a given resource, guarding the resources, having fences where necessary, etc, involve cost. Demsetz argues that “property rights arise when it becomes economic for those affected by externalities to internalize benefits and costs.” He defines communal property, private property and state property, and then states that the development of private property involves the community’s recognition of “the right of the owner to exclude others from exercising the owner’s private rights.”

After discussing the problems inherent in community ownership regarding the prudent management and development of resources, Demsetz highlights the benefits and downsides of private ownership. Demsetz further shows the merits of share companies that can mobilize resources without raising transaction and policing cost in economies of scale which would have been the case in communal ownership. This is so because owners cannot participate in all decisions thereby making it necessary to delegate a small group to be in charge of management “in recognition of the high negotiating costs that [it] would otherwise obtain.” The distinction that Demsetz makes between communal ownership and the rights of shareholders in a company is that in the latter case “[t]he shareholders own their shares, and the president of the corporation and possibly a few other top executives control the corporation.”

Krier⁸ builds up his analysis from Demsetz’s views. Even if he criticizes Demsetz in some respects, he admits that in communal ownership “any commoner who exploits the resource gains all the benefits of doing so for himself, whereas the costs spill over onto everybody,” and on the contrary, “individual rights, where each member of the community is entitled to a separate resource packet, to the exclusion of other members, concentrates costs and benefits and thus creates constructive incentives.” Krier also appreciates Demsetz’s contribution in demonstrating “how individual holdings reduce the transaction costs of the negotiation process by reducing the number of people who have to negotiate.” He further states that Demsetz, “had sought only to

⁸ James E. Krier (2009), “Evolutionary Theory and the Origin of Property Rights”, *Cornell Law Review*, Vol. 95, pp. 139 - 159

suggest a positive theory that property rights develop in response to costs and benefits.”

According to Bentham, the concept of property “consists in an established expectation” to draw “an advantage from the thing possessed” and secondly Bentham believed that “... this expectation, this persuasion, can only be the work of law.” Krier does not agree with Bentham’s second element of property rights because *de facto* property rights existed thousands of years before the existence of any formal law.

Krier raises the question whether the evolution of the concept of property emerged as an *intended design* or through the spontaneous unfolding of *unintended consequences*. He illustrates changes without design by using Adam Smith’s notion of the ‘*invisible hand*’ in the market place where every individual “intends only his own gain,” yet is “led by an invisible hand to promote an end which was no part of his intention.”

After having indicated that Demsetz mainly deals with the WHY aspect of the emergence and coalescence of property, Krier discusses HOW property emerged. He briefly highlights the views of Hobbes and Locke on the emergence of private property and supports Hume’s views on the gradual emergence of private property which ultimately acquired formal enforcement “by a slow progression, and by our repeated experience of the inconveniences of transgressing it.” He further contrasts Hume’s view that private property is unnatural to human beings with the views of many biologists who argue that “deference to possession is the result of biological evolution.” Krier states that possession “provides a clear indication of the status of any claimant.” Moreover, he cites Sugden and Locke regarding the human tendency to respect the earlier expenditure of effort, some labour, by the possessor; and he also mentions “the biological evidence suggesting “that humans, like other animals, have some ‘innate sense of possession and territory’.”

Krier does not consider property rights as outcomes of an intended design; nor does he believe that they are entirely spontaneous and unintended. Krier indicates the shortcomings of the *intentional-design approach* (albeit its account for the creation and enforcement of property rights) because “it entails the difficult task of accounting for the origins and actions of the designer and implies a degree of human rationality that probably had not yet developed by the time the first primitive property rights emerged.” He also states two limitations involved in the *unintended consequences approach*. First, there is the assumption of deference by members of the community owing to abundance of resources, and secondly this approach “cannot account for anything beyond very simple property rules because the asymmetries on which it depends must be crude in order to be effective.”

Krier notes the match up in “the strengths and weaknesses of the two approaches” and he states that “[w]hat the first approach does well, the second does not; and what the second approach does well, the first does not.” in effect, he suggests that the two approaches can be combined based on which he constructs a sketch of the development of property. He forwards the sketch in the development of property “in the context of a rough timeline of human evolution” with a long evolutionary development mainly as unintended and ultimately evolving towards legally enforceable rights which emerged along with the advent of the state, nation states and legal systems. Meanwhile, Krier underlines that as centuries rolled on, more and more population was competing for resources which could have hardly been facilitated by informal deference to possessions.

There have been various views regarding the underlying factors in the emergence of private property. Engels⁹ discusses the evolution of the family, private property and the state. He states that private property came into being in the course of the labour inputs of human beings in taming animals, handicrafts and agriculture. He also discusses the phases undergone in the transformation of property rights and the resultant emergence of exchange, land ownership and enhanced production which led to the emergence and consolidation of classes, the state and a legal regime with strong enforcement schemes.

Merges¹⁰ states three major theories of property, namely: the labor theory of property (John Locke *et al*), the transaction-cost approach (Demsetz *et al*), and institutional theories of property (Rose¹¹ *et al*). According to Merges, property rights have significant roles in contract formation and enforcement of contracts. He argues that that transactional role of property “is growing in importance, as the ‘new economy’ ushers in a more transaction-intensive industrial structure featuring greater numbers of smaller, more specialized firms.”

1.2- The principle of first possession (Appropriation)

The Ethiopian Civil Code envisages four modes of acquiring ownership, namely *occupation*, *possession in good faith*, *accession* and *usucaption*.¹² The first two

⁹ Frederick Engels (1884), *The Origin of the Family, Private Property and the State* (Chapter IX Barbarism and Civilization)

¹⁰ Robert P. Merges (2005), “A Transactional View of Property Rights”, *Berkley Technology Law Journal*, Vol. 20, pp. 1477-1489, 1519-1520

¹¹ Carol M Rose (1985), “Possession as the Origin of Property”, *The University of Chicago Law Review*, Vol. 52, No. 1. (Winter, 1985), pp. 73-88.

¹² The provision on usucaption, i.e. Article 1168 is largely outdated because of public ownership of land since 1975, other than its probable relevance towards analogous application for certain possessory claims.

modes solely apply for movables while the latter applies to immovables. Accession, however, applies to both categories of property. Occupation, possession in good faith and usucaption are manifestations of the principle of possession or appropriation, whereas accession (Arts 1170-1182) raises the issue of ownership of a *stock and its flows*.

Acquisition of ownership by *occupation* may be preceded by the hitherto non-appropriation of a certain property (*res nullius*) or by the abandonment of property by its former owner (*res derelictae*). The Ethiopian Civil Code makes a distinction between ‘*things without master*’ (Articles 1151-1153), and ‘*things found*’ (1154-57). The former provisions imply *res nullius* while the latter apply to *res derelictae*. However, Article 1157 allows recovery of the object by owner thereby allowing acquisition only in the case of abandoned chattels.

The exceptions to the rules that enable the finder to acquire ownership rights are treasures¹³ and antiques. While the treasures “become the property of the owner of the land”¹⁴ who is required to provide a reward to the finder, special laws shall apply to archeological excavations and antiques.¹⁵ These modes of acquisition of ownership show that the *principle of first possession* (also known as *the rule of first appropriation*) applies to things that are not formerly owned. In the case of *res derelictae*, as well, the same principle applies because the acquisition of ownership occurs as a result of abandonment of the right by the former owner.

¹³ According to Article 1159 (3), “[t]hings of which nobody can be shown to be the owner shall be deemed to be treasures where it appears certain, at the time of their discovery, that they have been buried or hidden for not less than fifty years.” The finder of such treasures “is entitled to a reward of one half of the value of the treasures” (Art. 1159/2) while the treasure becomes “the property of the owner of the land or [the] thing in which it was found” (Art. 1159/1). French law on acquisition of ownership of a treasure found is nearly identical with the stipulation under Article 1159 of the Ethiopian Civil Code. Article 716 of the French CC reads:

ownership of a treasure trove belongs to him who discovers it on his own tenement; where a treasure trove is discovered on another's tenement, one half of it belongs to him who discovered it, and the other half to the owner of the tenement.

A treasure trove is any hidden or buried thing of which nobody can prove ownership and which is discovered by a mere chance.

¹⁴ The land law regime is different from the one that existed during the promulgation of the Civil Code, and it is arguable whether the treasures found under a certain building belongs to the owner of an immovable, or to the state because land is currently under public ownership in Ethiopia.

¹⁵ Civil Code, Art.1160.

The second category of ownership under the Civil Code is *bona fide purchasing*.¹⁶ It is referred to as ‘*possession in good faith*’ and it considers ‘possession’ as a crucial factor towards the acquisition of ownership. Unlike the former mode of acquiring ownership (i.e. occupation), the person who aspires to acquire ownership ought to take possession of the thing, and should also in good faith believe that the seller owns the thing. Moreover, the *bona fide* buyer ought to have entered into the contract for consideration (such as payment of price). One may thus say that *bona fide* purchasing does not constitute a paradigm example of acquisition of ownership through ‘the principle of first possession.’

The typical modes of acquiring ownership through priority in possession (of things that are *res nullius* or *res derelictae*) envisage abundance of resources whereby members of a relatively sparse population will be able to (individually or in group) occupy, possess and own resource systems or their fruits. The rule of first possession thus seems to be feasible in legal regimes where the resources that are available for capture and possession are significantly wide or where state regulation of access to such resources seems difficult or unlikely.

The rule of first appropriation (‘first come, first served’; ‘finders, keepers’) is firmly rooted in Western legal culture and social practice. Also in state of nature situations, such as the allocation of parking places on the street and seats in a restaurant, people regard it as natural that the first occupant should be respected. Probably the possessive advantage explains a lot of this spontaneous attitude.

Legal rules, endorsing first appropriation, are often considered as expressions of a democratic and egalitarian spirit. Everyone has an equal chance at the start, without regard to his class-status, race or religion.¹⁷

For example the *American Homestead Act* of 1862 “was applicable to the vast territories, west of the Mississippi-Missouri” and it “allowed families to claim 160 acres of land, a surface considered as sufficient to feed a large farmer’s family.” The Act required “the payment of ± 10 dollars and the uninterrupted occupation of the claimed land during five years” based on which “the claimants obtained a valid title.”¹⁸

Bouckaert cites Gaius¹⁹ and states that “[u]nder *Roman law*, first appropriation (occupation) was possible for goods which did not belong to anybody (*quae antea nullius erant*), such as wild animals, for goods taken from

¹⁶ Civil Code, Arts 1161-1167.

¹⁷ Boudewijn Bouckaert (1999), “Original Assignment of Property Rights,” *Encyclopedia of Law and Economics*, 1100, <<http://encyclo.findlaw.com/1100book.pdf>>, p. 3 (Accessed: 29 September 2010)

¹⁸ *Ibid*

¹⁹ Gaius 2, 66; see D. 41, 1,1,1-7; D. 41,7,1. Van Oven, 1948 [in Bouckaert, *Ibid*]

enemies (*quae ex hostibus capiuntur*), for abandoned goods (*res derelictae*)”²⁰ The French Code of 1804 does not give much emphasis to the rule of first appropriation although prescription, as one of the grounds of acquisition of ownership under French law, envisages possession for a certain period of time as stipulated in the law. According to Article 712 of the French Civil Code, ownership is, *inter alia*, “acquired by accession or incorporation, and by prescription.”

2. Hobbesian, Lockean, Marxist and Hegelian Conceptions of Property Rights: An Overview

The perspectives that are forwarded above can further be substantiated by various theories on property rights. Such theories include the Hobbesian theory of the sovereign, Locke’s labour theory of property, the Marxist negation to private property and the Hegelian notion of a person’s rights over objects.

The Hobbesian, Lockean and Marxist conceptions of property, *inter alia*, represent a spectrum of positions regarding the role of the state in the assignment of and the respect for property rights. While the Hobbesian conception regards the state as the fountain of property rights, Locke considers individuals not as passive subjects but as citizens with inalienable rights including the right to property, subject to the conditions which he attaches to private property. The Marxist notion of property, on the other hand, negates Locke’s position, and is meanwhile different from the Hobbesian conception because reassignment of rights in land, for example, targets at redistribution of land to tillers, collectives and state-farms and not to other landlords or proprietors.

2.1- Hobbesian conception of the absolute sovereign

Thomas Hobbes lived during the most turbulent years of European history, and needless-to-say, his views in *Leviathan* were influenced by the realities that prevailed during the English civil wars in 1642-46 and 1648-49. According to Hobbes,²¹ human beings are naturally egoistic, quarrelsome and distrustful. He believed that human beings seek peace in the absence of which they resort to war, and are also willing to set aside their rights to the extent that others do the same. This, according to Hobbes, leads to the setting up of some civil power and the reduction of wills to a single will by giving part of the power of human beings under a given state to one man, or one assembly of men. In the realm of

²⁰ Bouckaert (*ibid*) indicates that “a rule of first appropriation concerning unowned things such as wild animals” is upheld by the common law and “as is illustrated by the famous case of *Pierson v. Post* (3 Cai. R., 175, N.Y. Supreme Court, 1805 -...)”

²¹ Thomas Hobbes (1651), *Leviathan*.

property rights, the sovereign “determines the rules that tell every man what goods he may enjoy and what actions he may do.”

The Hobbesian conception that considers citizens as “subjects” of the sovereign was manifested in the 1931 Ethiopian Constitution which considered all Ethiopians as the Emperor’s subjects. Article 27 (under Part I of the Constitution) guarantees private property subject to provisions of the law. Article 74 (of Chapter 8) of the 1931 Constitution recognizes the private ownership over all land possessed by the Emperor and the Imperial family (and further property that they may purchase in the future) and it further guarantees the inheritance of their estate by descendants. Article 75 recognizes the rights of the nobility, governors and all Ethiopians to the ownership of their possessions and to the property they would buy after the promulgation of the Constitution. In short, the 1931 Constitution recognized the possession of the Imperial Family, the nobility, governors and Ethiopians at large and it guarantees the acquisition of ownership to the possessions that existed before the Constitution. The preamble and Article 1 (i) of the Imperial Order (issued on November 3rd 1955),²² for example, indicate the power of the Emperor in the allocation of land.

2.2- Locke’s labour theory of property

John Locke ²³ lived through a period of European history which witnessed post-westphalian decades of nation-state building and the emergence of constitutional monarchy that gradually developed after the Glorious Revolution of 1688-1689. His theory of the state was liberal and anti-authoritarian which

²² The Imperial Order reads as follows:

“Conquering Lion of the Tribe of Judah

Haile Selassie I

Elect of God, Emperor of Ethiopia

Whereas, it has always been Our duty to promote the agriculture and commerce of Our people in order to advance their prosperity and well-being; and

Whereas, on the 23rd of Tekemt 1945 upon Our own motion we granted in full ownership of one-third of a gasha of land to those who were then in occupation of Maderia land; ...

Now therefore, on this occasion of the Silver Jubilee of Our Coronation: we order as follows:

1. (i) we do hereby terminate all services such as monthly special constable duties which are rendered by those who are in occupation of Maderia land and We Do Now Hereby Grant as extension of Our grant of 23rd Tekemt 1945, in respect of the remaining two-thirds of Maderia land of the occupants thereof to enjoy full ownership of them as rist .”

²³ John Locke (1689), *Two Treatises of Government*.

opposed divine rule and defended private property. Labour, according to Locke, justifies private property and the consent of people determines the limits of government authority. He underlines that human beings are born free and equal. Locke states the scarcity of resources such as land as population increases and the inadequacy of moral and social schemes of punishing transgressors thereby necessitating a *social contract* towards the formation of a constitutional government with expressly defined rights and obligations.

Locke supports private property on the ground that a person has the right to everything that is necessary for self-preservation. Locke rejects the idea that persons are subjects of a sovereign, and argues against the view that only one universal monarch should have property. Moreover, Locke does not accept the divine right of kings. His premises indicate that everyone owns his own person and whenever one mixes up his/her labour with natural resources, others will have no right to it thereby rendering it private property. The first limitation to this relates to the *Lockean Proviso*, which requires that “*enough and as good*” ought to be left in common to others. And secondly, one cannot take what will not be used or things that will be wasted (spoiled).

However, one can argue that Locke’s argument does not deal with the potential gap between the actual value of a thing and the amount of a person’s labour inputs. Under Locke’s *social contract*, people give up a certain portion of their liberty, accept civil society and will subject themselves to political power, while one of the core functions of government becomes the preservation of private property. Carole Rose²⁴ summarizes Locke’s *labour theory of property* and *Consent theories of property* and then explains the possession/occupation theory which she critically analyzes. She criticizes the crucial role that the act of possession and occupancy are given in the acquisition of property.

Locke’s view of private property evokes the dilemma involved between Locke’s premise about the common heritage of resources and the individual appropriation of scarce resources. Hubin²⁵ briefly states the lines of argument in Locke’s theory of property as discussed in *Two Treatises of Government*. In §25 Locke holds that the world initially belongs to everyone in common and this is justified “by appeal to natural law, which Locke believes knowable by reason, and to scripture.” Section 26 of Locke’s Treatise envisages means of appropriating “portions of the fruits of the Earth for private use without the

²⁴ Rose, *supra* note 11, pp. 73-88.

²⁵ Hubin, Donald C. (2003), *Locke’s Theory of Property*, Lecture Sketch, <<http://people.cohums.ohiostate.edu/hubin1/ho/Locke%20Theory%20of%20Property.pdf>> (Accessed: 15 September 2010).

consent of all.” However ‘*consent of all*’ is required under §193 to use something held in common. This may lead to an absurd conclusion that it is “impossible to get the consent of all to the use of the fruits of the Earth” (§28) so long as a resource is held in common.

According to Locke's *Labour Theory of Acquisition*, the appropriation is justified if one mixes his/her labour on the fruits of the Earth (§27) “which were formerly unowned.” Locke further states limits to acquire fruits of the Earth such as the condition that “[o]ne may acquire only as much as one can use without spoilage” (§31 & §37), and the “Sufficiency Limitation--also called *The Lockean Proviso* (§27 & §33)” which requires a person to “leave *enough and as good* in common for others.”

Hubin indicates that these limitations are overcome with the introduction of money, because it “allows the practical possibility of wage labor;” and “[i]f you employ wage labor, then the work of your employees is *your* labor (§85). Moreover, “[t]he spoilage limitation is overcome because the introduction of money allows the practical possibility of any commodity being converted into a nonperishable commodity; such commodities can be hoarded at will (§50).” With regard to the sufficiency requirement Hubin notes the following:

By allowing the practical possibility of wage labor, the introduction of money allows us to get around the sufficiency requirement. The justification for the sufficiency requirement is that each must be able to sustain his/her life through his/her productive efforts. With the introduction of wage labor, the existence of common resources is not necessary for this. Hence, we satisfy the underlying rationale for the sufficiency limitation.

Hubin indicates the dilemma in Locke's views: On the one hand, the literal interpretation of the Locke's views does not justify “most of the appropriations that have taken place in recent times” because “there has not been enough and as good left in common for others.” He thus suggests reinterpretation of the *Lockean Proviso* because “it would appear that all Locke can justify is a “*Value Added Theory of Acquisition*.” According to Hubin, such reinterpretation “may well justify some private ownership of natural resources, but it will probably not justify perpetual ownership of such resources (at least without labor being perpetually invested in it).”

2.3- Proudhon and Marx

Hubin contrasts Locke's views on private property with Proudhon's position in favour of possession rather than full private ownership. The rights related to property involve entitlements such as *use* rights, *exclusion* rights, a combination of both in the form of *usufructory* rights, and *full ownership* rights. Hubin shows that natural rights only justify the right to use, and he also notes that “[t]he argument concerning the “*tragedy of the commons*” and the *efficiency of private*

use of resources justify, at most, *exclusion rights*. The conclusion drawn by Hubin is the following:

Proudhon is charging Locke with committing a fallacy called “false dichotomy”. That is, according to Proudhon, Locke presents us with two systems, fully common property and full proprietary ownership, as if they are the only two alternatives when, in fact, there are others.

Proudhon’s book “*What is Property: An Inquiry into the Principle and Right of Government*”²⁶ deals with the distinction between full proprietary rights (which Proudhon) rejects and the right to use. Pierre-Joseph Proudhon is known for his two famous phrases “*slavery is murder*” and “*property is theft*”. He does not discard the notion of property altogether, but makes a distinction between *personal property* as applied to the possessions obtained from one’s labour and what he, in the context of the scarcity of resources, regards as *private property* beyond one’s needs.

Marx regards *private property* as “the product, the necessary result of *alienated* labour, of the external relation of the worker to nature and to himself”. Marx²⁷ and Engels²⁸ argue that capitalism has brought about the polarization of classes into the bourgeoisie and the proletariat (as opposed to the aspirations of 1789 French Revolution towards *liberty, equality and fraternity*). They note that property relations (and other elements of the superstructure that includes laws) are determined by the forces of production that will inevitably be accompanied by production relations that change in conformity with changes in production forces.

Marx and Engels state that every stage of social development has its own *mode of production* which is characterized by two elements. The first element relates to *the means of production* which refers to “the material means of production, the hardware, tools, machines, buildings, workers, etc.”), while the second element involves the *relations of production*, i.e. the “property relations under which a society produces, manufactures, and exchanges products.” According to Marx’s *Das capital*, capitalism brings about *social production* which becomes contradictory with *private appropriation*; and this contradiction^{26 27 28}

²⁶ Pierr-Joseph Proudhon (1840), “*What is Property: An Inquiry into the Principle and Right of Government*,” Chapter II- Property considered as a Natural Right. — Occupation and Civil Law as Efficient Bases of Property. Definitions.

²⁷ Karl Marx, *Economic and Philosophical Manuscripts*, First Manuscript, Translation by T. B. Bottomore, [in E. Fromin, *Marx’s Concept of Man* (New York, Frederick Utigar Publishing Co. 1961)].

²⁸ Karl Marx and Frederick Engels (1848), *The Communist Manifesto* (Proletarians and Communists).

can only be resolved through *social appropriation* which necessitates the abolition of private property of the means of production.

Marxism has clearly influenced the property rights regime under the Proclamation to Provide for the Public Ownership of Rural Lands (Proclamation No. 31/ 1975) and the proclamation that nationalized urban land and extra urban houses (Proclamation No 47 of 1975). The notion of public ownership embodied in these proclamations was also embodied in the 1987 PDRE (People's Democratic Republic of Ethiopia) Constitution and various laws. Article 1(3) of the 1987 PDRE Constitution expressly states that Ethiopia shall march from a National Democratic Revolution to Socialism, and Article 6 declares that the Ethiopian Workers Party pursues Marxism-Leninism and shall be the ruling party. Articles 9 to 18 of the PDRE Constitution indicate the economic system, and Articles 11 and 12 state that central planning and socialist ownership of means of production will be pursued which includes ownership by the state, cooperatives and private ownership.

Marxist approaches to property rights also seem to have a significant influence on Article 40 of the 1995 FDRE (Federal Democratic Republic of Ethiopia) Constitution, and in particular sub-Article 3 which provides that "[t]he 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." The provision further states that "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." Sub-Articles 4 & 5 guarantee the right of peasants and pastoralists.

Meanwhile, sub-Article 1 of Article 40 of the FDRE Constitution²⁹ guarantees private property. The influence of John Locke's labour theory of value is apparent in sub-Article 2 which defines private property as:

"any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common."

Locke's labour theory of value is also reflected in Article 40, sub-Article 7 of the Constitution which defines the rights of individuals in immovable property.

The issue that arises at this juncture is whether a certain legal regime can be equally Marxist and Lockean at the same time. Although a spectrum of

²⁹ Sub-Article 1 reads "Every Ethiopian citizen has the right to the ownership of private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise."

synthesis in this regard can be observed in the property law regimes of various countries, the Marxist influence in Article 40 of the FDRE Constitution seems to be predominant even if Lockean conceptions are reflected in the provision. Moreover, the Hobbesian approaches to property can also be manifested in various property regimes depending upon the magnitude of unlimited power of the state to assign and reassign property rights.

2.4- Property and personhood: Hegel and Radin

Radin³⁰ relates property with *personhood* and she gives examples of objects to which a person can feel attached. She believes that “people possess certain objects they feel are almost part of themselves” and that such objects “are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.” Radin states that the type of the objects we feel attached to can vary among different persons and indicates “a wedding ring, a portrait, an heirloom, or a house” as common examples. Evans³¹ summarizes Radin’s views as follows:

The article concludes with three summarizing propositions. (1) some conventional property rights should be preserved as personal. (2) Personal property is *prima facie* protected against interference from government and fungible property interests. This is strongest where the personal property is necessary to become a fully developed person. (3) Fungible property should *prima facie* yield to personhood interests not embodied in property.

Evans raises the question whether a person is entitled to own more and more property “which can then become bound up in [his/her] person.” The question raised by Evans also relates to how different would “the end result of the personhood perspective” be “from that envisioned by Marx, where personal property exists but to a large extent must give way to other interests?”

This personhood perspective to property traces its roots to Hegel’s conception of human beings as the soul of nature. According to Hegel, “[a] person has the right to direct his will upon any object, as his real and positive end” and “the object thus becomes his”.³² He argues that as the object “has no

³⁰ Margaret Jane Radin (1982), “Property and Personhood”, 34 *Stan. L. Rev.* 957 (1982).

³¹ Evans, Keith (2010), *Reading Introduction: Margaret Jane Radin, “Property and Personhood”*, February 26, 2010.

<<http://faculty.law.ubc.ca/harris/documents/propertytheory/student%20comment/Evans%20intro%20Radin.pdf>> (Accessed: 20 September 2010).

³² Hegel, G.W.F. (Berlin, 1840), *Philosophy of Right*, Translated by S.W Dyde (Kitchener: Batoche Books), 2001, §44, p. 57.

end in itself, it receives its meaning and soul” from the will of persons, and “Mankind has the absolute right to appropriate all that is a thing.”³³

Marx criticizes this view on the ground that Hegel’s position leads to the assumption that “every human being must be a landowner, in order to become a real individual” and that private ownership which is a “definite social relation of man as an individual to nature” has become “an absolute right of man to appropriate all things.” Marx further notes:

.. [t] the individual cannot maintain himself as a landowner by his mere ‘will’ against the will of another individual, who likewise wants to become a real individual by virtue of the same strip of land. It definitely requires something other than goodwill. Furthermore, it is absolutely impossible to determine where the ‘individual’ draws the line for resisting his ‘will’ - whether the will requires for its realization a whole country, or whether it requires a whole group of countries by whose appropriation ‘the supremacy of my will over the thing can be manifested.’ Here Hegel comes to a complete impasse. .^{33 34 35 36}

Property rights are *rights in rem* that must be respected by all persons that are subjects of a given legal system. On the other hand, *right in personam*, such as the right that a person has in relation to the performance of a contractual obligation, applies to a particular person or a group of persons. Hegel’s views seem to have given more emphasis to the relationship between the subject of rights (i.e. the owner) and the object of ownership (i.e. the thing or object owned) rather than the relationship between the person who owns an object and all persons who are duty-bearers to respect the right of the owner.

Hohfeld considers each *right in rem* (right over a thing) as the “multitude of more or less identical individual rights, each of which is held by the right in rem-holder against one of every large and individual group of persons, essentially all subjects of a legal system.”³⁵ In other words, Hohfeld describes “a *right in rem* as a multitude of *rights in personam*”.³⁶ Hohfeld’s analysis gives a significant insight into the causal relationship between *right in rem* and *right in personam*. Unlike Hegel’s assumption, therefore, the absence of will on the part of the objects that can be owned or possessed (such as land) does not prove the absence of will on the part of other persons that have competing interests

³³ *Ibid.*

³⁴ Marx Karl (1894), *Capital: Critique of Political Economy* Vol III (1894) Progress Publishers (1974) pp. 615- 616 [The quotes in the paragraph are from Footnote 26 in pp. 615-616]

³⁵ J. E. Penner (1997, Reprinted 2007), *The Idea of Property Law* (New York: Oxford University Press), p. 23. [Penner refers to W. N. Hohfeld (1923), *Fundamental Legal Conceptions* (New Haven, Conn.: Yale University Press), p. 72].

³⁶ Penner, *Ibid.*, p. 27

over the same object. Hegel should have thus considered the issue of competing wills among persons in the course of the private appropriation of natural resources such as land.

3. Rationales, Categories and Key Attributes of Property Rights

3.1-The rationales of property

Chartier states seven rationales which represent values that ought to be considered in property systems. These values are “autonomy, compensation, generosity, productivity, reliability, stewardship, and identity.”³⁷

3.1.1- Autonomy

Human beings are social animals (in their roles as members of a social group), and at the same time autonomous individuals because we all have a distinct existence (in time and space) and the notion of identity, individual thought processes, desire, interest and values. The latter feelings of the self, identity and autonomy are interwoven with the social and cosmic foundations of our being that evoke the feelings of fraternity (at various levels) and cosmic unity with the natural environment.

Chartier regards autonomy as the freedom of individuals “to determine the contours of their own lives and make major life choices without coercive intrusion.” Autonomy does not of course envisage absolute freedom to do whatever one ‘desires’ because autonomy and freedom envisage what Chartier refers to as “practical reasonableness” within the context of the Golden Rule of reciprocal respect to the freedom and rights of others.

The rights created by a fair property system serve the appropriate purpose of giving each “owner freedom to expend his own creativity, inventiveness, and undeflected care and attention upon the goods in question, to give him security in enjoying them or investing or developing them, and to afford him the opportunity of exchanging them for some alternative item(s) of property seeming to him more suitable to his life-plan.”[FN 10] Property rights matter because they equip people to control their own lives.³⁸

The rationale of autonomy thus establishes “a presumption against interfering with people’s property to the extent that doing so would significantly reduce autonomy”³⁹ but should meanwhile be regulated to avoid the risk of its adverse effects on the autonomy of other persons.^{37 38 39}

³⁷ Gary Chartier (2009), *Economic Justice and Natural Law* (Cambridge University Press), p. 35.

³⁸ *Ibid.* The footnote in the quoted text cites Finnis, *supra* note 1. at 172.

³⁹ *Ibid.*

3.1.2- Compensation, generosity and productivity

Compensation in the form of money or real property in return to goods or services provided is the second rationale for property. This is in conformity with the Lockean concept of labour as a rationale for property. The third rationale for property, stated by Chartier, is generosity which usually presupposes the material ability to be generous. He cites Aristotle who noted that “there is the greatest pleasure in doing a kindness or service to friends or guests or companions, which can only be rendered when a man has private property”.⁴⁰

The fourth rationale raised by Chartier is productivity⁴¹, because the propriety of a property regime can depend on its impact on productivity or efficiency. Effective use of resources not only increases productivity which benefits individuals who own the property, but is also beneficial to the community at large.

3.1.3- Reliability, stewardship and identity

A property regime is expected to have consistency and predictability. This is because it ought to “enable people to rely on their reasonable expectation that just property rules will continue in force” and “that decisions made about individual claims in light of such rules” and “just property titles will be respected.”⁴²

The notion of stewardship in property is the golden median between the *anthropocentric* conception in property rights (which regards the human species as the master of nature and its resources) and the opposite *eco-centric* conception which seeks natural preservation for its sake. While the former

⁴⁰ Aristotle, *Politics* (Benjamin Jowett trans., 1905), at II.5

⁴¹ “The productivity rationale warrants property rights to the extent that they foster the creation of wealth in a community. Given the negative impact on productivity associated with greater uncertainty on the part of property-owners regarding their holdings, the productivity rationale may lend support to a presumption in favor of respecting existing holdings. But it might also help, for instance, to justify the reassignment of fallow land from owners of large agricultural estates to peasants to the extent that the peasants were likely to be more productive than absentee landlords.” [Chartier, *supra* note 37, pp. 37-38]

⁴² *Ibid*, p. 38

“ ... [I]f frequent reassignment or extinction were a live possibility, people would be less likely to invest in the enhancement and efficient use of their property. And constant reassignment or extinction of property rights is likely to reduce people’s autonomy and their ability to plan and complete personal projects. Thus, the reliability rationale justifies protecting present possessory interests, all other things being equal.” [Chartier, p. 38]

conception confers upon property owners the widest discretion in the utilization of their ‘property,’ the latter view argues that ecosystems, wildlife and the natural environment in general deserve recognition, legal personality and preservation as *intrinsically* mandatory ends and not in view of their *instrumental* role in human well-being.

Stewardship is the middle path between these extremes. Property regimes are expected to “facilitate stewardship - taking good care of property, cultivating and developing it responsibly, and preventing it from falling into disrepair” because “[i]f no one in particular is responsible for something, experience suggests that it will likely not be taken care of well”.⁴³

And finally, Chartier considers ‘identity’ as the seventh rationale for property. He makes a distinction between ‘identity constitutive attachments’ to certain types of property such as a person’s attachment to a wedding ring or a farm in which an heir has grown up. He contrasts such property with fungible property to which a person does not have attachment as in the case of money in one’s bank account.

The rationales highlighted here-above and the consideration of ‘practical reasonableness’ can be used as a “broad range of standards regarding acquisition, retention, abandonment, forfeiture, deprivation, and voluntary transfer of property.”⁴⁴ Nevertheless there cannot be rigid standards which can invariably apply irrespective of the particular objective and subjective realities.

3.2- Definition and categories of property rights

property rights involve legally recognized and enforced entitlements to a spectrum of actions in the use and control of a given resource or object. To this end, the property law regime defines “actions that individuals can take in relation to other individuals regarding some ‘thing.’”⁴⁵ Hohfeld⁴⁶ cites the following from *Eaton v. B. C. & M. R. R. Co*:

⁴³ *Ibid*, at 38-39

“The stewardship rationale warrants property rights to the extent that they ensure that things are cared for at a satisfactory level. Thus, it will sometimes provide support for the reassignment of title to someone likely to care more effectively for a particular piece of property than the putative owner. But it will also support a stable system of property rights, and therefore count against some reassignments, because people are most likely to care for property when they are able to retain it or to dispose of it at their discretion.” Chartier, p. 39].

⁴⁴ *Ibid*, at 43.

⁴⁵ Elinor Ostrom (1999), “Private and Common Property Rights,” *Encyclopedia of Law and Economics*, 2000, p. 339.

In a strict legal sense, land is not 'property', but the subject of property. The term 'property', although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it'. 'It denotes a right over a determinate thing'. 'Property is the right of any person to possess, use, enjoy, and dispose of a thing'.

As stipulated under the Ethiopian Civil Code,^{46 47} ownership includes the right to *use (usus)*, exploit the fruits of the thing owned (*fructus*) and the right to transfer and dispose of (*abusus*). "Property rights entail *rights* with respect to benefit streams of value, and *duties* of others to respect those rights."⁴⁸ It is to be noted, however, that property rights are not absolute because duties such as good neighbourly behaviour,⁴⁹ social and environmental compliance standards, etc. embody restrictions in use and disposal.

Nor are property rights monolithic and uniform in content and scope because the "[r]ights of access, withdrawal, management, exclusion and alienation can be separately assigned to different individuals" or they can be "viewed as a cumulative scale moving from the minimal right of access through possessing full ownership rights" which "may be held by single individuals or by collectivities".⁵⁰ For example, "Some attributes of common-pool resources are conducive to the use of communal proprietorship or ownership and others are conducive to individual rights to withdrawal, management, exclusion and alienation".⁵¹

Most economists define private property as equivalent to alienation and they consider "property-rights systems that do not contain the right of alienation" as ill-defined.⁵² These economists presume that such ill-defined property rights cause inefficiency "since property-rights holders cannot trade their interest in an improved resource system for other resources, nor can someone who has a more efficient use of a resource system purchase that system in whole or in part."⁵³

⁴⁶ Wesley Newcomb Hohfeld (1913), "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", *The Yale Law Journal*, Vol. 23, No. 1 (Nov., 1913), p. 22.

⁴⁷ Civil Code of Ethiopia (1960), Art. 1205.

⁴⁸ <www.capri.cgiar.org/training/08Feb05_PRTheory-EM.ppt> (8 February, 2005, Slide 1, CGIAR Systemwide Program on Collective Action ...), Accessed: October 7, 2010.

⁴⁹ See for example the Ethiopian Civil Code, Articles 1225 and 1226.

⁵⁰ Elinor Ostrom (1999), *supra* note 45, p. 332

⁵¹ *Ibid.*

⁵² *Ibid.*, p. 339

⁵³ Harold Demsetz (1967), 'Toward a Theory of Property Rights', 57 *American Economic Review*, 347-359 [in Ostrom, *ibid*]

Consequently, it is assumed that property-rights systems that include the right to alienation will be transferred to their highest valued use. Ostrom states that economists such as “Larson and Bromley⁵⁴ challenge this commonly held view and show that much more information must be known about the specific values of a large number of parameters before judgements can be made concerning the efficiency of a particular type of property right.”⁵⁵

Schlager and Ostrom (1992)⁵⁶ define five property rights that show the range of entitlements in tiers of capacities as owners, proprietors, claimants, authorized users and authorized entrants.

Access: The right to enter a defined physical [area and enjoy nonsubtractive benefits (for example, hike, canoe, sit in the sun).]⁵⁷

Withdrawal: The right to obtain resource units or products of a resource system (for example, catch fish, [appropriate] water).⁵⁸

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

Exclusion: The right to determine who will have access rights and withdrawal rights, and how those rights may be transferred.

Alienation: The right to sell or lease management and exclusion rights (Schlager and Ostrom, 1992).

ostrom and schlager (1996) use the following table⁵⁹ to show the bundles of rights that are exercised by each category of property rights:

⁵⁴ Bruce A. Larson & Daniel W. Bromley (1990), ‘Property Rights, Externalities, and Resource Degradation: Locating the Tragedy’, 33 *Journal of Development Economics*, 235-262. [In Ostrom, *supra* note 45].

⁵⁵ Ostrom, *supra* note 45, p. 339.

⁵⁶ Edella Schlager & Elinor Ostrom (1992), ‘Property Rights Regimes and Natural Resources: A Conceptual Analysis’, *Land Economics*, Vol. 68, No. 3 (Aug., 1992) 250, 251.

⁵⁷ The parenthesis shows the version as it appeared in Ostrom, *supra* note 45 p. 339

⁵⁸ Slightly edited in Ostrom, *ibid*. The original version in Schlager and Ostrom (1992) reads “The right to obtain the "products" of a resource (e.g., catch fish, appropriate water, etc.).”

⁵⁹ Elinor Ostrom and Edella Schlager (1996), ‘The Formation of Property Rights’, in Hanna, Susan, Folke, Carl, and Maler, Karl-Goran (eds), *Rights to Nature*, Washington, DC, Island Press, p.133 [in Ostrom, *supra*, note 45 p. 340].

Bundles of Rights Associated with Positions

	Owner	Proprietor	Claimant	Authorized Auth.	
				User	Entrant
Access	X	X	X	X	X
withdrawal	X	X	X	X	
Management	X	X	X	X	
Exclusion	X	X			
Alienation	X				

Based on the definitions that Ostrom (1999) gives to the classes of property rights,⁶⁰ she criticizes the classification of the property rights regime into government, private and common property because of the complexity of the rights. She states that such classifications rather reflect “the status and organization of the holder of a particular right than the bundle of property rights held.”⁶¹ The property rights of access, withdrawal, management, exclusion and alienation can be held individually or by a group of persons. For example,

⁶⁰ Ostrom (1999), *supra* note 45, pp. 339-342

The following excerpts from Ostrom gives definitions and examples for five classes of property rights:

- ‘Authorized entrants’ include most recreational users of national parks ..., but do not have a right to harvest forest products. Those who have both entry and withdrawal use-right units are ‘authorized users’. ...
- ‘Claimants’ possess the operational rights of access and withdrawal plus a collective-choice right of managing a resource that includes decisions concerning the construction and maintenance of facilities and the authority to devise limits on withdrawal rights. .
- ‘Proprietors’ hold the same rights as claimants with the addition of the right to determine who may access and harvest from a resource. Most of the property systems that are called ‘common property’ regimes involve participants who are proprietors and have four of the above rights, but do not possess the right to sell their management and exclusion rights even though they most frequently have the right to bequeath it to members of their family and to earn income from the resource. .
- ‘Owners’ possess the right of alienation - the right to transfer a good in any way the owner wishes that does not harm the physical attributes or uses of other owners - in addition to the bundle of rights held by a proprietor. An individual, a private corporation, a government, or a communal group may possess full ownership rights to any kind of good including a common-pool resource (Montias, 1976; Dahl and Lindblom, 1963). ...

⁶¹ Ostrom (1999), *supra* note 45, p. 342

“irrigation systems in Nepal, the Philippines and Spain” that are managed by farmers “have established transferable shares to the systems”, and thus, “[a]ccess, withdrawal, voting and maintenance responsibilities are allocated by the amount of shares owned”⁶²

Ostrom states that communal groups have established some means of governing themselves in relationship to a resource⁶³ and she argues that the fact that a certain property right is collective or communal does not necessarily lead to the conclusion that it is not well-defined because, *inter alia*, full members of communal groups have the “right to sell their access, use, exclusion and management rights to others, subject in many systems to the approval of the other members of the group.”⁶⁴ Ostrom’s conception of communal property includes the rights of shareholders in corporate firms, and she argues that the modern corporation (or share company established through public subscription) should not be “thought of as the epitome of private property” but rather falls under one of the “mixed systems of communal and individual property rights.”⁶⁵

3.3- Attributes of property rights

From the perspective of the right holder, the key attributes of property rights are “*assurance, duration and breadth.*”⁶⁶

- a) *Assurance* refers to “the probability of enjoying the same right in a future period.”
- b) *Duration* denotes the “length of time or period” of a given property right.
- c) *Breadth* refers to the scope of the bundles of rights in a given property.

Assurance refers to the security recognized and protected. The property right holder is assured that s/he or anyone to whom the property is transferred through sale, inheritance, donation, endowment, etc. enjoys the same rights ‘without restriction’. The *duration* of such assurance depends upon the mode of ownership. In private property, the duration is unlimited while lease holding and other forms of restricted *rights in rem* have time limits which ought to balance the interests of *property owners* with other public policy considerations against the perpetual ownership of certain resources. Lease holdings assure use rights of an immovable for a limited duration which is usually long enough to motivate investments.^{62 63 64 65 66}

⁶² *Ibid.* Ostrom cites: Maass and Anderson, 1986; E. Martin, 1986; Martin and Yoder, 1983a, 1983b, 1983c; Siy, 1982.

⁶³ Elinor Ostrom (1990), *Governing the Commons: The Evolution of Institutions for Collective Action*, New York, Cambridge University Press.

⁶⁴ Ostrom (1999), *supra* note 45, pp. 343-343.

⁶⁵ *Ibid.*, p. 352.

⁶⁶ *Supra*, note 48.

The scope of a property right refers to the spectrum of rights that a person is entitled to enjoy. The scope or breadth of a given right is determined by:

- a) *Transferability of the right*: This is determined by laws and policies that range from those that allow unlimited right of transfer including sale to the ones that prohibit transfer. The degrees of permissibility of transfer may range from transfer of use right with the corresponding right to share the fruits (known as sharecropping), and may include transfers through renting, inheritance, sale with some restriction, or unlimited rights of transfer including sale.⁶⁷ *The right to alienation and disposal* is the highest tier in the transferability of property rights and it allows the owner to do whatever one pleases with property, including sale and other forms of disposal.
- b) *Entitlement to exclude others*: The exclusive entitlement to property rights can entitle the owner with the right to totally exclude others from using and exploiting property. On the contrary, open access entitles others to freely use and exploit property. The middle ground between these two extremes involves restricting “access to members of a defined group” or restricting access on “certain conditions.”⁶⁸ Allowing access to a defined group gives specific rights to the members of the group and excludes everyone outside the group, while providing access on certain conditions renders access contingent upon the conditions that are necessary for the sustainability of common-pool resources.
- c) *Rights of withdrawal*: The scope of the right to *use* and *manage* property might involve a hierarchy of benefits of withdrawal. The right to access such as access to parks does not include withdrawals or collection. The first stage in the exercise of the right for collection is known as “*non-destructive collection*”⁶⁹ which marks “the first step” in the hierarchy of withdrawal rights. This can apply to community owned or state owned lands in which members of a community can be allowed to gather fallen woods, use beehives, collect wild fruits, etc. without destroying or affecting the integrity of resources such as forests. The second level in withdrawal rights can be allowing “seasonal cultivation and grazing”⁷⁰ on lands that are vulnerable but yet utilizable with a certain level of protection and care. The third tier can be allowing exploitation of property with determined “withdrawal levels” based on the sustainability and renewability of resources.
- d) *The right to transform and enhance property*: A given property right might articulate the right to transform or enhance property. A case in point is the * * * *

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

right over a certain property with a non-profit motive of enhancing ecosystems, such as planting trees. An endowment that has an objective of protecting biodiversity or conducting forestation projects for instance, can allow property rights over a vast green belt surrounding a city, and this right may mainly involve the right to transform and enhance the ecosystem.

Harris⁷¹ supports private property without, however, “approving or condemning public, common or communitarian property.” Similarly, Heitger⁷² holds that “secure private property rights and the rule of law are important determinants of economic growth.” However, the regime of property rights involves issues that are far more complex than the private /common property discourse. Current academic discourse⁷³ suggests that concerns of ecosystem sustainability necessitate new theories of property rights.

Resources such as watersheds, for example, involve a complex combination of competing claims and interests. These claims may include the “use or control of the diverse resource stocks, flows and filters that comprise watersheds.” There can be “individuals and groups that exert those claims” which will bring about “statutory and non-statutory entities that support those claims.” There can be different “institutions that protect those claims” and it is inevitable that there will be “interactions among different types of resources.”⁷⁴

4. The Risk of Overconsumption in Common-pool Resources

4.1- Property rights on the stock of resources -versus- one time flow from resources

Lueck defends the principle of the first possession against critics who consider the principle as inefficient which renders resources susceptible to dissipation due to the race in possession and overexploitation. He shows that “possession

⁷¹ J.W. Harris (1995), “Private and non-private property: what is the difference?” *Law Quarterly Review* [L.Q.R. 1995, 111(Jul)] pp. 421-444.

⁷² Bernhard Heitger (2004), “Property Rights and the Wealth of Nations: A Cross-Country Study”, *Cato Journal*, Vol. 23, No. 3 (Winter 2004), pp. 381- 402.

⁷³ See for example: Carl J. Circo (2009), “Does Sustainability Require a New Theory of Property Rights?” *Kansas Law Review*, Vol. 58, pp. 91-159; Emily Sherwin (2006), “Three Reasons Why Even Good Property Rights Cause Moral Anxiety”, *William and Mary Law Review*, Vol. 48, pp. 1927-1951; Jerry L. Anderson (1989), “Takings and Expectations: Towards a Broader Vision of Property Rights”, *Kansas Law Review*, Vol. 37, pp. 529-562.

⁷⁴ *Supra* note 48.

may extend either to the entire stock of a resource or to simply a onetime flow from that stock.”^{75 76}

For example, possession could grant ownership of a pasture in perpetuity, or it could simply grant ownership of the grass currently being grazed by one's livestock. Perpetual ownership means ownership of the stock, while a shorter term of ownership means ownership of some flows. Granting rights to stocks also confers ownership to the future stream of flows, so the formal economic model is inter-temporal. Granting rights to flows, however, means ownership is a onetime event.⁷⁶

According to Lueck, the rule of first possession may lead to enforceable possessions of resource stocks followed by a race to claim assets and property rights. On the other hand, if the rule applies to enforceable possession of resource flows, the rule takes the form of ‘the rule of capture’ which entitles the possessor a certain part of the flow and claims of access for yet other captures from the flow.⁷⁷ Lueck admits that in a race with Homogenous Claimants the rule of first possession “can dissipate value when there is unconstrained competition among many potential claimants”.⁷⁸ This is because potential claimants within the group of homogenous competitors strive to “gain ownership by establishing possession just before their competitors”.⁷⁹

Lueck then contrasts the rule of first possession with the commonly recommended alternative of offering assets for auction in which the state offers it to the highest bidder. Under such circumstances Lueck admits that the winner of the auction pays the highest price and usually begins production in due time “thus maximizing the value of the asset” but, he *inter alia*, states that this begs the question as to how the state acquires property rights.⁸⁰ Lueck underlines that the rule of capture which is one of the derivatives of the rule of possession indeed leads to open access and dissipation.⁸¹

where the resources are ‘plenteous’ the rule of capture “may not produce severe dissipation” and under certain circumstances, “waste can be reduced simply by restricting access to the stock” that “creates a new ownership regime-

⁷⁵ Dean Lueck (1995), “The Rule of First Possession and the Design of the Law”, *Journal of Law and Economics*, Vol. 38, No. 2, (Oct. 1995), p. 430.

⁷⁶ *Ibid*, pp. 396, 397.

⁷⁷ Figure 1, *ibid*, p. 397.

⁷⁸ Yoram Barzel, “Optimal Timing of Innovations”, 50 *Rev. Econ. & Stat.* 348 (1968); Dale T. Mortensen, “Property Rights and Efficiency in Mating, Racing, and Related Games”, 72 *Am. Econ. Rev.* 968 (1982), [in Lueck, *ibid*, p. 399].

⁷⁹ Lueck, *ibid*.

⁸⁰ *Ibid*, p. 403.

⁸¹ *Ibid*, p. 404.

common property-which is an intermediate case between open access and private ownership.”⁸² Under such circumstances “[c]ommon property may arise out of explicit private contracting”⁸³ which leads to “joint effort to exclude outsiders”.⁸⁴ It may also “arise out of custom” as in the case of common pastures and forests; or may “have legal (for instance, riparian water rights) or regulatory (for example, hunting and fishing rules) origins that have implicit contractual origins.”⁸⁵ This, according to Lueck, leads to well-defined rights which ultimately bring about restrictions in open access and resource dissipation.

Lueck concludes that “[w]hen first possession has the potential for a race, the law tends to mitigate dissipation by assigning possession when claimant heterogeneity is greatest”. However, when first possession relates to the capture of flows from stock, open access can lead to dissipation, and “the law tends to limit access and restrict the transfer of access rights to limit open access exploitation.”⁸⁶

4.2- The '*tragedy of the commons*'¹ versus the '*conscience dilemma*'¹

The concept of the '*tragedy of the commons*' was “first advanced in 1833 by mathematician William Forster Lloyd”⁸⁷ regarding the tendency to neglect and abuse resources accessible to all. There is also the corresponding dilemma related to the tragedy in the *laissez faire* quest for private ownership and gain which puts the conscience in a dilemma between integrity and lower standards of conscience to prosper at the expense of others. While the “*tragedy of the commons*” leads to neglect of common possessions,⁸⁸ “*the conscience dilemma*”

⁸² *Ibid*, p. 405.

⁸³ *Ibid*.

⁸⁴ *Ibid*, p. 406.

⁸⁵ *Ibid*, pp. 405, 406.

⁸⁶ *Ibid* p. 409.

⁸⁷ Michael W. Masters (2001), “Ecology, Ethics, and Immigration: The writings of biologist Garrett Hardin”, *The Social Contract*, Fall 2001, p. 6.

⁸⁸ The following excerpt (*Ibid*), illustrates the concept of the '*tragedy of the commons*':

“The ... thesis [of] the tragedy of the commons begins with a pasture, held in common by a band of herdsmen. All are free to use the commons to graze their animals. use of the pasture costs each herdsman nothing, but his livestock are valuable. Therefore each herdsman, acting out of self-interest, will be tempted to exploit the commons by grazing more livestock on the land. But the commons can only support so many animals. This limit is called the carrying capacity. Exceeding the pasture’s carrying capacity leads to depleted grass stocks, soil erosion, malnourished animals — and, quite possibly, conflict among herdsmen.

on the other hand, tends to lead to unconscientious greed in *laissez faire* market systems owing to the prospects of 'prosperity' through unconscientious profiteering and endless quest for steadily increasing wealth.

According to Masters, the *conscience dilemma* occurs because a "laissez faire market system ruled by conscience alone rewards for a lack of conscience" and ultimately "the 'good guys' see the 'bad guys' prosper, their envy is energized and one after another good guys become bad guys." * 89 90 This is particularly manifest during the transition from collectivist and communitarian value systems and settings to *laissez faire* markets and atomistic individualism.

Parisi *et al* have substantiated the concept of the '*tragedy of the commons*' with another concept which they refer to as the '*tragedy of the anticommons*' In contrast to the tragedy of the commons which is vulnerable to overuse by the "failure to monitor and constrain each other's use, the '*tragedy of the anticommons*' is said to exist "when multiple owners hold rights to exclude others from a scarce resource and no one exercises an effective privilege of use" as a result of which "the resource might be prone to underuse: a problem known as the *tragedy of the anticommons*."⁹⁰ These problems, as the authors noted "are the effects of a lack of conformity between use and exclusion rights, with a

Unchecked, this process will lead to exhaustion of the commons. When this happens, everyone suffers, even those who — out of a sense of responsibility or conscience — refrain from overusing the commons. ...

Fortunately, restraint is possible even in the presence of human greed. If the pasture has an owner, he has a vested interest in preserving it for the future. If he fails to limit use to the pasture's natural carrying capacity it will be ruined, and he will suffer great loss. The tragedy of the commons is a persuasive argument for private property ownership. In a crowded world privatism may help provide a stable social and economic life."

⁸⁹ The following (*Ibid*, pp. 6-7) describes the '*conscience dilemma*' that has its downsides and which seems to be the antithesis of the '*tragedy of the commons*':

"While private property ownership may mitigate the tragedy of the commons, conscience will not. Since conscience is one of the most compelling demands of both secular humanism and [religious] dogma, this will strike many as heretical. However, Professor Hardin summons forth the rather startling conclusion that under certain circumstances, conscience may eliminate itself from a population:

'.. A laissez faire market system ruled by conscience alone rewards for a lack of conscience... The second stage in the dissolution of a conscience-ruled system takes place because of envy. As the 'good guys' see the 'bad guys' prosper, their envy is energized and one after another good guys become bad guys.'

⁹⁰ Francesco Parisi, *et al*, "Symmetry and Assymetry in Property: Commons and Anticommons"

<<http://www.vwl.uniwuerzburg.de/fileadmin/12010300/Publikationen/Symmetry.pdf>>
(Accessed: 30 September 2010).

consequential misalignment of the private and social incentives of multiple owners in the use of a common resource.”

4.3- Common property -versus- open access

Most economists believe that private property is conducive to economic development “due to the incentives associated with diverse kinds of property relationships” while loose connection of work with benefits tends to lead to free riding which ultimately leads to low economic productivity.⁹¹ Ostrom cites various studies and summarizes three sources of inefficiency that are stated by many economists in relation with common property. The *first* source is “*rent dissipation*, because no one owns the products of a resource until they are captured, and everyone engages in an unproductive race to capture these products before others do.” The *second* source of inefficiency is “*the high transaction and enforcement costs* expected if communal owners were to try to devise rules to reduce the externalities of their mutual overuse.” And the *third* aspect of the inefficiency relates to “*low productivity*, because no one has an incentive to work hard in order to increase their private returns.”⁹²

Ostrom criticizes such conclusions and she argues that this misunderstanding “has been clouded by a troika of confusions” with regard to “the differences between (1) common property and open-access regimes, (2) common-pool resources and common property regimes, and (3) a resource system and the flow of resource units.”⁹³ She argues that common property and open-access regimes should not be confused. According to Ostrom, the downsides of open-access in resources that are susceptible to dissipation should not be confused with common property which can exclude others and regulate access and use by property right holders. In property regimes that are *open access*, “no one has the legal right to exclude anyone from using a resource” while *common property* allows “the members of a clearly demarked group ... to exclude nonmembers of that group from using a resource.”⁹⁴ Yet, she admits that there will be lack of incentive to conserve the sustainable use of common-pool resources “or to invest in improvements” if they are accessible to everyone. She further notes that “the lack of rules regarding authorized use” of open-access resources “will lead to misuse and overconsumption.”⁹⁵

This adverse impact of open-access results not only from ‘lack of rules regarding authorized use’, but can also be caused by the non-enforcement or

⁹¹ Ostrom (1999), *supra* note 45, p. 334.

⁹² *Ibid*, p. 335.

⁹³ *Ibid*.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*, p. 336.

inadequate enforcement of such rules. This raises the issue whether natural resources that are legally declared as government-owned are in fact open-access regimes as long as there is no effective control against the withdrawal of the resources by persons who have no right to do so.⁹⁶

4.4- Ostrom's views on common-pool resources conducive to different modes of property rights

Common-pool resources are resource systems while the term '*common property*' refers to the property regime. "Common-pool resources"⁹⁷ may be

⁹⁶ Ostrom (*Ibid*, p. 337) observes the following:

"As concern for the protection of natural resources mounted during the 1960s, many developing countries nationalized all land and water resources that had not yet been recorded as private property. The institutional arrangements that local users had devised to limit entry and use lost their legal standing, but the national governments lacked monetary resources and personnel to monitor the use of these resources effectively. Thus, resources that had been under a *de facto* common property regime enforced by local users were converted to a *de jure* government-property regime, but reverted to a *de facto* open-access regime. when resources that were previously controlled by local participants have been nationalized, state control has usually proved to be less effective and efficient than control by those directly affected, if not disastrous in its consequences (Curtis, 1991; Hilton, 1992; Panayotou and Ashton, 1992; Ascher, 1995). The harmful effects of nationalizing forests that had earlier been governed by local user-groups have been well documented for Thailand (Feeny, 1988), Niger (Thomson, 1977; Thomson, Feeny and Oakerson, 1992), Nepal (Arnold and Campbell, 1986; Messerschmidt, 1986), and India (Gadgil and Iyer, 1989; Jodha, 1990, 1996). ..."

⁹⁷ "... All common-pool resources share two attributes of importance for economic activities: (1) it is costly to exclude individuals from using the good either through physical barriers or legal instruments and (2) the benefits consumed by one individual subtract from the benefits available to others (Ostrom and Ostrom, 1977b; E. Ostrom, Gardner, and Walker, 1994). ...

Common-pool resources share with public goods the difficulty of developing physical or institutional means of excluding beneficiaries. Unless means are devised to keep nonauthorized users from benefiting, the strong temptation to free ride on the efforts of others will lead to a suboptimal investment in improving the resource, monitoring use, and sanctioning rule-breaking behavior. Second, the products or resource units from common-pool resources share with private goods the attribute that one person's consumption subtracts from the quantity available to others. Thus, common-pool resources are subject to problems of congestion, overuse and potential destruction unless harvesting or use limits are devised and enforced. .

... Examples exist of both successful and unsuccessful efforts to govern and manage common-pool resources by governments, communal groups, cooperatives, voluntary associations, and private individuals or firms (Bromley et al., 1992; K.

owned by national, regional, or local governments; by communal groups; by private individuals or corporations; or be used as open access resources by whoever can gain access.”⁹⁸ Another relevant concept in relation with common-pool resources is what is known as ‘*resource stock*’ which refers to the resources such as rivers, underground water, etc. that cannot be subject to private appropriation while the *units* that are taken out of the stock are part of the flow.⁹⁹

under the setting of scarcity, common-pool resources are susceptible to conflict “over who has the rights to invest in improvements and reap the results of their efforts”, and this “can lead individuals to want to enclose land through fencing or institutional means to protect their investments.”¹⁰⁰ However, there are situations where a group of persons opts to use common resources by excluding others from having access to the resource, rather than enclosing individual parcels. Ostrom cites Netting’s¹⁰¹ observations that the practices of swiss peasants for many centuries shows that “the same individuals fully

Singh, 1994; K. Singh and Ballabh, 1996). Thus, as discussed below, there is no automatic association of common-pool resources with common property regimes - or, with any other particular type of property regime. Further, common property arrangements are essentially share contracts (Lueck, 1994; Eggertsson, 1990, 1992, 1993 a, 1993b) and, as such, face similar problems of potential opportunistic behavior and moral hazard problems.” (Ostrom: 1999, *Supra* note 45, pp. pp. 337-338).

⁹⁸ *Ibid.* p.338.

⁹⁹ The following explanation by Ostrom (*Ibid.*, p. 338) about common-pool resources further elaborates what is meant by resource system, resource stock and the units in resource stock:

“Common-pool resources are composed of resource systems and a flow of resource units or benefits from these systems (Blomquist and Ostrom, 1985). The resource system (or alternatively, the stock or the facility) is what generates a flow of resource units or benefits over time (Lueck, 1995). Examples of typical common-pool resource systems include lakes, rivers, irrigation systems, groundwater basins, forests, fishery stocks and grazing areas. ... The resource units or benefits from a common-pool resource include water, timber, medicinal plants, fish, fodder, central processing units, and connection time. Devising property regimes that effectively allow sustainable use of a common-pool resource requires rules that limit access to the resource system and other rules that limit the amount, timing, and technology used to withdraw diverse resource units from the resource system.”

¹⁰⁰ *Ibid.*, p. 343.

¹⁰¹ Robert McC. Netting (1976), ‘What Alpine Peasants Have in Common: Observations on Communal Tenure in a Swiss Village’, 4 *Human Ecology*, 135-146. [in Ostrom] & R. M. Netting, (1981), *Balancing on an Alp: Ecological Change and Continuity in a Swiss Mountain Community*, New York, Cambridge University Press. [in Ostrom].

divided their agricultural land into separate family-owned parcels” while their “grazing lands located on the Alpine hillsides were organized into communal property systems.”^{102*}

...Netting identified five attributes that he considered to be most conducive to the development of communal property rights:

1. low value of production per unit of area;
2. high variance in the availability of resource units on any one parcel;
3. low returns from intensification of investment;
4. substantial economies of scale by utilizing a large area; and
5. substantial economies of scale in building infrastructures to utilize the large area.¹⁰³

Similarly, “Agrawal (1996) has shown that communal forestry institutions in India that are moderate in size are more likely to reduce overharvesting than are smaller groups because they tend to utilize a higher level of guarding than smaller groups.”¹⁰⁴ For Example, if producers “aggressively pump from a common oil pool, all tend to be harmed by the overproduction and are willing late in the process to recognize their joint interests.”¹⁰⁵ However, this assumes homogeneity in “the knowledge and acceptance of local common property regimes” in the absence of which individual members tend to optimize their benefits to the detriment of joint interests.

Certain common-pool resources are, such as however, conducive to individual property rights. Such rights in private goods like industrial and agricultural commodities “generate incentives that lead to higher levels of productivity than other forms of property arrangements.”¹⁰⁶ Ostrom believes that “[a]gricultural land in densely settled regions is usually best allocated by a system of individual property rights”¹⁰⁷ which mainly includes formal title to land and other modalities that secure tenure.

Ostrom cites the studies of Feder *et al.* (1988)¹⁰⁸ and Feder and Feeny (1991)¹⁰⁹ and states that such secure titles “provided better access to credit and

¹⁰² Ostrom: 1999, *Supra* note 45, p. 344.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, p. 348.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, p. 349.

¹⁰⁷ *Ibid.*

¹⁰⁸ Gershon Feder, T. Onchan, Y. Chalamwong and C. Hangladoran (1988), *Land Policies and Form Productivity in Thailand*, Baltimore, MD, Johns Hopkins University Press [in Ostrom, *ibid.*].

¹⁰⁹ Gershon Feder and David Feeny (1991), ‘Land Tenure and Property Rights: Theory and Implications for Development Policy’, *5 World Bank Economic Review*, 135-153 [in Ostrom, *ibid.*].

led to greater investments in improved land productivity” in Thailand.¹¹⁰ On the other hand, the studies made by Skaperdas & Syropoulos (1995)¹¹¹ and (Umbeck, 1981a,¹¹² 1981b¹¹³), indicate that “[i]nsecure property rights may lead potential users to arm and engage in violent conflict so as to gain control over land through force or by negotiation to avoid force”¹¹⁴ thereby leading to various types of economic losses. With regard to mobile resource units such as water and fish, private rights can only be ownership of withdrawal rights because water rights, for example “are normally associated with the allocation of a particular quantity of water per unit of time or the allocation of a right to take water for a particular period of time or at a particular location.”¹¹⁵

5. The Need to Control Rural Open Access in Ethiopia: *De jure* public property and *de facto* open access

5.1- Ownership of rural land

Article 40(4) of the FDRE Constitution recognizes the right of peasants to get land without payment and their rights against eviction from their possession, and it envisages specific legislation towards the implementation of the provision. Likewise, Article 40(5) guarantees the rights of pastoralists for free land for grazing and cultivation and the right against displacement. Farming and grazing lands are thus allocated to rural farmers and pastoralists.

In addition to the consideration of *equitable allocation* of land to citizens, Ethiopian property law regime is also concerned about the *sustainable use* of rural land and resources. To this end, the fifth paragraph of the preamble of Proclamation No. 456/2005¹¹⁶ reads:

... [I]t has become necessary to put in place legal conditions which are conducive to enhance and strengthen the land use rights of farmers to encourage them take the necessary conservation measures in areas where mixed farming of crop and

¹¹⁰ Ostrom, *supra* note 45, p. 349.

¹¹¹ Skaperdas, Stergios and Syropoulos, Constantinos (1995), ‘Competing for Claims to Property’, Working paper, University of California, Irvine, Department of Economics [in Ostrom, *ibid*].

¹¹² Umbeck, John R. (1981), *A Theory of Property Rights: With Application to the California Gold Rush*, Ames, IA, Iowa State University Press {in Ostrom, *ibid*}.

¹¹³ Umbeck, John R. (1981), ‘Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights’, 20 *Economic Inquiry*, 38-59 (in Ostrom, *ibid*).

¹¹⁴ Ostrom, *supra* note 45, p. 349.

¹¹⁵ *Ibid*, p. 350.

¹¹⁶ The Federal Democratic Republic of Ethiopia Rural Land Administration and Use Proclamation, No. 456/2005.

animal production is prevalent and where there is threat of soil erosion and forest degradation.

As observed in the preceding sections, the conservation and sustainable use of resources require well-defined property rights (such as the common property rights of communities, property rights of individuals, enforceable public ownership, etc.). Moreover, the right to access and the mode of access to state-owned property ought to be well-defined particularly where resources are scarce. Well-defined property rights do not necessarily require private ownership because beneficiaries of common property can also regulate the sustainable use of resource stocks and units of flow from resources as highlighted in Section 4. A case in point is the Kobo traditional community forest allotment system in which every member of the community has a Kobo in Sheka Zone of Southern Nations Nationalities and Peoples (SNNP) Regional State. Each household can use its Kobo for bee-hives and to gather fallen trees for fuelwood. Cutting trees is traditionally considered as a taboo and such community practices clearly show that traditional property rights such as the Kobo have schemes of access, use rights, non-destructive collection and effective exclusion of others thereby regulating open access and safeguarding resources from dissipation.

Property rights are regarded as well-defined where the entitlements of access, withdrawal, management, exclusion and alienation are clearly and effectively articulated. This can take the form of recognition of indigenous or customary laws (such as the good practices of the Kobo regime stated above), conferring rights on entities that have the prime non-profit purpose of environment protection and forest preservation, and the practical protection of resources that are regarded as public. In rural communities where such well-defined property regimes are lacking, or where they are not effectively implemented, the problems of deforestation, overgrazing, squatting, and the resultant resource dissipation are indeed widespread. Likewise, indigenous customary laws that are conducive to the sustainable use and protection of natural resources against dissipation are being sidelined by rendering the possession of title deeds as a *sine qua non* condition for property rights which, in effect, fails to recognize the rights of indigenous communities to use and protect common-pool resources.

The French Civil Code, for example, confers property rights for communities who live on the land that has no master. Article 713 of the French Civil Code (as amended by Act No. 2004-809 of 13 August 2004) provides that “[t]he property which has no master belongs to the *commune* on whose territory it is situated”, and the provision allows transfer of ownership to the Public Domain “where the *commune* waives the exercise of its rights.” The current version of the French Civil Code thus gives priority in the presumption of property to communities in whose territory the property is found. Needless-to-say, effective

control and preservation of natural resources can be more effective if it is performed by communities that can exclude others and regulate access to common pool resources rather than a merely *de jure* state ownership unaccompanied by effective regulation of access.

The French Civil Code envisages open access to “things which belong to nobody and whose usage is common to all.”¹¹⁷ However, the second sentence of the same provision states that “public order statutes regulate the manner of enjoying them.” The French Civil Code, further stipulates that the “right to hunt and fish” shall be “regulated by specific statutes.”¹¹⁸

According to Proclamation No. 456/2005,¹¹⁹ government owns all rural land¹²⁰ and there can only be an entitlement to use rights referred to in the Proclamation as ‘*holding rights*’. In this regard the Proclamation deals with three forms of holding rights: namely individual, communal and state holding rights. The Proclamation further deals with certification, land registration and other pertinent issues.

In terms of ownership, however, the Proclamation recognizes only one form of ownership, i.e. ownership of land by the *government*. This seems to be inconsistent with Article 40(3) of the FDRE Constitution which vests ownership of rural and urban land, as well as of all natural resources (not in the government, but) in “the State and in the peoples of Ethiopia.” This constitutional provision further declares that “Land is the common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.”

5.2- Holding rights on rural land

The Rural Land Use Proclamation (Proc. No. 456/2005) confers *holding rights* to peasant farmers, semi-pastoralists or pastoralists and the right consists of using “rural land for the purpose of agriculture and natural resource development” and leasing and transfer to family members or other lawful heirs. The holding right also entails “the right to acquire property produced on [the] land by [his/her] labour or capital and sale, exchange and bequeath same.”¹²¹ It

¹¹⁷ French Civil Code, Art. 714.

¹¹⁸ French Civil Code, Art. 715.

¹¹⁹ Rural Land Administration and Land Use Proclamation No. 456/2005.

¹²⁰ Proclamation No. 456/2005, Art. 5(3).

¹²¹ Proclamation No. 456/2005, Art. 2(4).

must be noted that the term ‘holding’ in the Proclamation has a wider meaning in contrast to the definition of ‘holder’ under the Civil Code.¹²²

Under the Rural Land Use Proclamation, holding right is a *use right* which can be bequeathed in accordance with the law and it also includes acquisition of property of the products of one’s labour or capital in the course of using the land. The holder of the land has full ownership rights over the products from the land and can thus alienate them through sale, exchange and other forms such as successions without the restrictions that are set forth in relation to the holding rights over the land. Moreover, there are other forms of individual holding recognized under Article 5(4) of the Proclamation “subject to giving priority to peasant farmers, semi-pastoralists and pastoralists.” They are:

- a) the right of private investors engaged in agricultural activities,¹²³ and
- b) the right of Governmental and non-governmental organizations ‘to use rural land in line with their development objectives.’¹²⁴

It is debatable whether the Proclamation recognizes *communal holding*. Article 2(12) defines communal holding as “rural land which is given by the government to local residents for common grazing, forestry and other social services.” Unlike Article 714 of the French Civil Code, which was cited earlier, communities are not presumed to have property rights (no matter how long they had been using the land) until the government expressly recognizes the community’s holding rights. Article 5(3) of the Proclamation provides that “Government being the owner of land, communal rural land holdings can be changed to private holdings as may be necessary.” This shows that the recognition given to communal rural holdings can at any time (when deemed necessary) be withdrawn in favour of private holdings. This raises the issue whether communal holding has a merely partial recognition on a temporary basis.

Nevertheless, there are good practices in the legislation of various regional states that recognize common property of communities. For example, Article 3 of the Forest Proclamation of Oromia¹²⁵ recognizes community forests. Communal possession is also recognized under Article 16 of the SNNPR Rural Land Use Proclamation.¹²⁶ In addition to such recognition, however, issues

¹²² See for example Articles 1141 and 1147 of the Ethiopian Civil Code (1960) which define holding as possessing the object on behalf of another person who may be an owner or possessor.

¹²³ *Ibid*, Art. 5(4)(a).

¹²⁴ *Ibid*, Art. 5(4)(b).

¹²⁵ Proclamation No. 72/2003 (*Megeleta Oromia*, 15/1993).

¹²⁶ SNNP Regional State Rural Land Administration and Utilization Proclamation (Proclamation No. 53/2003) *Debub Negarit Gazeta*, 8th Year No. 2.

related with the benefits accrued to the community, the scope of access, the community's means of regulating withdrawal and the scope of the right to transfer ought to be addressed because they are among the factors that determine the extent to which such community rights can safeguard common-pool resources from dissipation. This necessitates regulatory schemes which not only provide concrete benefits to the community, but that can at the same time provide for restrictions that facilitate the sustainable use, conservation and development of resources.

The third mode of holding is '*state holding*' which, according to Article 2(13) of Proclamation No. 256/2005, refers to "rural land demarcated and those lands to be demarcated in the future as federal or regional states holding; and includes forest lands, wildlife, protected areas, state farms, mining lands, lakes, rivers and other rural lands." This provision evokes the issue whether any resource that is not held by individuals or communities can be regarded as '*state holding*', or whether the latter needs specific demarcation, certification and land registration.

interpretation in favour of the latter option may seem to be inconsistent with the right of the State in land ownership because *use-right holding* is the subset of ownership, and in the absence of another use-right holder, the owner automatically becomes the holder, and not a mere bare owner. Yet, one may argue that the State owns all land, but '*holding*' is specific and relates to property rights such as use right and control, which may be exercised by an owner or by a person to whom these rights are assigned by the owner. Even if we pursue this line of interpretation, demarcation of the state's holding in accordance with Article 2(13) is merely *declaratory* (to let the public know about the holding of the state which is the owner of the resources) and not *constitutive* (i.e. an act which confers new holding right to the state).

5.3- Unprotected public ownership and *defacto* open access

As highlighted in the preceding sections, land in Ethiopia is publicly owned, and there can be three forms of use-right holdings on land, i.e. individual, community and state holding. The issue that can arise is whether whatever is not effectively *held* by individuals, communities and the state is *defacto* open access, even if it is state-owned. This question presupposes a distinction between what is *held* (i.e., demarcated and effectively controlled) by the State and what is owned by the state but not held by any of the three entities (including the State) that are enumerated under Proclamation No. 256/2005.

The second issue of concern is whether we can offer a wider interpretation to Article 2(13) of Proclamation No. 456/2005 and interpret '*state holding*' as all resources not held by individuals and communities. This interpretation seems to be viable because the words "rural land demarcated" refer to the ones that have

already been demarcated as state forests, wild life parks, etc... and the phrase “those lands to be demarcated in the future” applies to all other resources outside the holdings of individuals and communities.

This warrants the interpretation that the State becomes the bare owner where the use rights of land are held by individuals and communities. with regard to the resources that come under *state holding*, however, the State is not only a use-right holder¹²⁷ but the possessor and the owner. This domain (which is state-owned but not effectively protected) is susceptible to *defacto* open access. There is thus the need for rethinking whether the State (both at federal and regional levels) is in the course of effectively and efficiently practicing the five attributes of ownership highlighted under Section 3.2, i.e. access, withdrawal, management, exclusion and alienation. Apparently, the lack or inadequacy of efficient and effective control in these attributes or property rights leads to *de facto* open access and resource dissipation.

China’s experience shows that collective ownership is more effective than state ownership of common-pool resources (such as forests) unless the latter is effectively implemented. China’s priority to collective ownership (and the current trend towards *Household Responsibility Systems*) illustrates the options that are available towards effective tenures under public ownership. It is to be noted that collective ownership is the principle and state ownership an exception under the Constitution of the Peoples Republic of China which clearly goes beyond the recognition of collective use rights, and rather recognizes collective ownership of rural land (subject to the restrictions imposed in relation with alienation):

Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law; house sites and private plots of cropland and hilly land are also owned by collectives. The state may in the public interest take over land for its use in accordance with the law. No organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways. All organizations and individuals who use land must make rational use of the land.¹²⁸

There can indeed be schemes that can be used in addressing the problem of *de facto* open access in Ethiopia. Such schemes can, *inter alia*, include the following:

¹²⁷ As stated in *supra* note 122, The term ‘holder’ is used in its restrictive sense under the Civil Code (eg. Arts 1141 and 1147). However, Proclamation No. 456/2005 uses the term *holding* in its wider interpretation as use-right holding.

¹²⁸ Art. 10, Constitution of the People’s Republic of China.

- a) One of the policy options is a stronger recognition of indigenous community rights¹²⁹ or collective rights of communities such as peasant associations that would exclude others who are not members of the community and in effect control open access. This can facilitate collective forest tenure over a defined area with periodic withdrawal and harvesting rights in such a manner that afforestation can be encouraged, and reforestation becomes commensurate with harvest. Such schemes require well-defined benefits to communities so that members can benefit from the preservation and development of forest lands, wild life, and other natural resources. subject to the need to control the risk of unproductive fragmentation, collective forest tenures can, for example, devolve towards *Household Responsibility Systems* which have indeed become effective in China.
- b) The second scheme (which can coexist with other forms of tenure) is effective state ownership through clear demarcation and articulation of the scope of access. This involves strengthening control through rangers employed from the rural areas in which the forests, wild life, etc. are found, putting inventory schemes in place and designing effective mechanisms which would make the rangers accountable for unguarded resources and wildlife;
- c) Thirdly, private foresters can play a positive role without, however, violating the interest of communities, nor without resorting to the privatization of already existing forests.

in all these forms of tenure, periodic harvesting need to be effectively monitored as envisaged under Article 7 of Proclamation No. 542/2007.¹³⁰ The issue of regulating forest harvesting is relevant not only in relation with private and community holding, but should also apply to state holdings. A case in point is the risk involved in undefined procedures of alienation and the inclination of certain public administrative institutions to harvest trees (without prior or immediate reforestation) in search of revenue without due regard to the precautions embodied under Arts 8 to 11 of Proclamation No. 542/2007 and other regional proclamations. prudence thus requires that harvesting timelines and procedures be regulated by public agencies such as the Environmental Protection Authority and not public administrative entities that have a conflict of interest owing to their pursuits to generate revenue for their budget and projects.

¹²⁹ See for example the discussion on community land holding rights in: E. N. Stebek (2008), "Dwindling Ethiopian Forests: The Carrot and Stick Dilemma", *Mizan Law Review*, Vol. 2, No. 2, pp. 267-271.

¹³⁰ Proclamation No. 542/2007, "A Proclamation to Provide for the Development and Conservation and Utilization of Forests."

Concluding Remarks

Exclusion is relatively easy in the implementation of various property rights such as the protection and use of an individual's possessions. Such exclusion and control is not necessary where public goods are abundant and not susceptible to depletion. While *pure public goods* such as air are regarded as largely non-subtractable and accessible without the risk of depletion, *common pool resources* are significantly subtractable and prone to overconsumption and depletion. As certain public goods such as forests become scarce (and depletable) competing interests unaccompanied by adequate regulation, control and exclusion render the sustainability of these resources difficult or highly costly.

The demarcation between *pure public goods* and *common pool resources* is indeed getting blurred as public goods such as water are growing scarce in some parts of the world. Nevertheless, resources such as forests (under the current Ethiopian realities) seem to predominantly fall under the domain of common pool resources that are vulnerable to overuse and dissipation.

Lack of adequate institutional framework and effective implementation coupled with competing interests in withdrawals from common pool resources enhance the pace at which these resources are depleted. This leads to overconsumption and dissipation of common-pool resources rather than their sustainable utility because the *common good* becomes accessible to all or to many without effective schemes of protection and preservation. This is because, public ownership without the effective control of the *usus* and *fructus* aspects of ownership merely means access to all thereby leading to the tragedy of resource non-sustainability.

There is thus the need for rethinking the Ethiopian legal regime on rural land use in light of the necessity to control open access to resources such as forests through well-defined common property rights of communities, rights of private foresters, rights of non-profit foresters, and well-defined state property regimes which expressly regulate or prohibit access with effective control and enforcement schemes thereof. Short of such schemes, the *business as usual* option inevitably worsens the dissipation of common-pool resources because the inadequacy of a "common property regime enforced by local users" and the conversion of "de *jure* government-property regime" onto "a *de facto* open-access regime" can eventually lead to the conversion of many green mountains to sand dunes and rocky landscapes.



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