

INTERROGATING LAND POLICY PERSPECTIVES: ETHIOPIA IN FOCUS

*Muradu Abdo**

ABSTRACT

The article examines major contending land policy perspectives in the context of contemporary Ethiopia. It casts doubts whether the people's land ownership perspective is actually in place in Ethiopia, calling for in-depth empirical investigation of the issue of whether the fundamental ethos of the people land ownership enshrined in the FDRE Constitution is being significantly denuded by land alienation trends reflected in the practices of loose landholding expropriation, of commercial farmland acquisitions and of significant informal land transfers. The article further suggests an investigation of whether a contingent case for the people's land ownership paradigm is defensible in the circumstances of Ethiopia with a proviso: a system of government which takes into account views of the rural landholding masses and thus bring the silent peasants and herders to the center stage in politics, i.e., prevalence in the nation of representative and deliberative democracy. The article sees the rule of law and functioning independent and competent judiciary as equally important preconditions.

Key words: *associative ownership, land ownership, land policy, land use right, land privatization, people's ownership*

Abbreviations:

FDRE: Federal Democratic Republic of Ethiopia;

EPRDF: Ethiopian Peoples' Revolutionary Democratic Front

*LL.B (Addis Ababa University), LL.M (University of San Francisco), PhD (University of Warwick). He is Associate Professor of Law at the School of Law, Addis Ababa University. He can be reached at: muradul@yahoo.co.nz

INTRODUCTION

Two competing perspectives seek to resolve the land question in Ethiopia.¹ These are private ownership of land and people's land ownership paths. The present article privileges the two standpoints due to their dominance in the existing land policy of Ethiopia and the political and intellectual clout of their adherents. The article examines these two analytical frames to see whether they enhance Ethiopia's land question in the context where there seems to emerge land alienation trends in the Country.

The privatization discourse argues individuals shall be provided with complete authority over their land in the sense of classic trinity of property rights - *usus*, *fructus* and *abusus* - subsumed in the hands of a single individual land owner. Such robust rights are believed to enhance individual liberty. It also centres on economic rationality of land tenure rules. Empowering the individual in this way is thought to facilitate market transfer of land from less able users to more able ones and thereby bringing about sustained economic growth with its trickledown effect to the poor. The adherents of this perspective seems to assume that the land privatization scheme benefits the rich and the poor alike without harming anyone's economic welfare.

¹ Evolutionary and neo-patrimonial approaches are less prominent perspectives on land policy in the Ethiopian scenario. For an articulation of the former, see Gebru Mersha and MWangi Githinji, 'Untying the Gordian Knot: The Question of Land Reform in Ethiopia' (2005), P.25; Sandra Joireman, *Contracting for Land: Lessons from Litigation in a Communal Tenure Area of Ethiopia*, Canadian Journal of African Studies (1996), Vol 30, Issue 2, P.437-8; Tesfaye Teklu, 'Rural Lands and Evolving Tenure Arrangement in Ethiopia: Issues, Evidence and Policies' (FSS Discussion Paper No. 10, 2003), P.23. For the general optimistic theory of the evolution of property rights, see Ester Boserup, *The Conditions of Agricultural Growth* (1965); Harold Demsetz, *Towards a Theory of Property Rights* American Economic Review (1967), Vol.57, No2; for a qualified view of the evolutionary theory of property rights, see North Douglas, *Institutions, Institutional Change and Economic Performance* (1990); Thrainn Eggertsson 'Open Access Versus Common Property' in T Anderson and F McChesney (eds), *Property Rights: Cooperation, Conflict, and Law* (2003); Jean Platteau *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment Development and Change* (1996); the neo-patrimonial approach is documented in M Bratton and N Walle *Neo-patrimonial Regimes and Political Transitions in Africa* World Politics (1990), 46; John Abbink 'The Ethiopian Second Republic and the Fragile 'Social Contract' 44 *Africa Spectrum*; S Davis, *The Political Economy of Land Tenure in Ethiopia* (PhD Thesis, University of St. Andrews, 2008) (on file with the author); D Noggo 'Contested Legitimacy: Coercion and the State in Ethiopia' (PhD Dissertation, University of Tennessee, 2009 (on file with the author).

The people's ownership of land view, on the other hand, is founded on ownership of land vested in the state or the people or community as a whole; it advocates for the ethos of agricultural land user rights for all, prescribing that landholdings of certain categories of people should generally be withdrawn from the market place. It champions the mixed objectives of liberty (robust individual land rights including marketability), or of equality (allocation of land to citizens widely) or of identity (ethnic autonomy).

The people's ownership paradigm may come under two variants. One version of it termed in this current article as revisionist model argues that land use rights ought to be transferred freely and detail and clear legal rules that curb undue discretionary power of state land administration authorities be issued and implemented. For example, in the Ethiopian setting, the revisionist thinking holds that the problems of the existing land tenure system of Ethiopia relate to a defective legal regime, i.e., ambiguity, vagueness and incompleteness of land tenure rules and overlapping jurisdictions over land administration authorities. To this perspective, the problem of the land question in contemporary Ethiopia is also linked to a lack of proper enforcement of existing land tenure rules or their lack of accessibility to the common people. The absence of these qualities in the land law regime makes it discretionary, creates room for diverse tenure practices and ultimately leads to the defeat of the objective of land law.²

The second form of the people's ownership approach to land called the associative ownership argues for land use rights to be given to each member of respective communities while land ownership is retained in the hands of each concerned community; state authorities being permitted to regulate land only in the interests of efficiency and social justice. This implies a vision to reshape the power of the central state vis-à-vis local communities over land as authority over land is sought to be decentralized and firmly placed in the hands of multiple communities.

² Hein Scholler and Paul H. Brietzke, *Ethiopia: Revolution, Law and Politics* (1976); Abebe Mulatu 'Compatibility between Rural Land Tenure and Administration Policies and Implementing Laws in Ethiopia' in Muradu Abdo (ed), *Land Law and Policy in Ethiopia since 1991: Continuities and Changes*, Ethiopian Business Law Series (2009), Vol.3.

The most important underlying finding of the article is that the two analytic perspectives have been presented to unwarrantedly assume that the existing land law and policy of Ethiopia is still faithful to the land for all principle. Both perspectives are unable to detect and thus articulate the state-driven land dispossession tendency set in motion through various land statutes and administrative practices. The article claims further scholarship advocating the privatization path wants to impose a single land tenure system over the country to the disregard of factors on the ground that have the effect of diversifying land tenure systems. The article also finds the search for a single approach by the privatization path appears to be dictated by the idea of modernization; modernization of land tenure in terms of farm consolidation, transfer of land to more productive users and facilitation of rural out migration is claimed to be better achieved via the instrumentality of the market than the coercive power of the state.

The remainder of the article, in the first section, examines the tenets, justifications and critiques of the land privatization perspective in the context of Ethiopia. The next section explains main characters, conceptual roots, rationale and critique of the people's land ownership approach. Conclusion follows.

1. THE PRIVATIZATION PERSPECTIVE

The privatization view rests on the assumptions that a system of individual land ownership when supported by titling and registration positively correlates with productivity and that land is a commodity. Context based articulation of the privatization perspective, reasons behind it and major critiques flanged against it follow.

1.1 TENTS OF THE PRIVATIZATION PERSPECTIVE AND ITS INTELLECTUAL ROOTS IN ETHIOPIA

The privatization perspective envisages a land tenure system which accords full individual private ownership. It envisions a set of rights which includes the right to unfettered individual use of land, claim ownership over fruits thereof, and disposition. This notion of land rights in view among the followers of the privatization approach is Blackstonian, where a person

possesses dominion over a given subject matter, in this case land.³ This approach links up itself with the theory of property that regards property as an exclusive right embodied in a unitary idea of ownership, i.e., an open-ended exclusive possession, use and disposition over a thing.⁴ As part and parcel of the broader liberal notion of property, the privatization thinking shares its key features: focuses on individual right alone, considers limitation on individual rights as unnatural, and views private property as a marketable commodity.⁵ The preferred norm is: freehold should mean free lose.⁶ In this system of complete set of land right, the role of the state is that of a night watchman confined in particular to introducing a system of land cadastre, individual tilting and certification, facilitating land alienation and enforcing property rights should disputes arise.

Land privatization has a longstanding intellectual root in Ethiopia. Such scholarly endeavour has taken private ownership of land a touchstone of modernity in the country. The early intellectuals dating back to 1930s went under the name ‘the progressives’ envisaged private ownership of land in the rubric of modernization of Ethiopia by chiefly setting up a salaried standing national army as opposed to predatory armies of nobilities and modernization of the state bureaucracy by instituting salaried public servants. For instance, Gebrehiwot Bykedagn, a German educated advocate of modernization, argued for the need for *serat* (i.e., law and order) received from western legal tradition in his book meant to advise the state. Gebrehiwot writes:

Whoever opens his door to European mind prospers; whoever closes his door will be destroyed. If our Ethiopia accepts

³ W Blackstone, Commentaries on the Laws of England WC Jones (ed.) (1915).

⁴ Thomas Merrill and Henry E, Smith, The Morality of Property 45 *Wm. & Mary L. Rev.* (2007), Vol.48, Issue 5; James E. Penner, The Idea of Property in Law (1997); Thomas W, Merrill, *Property and the Right to Exclude*, Nebraska Law Review (1998), Vol 77, Issue 4; Jerney Waldron, The Right to Private Property (1988).

⁵ B Cotter *Property as a Human Need: a Moral Basis for Private Property Ownership in the Work of Hannah Arendt and Simone Weil* http://www.researchgate.net/publication/242715378_Property_as_a_Human_Need_a_moral_basis_for_private_property_ownership_in_the_work_of_Hannah_Arendt_and_Simone_Weil (accessed 20 December 2021).

⁶ Parker Shipton, *Mortgaging the Ancestors: Ideologies of Attachment in Africa* (2009); Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019).

European mind, no one would dare attack her; if not, she will disintegrate and be enslaved.⁷

Gebrewhiot's idea of the 'European mind' is to be accomplished through the instrumentality of *serat*. He continues to say,

A people without intelligence have no *serat*, and hence no secure power. The source of all power is *serat*, not the size of army. A small town that is governed by law is to be preferred to a large nation that has no *serat*.⁸

For Gebrehiwot, *serat* means the use of western law,

Our existing law of the king is incompatible with the demands of modern public life. Therefore, the state shall convene knowledgeable people to come up with law of the king that is compatible with European *serat*. When this is done, there is a need for an advisor versed in European *serat*. A state without a written *serat* is short-lived.⁹

Mesfin Weldemariam on his part sees the concept of *serat* as liberation of the individual from the bondages of custom when he says:

People live under the tyranny of custom... The individual is so inseparable from the tribe or the clan, that he hardly has an independent existence... It is a hurdle that Western societies overcame by their own efforts, and all their great achievements have their foundation in this victory, the liberation of the individual.¹⁰

Afewerk Gebreyesus, an Italian educated scholar, said that Ethiopia would have been on the road to modernization firmly if she had been colonized just

⁷ Gebrekidan Bykedagn, Emperor Menelik and Ethiopia (1927), P.22 and 24.

⁸ Bahiru Zewde, Pioneers of Change in Ethiopia (2002), P.118.

⁹ Gebrekindan Baykedagn, The Works of Negadras Gebrehiwot Baykedagn (2010), P25; Bahiru Zewde 'Intellectual and the State in Twentieth Century Ethiopia' in Bahiru Zewde (ed.) Society, State and History: Selected Essays (2008), P.242.

¹⁰ Mesfin Wolde-Mariam, The Horn of Africa Conflict and Poverty (1999), P.13 &18.

for a few years.¹¹ Fasil Kiros argued these early intellectuals assimilated modernization to westernization; Ethiopia has since then become ‘dangerously addicted’ to western ways of doing things.¹²

The proposals for modernization of Ethiopia by early intellectuals had a land tenure reform element. They argued for land measurement and introduction of fixed annual agricultural tax. Their concern was raising agricultural productivity by easing the burdens over peasants. Gebrehiwot described the condition of the peasants in the feudal era as:

The woes of the tiller of the land are manifold. Not only is he subjected to arbitrary impositions of taxation, but the peace and sanctity of his household are disrupted by soldiers quartered in his house and demanding all sorts of services from him and his wife.¹³

Gebrehiwot favored private land alienations and wanted to end the exploitative feudal relations that skimmed off the fruits of peasants without seeking to reorder the then existing feudal property relations. On land transferability, Gebrehiwot says,

A ban on sale and exchange of land would be detrimental to the peasant since his land is his only asset. If he cannot sell or exchange this asset as he pleases, he will lose sense of ownership over it completely. If he is sued for a debt, he will not have a way out of it. If he is overburdened with tax, he would migrate by abandoning his land since he cannot transfer it to another person who is able to till it; if the state gives the land so abandoned to another person after it becomes a waste land due to lack of husbandry, that person would not be happy to develop it since he would think it is of little or no use to expend money and energy over land that he is unable to sell or exchange.¹⁴

¹¹ Bahiru Zewde, *supra* note 8, P.55.

¹² Fasil Kiros, *The Subsistence Crisis in Africa: The Case of Ethiopia* (1993), P.53-54.

¹³ Bahiru Zewde, *supra* note 8, P.243.

¹⁴ Gebrekidan Bykedagn, *State and People’s Administration* (1924), P.88. TH Tekele Mariam, *Autobiography* (2009), P. 96-97.

Contemporary Ethiopian writers assert peasants' landholding is chronically insecure, leading to agricultural underdevelopment and food insecurity, and that this chronic land tenure insecurity would be remedied if land is privatized. Put differently, the basic land question in Ethiopia today, as it used to be in the past, is lack of tenure security and this can be addressed if and only if land is individualized. Dessalegn Rahmato argues "... freehold is the best means of ensuring absolute tenure security."¹⁵ Berhanu Abegaz says,

Private ownership provides the strongest incentives for agricultural investment and the greatest flexibility for generating optimal farm sizes. Ownership also confers more clout on long-suffering rural residents to obtain public services. That is, secure and complete rights to land provide the first line of defense against the impunity of political elites whose capture of power has yet to face an effective domestic restraint from an enfeebled civil society.¹⁶

1.2. JUSTIFICATIONS

The proponents of the privatization perspective justify it on the grounds of greater land security, enhancement of freedom of landholders and faith in exercise of self-restraint.

Firstly, greater land tenure security means private ownership of land as a guarantor of tenure security is simple and intuitive, though difficult to prove. It is that land tenure security leads to efficient resource allocation; returns from improved land tenure security are substantial as the experiences of post-1979 China and Thailand demonstrate.¹⁷ To the privatization path, it is only in the context of private ownership of land that smallholder farmers in the Country would enjoy tenure security.¹⁸ The privatization perspective paints the worst

¹⁵ Desalegn Rahmato 'Land Tenure in Ethiopia: From the Imperial Period to the Present, A Brief Description' in Tafesse Olika and others (eds.), Topics in Contemporary Topics in Contemporary Political Development in Ethiopia (2003), P.84.

¹⁶ Berhanu Abegaz, *Escaping Ethiopia's Poverty Trap: The Case for a Second Agrarian Reform*, Journal of Modern African Studies (2004), Vol.42, No.3, P.315

¹⁷ Tokie Alemu, *infra* note 73, Pp.87 & 88.

¹⁸ Desalegn Rahmato, From Heterogeneity to Homogeneity: Agrarian Class Structure in Ethiopia since the 1950s in Desalegn Rahmato and others (eds), Land and the Challenge of

picture arising out of perennial land tenure insecurity with damaging consequences. That is, land tenure insecurity has resulted in less investment, greater land degradation, persistent large-scale food insecurity and confinement of people to rural areas. Ethiopia finds itself in a situation in which the agricultural sector is in a gridlock because of poor land tenure system. This gridlock should end with the program of privatization. Haile Kebret says that the people's ownership of land with a redistributive element:

...might be a useful instrument to redistribute income in the short run, but it constrains economic growth. Therefore...the best way to achieve income distribution is by fostering economic growth in the long run. This conclusion is predicated on two assumptions: First, large-scale farming is more productive than owner-farmers. Second, economic growth ultimately reduces poverty and redistributes income.¹⁹

The program of private ownership of land envisions chains of positive consequences: greater land tenure security; robust transferability and greater collateralization, elevated agricultural production and periodicity, enhanced food security; and accelerated national economic growth with its ultimate trickledown effect benefiting every Tom, Dick and Harry.²⁰

Secondly, beyond and above consequential justifications, private ownership of land is seen as having its own value of expanding the individual freedom of each landholder as greater freedom is to be valued for its own sake.

Thirdly, there is peasants' self-restraint against land alienation. If granted, the freedom to transfer their land rights would not be exercised automatically and spontaneously. The claim is allowing Ethiopian peasants to alienate their land would not automatically lead to massive self-eviction simply because peasants

Sustainable Development in Ethiopia (2006), P.13-16; Desalegn Rahmato, Land, Peasants, and the Drive for Collectivization in Ethiopia in Thomas Bassett and Donald E Currmey (eds.), *Land in African Agrarian Systems* (1993), P.294.

¹⁹ Haile Kebret Land Reform, Revisiting the Public versus Private Ownership Controversy in Alemu Mekonnen and Dejene Aredo (eds), *Proceedings of the 9th Annual Conference of the Ethiopian Economy* (1999), P.55.

²⁰ Yigremew Adal, Some Queries about the Debate on Land Tenure in Ethiopia (2004), P.5; Tikie Alemu, *infra* note 73.

more than anyone else appreciate the value of their land; land for Ethiopian peasants perhaps like a peasant elsewhere in a similar situation is not just a disposable economic asset; land for them is a resource needed for their survival; it is a site with sentimental attachment; it is their birth place; it is a place where their ancestors' spirit resides. To say that peasants' will alienate an asset with such wide ranging and deep economic, cultural and spiritual value is to belittle their judgment. And to claim that peasants shall be restrained from their temptations to sell out their land is patronizing. The country's own experience shows that peasants would not sell their land even during worst famines; they simply move away from their farming village and return to it later when normality returns. Dessalegn writes:

Is there a danger of peasants selling their land and the consequent emergence of agrarian capitalism in the rural areas? I believe there is none. The tradition of peasants in this country is to hold on to their plots for life unless they are victims of extraordinary misfortune. To the peasant land is a source of life, of pride and identity. In those rare cases where land selling may occur... new legislation could make it either difficult for the peasant to sell or for outsiders to buy the land in question.²¹

He further states:

The argument of the state is that if the peasant is given absolute rights over the land he will immediately sell, or will be quickly deprived of it by unscrupulous urban-based capitalists, and the result will be large-scale landlessness...This argument is not only foolish but assumes the peasant to be either irresponsible or child-like who will quickly throw away the most valuable asset in his possession. The peasant values the land very highly and is strongly attached to it; he or she will not give it away under any circumstances unless there is a compelling reason to do so. Moreover, selling the land is not a mortal sin.²²

²¹ Desalegn Rahmato, 'The Land Question and Reform Policy: Issues for Debate' (1992)1 *Dialogue*, P.53.

²² Desalegn Rahmato, 'Revisiting the Land Issue: Options for Change' (1999) 2 *Economic Focus*, P.10.

Mesfin argued that the assertion that peasants will sell their land if ownership is granted to them considers the peasants as child and is historically unfounded.²³ He stressed that this had never happened even when peasants were troubled. Lidetu Ayalew, remarks, it is a shame in rural Ethiopia to sell out seeds farmers store for the season to set in; it is of even greater shame to alienate farm land, which is both a subsistence asset and ancestral ground.²⁴

Thus, the argument of the privatization perspective is since it is somehow known that peasants would not alienate their lands, it is unnecessary to maintain a tenure system which outlaws land alienations. Further, the privatization perspective argues that it is not rational to deprive the right of some peasants who may choose to alienate their land by overcoming the grip of tradition that removes land from the market.²⁵ Some peasant land alienation is even a desirable thing for both the peasant and for the larger economy on efficiency grounds.

1.3 CRITICISMS

The land privatization approach assumes insecurity of land rights could be removed via a tenure reform that gives private ownership over land which in turn boosts agricultural productivity.²⁶ Yet empirical evidence shows that land privatization supported by titling does not automatically lead to tenure security. To the contrary, as happened in Kenya, the program of land privatization through the tool of land registration can lead to insecure tenure

²³ Mesfin Woldemariam, Land and Development in Ethiopia (1999) 12 *Economic Focus*, P.13.

²⁴ Lidetu Ayalew, *Medlot, The Role of the Third Alternative in Ethiopian Politics* (2011).

²⁵ Berhanu Abegaz, *Supra* note 16, P.313 says,

Land privatization...is necessary for... thicker markets... peasants should be permitted to transfer their lands to match possession of farmland and the capacity to use it productively. The government would generate revenues from land transfers and subsequent investments in land and such revenues would enable the government to implement program for the unemployed peasants who are now in cities.

²⁶ The privatization path might have been inspired by the new institutional economics that holds that the West has advanced economically primarily because of the institution of private property; and, to contrary, non-western societies have failed to show progress owing to their weak institutional foundation such as insecure property system. For this, see D North. *Structure and Change in Economic History* (1981); Hernando Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000).

for the poor through exposure to elite capture.²⁷ Land privatization does not necessarily lead to more investment in land. Land privatization alone does not always increase transfer of land to more efficient users nor does it create more demand for bank credits or decrease land disputes. The assumed effects of land titling are contingent on a number of extra-tenure factors.²⁸ Thus, available evidence shows that there is no inherent connection between land privatization and productivity.²⁹ As the land tenure history of Ethiopia shows there could be tenure insecurity in the context of private ownership of land while people could enjoy tenure security even in the context of people's ownership of land.³⁰

More broadly, unlike the claim of the perspective, land privatization does not automatically help an agrarian society transform socially and structurally through the instrumentality of agricultural development. At best the path may contribute to economic growth of a country by furthering the security of property of the few through the expropriation of the property of marginalized groups, which happens through “the reallocation of [property] into the hands of more politically powerful constituencies with access to the knowledge and capital necessary for efficient investment.”³¹ Stated differently “severe property insecurity for some groups often exists alongside very secure property rights for others. Heterogeneity in property rights enjoyment means that property rights can simultaneously be strong and secure for some groups and weak and insecure for other groups.”³²

The argument that private ownership of land enhances liberty raises the question of whose liberty? Is it an empty or unrealizable freedom to obtain the

²⁷ J Ubink and others (eds), *Legalising Land Rights in Africa, Asia and Latin America: Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America* (2009).

²⁸ Michael Trebilcock and Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization* University of Pennsylvania Journal of International Law(2008-2009), Vol 30. For the critique of Hernando De Soto, see Celestine Nyamu Musembi, *De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights* ,Third World Quarterly (2007), Vol.28, No.8; Jan Michael Otto, *Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando De Soto* (, Hague Journal on the Rule of Law, 2009),Vol.1,No.1

²⁹ Musembi, Id., P.63.

³⁰ Desalegn Rahmato, *Supra* note 15, P.86; Yigremew Adal, *Supra* note 20, P.11.

³¹ Terra Lawson-Remer, *Property Insecurity* Brooklyn Journal of International Law (2012), Vol 38 (1), P.147.

³² Lawson-Remer, *Id*, P.149.

right to land or is it a concrete realizable right to have land right? More often than not, the privatization perspective has produced freedom for landholders are un-freedom for non-landholders, the masses.

The privatization path followers believe that the Ethiopian state has assumed a hegemonic power over land and that hegemony is inimical to liberty and democracy. The power of the state shall be tamed and the best way to tame state power is the program of land privatization for the sake of maximizing liberty and democracy. Thus, individualization of land rights is tied to the enhancement of the autonomy of rural institutions such as peasant organizations in relation to the state.³³ The privatization path argues private ownership of land would expand the liberty of the rural landholders, which, among others, means the correlation between land ownership and the prevalence of democracy in rural Ethiopia. When peasants are made the master of their land in the sense of full ownership, they would be daring enough to vote unaccountable governments out of office.³⁴ However, privatization of land may not necessarily and automatically diminish the power of the state over land. Even in the context of full private ownership of land the Ethiopian “...government can use its police power, which is, inherent government authority to regulate matters of safety, health, welfare, environment, morality and other matters pertaining to the protection of the public interest.”³⁵ For instance, in private ownership tenure system, the government can use its eminent domain which is “inherent power of the state to take private property for a public purpose provided that any legal requirements for compensation are complied with.”³⁶

On the issue of use self-restraint on the part of the rural masses in the event of introduction of private ownership of land, Yigremew Adal asserts “seen in light of past and current experiences both in the country and elsewhere in Africa, it is untenable to hold that unrestricted ownership over land would in itself give meaningful security to peasants.”³⁷ Peter Singer says,

³³ Desalegn Rahmato, *The Peasant and the State: Studies in Agrarian Change in Ethiopia 1950s`-2000s* (2009).

³⁴ Desalegn Rahmato, *Supra* note 15, P.89.

³⁵ C Juma and J Ojwang (eds), *In Land We Trust: Environment, Private Property and Constitutional Change* (1996), Pp.419-424.

³⁶ Juma and Ojwang (eds.), *Ibid*.

³⁷ Yigremew Adal, *Supra* note 20, P.11.

One may ask whether transparency and the requirement that local landholders consent to a sale is enough to protect people living in poverty. Supporters of free markets will argue that if local landowners wish to sell their land that is their choice to make. But, given the pressures of poverty and the lure of cash, what does it take for people to be able to make a genuinely free and informed choice about selling something as significant as a right to land? After all, we do not allow poor people to sell their kidneys to the highest bidder.³⁸

Furthermore, the privatization perspective suffers from the single best path syndrome. The one-size-fits-all thinking assumes that it has discovered the best land tenure system for Ethiopia. This path believes that the best tenure system is that which accords complete land ownership to peasants. It wants to de-center the state, assigning it mere regulatory power. It advocates the idea that land tenure rules exclusively come from state institutions. It claims to have found the best tenure system for the country and for this reason it is ready to preclude us from experimenting with other forms of land tenures in a manner contrary to the virtue behind “the best is the enemy of the good.” It is ready to disregard the situation of the country that is manifestly diverse in terms of agro-ecology and of land tenure practices. This land reform thinking is heroically simplifying.³⁹ It does not seem to occur to it the possibility of co-

³⁸ P Singer (2013), Ethics and Agriculture? www.project.syndicate.org/commentary/agriculture-investment-or-third-world-land-grab (accessed 31 July 2022) See R Steppacher ‘Property, Mineral Resources and ‘Sustainable Development’ in Steiger O (ed.), Property Economics – Property Rights, Creditor’s Money and the Foundations of the Economy (2008).

³⁹ On the diversity of pre-revolutionary Ethiopian land tenure rules and practices, Margery Perham remarked “...the situation was at least as intricate as in early medieval England but lacked any Dooms Day Book to give a clear point of departure and none of the excessive ravel-lings of generations of scholars to help the inquiries...”, cited in Molla Mengistu ‘The Ethiopian Urban Landholding System: An Assessment of the Governing Legal Regime’ in (Muradu Abdo (ed), *supra* note 2, P148. Perham’s apt observation about the diversity of land tenure forms operating on the ground several decades back still hold true. D Ali ‘Rural Land Registration and Certification in Amhara Region, Reliability and Validity of Certificates in the Eye of the Courts’ LL.M Thesis, Bahir Dar University, 2012,P 40 (on file with the author). Abebe has established the existence of an intricate system of informal land tenure rules which permit ‘land rents’ in rural Ethiopia contrary to official pronouncements in Abebe HaileGabriel ‘Thriving Informal Land Markets and Patterns of Entitlement Redistribution among Peasant Households’ in A Mekonnen and D

existence of multitude of overlapping and competing land tenure rules, originated both from state and non-state institutions. It presumes that the diverse tenure rules operating on the ground would vanish into the thin air with the promulgation and enforcement of state land laws along private ownership of land. In the land tenure debate of the country, “Why a fight over a single tenure arrangement?...is it not important to have a combination of different tenure arrangements wherever necessary than the given single choice?”⁴⁰ It is said that,

...there is no basic reason to limit the tenure arrangements to one single choice. Given the diverse socio-economic and cultural conditions of the country, it will be more important to exploit the advantages and to have experience in the pros and cons of a combination of private, communal, and state tenure systems for different purposes and different tracts of land.⁴¹

Finally, the privatization view is based on presumed rather than ascertained knowledge of the preference of people most immediately affected by a possible change in land tenure reform since this approach assumes that it knows for certain the type of land tenure peasants want most. This assumed ‘knowledge’ about the preferences of the public is gained without documenting the manner in which peasants have perceived and adapted to decades of top down approaches to land tenure reforms. It has not convincingly made efforts to find out the views and opinions of peasants and pastoralists about the appropriate mode of land tenure system.⁴² In this regard, Tekie Alemu rightly asserts that: “it is seldom, if ever, that farmers are actually asked how they feel about these issues, controversies and the policy options, all of which are entertained and created by outsiders [i.e., the elites] who are usually out of touch with the farmers’ realities.”⁴³ Tekie also says

Aredo (eds), *Proceedings of the 9th Annual Conference of the Ethiopian Economy* (2008), Pp.67-86.

⁴⁰ Yigremew Adal, *Supra* note, P.58.

⁴¹ Yigremew Adal, *Id.*, P.15.

⁴² Yigremew Adal, *Id.*, P.10; S Pausewang (2000) *The Need for a Third Alternative: The Amputated Debate on Land Tenure in Ethiopia* www.irsaworld.org/prior/XI/papers/4-8pdf <accessed 31 December 2022>.

⁴³ Tikie Alemu, *infra* note 73, P 89 See also H Jemma ‘Defence of Status Quo versus the Quest for Second Round Reform: Some Remarks on Current Debate over Rural Land Tenure

most common normative statements regarding land privatization in Ethiopia... begin or end by asserting that “farmers must have rights to sell their lands.”⁴⁴ He says this argument is rarely presented as,

We must have the right to buy the farmers out. Irrespective of the argument or option forwarded, the policy option is presented as if it is nothing but positive to the farmers, while in reality they are probably seeking for their own benefits. The under text of which contains an elitist view, i.e., we know better, we can identify your problems, your solutions, and even your controversies!⁴⁵

It may be sound to summarize this sub-section using the words of the late Patrick McAuslan who, after reviewing decades of land law reform of several sub-Saharan African countries, cautions us not to be reductionist because land reform involves multiple considerations,

Very wide mixture of inputs [and] ... there has been in all cases a mixture of motives, ideas, beliefs, hopes and expectations on the part of public officials, politicians and others when they have embarked on a land law reform exercise and by no means all of this variety of concerns focus on tenure issues. It would be naïve to suppose that politicians and public officials were not highly conscious of issues of power – their power – with respect to any reforms that might reduce their power...but it would be correspondingly wrong to assume that that was their only concern. I think order, regularity and predictability – archetypical concerns of the bureaucrat ... – have also been very important in land law reform and it is these concerns as much as any others that have determined the final shape and content of the laws and have limited the enthusiasm or commitment by the centre to the devolution of power to small scale local authorities and communities...Nor can we ignore the influence of the

Issues in Ethiopia’ in Tafesse Olika and others (eds.) *Topics in Contemporary Political Development in Ethiopia* (2003).

⁴⁴ Tikie Alemu, *infra* note 73.

⁴⁵ Tikie Alemu, *infra* note 71, P89.

donors...Nor should the UN agencies be left out of this catalogue of external inputs...These agencies have their own policies and approaches to land law reform and these form part of the dialogue with states when land law reform is being undertaken.⁴⁶

2. PEOPLE'S LAND OWNERSHIP PERSPECTIVE

The section recounts key features of the people's land ownership paradigm, its affiliation with the functionality view of property, justifications, its two variants and then critiques.

2.1 TENETS

The people's ownership perspective is analytically characterized by disaggregation of land rights into ownership and lesser rights. The key features of the perspective are as follows.⁴⁷

Firstly, the perspective vests exclusive ownership of land either in the state, or the people collectively, or groups tied together by religious or ethnic affiliations.

Secondly, land usufruct right is bestowed upon certain groups such as rural small producers by the state with or without initial payment arrangement. Such rural producers are permitted to use their land to the exclusion of others in accordance with the law. In addition to use right, the paradigm in question guarantees individual ownership right over permanent or temporary improvements on their land. Land policy informed by this approach may also go to the extent of guaranteeing fair prices for the produce of the rural masses. This is meant to protect smallholders against the vagaries of the market. The assumptions are that when prices nose dive, the small producers would suffer considerably; thus, they are unlikely to produce next season as desired. This adverse effect would in turn affect urban consumers, factories and export. If

⁴⁶ P McAuslan '50 Years of Land Law Change in Eastern Africa: Transformative or Traditional? A Preliminary Assessment' (2012) 131-132 (on file with the author).

⁴⁷ Desalegn Rahmato, *supra* note 21; Muradu Abdo (2015), *State Policy and Law in Relation to Land Alienation in Ethiopia*, (Ph.D. Thesis, University of Warwick, School of Law), http://wrap.warwick.ac.uk/74132/1/WRAP_THESIS_Spur_2014.pdf, <accessed 21 January 2023>

prices for agricultural products skyrocket, it would harm end consumers and thus leading to a significant and sustained drop in demands. The net effect of both trends would destabilize the political economy of the polity concerned.

Thirdly, land deals may be restricted including a ban on land collateralization by certain social groups deemed to require protection.

Fourthly, the rural masses may also be given immunity against eviction from their landholdings by government authorities and third parties.

Fifthly, there may be possibility of periodic land redistribution initiated and applied by public authorities with the view to avoiding reversal of the initial egalitarian reallocation of agricultural land.

Sixthly, since the people or the groups who collectively own land cannot administer land themselves directly, governments are presented as trustee of land – supposed to deploy on behalf of the people and for their common development.

Seventhly, government under this perspective may retain the prerogative of land expropriation for public purpose with compensation for the property on the land.

Finally, the perspective especially in the context of adoption of market economy may envision provision of land use rights on payment basis to business people without jeopardizing land rights of smallholders. Transfer of land use rights of members of the business community may assume a liberal form – they may be permitted to transfer land use right freely.

The people's ownership perspective may have several mixed objectives.⁴⁸ A quest for social justice is the cornerstone of the policy foundation of the perspective. Equity in agricultural land distribution is assumed to ensure survival asset and food security. It is also thought to promote productivity as people would be motivated to produce more when a key means of production is put in their hands firmly together with a guarantee of full ownership of the

⁴⁸ The EPRDF, Our Land Policy and the Revised Lease Proclamation (2013), (hereafter Our Land Policy) Addis Raey, 3:8

fruits of such land. Besides, a concern for equal distribution of a productive assets among the populace as widely as possible, there is a motive of ensuring political stability by serving as a floodgate of people to urban areas in the setting where off farm activities are unable to absorb people flocking to cities from the countryside in search for opportunities. The perspective is viewed as a tool to make an exercise of collective self-government of groups meaningful by preventing massive land alienation resulting in displacement of communities from a territory that they regard as their homeland.

2.2. AFFINITY WITH FUNCTIONALITY APPROACH TO PROPERTY

In regarding subsistence land as the central purpose of land, the people's ownership of land perspective enunciated in the foregoing section disaggregates property rights in land in a fashion perhaps similar to the functionalist approach to property whose fundament is that one does not need to possess the full spectrum of land rights for one to become secure or meet their subsistence requirement. For the purpose of livelihood, possessing and securing just one of the land rights disaggregated and deemed to be central for people's survival is good enough. In the Ethiopia context, for instance, the rights in land so tied to people economic subsistence are exclusive land use rights and need not extend to marketability of such rights.

It seems germane to shortly highlight the functionalist approach to property. The functionalists understand property right as a bundle of rights over an object. Functionalism rejects the other competing conception of property; namely, a unitary approach to property, which is anchored on exclusive "...a complete set of timeless, natural, or a proper property rule is absurd."⁴⁹ Functionalism is opposed to the understanding of property as having an essential indivisible core meaning.⁵⁰ In particular, functionalists view property as the sum total of rights including the right to use, the right to own fruits and right to disposition.

⁴⁹ Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, University of Pennsylvania Law Review (1985-1986), P.743.

⁵⁰ Robert Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith* Economics Journal of Watch (2011), Vol 8, No.3, P.219.

Functionalism in a post-modernist fashion decomposes property into its component elements and seeks to attach a particular function to a strand of the right in the property so decomposed. To the functionalist, “a person’s property is not a single thing, not a single type of right.”⁵¹ It is rather an aggregate of many rights. Each right in the aggregate can serve different functions. They use the ‘bundle of firewood’ metaphor with the political agenda of “dethroning the sanctity of private property and the private ordering it enables in order to enhance levels of ‘collective control and redistribution.”⁵² Edwin Baker, as an advocate of the view, sees a specific property right as,

...decision-making authority of the holder of that right. The standards used to determine the content and extent of decision making authority, and to determine who holds this authority, are what I mean by property rules. Property rules determine various relevant factors, including the behaviour and status of people, to the evaluation of a person’s claim to possess some specific decision-making authority.⁵³

Baker thinks this ‘decision-making authority’ fulfils six functions: an allocative function “serves to structure the societal allocation of resources to productive or otherwise desired uses;”⁵⁴ a sovereign function “provides the owner a means of exercising power over other people;”⁵⁵ a protective function “provides some limited protection from invidious, arbitrary treatment;”⁵⁶ use function permits people to “use of property in their everyday life without any orientation towards eventual market exchanges;”⁵⁷ personhood function which is the case where people “intertwine their identity or personhood in certain property;”⁵⁸ and welfare function, meaning people’s use of property to provide “at least minimal levels of those goods or opportunities that a

⁵¹ E Baker, *Disaggregating the Concept of Property in Constitutional Law in Genesis of the Ethiopian Constitution of 1994* (1993), P.345

⁵² Robert Ellickson, *supra* note 50, P.216-218.

⁵³ Baker, *supra* note 51, P.743.

⁵⁴ Baker, *supra* note 51, P.337.

⁵⁵ Baker, *Ibid*.

⁵⁶ Baker, *Ibid*.

⁵⁷ Baker, *Id.*, P.338.

⁵⁸ Baker, *Id.*, P.337.

person`s society identifies as basic to meaningful life and full membership within that society.”⁵⁹

For Baker, a person to whom a certain property such as a farmland is allocated for their living may not need to have the power to alienate that property. What those persons need is secure right to make use of the land as a subsistence asset. In this regard, Baker states “...Society can plausibly conclude that the reasons to allocate property to a person for purposes of use do not necessarily require allowing the person to employ the property as a means to exercise power” through a system of market allocation.⁶⁰ Baker privileges the welfare role of property over the other five functions:

A major measure of the legitimacy of a society is how well its property rules serve this welfare function ... all democratic societies guarantee their members those goods or opportunities that the particular society considers basic for meaningful membership - although the precise content of these goods and opportunities varies from society to society...Conceivably, guarantees to possess the land that a person uses to provide for subsistence adequately serve this welfare function in some societies — for example, if livelihood can be gained almost entirely from the land *and* if land is readily available to anyone who works it.⁶¹

Baker further states that “...respect for people`s dignity, liberty, and equality, explain why welfare rights (claims to satisfaction of basic needs) merit constitutional protection.”⁶² A compelling reason behind the welfare function of property is “...society must accord an individual this respect before it may justifiably request that she obeys its rules.”⁶³ Baker further says, “An allocation system might even dispense with market exchanges entirely by allocating property to people only as they are prepared to use it. Unlike rules

⁵⁹ Baker, *Ibid.*

⁶⁰ Baker, *Id.*, P.347.

⁶¹ Baker, *Id.*, P.343-344.

⁶² Baker, *Id.*, P.349.

⁶³ Baker, *Id.*, P.760.

that prohibit a person's valued use of her property, such an allocation system would not abridge formal liberty.''⁶⁴ Alexander Gregory seconds Baker:

...the institution of property has multiple potential purposes and that the level of constitutional protection accorded to property, indeed, the basic question whether to constitutionally protect property at all, depends on what purpose (s) the legal system involved has historically assigned to property. Property rights are epiphenomenal. They are not ends in themselves but rather an instrument designed to instantiate and serve deeper substantive values, such as wealth maximization, personal privacy, and individual self-realization. In this sense property rights are never 'fundamental.' Only the substantive interests they serve can be.⁶⁵

To Gregory, the German legal system distinguishes,

Property interests whose function is primarily or even exclusively economic, especially wealth-creating, and those that primarily serve a non-economic interest relating to the owner's status as a moral and/or political agent. Only the latter are protected as fundamental constitutional interests...Property is a fundamental right accorded the highest degree of protection, in German constitutional law only to the extent that the affected interest immediately at stake implicates the owner's ability to act as an autonomous moral and political agent... It [German constitutional law] strongly protects a particular property interest only to the extent the interest immediately serves, other primary constitutional values, in particular, human dignity and self-governance.⁶⁶

⁶⁴ Baker, Id., P.809-810.

⁶⁵ Alexander Gregory (2003), Property as a Fundamental Constitutional Right? The German Example, P.7 http://scholarship.law.cornell.edu/clsops_papers/4 <accessed on 20 January 2023>.

⁶⁶ Gregory, Id., Pp.8-9.

Joseph Singer has argued to legitimize property reallocation of some kind in terms of equal opportunity as follows.

... we cannot be indifferent to social, economic, and legal barriers that continue to prevent access to the property system today ... using democratic means to limit or reallocate property rights to ensure equal opportunity and to promote social relations compatible with a free and democratic society is not only not a violation of property right but compelled by the very reasons we created property rights in the first place.⁶⁷

In sum, functionalist approach to property stands for non-marketable exclusive use right over a key subsistence asset in a liberal democratic society. It favors a right over an asset shielded not for the survival of the system of property right 'rather than of the people within it.'

2.3 VARIANTS OF PEOPLE'S LAND OWNERSHIP PERSPECTIVE

As hinted in the introduction to this article, the people's land ownership perspective may come under two versions, i.e., an associative land ownership and a revisionist variants. Both variants subscribe to land ownership schemes vested in persons other than private individuals, the latter enjoying usufruct right.

2.3.1 The Associative Ownership Variant

The associative ownership view advocates for a system of associate ownership of land in which each community own their land while members get secure user rights including community supervised land transfers to outsiders including the state.⁶⁸ Each community is a master of land within its territorial

⁶⁷ Joseph W. Singer, *Original Acquisition of Property: From Conquest and Possession to Democracy and Equal Opportunity*, Indiana Law Journal (2011), Vol 86, Issue 3, P.16-17; Joseph W. Singer, *The Reliance Interest in Property Revisited*, Harvard Journal of the Legal Left (2011), Vol.7, P.82.

⁶⁸ Hoben calls this view devolutionary in A Hoben, *Ethiopian Rural Land Tenure Policy Revisited* (Paper Presented at the Symposium for Reviewing Ethiopia's Economic Performance 1991-1999 Addis Ababa. April 26-29, 2000); Yigremew Adal, *supra* note 20, P10. See also C Boone 'Property and Constitutional Order: Land Tenure Reform and the

limit. The land owning community may consist of a neighbourhood organized territorially or ethnically or religiously or a combination thereof.

The strategy of the associative view is to secure land tenure by restraining the power of state authorities over land through the tool of decentralized decision making. Siegfried Pausewang associative ownership protects communities from the threat of local government functionaries with the loss of their lands where such communities are able to demand government accountability.⁶⁹ He thinks that if the real intent is to hold the state answerable to the people, the model associative ownership of land with robust user rights to individual members of a community. For Pausewang associative ownership will be accepted by the majority of peasants because it is grounded in rural cultural understanding of land relations and builds on bottom up approach to rural development. It guarantees that:

...Land remains common property (not state property)...
Distribution of access to arable land remains in local hands...
Collective responsibility of distribution and social security is maintained ...Individual rights to a share in the community's land are preserved... Individual control over the fruits of one's work (including permanent improvements on the land, trees, buildings, etc) is not restricted ...There is some limitation of contributions, including taxes, to a level which allows the individual farmer a fair return for additional work.⁷⁰

Dessalegn outlines the associate ownership model in a fashion pretty much similar to Pausewang's approach but with greater force and elaboration.⁷¹ The associative ownership puts an accent on the question of who is to have effective control over land rather than mere ownership; land tenure security can materialize for the rural mass when they are firmly in control of decision making power over land matters. It proposes land tenure model shall be based

Future of the African State' (2007) 106 *African Affairs* for an articulation of three possible models of land tenure in Africa.

⁶⁹ Siegfried Pausewang, *Ethiopia: A Political View From Below*, South African, Journal of International Affairs, (2009), Vol 16, Issue 1.

⁷⁰ Siegfried Pausewang "Meret Le Arrashu" Land Tenure and Access to Land: A Socio-historical Overview' in *Ethiopia: Options for Rural Development* (1990), P.47.

⁷¹ Desalegn Rahmato, *Supra* note 22, P.20.

on a nation's experience instead of basing it on 'systems perspective.'⁷² The associative ownership position offers room for diverse land tenure systems in multi-cultural and multi-agro-ecological countries such as Ethiopia. It distances itself from one factor theories of land tenure. Finally, the associative ownership model's vision of development from below is a proposal with immense potential.

2.3.2 The Revisionist Variant

The revisionist view is underpinned by two features; namely, proposal for lifting restrictions on transferability (imposed by land use rights of landholders by the people's ownership paradigm) and argument for more land law.

Lifting restrictions on land use rights: The revisionist approach emulates a contingent case for people's land ownership path by opting for removal of various legal restrictions imposed on the transferability of a peasant's land use rights. Tekie Alemu, for example, thinks that there is land tenure insecurity in Ethiopia as expressed through peasant perception emanating from the possibility of land reallocation and failure to spell out the conditions under which compensation would be paid and peasants are well aware of the vulnerabilities of their land rights.⁷³ He says there are compelling reasons,

... for having a secured institutional setup for farmers in Ethiopia. The government is faced with only one imperative policy option: a movement away from the existing insecure tenure towards a more stable and secured one. It should be clear however that the sole solution to this problem is not necessarily a full-fledged privatization of land... On the contrary the available option towards a secured system is a continuum of property rights structures. One feasible option, given the situation of the farmers in the country is, for instance, to stop any systematic redistribution of land that is sponsored by the government, be it at the federal or regional one, and make sure

⁷² Ibid.

⁷³ Tikie Alemu 'Farmers' Willingness to Pay for Tenure Security' in Alemu Mekonnen and Dejene Aredo (eds), *Proceedings of the 9th Annual Conference of the Ethiopian Economy* (1999).

that each household would have complete say, in the allocation of land among its siblings.⁷⁴

Getnet Alemu similarly suggests,

One possible area for this is to think of change in the current tenure, from unlimited time use right to time limited use right with transfer, exchange, and sale rights. This has a number of advantages. Farm households will be certainly sure that they really own the land for that specific period, removes in-house redistribution, consolidate fragmented farm plots, increase size of holdings, encourage mobility of farm households and non-farm activities, mitigating the existing pressure on land, and allow money banks to value the land for that specific period and provide credit to farm households by taking the land as collateral as they do it for those who take agricultural land on the basis of lease for specific period.⁷⁵

The solution is a dynamic land reform which gives “long-term use right with transfer and sale rights”.⁷⁶ This view tends to emphasize more on security and breadth of land rights and less on full private ownership *per se*. This revisionist approach has received grudging support from major international institutions that are supportive of the neoliberal notion of property rights.⁷⁷

To this view robust land rights short of full ownership will do if such rights are characterized by breadth, transferability, longevity and security even within the framework of people’s ownership of land without resorting to full privatization to make land rights as secure as they can get.⁷⁸

⁷⁴ Tokie Alemu, Id., P103; W Crewett and B Korf, *Ethiopia: Reforming Land Tenure* Review of African Political Economy (2008), Vol.35.

⁷⁵ Getnet Alemu ‘The Challenges of Land Tenure Reform to Structural Transformation of the Economy: Lessons from Country Experiences’ in S Ege and others (eds.), *Proceedings of the 16th International Conference of Ethiopian Studies*, 2009), Pp.763-764.

⁷⁶ Id., P.776.

⁷⁷ Muradu, *supra* note 47, P.257-285.

⁷⁸ These dimensions are articulated as land tenure security elements in the African context by F Place and others ‘Land Tenure Security and Agricultural Performance in Africa: Overview of Research Methodology’ in J Bruce and S Mingot-Adholla (eds) *Searching for Land Tenure Security in Africa* (1994).

In terms of breadth of right, this view aspires to see peasants offered a bundle of land rights which approximates ownership. That is, land rights are a close-ended list of rights over land but without including ownership. This way of presenting land rights makes the perspective analogous to scholarship which conceives property rights as a ‘bundle of sticks’ that may be aggregated and disaggregated as the occasion demands.⁷⁹ As regards to transferability, the revisionist view would like to see peasants permitted to lease out their land to any willing lessee in its entirety on the basis of long-term lease, transfer their use rights to any one of their liking via donation and inheritance, collateralize such use rights and lift conditioning of land use rights upon continuous use with residency requirement.⁸⁰ That is, the numerous legal and administrative restrictions imposed on peasants’ right to transfer their land rights shall be lifted. As regards to longevity, it would like to see the determination of a fixed longer term use rights.⁸¹

In relation to tenure security, this perspective likes to shield the peasants against state encroachments on their land rights in the sense of disciplining the power of land expropriation, introduction of ban on land redistribution, and the issuance of an effective land registration and certification system.⁸²

More land law: More land law seeks to restrain land administrators, courts and local communities who might tempt to invoke customary land tenure principles and practices through specific, clear and comprehensive state land laws as opposed to customary tenure rules to make rural land bureaucrats accountable.

Arguments in favour of detailed land law have been raised in regard to Tanzania. Patrick McAuslan argues that land law should achieve two

⁷⁹ Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* Yale Law Review (1913), Vol 23, No.1, Pp16-59 J Penner *The “Bundle of Rights” Picture of Property* 43 UCLA Law Review(1996), Vol.43; L Katz, *Exclusion and Exclusivity in Property Law* University of Toronto Law Journal(2008),Vol.58 T Merrill and H Smith, *What Happened to Property in Law and Economics?* Yale Law Journal (2001),Vol.111 (2).

⁸⁰ G Seifu ‘Rural Land Tenure Security in the Oromia National Regional State’ in Muradu Abdo (ed) *Land Law and Policy in Ethiopia since 1991: Continuities and Changes* Ethiopian Business Law Series(2009), Vol.3

⁸¹ Ibid.

⁸² Ibid.

objectives: advance legal certainty to facilitate a market economy and “replace administrative discretion with specific legal rights.”⁸³ In order to attain these objectives, land law has to be “detailed, specific, and clear.”⁸⁴ McAuslan has taken land law as an aspect of administrative law because it raises the question of state accountability. He observes that “officials armed with powers and subject to few or no restraints, cannot be relied upon to behave reasonably.”⁸⁵ Further, he says “once the land law recognizes and protects private rights, and facilitates dealings with those private rights in the market place the law has to be much more specific, detailed and clear.”⁸⁶ There is a need to have detailed land tenure rules even if the administrative authorities in charge would not as a matter of fact abuse their discretion because “...the men-at-home read the regulation, see the width of the discretions, and fear and expect the worst...”⁸⁷ McAuslan thinks one cannot make prudent land law reform out of mere ‘common sense.’⁸⁸

Similar arguments have been advanced by Heinrich Scholler and Paul Brietzke explaining the problem of land tenure in Ethiopia in terms of lack of specific and comprehensive state tenure rules that would constrain local government authorities who are dealing with rural land administration. Researching the 1975 Rural Land Proclamation Scholler and Brietzke predicted that less law and lack of institutional supervision would impede the fulfilment of the aims of the land law reform:

...as the holder of the ultimate title to all land, Government can specify that the observance of certain patterns of use, cultivation..., conservation, harvesting and marketing are preconditions to continued possession of the land... In the absence of effective regulations, however, the nationalization of land is irrelevant from the stand point of development; the

⁸³ Patrick McAuslan, *Binging the Law Back in: Essays in Land, Law and Development* (2003) as cited in Ambreena Manji, *The Politics of Land Reform in Africa: From Communal Tenure to Free Markets* (2006), P.90.

⁸⁴ Ambreena Manji, *Id.*, P.89 See also Patrick McAuslan, *Binging the Law Back in: Essays in Land, Law and Development* (2003).

⁸⁵ *Id.*, P.93.

⁸⁶ Ambreena Manji, *supra* note 83 See also Patrick McAuslan *Land Policy: A Framework for Analysis and Action* *Journal of African Law* (1987), Vol.31

⁸⁷ L Gower cited in Manji, *supra* note 83, P.94.

⁸⁸ Ambreena Manji, *supra* note 83.

adoption of innovations is not made a *quid pro quo* of tenure security. Peasant associations might as well redistribute or merely recognize the ‘freeholds’ which would be greatly preferred by peasants since without appropriate Government regulation and supervision, security of tenure is totally dependent on the quality of local politics in the peasant associations.⁸⁹

Abebe Mulatu, on his part, thinks the 1975 Rural Land Proclamation did not achieve its intended purpose because “of the absence of regulations and guidelines to effectively and consistently implement the policy objectives of the proclamation, and the absence of institutions accountable to administer rural lands on local level...”⁹⁰ Abebe further states:

The Proclamation delegated the Ministry of Land Reform and Administration to issue regulations and directives to give effect to the purposes and provisions of the Proclamation. But no regulations or guidelines were issued to implement the Proclamation. As a result, peasant associations which were in charge of administering rural lands were applying their discretion to determine when and how to distribute rural lands and who shall get what land in their areas. This discretionary power was being abused as time went on and insecurity of tenure was more exasperated.⁹¹

Scholler and Brietzke’s concern was to see clear, comprehensive and detailed land law in the context where land was removed from the sphere of private law and put in the domain of public law by the 1974 Ethiopian revolution to ensure the contribution of land to the country’s development. Concurring with these two legal scholars’ observation about the sketchy nature of the 1975 Rural Lands Proclamation, Abebe extends it to the current land law of the country: even if there are more detailed land tenure rules today than in the past, the current rural land laws are replete with significant gaps and

⁸⁹ Scholler and Brietzke, *supra* note 2, P.81.

⁹⁰ Abebe Mulatu, Compatibility between Rural Land Tenure and Administration Policies and Implementing Laws in Ethiopia in Muradu Abdo (ed), *Land Law and Policy in Ethiopia since 1991: Continuities and Changes* 3 Ethiopian Business Law Series (2009), Vol.3, P.14.

⁹¹ *Ibid.*

overlapping administrative jurisdictions on rural land matters.⁹² Interviewees and focus group discussion participants share Abebe's observation about the need for detail land law.⁹³

The above observation about the scanty nature of the then land law of Ethiopia is correct. The 1975 Rural Land Proclamation lacked detailed rules and thus indicated the need for directives to facilitate implementation of its terse principles.⁹⁴ But such directives and guidelines did not come out. Such issues relating to criteria of land allocation and reallocation were not addressed. There were few provisions dealing with the entire range of substantive and institutional issues regarding rural land. It is also correct that there were and are overlapping jurisdictions over land administration matters and this might breed confusion and uncertainty.⁹⁵ This condition of land law is said to have unduly contributed to the discretionary powers of state local functionaries, such as peasant associations and land dispute settlement tribunals; scanty land tenures rules meant greater say for peasant associations in charge of land distribution, of redistribution, dispute settlement as well as village land demarcation.⁹⁶

In sum, the intention of the followers of the more land law thinking is to minimize administrative and judicial discretion, ensure consistency of the rules with the underlying land policy, and thus see to it that the intended development policy is not contradicted and defeated by implementation of sketchy land tenure rules.

2.4 CRITIQUING PEOPLE'S LAND OWNERSHIP PERSPECTIVE

The people's land ownership approach has been subject to numerous critiques. This sub-section will consider a few of them in particular focusing on those based on land tenure insecurity, subsistence dependency, conceptual lucidity,

⁹² Ibid.

⁹³ Interview with a practicing lawyer on 25 September 2012. Focus Group Discussion with land law specialists on 13 July 2013.

⁹⁴ Abebe Mulatu, *supra* note 90.

⁹⁵ Ibid.

⁹⁶ Ibid.

the agency of the rural masses, implications of more law and tendency to de-politicization of the land question.

Firstly, the people's land ownership is critiqued on the grounds that it leads to chronic land tenure insecurity and thus undermining productivity. Berhanu Abegaz argues that "The pre-reform insecurity arising from multiple and perpetual claims over kinship land or eviction from rented land has been replaced by the insecurity from non-ownership, and the threats of periodic redistribution by the authorities for political or demographic reasons."⁹⁷ Abegaz says,

The imperative of short-term survival leads ...[Ethiopian peasants] to resort to myopic agricultural practices of intensification (mainly via reduced fallow and increased acreage by encroaching on pastures or woodlands), adopting ox-plough technology in transhumant areas, and altering the mix of grains mainly in favor of lower value cereals such as maize.⁹⁸

Secondly, in the Ethiopian scenario Abegaz says "the well-meaning but misguided mantra of the post-imperial ruling elites to provide peasants guarantees of entitlements to subsistence plots of land must now give way to an equally strong commitment to assuring subsistence income to all, albeit a variety of sources."⁹⁹ He argues that there is a compelling reason to shift from "entitlements to subsistence plots of land" to "assuring subsistence income to all" not connected to allocation of land to all.¹⁰⁰

⁹⁷ Berhanu Abegaz, *supra* note 16, P.322.

⁹⁸ *Id.*, P.314.

⁹⁹ *Id.*, Pp315-316.

¹⁰⁰ Berhanu Abegaz, *Persistent Stasis in a Tributary Mode of Production: the Peasant Economy of Ethiopia*, Journal of Agrarian Change (2005), Vol.5, Issue 3. Abegaz seems to contradict himself when he argues in the same article that the main feature of land tenure under the Derg period should be featured as 'socialist tributary system' which means first the peasantry had "...uncontested possession of the land and (i.e., they enjoyed customary, or legal right of use and transfer to land)" and second, the right to land was "conditional on payment of tribute" to the state cum landlord. See also Berhanu Abegaz, *supra* note 16, Pp 316-317; Dustin Miller and Eyob Tekalign, *Land to the Tiller Redux: Unlocking Ethiopia's Land Potential* Drake Journal of Agriculture (2008), Vol.13, P.353-354; John Markakis, *Nationalities and the State in Ethiopia* Third World Quarterly (1989), Vol.11, No.4; Omiti John and others, *Some Policy Implications of Rural Factor Markets following Agrarian De-Collectivization in Ethiopia*, Human Ecology (2000), Vol.28, No.4 .

Thirdly, the associative ownership version of the people's ownership challenged with regard to lack of conceptual clarity and practicality. Hence, it has been attacked on its inability to throw light on some crucial questions such as factors that may lead to legitimate state intervention in a community mandate over land matters, articulation of the meaning of a community, demarcation of village lands as opposed to state land and the power of villages over communal land, land and gender relations, the mode of curbing land accumulation by richer peasants, the place of customary land tenures and institutions and how to tackle long standing inertia of centralized land administration.¹⁰¹

Fourthly, the people's ownership perspective as applied in the Ethiopian setting is critiqued to have undermined the agency of small farmers in a broad sense which encompasses entire range of political and economic relationships Ethiopian peasants have with the state.¹⁰² Dessalegn argues "... the agency of the men and women who are responsible for cultivating the land and managing the resources associated with it, and the institutions that have helped or hindered them in their endeavour, must be placed at the centre of the agrarian debate."¹⁰³ Human agency means, "...the right to the land without any outside imposition, the right to work [the land] freely and for oneself not for others...the right to dispose of the product from the land to benefit the producers themselves..."¹⁰⁴ Dessalegn continues to say "Ethiopian peasants have not enjoyed this kind of freedom, and I believe this has been responsible to a large extent for the failure of agrarian progress in this country."¹⁰⁵ He says one of the mysteries of Europe's progress has been the 'suborn growth' of freedoms.¹⁰⁶ During the Derg regime "agrarian change has removed some of the forces of peasant domination, but on the other hand, it has enhanced the power of the state over the peasant and inhibited the agency of the rural producers."¹⁰⁷ He also asserts "The central flaw of the land reform of

¹⁰¹ I Shivji and W Kapinga 'Implications for the Draft Bill for Land Act' (1997) 5 *Change*; See also Siege Pausewang 'Participation in Social Research in Rural Ethiopia' (1998) 26 *The Journal of Modern African Studies*.

¹⁰² Shivji and Kapinga, *supra* note 101.

¹⁰³ Desalegn Rahmato, *supra* note 22, P.21.

¹⁰⁴ *Id.*, P.22.

¹⁰⁵ *Ibid*

¹⁰⁶ *Ibid*.

¹⁰⁷ *Id.*, P.23.

1975...was its failure to provide peasant households with individual ownership and title deeds. All other weaknesses of the reform...arose from this basic mistake.”¹⁰⁸ Therefore, it is unclear if he opts for land private ownership or just secure land user rights.

Fifthly, as described earlier, the revisionist rendition of people's ownership paradigm prescribes for detailed rules to govern land relations seeing elaborate land law as major element in land reform to achieve certainty, efficiency, equity and the related reasons of curbing the discretionary power of land administrators.¹⁰⁹ However, emphasis on detailed land tenure rules can have implication of removing land relations from the rural producers and put them in the hands of lawyers and administrators. For instance, one might argue the sketchy nature of the provisions of the 1975 Rural Lands Proclamation permitted local administrations to contextualize decisions over land and develop their own land tenure practices or to apply their own customary rules. So, fewer rules might actually mean greater opportunity for the local people to take part in the business of land administration. In the context of Tanzania, Issa Shivji contended that land bills drafted for that country in 1990s by an international consultant were,

unworkable because they set out in intricate detail the powers and responsibilities of bureaucrats in the land administration machinery and sought to exert detailed control over their actions, which trampled on traditional community methods of controlling the exercise of discretion by public officials.¹¹⁰

To Shivji, less detailed land rules and thin state land administration machinery would enable traditional rules and institutions to have a say in the management of this critical livelihood asset, land,¹¹¹ because the condition of less land law opens a door for peasants to resort to customary tenure practices. John Bruce raises a similar argument.¹¹²

¹⁰⁸ Desalegn Rahmato, *supra* note 33, P.294.

¹⁰⁹ *Id.*, P.89.

¹¹⁰ As cited in Manji, *supra* note 83, P.90-91.

¹¹¹ *Id.*, P 92 See also Shivji and Kapinga, *supra* note 98.

¹¹² John Bruce and others, *Land Law Reform: Achieving Development Policy Objectives* (2006).

The more land law argument assumes that if detailed land administration laws had been issued, they would have been communicated and this in turn would have led to compliance and thus implementation by the authorities. One might not take these assumptions for granted for the rules might not be communicated properly due to several barriers including that of language and even if the rules were to be communicated effectively government authorities might not adhere to them.

Finally, the lawyers' argument for detailed rules is presented as a political. For example, Dessalegn claims the land question in Ethiopia has been politicized and there is a need to de-politicize it when he writes: "Land tenure issues must not be politicized...There will be no secure ownership until the politicization of land is brought to an end" by putting the land question in a firm legal framework.¹¹³ In Ambreena Manji's view the essence of the more law argument is "not intra-legal technical battles but are deeply imbricated in political and economic choices."¹¹⁴ Manji continues to say,

...the work of lawyers on the new laws aimed at liberalizing land relations has been centrally concerned with issues...such as the most effective means by which to control the exercise of discretion and encourage foreign investment. Far from being an exercise in the technicalities of how best to draft new laws' the more law paradigm pertain to land tenure 'choices' that are deeply political.¹¹⁵

5. CONCLUDING REMARKS

The privatization of land approach, like the people ownership of land perspective, is a quest for land tenure security, land productivity and development. In the pursuit of these objectives, the individual land ownership perspective gives greater privilege to property right in land and thus free

¹¹³ Bruce and others, *supra* note 112.

¹¹⁴ Manji, *supra* note 83, P.90 and 95 See also Ambreena Manji. 'The Politics of Land Reform in Kenya 2012' *African Studies Review* (2014), Vol.57, Issue 1 where she has argued that the 2012 land acts of Kenya have failed, both process and content wise, to reflect the redistributive ethos embodied in the 2009 Land Policy and the 2010 Revised Constitution of that country.

¹¹⁵ Manji, *supra* note 83, P.95-96.

transferability of land rights. The philosophy is simple: ‘grant to individuals property right in their land possessions; everything else will be taken care of.’ However, the privatization perspective launches incessant attacks against the people’s land ownership perspective, which is the bedrock of the existing land policy of Ethiopia, assuming that the land for all principle still underlies Ethiopia’s land policy. Therefore, privatization perspective fails to spot and thus explain the nature and mechanisms of the ongoing state-driven land alienation. Recent research findings have brought to light such failings of privatization perspective, suggesting land alienation, as a tendency supported by the state, is rooted in Ethiopia’s modern history.¹¹⁶

Additionally, the privatization perspective approach implicitly assumes that land issues in the country are exclusively determined nationally and thereby failing to consider the role of global actors who tend to advocate for land commoditization and back expansion of corporate farming in Ethiopia and are able to put their prints on the land law of the country, though not yet determinative, but significant. The privatization perspective glorifies transferability of land rights to the neglect of land relations in the history of the country which experienced gross injustice under private ownership of land.

Further, the privatization view reveals the elites’ stubborn persistence to impose a single land tenure system on the whole country in the name of enhancing agricultural productivity, economic development and modernization of land tenure systems. This prescription for a unitary approach is informed merely by what the elites think the people want as regards land policy. This negates conditions of land relations because Ethiopia manifests three major kinds of agricultural systems, each entailing a distinct land tenure system. A sedentary farming system prevails in highland parts that support about two third of the Ethiopian populace where the prevalent tenure practice is private landholdings, not private land ownership, augmented by communal landholdings. In the pastoral areas, which sustain about twelve percent of the Ethiopian population and covers about sixty four percent of Ethiopia’s total land mass, the dominant landholding is clan-based communal landholdings

¹¹⁶ Muradu Abdo, *supra* note 47, Pp.286-303; Teshome Emanu, Post-Cold War Ethiopian Land Policy and State Power in Land Commercialization in S Takeuchi (ed) African Land Reform under Economic Liberalization (2021):

used largely for pasturing. The third land tenure form is the system of shifting cultivation prevalent in the south western segment of the country. There are also continuums of nuanced land tenure systems within each of the three agricultural systems. Such plural land tenures emanate from government tenure rules, proximity to towns and migration of people from other agricultural systems and agro-ecological diversity. This demonstrates that the reality on the ground is characterized by multiple tenure rules and tenure conceptions.

The people's land ownership perspective, despite many criticisms against it, has a potential for advancing land tenure security, land productivity, social justice, pluralism, and development in the context where there is massive poverty and smallholder agriculture is the mainstay of the country, where industries and services cannot "offer sufficient jobs for the redundant peasants..."¹¹⁷ It appears that some variant of the people's land ownership enunciated in this article has inspired land rights embodied in the Ethiopian present Constitution.¹¹⁸ Land policy of the country as reflected in the FDRE Constitution and in some subsidiary land legislation is underlined by the idea that peasants and pastoralists need only to have some strands in a bundle of land rights, for example, use for welfare purpose, ownership of fruits and part of the disposition right mainly renting so that they could fulfil their basic survival needs - survival as free moral agents, an objective which could be tied to the right to life recognized in the Constitution.¹¹⁹ In this constitutional schema, in order for peasants and pastoralists to earn their livelihood, it is assumed that they do not need to have all the six sticks in the bundle of land rights that Edwin Baker refers to. Use rights for welfare purpose appear to suffice. Normatively speaking, in the Ethiopian approach, such land use rights are *ex-commercium* and shall return to the common land fund if and when a peasant to whom land is given starts obtaining sufficient income for themselves and their family in a permanent fashion from non-agricultural sources pretty much like the case where unemployment benefits cease to apply when a beneficiary gets other means that earns them adequate income.

¹¹⁷ Pausewang, *supra* note 101, P.76.

¹¹⁸ This is so because Edwin Baker was one of the expatriate scholars consulted by the Constitutional Assembly, the body responsible for designing the Constitution.

¹¹⁹ The 1995 FDRE Constitution, Arts. 14 & 15 which deal with the right to life that can arguably be construed to link with small farmers' the right to land.

However, the manner of articulation of Ethiopia's rendition of the people's land ownership paradigm has a digression effect. Scholarship, rhetoric of policymakers and politicians wittingly or unwittingly portray as if the people's land ownership exists intact in current Ethiopia. There are indications we cannot take this assumption for granted anymore. There is a need to undertake an empirical investigation of the issue of whether the fundamental ethos of the people land ownership enshrined in the Constitution is being significantly denuded by land alienation trends reflected in the practices of landholding expropriation, of commercial farmland acquisitions and of significant informal land transfers.¹²⁰ It appears that researchers have not captured these tendencies adequately. Apart from articulating the major contending land policy perspectives in the Ethiopian setting, another mission of this article has been asking this question. Further, it is worth investigating whether a contingent case for the people's land ownership paradigm is defensible in the circumstances of Ethiopia. One proviso for this conditional case for people's ownership of land is if a system of government which takes into account views of the rural landholding masses by bringing the silent peasants and herders to the center stage in politics; this envisages the prevalence in the nation of representative and deliberative democracy.¹²¹ An equally important precondition is the rule of law and functioning independent and competent judiciary.

¹²⁰ Muradu Abdo, *supra* note 47; Teshome Emanu, *supra* note 116; Addiswork T Teklemariam *et al*, The Rush to the Peripheries: Land Rights and Tenure Security in Peri-Urban Ethiopia *Land (2021)*, Vol 10 (2); Asebe R Debelo and Teshome Emanu, *Urban Development and the Making of Frontiers in/from Addis Ababa/Finfinne, Ethiopia*, Journal of Asian and African Studies (2022); C Ochieng, *Rethinking Land Reform in Africa* (2020) African Natural Resources Center https://www.dlci-hoa.org/assets/upload/land-documents/2020_080404_2940_748.pdf <accessed 21 January 2023>

¹²¹ Siegfried Pausewang 'Economic Reconstruction and the Experience of Ethiopian Peasant Communities' in Fantu Cheru and Siegfried Pausewang (eds) *Two Papers Presented at the Symposium on the Ethiopian Economy, with a Postscript* (1992).