NATURAL RESOURCES: STATE OWNERSHIP AND CONTROL BASED ON ARTICLE 130 OF THE REVISED CONSTITUTION

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Introduction

Current interest in the control and conservation of Ethiopia's natural resources has brought to light a number of fundamental and long standing questions concerning the scope and significance of Article 130 of the Revised Constitution: What natural resources does the Government now own? Which of these can it convey? Are its conveyances made prior to the Revised Constitution still valid? To what extent can it control the exploitation of natural resources?

An understanding of Article 130, which purports to set forth the general principles controlling ownership and use of natural resources, is obviously fundamental to any Government involvement in the development of these resources. But no serious effort has yet been made to deal with the vague and elusive phrases of this article. A brief review of available decisions indicates that the courts have, at best, avoided the few opportunities for interpretation which have thus far arisen. Now, however, His Imperial Majesty's emphatic directives and the inevitable demands of national planning and economic progress have prompted the preparation of extensive new legislation and the proliferation of schemes dealing with natural resource development. Thus, it appears that the time has finally come for an earnest attempt to understand the theoretical basis of Ethiopian natural resources law. It is the aim of this paper to make such an attempt.

A cautionary note must at once be sounded, for there is danger of falling into pious and unreal abstraction in pursuing the sketchy and highly theoretical sort of analysis which is all that the lack of information about Ethiopian constitutional origins and proper modes of constitutional interpretation currently permits. This danger may be diminished in some measure by its recognition. Even so, the present essay can be no more than an initial reference point for the really serious consideration of legal problems pertaining to natural resources which will ultimately be demanded by the critical importance of these resources in the overall program of national development.

General Interpretation

Article 130 of the Revised Constitution reads as follows:

(a) The natural resources of, and in the sub-soil of the Empire, including those beneath its waters, are State Domain.

(b) The natural resources of the waters, forests, land, air, lakes, rivers and ports of the Empire are a sacred trust for the benefit of present and succeeding generations of the Ethiopian People. The conservation of the said resources is essential for the preservation of the Empire. The Impe-

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rial Ethiopian Government shall, accordingly, take all such measures as may be necessary and proper, in conformity with the Constitution, for the conservation of the said resources.

(c) None of the said resources shall be exploited by any person, natural or juridical, in violation of the principles of conservation established by Imperial Law.

(d) All property not held and possessed in the name of any person, natural or juridical, including all land in escheat, and all abandoned properties, whether real or personal, as well as all products of the sub-soil, all forests and all grazing lands, water-courses, lakes and territorial waters, are State Domain.

1. *Scope of the Term "Natural Resources"*

The first and most obvious question to be asked is, "What are natural resources?" Comparable provisions in the constitutions of some other nations avoid this question by specifying particular resources.[1] The term "natural resources" is itself generic and does not have a generally accepted legal definition. In the absence of any guiding jurisprudence the bounds of its definition must be left almost entirely to delimitation by legislative and judicial decision. This vagueness does not, however, forestall further analysis, since there are certain classes of resources which can safely be assumed to constitute "natural resources." For purposes of this paper these classes are confined to three: (1) minerals, (2) forests,[2] and (3) wildlife, all of which have been chosen primarily because they are or will shortly be the subjects of legislation and, generally, because they are of the most immediate legal significance. Furthermore, questions relating to such other obvious classes of natural resources as land and water raise problems of utilization, conservation and technical and agricultural policy and reform which are far beyond the intended elementary scope of the present analysis; consideration of such other resources here will only be incidental to the general interpretation of Article 130.

2. *Significance of the Term "State Domain"*

As to these three categories of natural resources the following questions may be set forth as a starting point for discussion:

(1) *Does Article* 130 *require the total and inalienable ownership and control by the State of all of these resources, or does it permit all or any of them to be controlled by private persons?*

(2) *If Article* 130 *does not require total State ownership and control over these resources, then what is the extent of State control over them where they come under the ownership or immediate control of private persons?*

1. See constitutions of, e.g., Argentina, Article 40; Burma, Article 219; Greece, Article 17; A. Mexico, Article 27; Syria, Article 21(7); Venezuela, Article 60(17), all as contained in A. Peaslee, *Constitutions of Nations* (2nd ed., 1956).

2. Ethiopia's first extensive forestry legislation was recently promulgated following many years of preparation and serious debate. See State Forest Proclamation, 1965, Proc. No. 225, *Neg. Gaz.*, year 24, no. 17; Private Forests Conservation Proclamation, 1965, Proc. No. 227, *ibid.*

To begin with, the broadest possible reading of Article 130, taking the English version of paragraph (a) of the article in isolation, would impose absolute and inalienable State ownership of all natural resources within the Empire. As will be demonstrated below, this reading is not fully supported by the Amharic version, but it has apparently acquired a certain ready acceptability which should be refuted. To begin with, so sweeping an interpretation is altogether unwarranted and unnecessary in view of past practice both within the Empire and in other countries and, more particularly, the tenor and wording of the Constitution itself. Moreover, the establishment of a single inflexible rule would be wholly unrealistic. Natural resources are not intrinsically subject to any uniform governing principle. Different natural resources are necessarily used in different ways so that vast and diverse bodies of specialized law develop in respect of each of them. In the United States, minerals in the land are owned by the land owner.[3] In many of the less developed countries they are owned by the state.[4] Finally, if private ownership of land or *any* natural resource at all is to be possible in Ethiopia, then the provisions of paragraph (a) of Article 130 cannot be taken at face value but must somehow be limited and understood in a broader context.

It seems an inescapable conclusion that paragraph (a) was not intended to confiscate every scrap of privately owned land in the Empire. Private ownership and exploitation of land is a basic tenet of Ethiopian society, and the Constitution, including Article 130 itself, is ripe with references and implications to the continuing private ownership of land.[5] But paragraph (a) certainly does classify some or all "natural resources" as "State Domain." The development of a theoretical understanding of this concept of State Domain is the first step in the further analysis of the problems already set out.

The term "State Domain" as applied to natural resources seems to have been imported from France, where the concept has been highly developed. It follows that the French uses of this term will provide helpful points of reference for Ethiopian law, though they certainly cannot be binding or conclusive.

In France the domain of the State is today divided into public and private sectors. The public domain is comprised of that property owned by the State which is devoted to public use. The private domain is comprised of that property owned by the state which is "... of the same kind as that of private persons."[6] This distinction between the public and private domains of the State is implicit in

3. *American Jurisprudence*, vol. 36, "Mines and Minerals," sec. 6, p. 285.

4. See, e.g., the constitutions of Argentina, Burma, Mexico and Syria, cited above at note 1; *Laws of Kenya*, vol. 6, Mining, Chapter 306, sec. 4; *Laws of the Federation of Nigeria and Lagos* (1958), vol. 4, Minerals, Chapter 121, sec. 3(1); and generally, pp. 1-2 of unpublished commentary to the Mining Code of Saudi Arabia, 1963.

5. See paragraphs (b), (c) and (d) of Article 130; paragraph (d) of Article 31; Articles 43, 44 and 60; Civ. C., Title VI and Title VII *passim*. Arguments in support of this assumption are advanced throughout the present essay.

6. M. Planiol, *Treatise on the Civil Law* (11th ed. 1939) (transl. Louisiana State Law Commission, 1959), sec. 3080.

Ethiopian law, presumably having been carried over from the French sources of the Civil Code of 1960.[7]

Under modern French law the essential characteristic of property in the public domain is that it is neither alienable nor prescriptible. These restrictions stem from the ancient principle that it is necessary "to protect the immediate possessions of the public and mainly its means of communication . . . against public encroachment or governmental inefficiency. Ever since Roman days the *res publicae* have been *extra commercium*."[8]

Such restrictions did also at one time affect the private domain, but this was due not to overriding considerations of public interest but rather to a need "to obviate the ruin of royalty at a time when taxes could not be freely increased" and when property belonging to the King, property which was in effect "private domain," had to be closely guarded.[9] This need has long since disappeared and the restrictions with it. The Ethiopian Civil Code, in its turn, now provides that property in the public domain is inalienable[10] and subject neither to "possession in good faith" as regards corporeal chattels nor to usucaption as regards immovables.[11] But these limitations apply only in respect of the public domain and not to "other property belonging to the State."[12]

The practical distinction between property in the public domain and property in the private domain thus settles on this issue of alienability — the right of the State to dispose of the property. Classification of State property in one or the other of these categories alters the nature or extent of State control over that property only in his respect. Even when property has been classified within the private domain, nothing either compels the State to sell the property or prevents it from setting limiting conditions in respect of any sale which it chooses to make.

Given the existence of the private domain in Ethiopian law it is possible to formulate the following first premise for an understanding of Article 130: *The classification of natural resources within the State Domain does not compel the retention of these properties within the State Domain.* In other words, private ownership of natural resources is at least *possible* even under the broadest reading of this provision of the Revised Constitution. For, if properties within the private

7. Article 1444 of the Civil Code provides in part that all state property other than property in the public domain "shall be subject to the provisions [of the Code] relating to property privately owned." This defines the private domain. Articles 1145-49 then describe and distinguish property in the public domain: Article 1445 declares that the public domain includes property "left at the disposal of the public" or "destined to a public service... and principally or exclusively adapted to the public service concerned." Article 1446 declares that particular properties, including roads, seashores and certain buildings, are part of the public domain.

8. Planiol, work cited above at note 6, sec. 3068.

9. *Ibid.* In Ethiopia, certain Crown property is still protected in much this way. See, e.g., Article 19(b) of the Revised Constitution, which declares "realty registered in the name of the Crown" to be inalienable. Such property does not today fall within the State Domain but comprises a wholly separate, and distinct category, which is ordinarily referred to as the "Crown Domain" or the "Imperial Domain."

10. Art. 1454.

11. Art. 1455.

12. Art. 1444(1).

domain are alienable, they can be alienated to private persons and private ownership must follow. To the extent that such properites have been alienated, paragraph (a) can be reduced to a statement of the theoretical origin of all ownership of natural resources with the State. Or, if the word "ownership" is tendentious in this context, it may be better to say that the State does itself in theory continue to "own" all natural resources but that it conveys to private persons limited rights in property which are equivalent to practical ownership, retaining only its residuary rights to the return of the property pursuant to paragraph (d) in the event of escheat or abandonment.[13]

This practical ownership, this bundle of rights equivalent to ownership, has been and may yet again be lawfully granted to private persons in respect of State properties in the private domain. Article 1454 of the Civil Code provides that even property in the "public domain" may be alienated upon passage of a special law excluding the property from the public domain. Furthermore, Article 31(d) of the Revised Constitution provides that the Emperor "makes grants from abandoned properties, and properties in escheat, for the purpose of recompensing faithful service to the Crown." Then, the conservation language of paragraphs (b) and (c) of Article 130 itself certainly implies extensive private use of resources. And the language of paragraph (d), the words "not held and possessed," "in echeat" and "abandoned," clearly assume continued private ownership of land. Thus, the Constitution, the Civil Code and the very nature of the Ethiopian economy seem inevitably to demand private "ownership" of land, and land is the most basic of all natural resources.

Taking these things into account, it requires only a very short step from the suggested first premise, that private "ownership" of natural resources is possible, to the following second premise: *Any grant to any person of land or any other natural resource lawfully made by the State and generally accepted as having been so made is valid and effective, the State retaining at most, certain residuary rights which are less than ownership but sufficient to permit such land or natural resource to remain part of the State Domain in satisfaction of possible requirements of paragraph (a).* A corollary to this second premise must be that: *Grants of natural resources made by governmental and tribal authorities prior to their amalgamation in the present Ethiopian State were confirmed by the State as of the time of the accession of these authorities thereto and are as valid as such grants subsequently made by the present State.*[14]

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13. The theory of residual state ownership finds particular support in the Ethiopian tradition of feudal land tenure. While the principle itself has long since been abandoned in practice, it seems to be generally accepted by scholars that all land in the Empire was theoretically held of the Emperor and at his pleasure, reverting to him in the event of failure of the tenant to provide adequate service or loyalty. See E. Ullendorf, *The Ethiopians* (1960), p. 187; R. Pankhurst, *An Introduction to the Economic History of Ethiopia* (1961), p. 179.

14. It seems fair to assume that all privately owned land in Ethiopia was at one time conveyed by such a grant. The existence of such a conveyance would probably be extremely difficult to prove in all but the most recent cases, so that a proper rule would have to presume the grant in all cases of doubt. The rules on "prescription" or "usucaption" would undoubtedly support such a presumption; see text accompanying note 36 below and the present law on this subject, Civ. C., Arts. 1168-69. For the earlier rules, *cf.* The Prescription Proclamation in Civil Matters, 1948, Proc. No. 97, *Neg. Gaz.*, year 7, no. 6, particularly Arts. 16-22.

As already indicated, however, the preceding argument stemming from a broad reading of paragraph (a) is based on the English version of Article 130. This argument may in fact be superfluous. If a single comma were omitted so that the first line of the paragraph read, "The natural resources of and in the sub-soil of the Empire, including those beneath its waters, are State Domain," the paragraph would be reduced to a mere declaration of State ownership of sub-soil resources, excluding land, forests and wildlife. This would eliminate the need for extended speculation about theoretical qualities of the State Domain which the actual punctuation of the English version unfortunately seems to require.

Happily, there exists a substantial possibility that the published English version is in error. In fact, the Amharic version of the article, which should be definitive, probably confirms the English reading of the paragraph without the comma. Re-translated into English, the Amharic version of paragraph (a) reads roughly as follows:

> Those resources existing in the land of the Empire, including those beneath the waters, are State Domain.

Also, earlier English drafts of the article as prepared by the Commission on Constitutional Revision include the following opening sentence:

> The natural resources in the sub-soil of the Empire, in its forests, and in, of and beneath its waters, as well as the air, lakes, ports and forests, are a sacred trust for the benefit of the present and succeeding generations of the Ethiopian people.[15]

The remainder then proceeds substantially as does the present article. The change to the present version seems to indicate an intention to isolate sub-soil resources from the other natural resources mentioned, arguably leading to the conclusion that paragraph (a) does apply only to the sub-soil. Perhaps the entire problem could be resolved, or at least better understood, by further research into constitutional origins. For the present, however, such research is not possible.

Particular Natural Resources

It remains now to enter into more detailed consideration of the proper scope and limitations of State control over certain natural resources. It must be made clear at the outset that varying demands compel varying conclusions and, in short, that not all resources should be subject to the same treatment and legal status. The questions of most immediate importance in respect of each of these particular resources differ, so that the examinations which follow are neither parallel in reasoning nor identical in conclusions. The differences and their causes should become clearer as the discussion proceeds.

1. *Minerals*

The authority of the Government to control the exploitation and conservation of minerals would appear generally to be virtually complete. The experience of other countries seems here to support the broadest possible reading of Article 130: that an owner of land has no significant rights of ownership in respect of the minerals contained in the land.

15. Draft of February, 1954.

Again, analysis may properly begin with reference to French law. Ownership of land in France, as in the common law countries, includes, at least theoretically, the minerals in the sub-soil.[16] The extent of private ownership of minerals in France has, however, been considerably narrowed during the past hundred and fifty years, so that at present it comprehends only the right of the owner of land to collect a "surface rental" in respect of underlying mineral concessions. While in theory the ownership of the soil still "extends indefinitely in depth,"[17] the effect of various laws has been "to make a mine a piece of property distinct from the surface and to ordain that it is no longer at the disposal of the owner of the land."[18]

Utilitarian considerations have forced this distinction. Since ore bodies do not coincide with the boundaries set up for surface rights, there would be great obstacles to mineral development if exploitation were to depend upon the will of individual owners of surface rights. This is especially true where plots of land are relatively small as in France. The State, desiring a systematic and economic exploitation of its mineral resources, has been forced to assume control over these resources and, when a mining lease expires, now takes over full ownership of the relevant mineral rights in its own behalf.[19]

Article 130 would, in light of these developments, seem to have sought to make explicit in Ethiopian law what is already implicit in French law. While the common law approach still retains in full force the concept of private ownership of minerals, it seems obvious that Article 130 was intended to assimilate the French approach. The same utilitarian consideration would appear to have been relevant. Certainly there is greater likelihood of successful mineral exploitation in Ethiopia under Government control than under individual private auspices. This is not merely a question of the size of individual land holdings. The Government has greater access to investors and technically competent people, greater capacity for promotion, and stronger inclination to utilize or assure the utilization of these resources for the national and public interest.

In addition, legal and economic theory aside, past practice and policy in Ethiopia would appear conclusive of the matter in themselves. As already indicated, the Government has freely undertaken to grant concessions over minerals, and numbers of such concessions are presently in existence. The power to grant these concessions, which must rest on ownership of the minerals, has well documented support in Ethiopian mineral legislation of the pre-constitutional era. An Imperial Decree of the 18th April, 1928, provided that:

> All wealth of the sub-soil of Ethiopia is state property and in consequence beyond the power of disposal of the land owner ... There are assimilated to mines, from the point of view of the decree, the beds of mineral or fossil substance susceptible of special use, with the exception of building materials which may be freely disposed of by the

16. Planiol, work cited above at note 6, sec. 2391.
17. *Ibid.*
18. *Ibid.*, sec. 2394.
19. *Ibid.*

> land-owner ... The exploration for all minerals in their natural beds is permitted only to those persons or companies provided with a "permit of exploration" granted by the Ethiopian Government.[20]

It is not entirely clear whether this Decree remains in force, but it certainly ought to be a powerful directive for interpretation of Article 130. Its substance was apparently further confirmed by Imperial Decrees of 29th November, 1929 and 5th December, 1929.[21]

It does remain possible to argue that the State has in the past conveyed to private persons the full measure of its ownership of certain mineral deposits. If minerals are within the private domain this possibility cannot simply be dismissed. It might therefore be useful to maintain that minerals are rather in the public domain. That position, however, is not easily defensible in the light of the Civil Code provisions defining and describing the public domain.[22] Moreover, it might even be legally inconsistent with any exploitation at all of minerals by private persons. Clearly, some further research into this question is merited. Since, however, the Government policy of granting concessions for, rather than ownership of, minerals is of relatively long standing, there are unlikely to be any claims to ownership of minerals founded on modern grants. As to historic grants and rights appertaining to ownership, it can be fairly assumed that the Ethiopian economy having been traditionally based chiefly on agriculture and only marginally on mining, concepts of land tenure and ownership have had to do only with use of land or soil for agricultural purposes. The right to exploit resources in the "sub-soil" would not very likely have been relevant to the traditional Ethiopian concept of land ownership.[23] So, it is practice rather than theory which justifies a general assumption that the Ethiopian State now owns all mineral resources within its boundaries, subject to a dim possibility that private ownership of minerals may exist in a few cases on the basis of previous agreements.

It must, however, be noted and emphasized that the Decree of 18th April 1928, quoted above, does clearly provide for a single general exception to total State ownership and control of minerals: "building materials" or, less grammatically but more commonly, "quarries."

This is a well-established exception in the law of France, where the owner of land has complete freedom to exploit quarries thereon.[24] Returning to their

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20. Excerpted in the preamble to the Proclamation for the Control of Transactions in and Concerning Gold and Platinum, 1944, Proc. No. 67, *Neg. Gaz.*, year 3, no. 11. The full text is reproduced in A. Zervos, *L'Empire d'Ethiopie* (1930), p. 306.

21. Excerpted as indicated, note 18. The full text of the Decree of 29th November, 1929 appears in Zervos, work cited above at note 20, p. 303.

22. Arts. 1445-49.

23. Limited research has failed to reveal documentary support for this contention, which the Emperor's historically paramount position in respect of land tenure and "ownership" would seem to make inevitable. Article 1209 of the Civil Code now provides for private ownership of sub-soil rights only to the "extent necessary for the use of the land," and it would seem that something like this would have been intended in past grants of land ownership. The practice in recent years, even before promulgation of the Revised Constitution, has been to confer mineral concessions rather than outright ownership of minerals. See, e.g., the decrees cited above at notes 20 and 21 and copies of various mining concessions dating as early as 1899 included in Zervos, work cited above at note 20, pp. 301-18.

24. Planiol, work cited above at note 6, sec. 2399.

original premise, that ownership of land extends indefinitely in its depth, the French have not derogated from the liberty of owners as regards quarries. No concession or permits from the State are required for the exploitation of quarries. State control is confined to government inspection and the requirement that the owner of land who desires to open a quarry declare his intention at the town hall.[25]

There is good reason to interpret Article 130 as creating substantially the same situation in Ethiopia. To begin with, the public interest in developing quarries is not so great as the interest in developing other minerals and does not require the same degree of State control. Nor is there the same concern of society as a whole in the proper exploitation of quarries. The area required for their development is small. Their exploitation is dependent neither on large outlays of capital nor on the extensive construction of underground works, which would decrease the likelihood of such exploitation by owners of lands; indeed, private ownership may actually favor their increased use in private construction. Further, quarries are neither as rare nor economically as essential as other minerals. And, finally and most conclusively, quarries are usually found at or near the surface of the earth and may actually even comprise the land or soil itself. So, from a policy point of view it seems entirely reasonable that quarries should be deemed assimilated rather to the soil than the sub-soil, and should, therefore, belong to the owner of the soil.

This position is somewhat more difficult to maintain on sheer literal analysis of the English versions of paragraphs (a) and (d) of Article 130. But it does derive some support from the express stipulation in paragraph (d) that "products of the sub-soil" are State Domain. The implication is clear, though not entirely persuasive, that the stipulation of products of the sub-soil necessarily excludes the products of the soil itself, such as quarries and, with additional arguments set out below, certain forests. Put another way, the specification of particular natural resources under paragraph (d) might be intended to bring these under the actual and not merely the previously suggested theoretical "ownership" of the state. If this approach is at all acceptable it provides an explanation for the otherwise apparently useless repetition in paragraph (d) of the principle already stated in paragraph (a).

A much stronger argument for such an interpretation can be made by holding to the narrower Amharic version of paragraph (a), already referred to. This version would classify as State Domain only those resources existing *in* the land; and it can be argued that quarries are rather "of" the land than "in" it. Ignoring the unwelcome punctuation of the English version, supporting reference for an interpretation of the Amharic word *maret* may usefully be made to the equivalent English term "sub-soil." The Amharic phrase *b'maret wust*, "in the land," may then be said to mean "of and in the sub-soil," excluding the soil itself and, consequently, quarries.[26] This is admittedly a self-serving method for evading the difficulties posed by the English version, but it does have at least a limited theoretical validity and the manifest virtue of simplicity.

25. *Ibid.*

26. This can be done on a theory of interpretation analogous to the venerable "parole evidence" principle of the common law, which holds that external statements and writings cannot be used to vary the express content of a document, but may be utilised to clarify the meaning of certain words and to explain the intention underlying the words used in the document where this is not clear on the face of the document.

There is at least one further argument in favour of the interpretation here suggested: Setting aside some highly questionable court decisions, there seems to have been no law previous to the Revised Constitution which purported to deprive land owners of rights over quarries. On the contrary, the above-mentioned Decree of 18th April, 1928 specifically exempted "building materials" from State ownership. Articles 43 and 44 of the Revised Constitution stipulate that "life, liberty or property" may not be taken "without due process of law" and that "No one may be deprived of his property" except upon "ministerial order issued pursuant to the requirement of a special expropriation law... and except upon payment of just compensation." If Article 130 did make State Domain of quarries it would have worked a confiscation of property inconsistent with at least the spirit of these provisions.[27] While this is by no means a conclusive basis for interpretation of Article 130, it must be considered unlikely that one provision of the Constitution should work in contravention of the principles established by its other provisions.

The suggested distinction between quarries and other minerals is not wholly consistent with various judicial decisions confirming the power of the Imperial Highway Authority to "take by eminent domain any privately owned lands for public use and fix the compensation for any buildings, crops, vegetation or other fixtures on the lands so taken." The theory behind these decisions appears to be that the Highway Authority Proclamation does not specifically state that compensation must be given for the taking of stone, sand and other building materials or quarries.[28]

The eminent domain or expropriation power given in the Proclamation has, in fact, been effectively negated both by the above-mentioned Article 44 of the Revised Constitution, imposing specific expropriation procedures and requirements, and by the further procedures and requirements contained in the expropriation provisions of the Civil Code.[29] Even if Article 44 did not retroactively invalidate the statutory provision conferring this broad power on the Highway Authority, because Article 122 states only "future legislation ... and acts" inconsistent with the Revised Constitution are null and void, it would seem that any expropriation proceedings initiated in the exercise of that power after 1955 should be required to conform to constitutional standards.[30] In any event, the broad repealing article

27. Of course, it is not possible for a part of the Revised Constitution to be "unconstitutional," and as a matter of legal analysis it is not difficult to reconcile the broad interpretation of Article 130 with the language of Articles 43 and 44. A necessary basis for a claim under the latter articles is that the property taken have belonged to the person asserting the claim. If Article 130 is interpreted as, in effect, excluding natural resources from the realm of private property, there could be no unconstitutional "taking" of such property. However, this line of reasoning merely underlines the conclusion that the broad interpretation of Article 130 would subvert the *spirit* of Articles 43 and 44.

28. Highway Authority Proclamation, 1951, Proc. No. 115, *Neg. Gaz.*, year 10, no. 5. For decisions, see, e.g., Ayana Woyessa v. Imperial Highway Authority (Sup. Imp. Ct., Feb. 6, 1956) (unpublished); Lelissa Beyene v. Imperial Highway Authority (Sup. Imp. Ct., 1956, Civil App. No. 475/47) (unpublished); but cf. Imet Tsigue Wolde v. Imperial Highway Authority, (H. Ct, 1956, Civil Case No. 657/47) (unpublished), as confirmed by Supreme Imperial Court, Civil Appeal No. 137/48 (unpublished).

29. Arts. 1460-88.

30. Unless, perhaps, post-1955 acts performed pursuant to a pre-1955 statute were considered also to be insulated from constitutional restrictions by the limiting word, "future," in Article 122. See R. Means, "The Constitutional Right to Judicial Review: Threshold Questions," *J. Eth. L.*, vol. 3 (1966), pp. 175, 179 *et seq.*.

of the Civil Code should conclusively have foreclosed further exercise of the power by removing the statutory provision altogether.[31]

Of course, the suggestion that expropriation proceedings are required for the taking of quarries necessarily assumes that the quarries to be taken are private property. Only in a single instance has a court suggested otherwise,[32] and the reference in that case was entirely gratuitous. But the courts seem to have upheld the need for and power of expropriation only as to the land necessary for the exploitation of quarries and not for quarry materials themselves. The best that can be said is that the cases are inconclusive. And since the varying positions taken by the courts have derived from the presumed existence of a power so broad that it can no longer be validly established nor persuasively argued to exist, they should be disregarded.

Article 130 should tentatively, then, be read as excluding from State ownership those natural resources of the Empire which are part of the soil. If existing private ownership of the soil is accepted on the theory of interpretation of paragraph (a) of Article 130 already advanced, then the definition of the ownership of land as inclusive of quarries is an acceptable refinement of that theory on the considerations here outlined. If land is part of the State Domain only to the extent of residuary rights remaining after the land itself has been conveyed to a private person, then any such private person possesses the right to use quarries within the land, such quarries being, legally, part of the land and not intrinsically distinct from it as, at least for theoretical purposes, are other minerals.

In summation of the significance of Article 130 with respect to minerals, a reasonable view might incorporate the following principles:

(1) *Mineral resources fall into two classes:*

(a) *minerals in the sub-soil as to which State ownership and control may be assumed to be complete and total, although private ownership of such minerals is at least a theoretical possibility; and*

(b) *quarries, which are theoretically part of the soil and whose ownership is therefore not intrinsically distinct from the ownership of surface and land rights generally.*

(2) *The State may grant concessions for the exploitation of minerals and even the ownership of the minerals themselves. Policy favors the grant only of concessions.*

(2) *Forests*

While the extent of State control over most minerals is reasonably clearcut and definite, issues of ownership and rights in and over forests present more complex problems. The first question to be raised in determining the legal extent of State

31. Civ. C., Art. 3347, as applied to Arts. 1460-88 thereof; see generally, G. Krzeczunowicz, "A New Legislative Approach to Customary Law: the "Repeals" Provision of the Ethiopian Civil Code of 1960," *J. Eth. Studies*, vol. 1, no. 1 (1963), p. 57.

32. Alemou Tadesse v. Imperial Highway Authority (H. Ct., 1948 E.C., Civil Case) (unpublished).

control over forests is whether Article 130 was intended to convert them all to State Domain.[33]

The earliest important expression of concern for the forests of the Empire in modern times occurred during the reign of the Emperor Menelik II. The recognition of the forests as productive timber resources for the national economy was then first secured.

> Menelik employed foreign forestry experts and set up the first self-contained and consequent forest policy in the country when he liberated the forests from their subjection to agricultural purposes and *declared all forests including all trees on private lands State property.*[34] (Emphasis added.)

This apparent attempt to bring all trees and forests into what would now be the State Domain was certainly only partially successful. While notable advances in the protection and reforestation of the country were made during the Emperor Menelik's reign the nature of individual concern with preservation of rights of ownership and the relative weakness of the central government made the projected confiscation of property unworkable. Such a plan even today remains impracticable since, if applied, it would discourage any private reforestation or conservation efforts on the part of land owners, who would seem to face the loss of the use of any property where forests were permitted to grow. To be fair, however, it is not really clear that this early plan was intended to go so far. Accordingly, it is appropriate for present purposes to accept it primarily as an expression of concern over a still significant problem: the preservation of Ethiopia's fast diminishing forest resources.

It appears, though, that the broadest reading of Article 130 would amount to re-enactment of the unworkable law of Emperor Menelik's time. For even if forests can be excluded from all but the "theoretical" State Domain on the reasoning already advanced in interpretation of paragraph (a) with respect to ownership of quarries, nevertheless paragraph (d) again specifies that "forests" are part of the State Domain. This further specification must, as already suggested, have some additional significance, most probably that the items specified are to come under the actual and not merely the theoretical "ownership" of the State. There are, however, at least four counter arguments to support a reading of paragraph (d) which would not make "State property" of "all forests including all trees on private lands."

First, it can very plausibly be urged that the term "forests" means only "virgin" or natural forests, and does not include forests created by man. — Indeed, there are substantial problems presented in attempting to define just what constitutes a forest. — Strictly speaking, trees cultivated by man for commercial purposes

33. The practical answer to this question has already been provided with the recent enactment of the three forestry laws cited above at note 2. These laws are based on the conservation power specified in paragraph (c) of Article 130, and in presuming the existence of privately owned forests they render moot most questions of state ownership. The text analysis serves chiefly to justify the legislative interpretation and proceeds almost entirely on theoretical grounds.

34. Imperial Ethiopian Government, Ministry of Agriculture, *Second Five Year Development Plan* (1962-67), p. 6. (Emphasis added.)

are rather "fruits of the soil" than a natural product or capital element thereof; consequently they are not a *natural* resource.[35] An interpretation along these lines must be accepted if the State is to encourage reforestation and conservation efforts by private land owners.[36]

Second, a strictly verbal approach to paragraph (d) makes it at least arguable that the phrase "All property not held and possessed in the name of any person" governs all the later words of the paragraph so that only forests not held and possessed in the name of any person are State Domain. But this argument is tenuous at best. The plural verb "are" indicates that the phrase in question is merely the first in what is apparently a list of various kinds of property comprising the State Domain, so that the phrase does not govern and is not just further elaborated and defined by the remainder of the paragraph. Surely the paragraph was not meant to convey that only those lakes and territorial waters not held or possessed in the name of any person are State Domain.[37]

Third, if, as seems likely on the basis of the extended arguments which follow, forests within the State Domain are alienable and prescriptible, then those virgin forests which, under the literal impact of paragraph (d), are at any time included within the State Domain can still be sold or granted in accordance with any law on the subject, or granted by the Emperor under Article 31(d) of the Revised Constitution. And if forests within the State Domain can be granted or sold to private persons under the present Constitution, there is no reason why they could not have been properly granted or sold prior to adoption of the troublesome provisions of Article 130.

What Article 130 comes down to then is that virgin forests properly granted, conveyed or confirmed to private persons by the State, whether before or after the coming into effect of the Revised Constitution, are the property of such persons. All other virgin forests are State Domain.

This analysis leaves aside the highly complex problem of usucaption of such forests but does provide at least a starting point for consideration of that problem. Since usucaption under the Civil Code requires as one of its elements the payment of land taxes for fifteen years,[38] there is a strong case to be made that in accepting such payments the Government acknowledges the taxpayer's right to the property and thus provides him with a kind of grant.

Fourth, and in support of the three previous arguments, it can be argued with respect to all forests deemed to have been privately owned as of November 4, 1955, that since forests have in fact remained under private ownership after Emperor Menelik's decree, Article 130 cannot be interpreted as a possible further attempt to confiscate them except by doing violence to the spirit of Articles 43 and 44 of the Revised Constitution.[39] The expropriation law referred to in Article 44 as the

35. Planiol, work cited above at note 6, sec. 2790; and see generally *Encyclopaedie Dalloz-Droit Civil*, vol. 2, "Fruits - Arbres," paras. 45 *et seq.*

36. See Art. 5(a), Private Forests Conservation Proclamation 1965, cited above at note 2, requiring the owners of private forests to obtain a permit for exploitation only where such forests are natural forests or are to be exploited for commercial purposes.

37. See Civ. C., Arts. 1228-56, and the Maritime Proclamation, 1953, Proc. No. 137, *Neg. Gaz.*, year 13, no. 1.

38. Art. 1168.

39. See notes 27 and 29 above and accompanying text.

necessary basis for the taking of private property appears in part in the Civil Code of 1960 and stipulates that property may be taken only where "required for public purposes."[40] Respect for the rights of private ownership compels the conclusion that no property is really required for a public purpose where the owner is capable of fulfilling and does, when so requested, in fact fulfill by himself any interest of the public which might otherwise conceivably justify the taking of that property.

For the present, however, all these arguments are academic. No one seriously contends that the State has the right to take private forests without paying compensation, or that such taking is or will be generally necessary with or without such compensation. Specific instances where the needs of conservation may in fact require the confiscation of private forests under a proper law will be discussed below.

In any case, Article 130 does clearly indicate that forests on land owned by the State are State Domain, just as are those forests on land which may come to the State by escheat or abandonment. The second important question to be raised in connection with forests is whether forests within the State Domain must remain there. In other words: *Do State forests belong to the public domain or to the private domain, as those two categories have so far been explained?*

In France, State forests are included within the private domain. The explanation for this is reasonably straighforward:

"Formerly, great importance was attached to the preservation of the great trees of the forests, principally for the upkeep of the fleet.... And forests were one of the main sources of royal wastage because it was always easy to make money out of them and to find purchasers for them."[41] Thus, some forests, the former personal possessions of the King, came to be owned by the State and to compose part of the "private domain." But there was no essential communal or public purpose — other than the maintenance of the navy, which has now long ceased to have need of wooden masts and hulls — which required State ownership of all forests. While the State did succeed to the former royal domains, including the royal forests, as successor to the monarchy and as a matter of course, it neither succeeded to nor confiscated forests owned by private persons. There was no *public need* for any such succession or confiscation. Now, State forests in France have even become prescriptible though they were neither prescriptible nor alienable under the old regime. And, finally, although authority for the sale must still be specifically granted by law, State forests in France are now alienable.[42] It may be concluded, then, that the attributes of inalienability and imprescriptibility have no modern justification in respect of forests and that the existing remnants of these attributes are essentially vestigal.

Nothing in the law of Ethiopia would require a different situation here. State forests are not classified within the public domain under specific provisions of the Civil Code, and there is no apparent public purpose which would either justify or require such a classification under the general provision defining the

40. Art. 1460.

41. Planiol, work cited above at note 6, sec. 3081.

42. *Ibid.*, secs. 3081, 3089.

public domain, Article 1445. The only possible exception might be for particular forests designated as parks or national reserves. It then follows that State forests in general have the same legal status under Ethiopian law as they do under French law: they are part of the private domain and therefore can be sold or granted to private persons.

Furthermore, there are good reasons why Article 130 should not even be interpreted to classify all forests as private domain and thus to expropriate forest rights granted before its effective date, November 4, 1955. This classification is necessary, if at all, only in the theoretical sense already explained in which all natural resources might be made State Domain under paragraph (a) while acknowledged private rights of "ownership" nonetheless remain in force. Forests within the State Domain in the fullest sense, that is forests subject wholly and exclusively to State ownership, can be limited to those forests owned by the State in its own right in 1955 and those which come to it by escheat or abandonment. The Emperor, before 1955, had alienated to private persons a number of forest properties, and there is no reason to assume that the Revised Constitution abrogated these transactions, which had been effected in a thoroughly legal exercise of His power, under Article 15 of the 1931 Constitution, to establish personal estates. Rather, the Emperor's continuing power to convey certain properties, under Article 31(d) of the 1955 Constitution, indicates precisely the contrary. The prior occurrence of these transactions also lends further support to the proposition that State forests fall within the private domain. There is only a single modern ground for State concern with forests, and this, even at its furthest reach, by no means requires State ownership of all forests.

The ground in question is conservation. Paragraphs (b) and (c) of Article 130 make conservation measures obligatory. Laws promoting and enforcing such measures are necessary as regards both publicly and privately owned forest lands. The French *Code Forestière* goes so far as to require governmental approval for the clearing of privately owned woods and forests.[43] It sets up definite criteria upon which denial of such approval must be based.[44]

In fact, most modern states have found it necessary to impose some restrictions on the cutting of forest trees, whether publicly or privately owned, as well as positive requirements of exploitation, reforestation and conservation activities. The scope of legislation imposing such restrictions and requirements is almost entirely dependent on the will of the State legislature. In Ethiopia too, this must be the case under paragraphs (b) and (c) of Article 130.[45]

43. Art. 157. *Cf.* Article 5, Private Forests Conservation Proclamation, 1965, cited above at note 2.

44. Art. 158.

45. It should be noted by way of caution that the phrase "Imperial Law" or "*Ē negusa negist mengist hig*" used in paragraph (c) probably does not imply any special kind of law distinct from "law" as referred to elsewhere in the Revised Constitution. This special usage, which does not otherwise appear in the Constitution, is most plausibly explained as an attempt to distinguish between Empire-wide or Imperial Law on one hand, and Eritrean or local law on the other. Its effect would then have been to bring the control of all Eritrean natural resources under the jurisdiction of the central Government during the period of the Federation.

The only important limitation on the power to impose such restrictions and requirements is, once more, the prohibition contained in Article 43 of the Revised Constitution against the taking of property without due process of law. The practical significance of this provision is that no requirement of conservation can be imposed, even by law, which amounts to a "taking" of property. Where the public interest in any particular privately owned forest would require substantial limitations on the right of the owner to use or profit from that forest, there would then be a proper situation for expropriation proceedings in accordance with Article 44 of the Revised Constitution and the Civil Code. Legislation imposing forest conservation requirements should provide a means for determining when a "taking" of property might result from the imposition of such requirements and for securing just compensation in these cases.[46] Given the likelihood that most forest conservation techniques can be implemented by private persons with relative ease and without substantial damage to their rights to utilize their forest property, expropriation cases ought to arise only rarely and then in the special instances where forests are necessary as "national parks" or, in certain locations, as permanent barriers against erosion.

It remains to note again that, although both forests and minerals are declared by Article 130 to be part of the State Domain, the conclusions here presented suggest different treatment for each of these categories. This anomaly is attributable more to practical considerations than to anything express or implied in the wording of Article 130.

Clearly, all forest and mineral resources in the Empire have some connection with the State Domain. As is here argued, they are, when owned by the State, a part of the private sector of the State Domain and can be transferred from this private domain to private persons. When the State has in the past made transfers of property from its own domain, it has transferred land — that is, the soil as distinct from the sub-soil. It has transferred a bundle of rights equivalent to ownership of those resources which are legally within the soil, including on the theories here presented, forests and quarries and excluding all minerals other than quarries since quarries are instead deemed to be part of the sub-soil. Put another way, transfers of land in the past would almost certainly have been intended to include forests, and there are sufficient legal and practical grounds for assuming that they also included quarries, but not other minerals.[47]

However, now that the economic and conservation requirements of the State are becoming better known and recognized, it is most unlikely that State grants of land will henceforth include forest rights.[48] Accordingly, it may be expected that exploitation of forests and minerals other than quarries, as well as, though for other reasons, wildlife, will in the future be conducted rather under concessions or licenses from the Government than on the basis of any strict grant of ownership rights. The arguments here offered are rather in justification of existing rights than in anticipation of further such grants.

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46. See, e.g, Art. 6, Private Forests Conservation Proclamation, 1965, cited above at note 2.
47. See note 23 above and accompanying text.
48. See Art. 6, State Forest Proclamation, 1965, cited above at note 2, which declares state forests to be inalienable.

Nevertheless, present problems of conservation in Ethiopia are not susceptible of immediate resolution either by legal rules and analysis or by any other ready devices. The need for the education of the population as to the general importance and particular techniques of forest conservation is vital if conservation standards introduced by law are to be implemented soon or, indeed, at all. If such standards are ignored there will be much greater need of Government expropriation of privately owned forests at great and unnecessary expense to the nation and with considerable interim losses in the nation's fast diminishing forest resources.

In summation of the significance of Article 130 with respect to forests, a reasonable view might incorporate the following principles:

(1) *Forests as natural resources are historically and legally distinct from natural resources existing in the sub-soil. Their ownership is not ordinarily distinguishable from the ownership of surface and land rights generally.*

(2) *Forests owned by the State, excluding those on lands owned by the Crown and therefore inalienable by virtue of Article* 19(b) *of the Revised Constitution, are alienable to private persons on conditions set by the State.*

(3) *Forests, whether privately or publicly owned, must be administered in accordance with such conditions as the State may see fit to impose by law or concession for purposes of conservation, subject, however, in the case of private forests to constitutional restrictions against taking property without due process of law.*

3. *Wildlife*

The authority of the State in respect of wildlife — as in respect of minerals — is virtually complete. Almost without exception, practice throughout the world here supports the broadest possible exercise of State power, regardless of ownership.

Wherever monarchy has prevailed the ownership and, consequently, the control of wildlife has tended to lodge in the King, and in the process of political evolution to succeed to the State. Thus, for example:

> While originally the ownership of wild game in England was regarded as vested in the King as a personal prerogative, in the course of time it became established that the title of the Crown was only in trust for the benefit of the English people.[49]

Translated into more modern terms this would mean that the State owns all wildlife and must protect and conserve it on behalf of the people. Such is, in fact, the literal purport of both paragraphs (a) and (d) of Article 130, and there is no practical reason to interpret these provisions so as to derogate from attendant State power and responsibility.

On the other hand, the matter of ownership does raise some knotty theoretical problems. These problems stem from the ancient legal principle that things with-

49. *American Jurisprudence*, vol. 24, "Game and Game Laws," sec. 3, p. 374.

out a "master" are not subject to ownership until reduced to possession. This principle has, apparently, been adopted in Ethiopian law.[50] Thus, if a wild animal is not possessed or has no master it is not owned.

The bare English words of paragraphs (a) and (d) as applied to wild life are virtually meaningless, if this principle is taken to its limits. With respect to paragraph (a), wild animals, having no master, cannot logically be said to have been "vested" as a natural resource in the State Domain. Similarly, with respect to paragraph (d), a wild animal cannot be "property not held and possessed in the name of any person" since, having no master, it cannot be property; hence, it cannot be vested in the State Domain. This latter conundrum can be resolved by what, to anyone but a property lawyer, must seem mere verbal sleight of hand, to wit: wildlife is not, in fact, "property," since in its natural state it is not susceptible of ownership. Wildlife is, to use the terminology of the Civil Code, rather a "movable" or "corporeal chattel" without a master. Consequently, paragraph (d) does not really purport to vest ownership of wild animals in the State Domain. As to paragraph (a), there is no clear resolution except that the paragraph was not meant to apply to wildlife in the first place. This, as has already been shown, is in fact a very real possibility.[51]

Thus, it is at least plausible to argue that wildlife in Ethiopia is altogether without ownership until reduced to possession. The effects of this argument are of no real significance since the State, acting under paragraph (c), presumably has full power to restrict hunting or capturing of game in any way it deems appropriate for purposes of conservation and can itself capture and assume possession and ownership of game or permit others to do so on appropriate conditions as it chooses.[52] The only distinction might be that such restrictions require authorisation by law and do not stem from an owner's right to control his property.

It follows, then, that with the exception of such wildlife as may be reserved to the Emperor personally under any of His traditional prerogatives, all wildlife in Ethiopia is *res nullius* and may not in its wild state actually be owned by the State or by anyone at all but is nonetheless subject to the laws which the State may impose to restrict its capture or killing or otherwise to protect it.

Once again, past practice in Ethiopia supports the broad interpretation. When, during the reign of Emperor Menelik II, the diminution of Ethiopian wildlife first became recognized as a major problem it was decreed that all "big game hunting should cease, and that all you big-game hunters who before this went down to the desert and are hunting should return to your provinces."[53] This decree was certainly not then enforceable, and the problem which it sought to resolve remains. The policy expressed in this and similar prohibitions against the destruction of

50. See Civ. C., Arts. 1140, 1151 and 1152.

51. See text accompanying note 26 above.

52. Penal C., Arts. 646(1), 804 and 805(c) already provide for punishment of violators of such conditions, and it only remains for them to be formally established. Preparation of detailed wildlife regulations is in progress at the time of this writing and their promulgation can be anticipated in the near future.

53. Decree of 1913; see R. Pankhurst, "Wildlife and Forests in Ethiopia," *Ethiopia Observer*, vol. 7 (1964), pp. 241, 248.

"elephants and other wild life of economic value" is still valid.[54] In fact it should develop even greater significance as the Ethiopian tourist trade continues to expand.

There is no apparent reason why hunting need be absolutely prohibited. Indeed a certain amount of hunting, particularly of predatory and noxious animals, is useful for tourism and even for general conservation purposes and to maintain a proper balance among the species. But no one has a right to hunt unless the State is willing to concede it. The Ministry of Agriculture has made general provision for the grant of hunting licenses,[55] but even these do not give an absolute power to enter any premises and to shoot any animal authorized to be taken. This is so because, in effect,

> ... the owner of premises whereon game is located has a qualified property interest in such game; without his permission no other person can go upon those premises and take the game. The owner has the unqualified right to control and protect the game on his lands, subject to such regulations as may be made by the state.[56]

Again, however, this does not mean that the owner of land has any right to kill or capture wildlife which happens to be present on that land. He can simply prevent people from coming onto his property, for virtually any reason under the law of trespass, and he can, therefore, certainly prevent persons from coming on in order to hunt.[57]

Furthermore, where any person is authorized to hunt or capture animals both by the State and by any relevant landowner he does not thereby acquire property rights in any animal. Rather,

> ... until game is rightfully reduced to the possession of the hunter, title thereto is not subject to private ownership except insofar as the people of the state declare it to be so.[58]

> ... Private ownership may be so qualified that a person may kill game for his own use, but he may be denied the right to transport it or sell it to another. But irrespective of game laws which may be enacted, an individual has no property in game until it has been subjected to his control.[59]

This must also be the case where the State grants concessions to exploit certain game animals or fish commercially, unless, of course, the terms of the concession say otherwise. In such concessions the State may impose whatever

54. See, e.g., Game Proclamation, 1944 Proc. No. 61, *Neg. Gaz.*, year 3, No. 9, and subsequent legislative proposals of and relating to the Wildlife Commission as well as the draft regulations referred to at note 52.

55. Art. 3, Game Proclamation, 1944, cited above at note 54.

56. *American Jurisprudence*, place cited above at note 47, p. 375. Ethiopian law on this subject is, perhaps, less broad; see, e.g., Penal C., Art. 805(b); but *cf.* the draft regulations referred to at note 52.

57. See Civ. C., Arts. 1207, 1216-19, 2053; and other Ethiopian sources cited at note 54.

58. *American Jurisprudence*, place cited above at note 49, p. 375.

59. *Ibid.*, pp. 375-76.

restrictions it chooses and may confer upon the holder the exclusive right to hunt or capture certain animals, either absolutely or within a particular area.

While alternative practices and policies to those here stated do prevail in certain states, there is no apparent reason why these ought to be applied in Ethiopia. The old English rule that the owner of land has the exclusive right to hunt on his property and that if game thereon is killed by a trespasser it remains the property of the landowner is, as already indicated, inconsistent with the Civil Code.[60]

In summation of the significance of Article 130 with respect to game, a reasonable view might incorporate the following principles:

(1) *Wildlife within the Empire is res nullius and not a subject of ownership.*

(2) *The State may authorize hunting or capturing of wildlife on such principles and conditions as it may by law establish, and ownership of wildlife may be acquired by private persons only in accordance with such principles and conditions.*

(3) *Ownership of a wild animal can not be acquired by private persons unless and until the animal has been reduced to possession in accordance with the law.*

Conclusion

It should now be obvious that the cautionary note sounded at the outset of this essay has a range and volume somewhat greater than any scholarly self-consciousness of the writer might justify. Common sense general conclusions can be drawn and have been suggested, but the analyses leading to these conclusions are many, and few are altogether satisfactory. The full "intended" meaning of Article 130 may never be truly known. Indeed, there are adequate grounds for doubting that there was a generally accepted understanding of its words as it was enacted and proclaimed. But in Ethiopia, as elsewhere, there is surely need for distinction between constitutional and statutory methods of interpretation. Thus, since "it is a Constitution that we are expounding," we are bound not only to probe for intentions but also to retain a certain pragmatism and flexibility of outlook.

60. See note 50 above and accompanying text.