

CURRENT ISSUE

PUBLIC-PRIVATE CONFLICTS OVER SUB-SURFACE STONE IN ETHIOPIA

Harrison C. Dunning *

When Ethiopia revised its constitution in 1955, one of the important innovations was an article on "natural resources." Nothing on this subject had been included in the Constitution of 1931, legislation on various natural resources was fragmentary at best, and the way was open to chart a new course. What emerged, Article 130 of the Revised Constitution,¹ is hardly a model of precision, but it does set forth important principles regarding state ownership and control of various categories of property. One of these principles is that natural resources constitute a "sacred trust" for the benefit of "present and succeeding generations of the Ethiopian People" which must be conserved in accordance with principles to be established by "Imperial Law."² Another is that certain categories of property are "State Domain."

* Assistant Professor of Law and Assistant Dean, Faculty of Law, Haile Sellassie I University.

1. The text of Article 130 of the Revised Constitution is 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 in 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 Imperial 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.

2. This phrase is significant, for at the time of the promulgation of the Revised Constitution Eritrea was "an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown." Section A, Paragraph 1, Resolution 390(V) on Eritrea of the General Assembly of the United Nations, Fifth Session, December 2, 1950, a portion of the "Federal Act" ratified by H.I.M. Haile Sellassie I as Crown and Sovereign of the Empire of Ethiopia on September 11, 1952. The text of the instrument of ratification is reproduced in N. Marein, *The Ethiopian Empire—Federation and Laws* (1955), p. 431. See also the Proclamation of the Entry into Force of the Federation of Eritrea with Ethiopia, 11th September, 1952, Proc. No. 124, *Neg. Gaz.*, year 12, no. 1. Article 5(2)(h) of the Constitution of Eritrea of 1952, reproduced in J. Paul and C. Clapham, *Ethiopian Constitutional Development*, vol. 1 (1967), p. 376, had provided for inclusion within the jurisdiction of the Government of Eritrea of the "exploitation of natural resources." Section 8 of the Federal Incorporation and Inclusion of the Territory of Eritrea within the Empire of Ethiopia Order, 1952, Order No. 6, *Neg. Gaz.*, year 12, no. 1, provided that the Constitution of 1931 together with the Federal Act, federal legislation pursuant thereto and international treaties, conventions and obligations of the Empire were the supreme law of the Empire, however, so that Article 130 of the Revised Constitution as part of a revision of the Constitution of 1931 seems to have superseded Article 5(2)(h) of the Constitution of Eritrea. This conclusion, of course, depends on the assumption that Section 8 of the incorporation order was itself "constitutional" under the Federal Act.

The proper interpretation of the language of Article 130 raises numerous difficulties, which have been dealt with elsewhere at some length.³ It is not the object of this "current issue" to consider all these difficulties: instead, attention will be directed to the relevance of Article 130(a) of the Revised Constitution for the solution of the increasingly frequent conflicts in Ethiopia over a particular kind of property — sub-surface stone.⁴ Such stone has considerable economic value, and as it is needed both for public and private development projects, a wise solution to conflicts over its legal status is of great importance.

Litigation over Stone: The Landowner versus the IHA

Most typically litigation over sub-surface stone takes place between the Imperial Highway Authority, which requires it in large quantities for its highway construction and maintenance projects, and the owner of the land from which the stone is taken, who claims compensation for it. As uncrushed stone, at least in the vicinity of Addis Ababa, is currently worth about E\$4 per cubic meter,⁵ the amounts involved can be substantial. For many years the IHA maintained that when it takes sub-surface stone from private land it need compensate only for disturbance to the surface, e.g., the destruction of houses or crops on or near the quarry site. Legal support for this position was provided by Section 5 (d) of the Highway Authority Proclamation of 1950, which granted the IHA the power to expropriate and required compensation only for "buildings, crops, vegetation and other fixtures" on land taken by expropriation.⁶

This use of Section 5 (d) seems in general to have been accepted by the courts,⁷ even following promulgation of the Revised Constitution which in Article 44 requires "just compensation" for all "property" taken by expropriation. The assumption on the part of all concerned seems to have been that even if sub-surface stone was owned by the owner of the surface, compensation for it was barred by the restrictive language of the Highway Authority Proclamation.⁸ With the repeal of this language by the Civil Code,⁹ however, such reasoning can no longer be used. The IHA

3. R. Berman, "Natural Resources: State Ownership and Control Based on Article 130 of the Revised Constitution," *J. Eth. L.*, vol. 3 (1966), p. 551.

4. "Sub-surface" is used here to distinguish stone in the ground from stone which has been extracted from the ground. In some cases such "sub-surface" stone may extend to the surface itself. Article 130 of the Revised Constitution uses the phrase "sub-soil," which seems to mean the same thing.

5. This is the approximate cost to the buyer. For other purposes uncrushed stone may be valued at a different figure. Thus in *Taffa Segn v. Highway Authority* (Sup. Imp. Ct., Addis Ababa, 1968), *J. Eth. L.*, vol. 5, p. 234, an engineer of the Ministry of Public Works assessed stone for purposes of expropriation at E\$.60 per cubic meter. *Id.*, p. 236.

6. Section 5(d), Highway Authority Proclamation, 1950, Proc. No. 115, *Neg. Gaz.*, year 10, no. 5. The word "fixtures" was originally translated into Amharic as "other immovables," but significantly the translation was later corrected to read "other man-made immovables." Corrigendum, 1954, Corrigendum No. 35, *Neg. Gaz.*, year 14, no. 1 (Amharic only).

7. An exception is the recent case of *Taffa Segn v. Highway Authority*, cited above at note 5, where a division of the Supreme Imperial Court, by way of *dicta*, stated that Section 5(d) of the Highway Authority Proclamation does not bar compensation for stone. *Id.*, p. 237.

8. On Section 5(d), see generally H. Dunning, "Expropriation by the Imperial Highway Authority," *J. Eth. L.*, vol. 5 (1968), p. 217.

9. Civ. C., Art. 3347. See *Taffa Segn v. Highway Authority*, cited above at note 5, p. 237; see also H. Dunning, cited above at note 8, p. 221.

PUBLIC-PRIVATE CONFLICTS OVER SUB-SURFACE STONE IN ETHIOPIA

is now bound, like all other government agencies engaged in expropriation, to observe the dictates of the Civil Code, as well as those of the Revised Constitution. These clearly require compensation for all private property, so that the question of ownership of sub-surface stone must be squarely faced. In dealing with this question Article 130(a) of the Revised Constitution is the legal provision of greatest relevance.

Article 130 (a) of the Revised Constitution

A beginning toward a proper construction of Article 130(a) may be made by examining with care the language used: "The natural resources of, and in the sub-soil of the Empire, including those beneath its waters, are State Domain." On its face, this language is perhaps susceptible of two readings: first, that natural resources "of . . . the Empire," including those "in the sub-soil," are State Domain; and second, that only natural resources "of and in the sub-soil of the Empire" are State Domain. Although either reading could include sub-surface stone as a natural resource, it is important to choose between these readings in order to have a clear idea of the scope and intent of Article 130 (a). The second reading would seem to be the correct one for a number of reasons.¹⁰ First, if *all* natural resources in the Empire were State Domain, then all the nation's land would be included, yet it is clear from other articles in the Revised Constitution that private ownership of land is contemplated.¹¹ Article 130(a) appears to be the fruit of a tradition of State ownership of sub-surface wealth,¹² rather than a sudden attempt to nationalize all natural resources of the Empire. Second, what little preparatory material there is on Article 130 of the Revised Constitution indicates that Article 130 (a) was intended only to govern natural resources of the sub-soil.¹³ Finally, the second reading seems

10. It should be noted that the first reading is only made possible by the existence of the first comma in Article 130 (a), which may well have been the result of inadvertence.

11. See, e.g., Rev. Const. Art. 19(d), Art 31(d) and Art. 44, as well as sub-article (d) of Art. 130 itself.

12. An important statement of this tradition is found in Article 1 of a "Décret réglementant l'exploitation des mines dans l'Empire d'Ethiopie" of April 8, 1928, reproduced in A. Zervos, *L'Empire d'Ethiopie* (1936), p. 306, which provided that "[t]outes les richesses du sous-sol éthiopien sont des biens nationaux et par conséquent soustraits de la faculté de disposition du propriétaire foncier" ("all the riches of the sub-soil of Ethiopia are national property and consequently beyond the power of disposition of the landowner"). See also Article 6 of the "Loi portant réglementation pour la recherche et l'exploitation des mines dans l'Empire d'Ethiopie," reproduced in Zervos at p. 313, although the exact legal status of this measure is not clear, and 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. Significantly, the first two measures both stated an exception for building materials or quarries. Article 2 of the first provided that building materials could be freely disposed of by the owner of the earth, Zervos, cited above, p. 306, while Article 6 of the second provided that "[l]es Carrières sont réputées ne pas être séparées de la propriété et de l'exploitation de la surface, elles en suivent la condition; il en est de même pour les tourbières" ("quarries are deemed not be separated from the ownership and exploitation of the surface, they are in the same position; it is the same for peat-bogs"). *Id.*, p. 313. It has been argued on the basis of these exceptions that a similar exception should be read into Article 130(a) of the Revised Constitution. Berman, cited above at note 3, pp. 558-561. One could maintain with equal logic, however, that the failure to reiterate the previously stated exception for quarries indicates an intent to abandon it, so that the existence of this earlier exception seems of limited usefulness in interpreting Article 130(a).

13. An early version of Article 130, quoted in part by Berman, cited above at note 3, p. 556, did not refer to property in the State Domain, but simply provided for law on the conservation of the Empire's natural resources and provided that none of these natural resources

to be the one required by the Amharic of Article 130(a), which states that all wealth "inside the ground" ("be meretu wust") belongs to the State.

If it is accepted that Article 130(a) vests only "sub-soil" natural resources in the State Domain, it remains to be decided whether there is an exception for sub-surface stone. On the basis of Ethiopian tradition and current practice, one can safely assume that the language of Article 130(a) covers, e.g., gold and platinum, but to make the same assumption for salt,¹⁴ sand or stone may fly in the face of both. Consequently the question must be approached with care.

The Constitutional Allocation of Wealth

One approach which may be fruitful is to treat Article 130 as the keystone of a constitutional scheme for the allocation of wealth—for drawing, in Ethiopia, the "public-private" line insofar as property is concerned. Land clearly falls on the private side of that line—in an agricultural economy built for generations on private exploitation of the land, it could hardly be otherwise without a more sweeping statement. The State, of course, also can hold rights over land, but generally on the same basis as a private person.¹⁵ Land comprehends the soil, the source of the crops essential to life. Article 130 (a) seems to put on the other side of this public-private line, however, all which is the "wealth" in the land—all that which has value but which is not part of the soil which nourishes crops.¹⁶ Article 130 (d) adds to this "State Domain" certain other kinds of property, such as escheated or abandoned properties, forests and territorial waters.¹⁷

could be exploited by non-Ethiopian persons except as authorized by Imperial Law. The latter provision was later dropped and sub-articles (a) and (d) of the present Article 130 were added, seemingly in order to isolate certain categories of property and treat them as vested in the State. The conservation language of the earlier version was apparently kept as sub-articles (b) and (c) in order to provide for control of those natural resources not vested in the State. If this is so, it seems clear Article 130(a) should not be read as vesting all natural resources in the State.

14. For an interesting account of private salt mining in Ethiopia, see Haile Michael Mesghinna, "Salt Mining in Enderta," *J. Eth. Studies*, vol. 4, no. 2 (1966), p. 127.
15. Article 1444 of the Civil Code of 1960 provides that State property is subject to special provisions only when it forms part of the State's "public domain," as defined by subsequent articles. Article 19 of the Revised Constitution refers to what seems to be a distinct category of property, the Crown Domain, which by Article 19(b) is stated to be inalienable.
16. An echo of the notion that man holds only the surface and what is necessary for his sustenance is found in Article 1209 of the Civil Code: "Ownership of land shall extend below the surface of the land to the extent necessary for the use of the land." (Emphasis added.) Recently some courts seem to have read Article 1209 as establishing that owners of the surface also own the stone below that surface. See, e.g., Taffa Segn v. Highway Authority, cited above at note 5, p. 238. Unfortunately such judgments fail to consider the relevance of Article 130 of the Revised Constitution. If the constitution vests the ownership of sub-surface stone in the State, Article 1209 cannot alter that vesting, any more than it could alter the vesting of sub-surface gold in the State by the constitution. See Rev. Const., Art. 122, Ethiopia's "supremacy" provision. Nor can Article 1209 be used to show that Parliament places a particular construction on the constitutional provision, since the article makes no reference to sub-surface stone. The intent of Article 1209, following Article 667 of the Swiss Civil Code, seems to be merely to limit the classic notion that land subject to ownership is unlimited in depth, rather than to deal with particular categories of sub-surface wealth other than land. See P. Tuot, *Le Code Civil Suisse* (2nd French ed., 1950) (Deschenaux translation), p. 492.
17. Article 130(d) presents some formidable problems of interpretation, which are not treated here as Article 130(a) seems more directly relevant to the problem of sub-surface stone. This is so even though Article 130(d) vests in the State Domain "all products of the sub-soil,"

PUBLIC-PRIVATE CONFLICTS OVER SUB-SURFACE STONE IN ETHIOPIA

If this perspective is accepted—that to private persons goes the surface of the earth to be worked, to be used for crops and animals, but that to the State goes the wealth found below that surface—is there any reason to treat sub-surface stone differently from gold or other “precious” minerals found below the surface of the land? Does its very lack of “preciousness” mean that stone, too common an object to be classed with the treasures of the State, should be treated differently? Is stone, like soil, so closely associated with the everyday life of the farmer that it must be placed on the “private” side of our line?

Answering these questions in a way which at once satisfies logic, common sense and the pressing development needs of Ethiopia is not an easy task. Stone is of importance in everyday life on the land—farmers can and do use it to build walls and, in some cases, houses. So, too, could they use gold to make earrings for their wives. Stone is normally more accessible than gold—but to operate even a modest quarry may require implements and modes of transport on a scale not possible for the ordinary farmer.

A look at the practical economic consequences of deciding these questions one way or the other is no more helpful. Stone is vitally important to the State for highway construction and maintenance, one of the most important of its development activities. To hold stone excluded by Article 130(a) of the Revised Constitution and hence most often private property for which Article 44 of the Revised Constitution and the Civil Code require compensation would mean in many areas of the Empire payment for something heretofore of little practical economic benefit to most owners of the land. On the other hand to hold the opposite would mean that any landowner extracting stone not needed by the State for its projects would nonetheless risk prosecution for a penal offense,¹⁸ as well as a civil action against him by the State.¹⁹ An entire industry could be disrupted with a substantial adverse impact on private development. The stone necessary for private construction might have to be extracted pursuant to agreements similar to the concession agreements now granted by the State for the exploitation of other forms of sub-surface wealth, a cumbersome process at best.

Despite such difficulties, the essentials of a reasonable yet logical solution in conformity with the dictates of Article 130(a) can be suggested. As a starting principle, it is submitted that Article 130(a) should be construed to place stone, like all other sub-soil or “non-soil” wealth, in the State Domain—that is, under ownership by the State.²⁰ The language contains no exception. It gives constitutional

an apparently useless repetition of the principle stated in Article 130 (a). Article 130 (d) also vests in the State Domain “all forests and all grazing lands,” although the position seems to have been taken officially that despite this provision private forests do exist in Ethiopia. See the Private Forests Conservation Proclamation, 1965, Proc. No. 226, *Neg. Gaz.*, year 24, no. 17. There are substantial discrepancies between the English and the Amharic versions of Article 130 (d), in particular for the phrase “any person, natural or juridical,” which in the Amharic is rendered “any person who is Ethiopian by creation, or any legal person on whom Ethiopian nationality is conferred by law.”

18. See Pen. C., Art. 650, Art. 646 and Art. 630.

19. Civ. C., Art. 1206.

20. It has been suggested by Berman, cited above at note 3, pp. 552-556, that there can be private ownership, or at least “limited rights in property which are equivalent to practical ownership,” *id.* p. 555, of property which by virtue of Article 130 is vested in the State Domain, but so, to hold would deprive the vesting provisions of Article 130 of any real significance. There seems to be nothing to support Berman’s contention, *id.* p. 553, that the term “State Domain” was imported from France—rather it has its roots in Ethiopia’s own legal history, where it seems for many years to have been used to refer to property owned by the State.

status to a principle on sub-surface wealth of considerable longevity, without including the exception for building materials which on occasion had been stated for that principle. Most importantly, Article 130 seems to reflect a broad distinction between rights on the surface of the land, which private persons may hold in order to derive their livelihood, and rights on the wealth found below that surface. Whether "precious" or not, stone in many ways is economically a more important "natural" resource than many minerals with more alluring names about which no question would arise.

If this principle is accepted, then it is suggested further that certain adjustments ought to be made in order to accommodate the needs of development. The State can insist that as stone is in the State Domain no compensation need be paid for it when it is taken for projects of interest to the State, except of course compensation for disturbance to the surface. But at the same time, easy access to needed stone ought to be permitted to persons who require it for private development. This might be done by legislation providing that all owners of the surface are "legal concessionaires" of the stone found below the surface. Such owners would be particularly deserving of protection against uncompensated takings of sub-surface stone where they have begun to quarry the stone themselves on a commercial basis. A provision for payment to the State of a special fee upon exploitation of deposits of sub-surface stone, or at least payment when such exploitation is commercial and exceeds a certain scale, would serve as a practical reminder of the paramountcy of the State in its sub-surface domain.²¹

Conclusion

Article 130 of the Revised Constitution introduced into Ethiopian constitutional law important new principles on State ownership and control of natural resources, but ones that call for interpretation on a number of points. One of these is the scope of Article 130 (a). It seems clear that this sub-article vests only sub-surface natural resources in the State, rather than all natural resources of the Empire, but it does not appear to include an exception for any form of sub-surface wealth such as stone. The most important practical implication of this conclusion, at least at present, is that government agencies like the Imperial Highway Authority which take stone from beneath private land need pay nothing for the stone itself. It is owned by the State in the first place, so that there is no "expropriation." Nonetheless, it is suggested that in order to avoid an adverse effect on private development the State should allow private persons to have easy access to that sub-surface stone which is not required for projects in which the State has a direct interest.

21. To permit private exploitation of the sub-surface property of the State is a practice long recognized in Ethiopia. In the concession agreement of December 25, 1899, between Menelik II and G. W. Lane, for example, Lane was by Article 1 given permission "to search for gold, silver and anything else that can be got out of the earth in the world of the Beni Changouli country for four years," but it was also provided that the inhabitants of the area "will not be stopped from extracting the gold, as they have done hitherto." Zervos, cited above at note 12, p. 306.

In Eritrea under the Italians sub-surface building materials apparently were considered owned by the State and subject to concessions where exploited commercially. See the "Ordinamento fondiario e regolamento per la sua applicazione" for the Colony of Eritrea, 1926, *Bullerino Ufficiale* no. 13 (supplement), in particular Article 45 of the regulations. Article 2 of the ordinance provided protection for the rights of the local population on the land only in conformity with "ancient local customs."