

## Legal History of Extractive Industry Governance in Ethiopia

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*‘The history of what the law has been is necessary to the knowledge of what the law is.’*

*Oliver Wendell Holmes*

### Abstract

*Extractive Industries (EIs) are essential sources of economic and social development of a country. Current governance structures, extending from policies and laws pertaining to this sector are, in one way or another, the results of governance practices from the past. Even though the sector in Ethiopia has not grown to the expected level, the country had had a governance structure for this sector since the late 19th century. Over this stretch of time, there were governance systems regulating institutions engaged in mineral extraction activities. To fully understand the current governance structure, it is essential to analyse the sets of laws that were in place over that period. With this in view, the article evaluates the governance structure of extractive industries from the time of Emperor Menelik II to the time of the Derg. This is neither a denial of the existence of a governance framework in the pre-Menelik era nor a neglect of the developments in the governance of the sector after the Derg. Rather, this investigation is meant to draw insights from the extensive experience that could inform the current governance structure of extractive industries. By analyzing, through doctrinal legal analysis, the governance structures in place over those times, the article argues that since the inception of modern legal structures, the Ethiopian EI governance structure, though varied in depth, is informed by accumulated*

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*institutional experiences on the core issues related to EI governance. Accordingly, the paper further argues that an evaluation of the content of such historical legal documents is a first step to understanding the current institutional governance structure.*

**Keywords:** *Extractive Industries; Governance; Historical Analysis*

## **1. Introduction**

Extractive industries (EIs) are operations that harvest resources such as metals, minerals, aggregates and other items from the earth.<sup>1</sup> Its activities range from drilling to mining, and quarrying that require considerable investment on the part of a government, society or transnational companies. EIs are the backbones of some economies while they are paradoxically a curse for peaceful coexistence and growth in many parts of Africa. This difference in the contribution of EIs to socio-economic wellbeing across societies is mainly one of a difference in the quality of EIs governance in the respective societies or countries.

This article aims at assessing the historical background of the existing governance structure for extractive industry in Ethiopia.<sup>2</sup> The assessment places the governance frameworks at the center, which are references to all the policy and legal regimes regulating the rights and duties of active parties

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<sup>1</sup>ExtractiveIndustryBusinesDictionary.com.WebFinance.Inc. available at [http://www.buisnessdictionary.com/definition/extractive industry.html](http://www.buisnessdictionary.com/definition/extractive%20industry.html)<accessed March 15,2022>

<sup>2</sup> Id. Note that the common distinction made among metallic and non-metallic minerals as well as mineral fuels are all the subject matters of extractive industry discourse.

in the extractive industry. Also these governance frameworks encompass domestic legislations that are meant to address the core issues of EIs.<sup>3</sup>

This article will draw a three-phase timeline to analyze the frameworks. The first phase covers the time of Emperor Menelik II, during which documented extractive industry-related activities clearly began. This is followed by the era of legislation when the *Negarit Gazeta*, the official newspaper for laws, was established, bringing all governance structures of the extractive industry under its ambit. This era covers three separate legislative frameworks. Finally, the legal frameworks of the Derg regime are closely examined.

In these three phases, facts and laws will be presented to uncover what governance of EIs constituted at different periods and how various issues arising therefrom were handled by the concerned organs. In the process, a reflection is made on the governing structure of the time and the core problems therein. It is the conviction of the author that a thorough analysis of these structures' sheds light on the journey of the institutions over those periods. This, in turn, would inform the current governance practice in the EIs.

## **2. EIs Governance Framework during Emperor Menilik II Regime**

### **2.1. Emperor Menilik's Mining Letters**

#### **2.1.1 Letters to Foreigners**

Richard Pankhurst, in one of his major works, "economic history of Ethiopia", provides a brief overview of ancient writers who have visited the old lands of Ethiopia and their account regarding the Mineral wealth of the

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<sup>3</sup>Osisa, available at <http://www.osisa.org/books/regional/what-laws-each-country-say>. <accessed March 15,2022>.

country.<sup>4</sup> It is safe to conclude, from that overview coupled with investigations made on ancient Ethiopia by other historians, that the country is endowed with a wealthy potential of mineral resources.<sup>5</sup>

Domestic and foreign historians concur in giving the credit to Emperor Menelik II for the creation of the modern Ethiopian empire state.<sup>6</sup> It is also during the time of his reign that most of the industry and technology advancement of the world reached the doorsteps of the Ethiopian Empire.<sup>7</sup>

Regarding extractive industries, although there was not a full-fledged governance structure in the form of the institutional establishment or legal framework, the emperor was considered as the center of the state's functions acting as the governance structure *per se*. Accordingly, the emperor had made various decisions on extractive resource governance.

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<sup>4</sup> Richard Pankhurst, *An Introduction to the Economic History of Ethiopia: From early times to 1800*, Lalibela House (1961) pp. 224-231.

<sup>5</sup> Id. Professor Richard went on to mention the accounts of renowned travelers including Ibn fadl Allha, Brother Thomas of Angot, Alvares, Castanhoso, Bermudes, Almeida, Pero Pais, Barradas, Baratti, Puncet and Bruce, who in one voice register their account of mineral resources of the ancient Ethiopian lands and their use at the time, places as Gafat, Damot, Gojam, Axum, Enarea, Tselemt and Tambein were mentioned as having mineral resources or mineral resource potentials: For an exhaustive specific work on ancient Aksumite and Northern Ethiopia Civilization dating as far back as 1000BC wherein Various Mineral resources ranging from Gold, Silver, copper, zinc, Quarry and others were even used for industries of the time see David W Phillipson, *Foundations of an African Civilization: Aksum & The Northern Horn 1000BC- AD 1300*, James Curry & Addis Ababa University Press, (2012), pp. 159-180.

<sup>6</sup> Bahiru Zewde, *A History of Modern Ethiopia 1855-1991*, 2<sup>nd</sup> edition, James Currey Ltd, (2002), pp. 60-79.

<sup>7</sup> Paulos Ngongo, *Atse Menelik*, 2<sup>nd</sup> edition, Mankusa Printing, (1981), pp.236-338. Although the author is very fond of the emperor, his compilation of the technologies and advancements of the time after a careful evaluation of various sources supported by documents and photographic evidence is an important source to understand the developments of the time.

After a careful examination of more than sixty imperial letters addressed to foreign persons and companies<sup>8</sup> as well as local officials<sup>9</sup> about mining activity, it is argued that a de facto governance of extractive industry was in place with the sovereign Emperor acting as the sole regulatory authority and institution.

The ensuing paragraphs examine the core contents of the letters as a way to unravel the emperor's and his advisors' understanding of the governance structure of the extractive industry. It is to be noted that the reference to the extractive industry in these contexts includes all activities related to the available mineral resources.

It is widely noted that after the battle of Adwa whereby Ethiopian forces became victorious over Italian forces, Ethiopia was considered as a sovereign nation in the continent of Africa. As such Ethiopia was treated with equal footing of the diplomatic tie with the major forces of the world, forcing them to enter into negotiations of border treaties.<sup>10</sup> This justifies the reason why foreigners from all corners of Europe seek imperial permission to operate in the resources of an African country, a tale that seems fairy to the entire African continent of the time.

Of the seven letters issued by the emperor in the year 1901 five were initiated by individuals desirous of exploiting gold, silver, metallic and other minerals either by themselves or through a company.<sup>11</sup> The contents of these letters by the emperor follow a clear pattern. It usually starts with a mention of the

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<sup>8</sup>Paulos Ngongo, 'Atse Menelik bewuchi hager yetesatsafuachew debdabewoch' Atse Menelik's Correspondences with Foreign countries, Aster Nega Publisher, (2010).

<sup>9</sup>Paulos Ngongo, 'Atse Menelik behager wust yetesatsafuachew debdabewoch' Atse Menelik's Domestic correspondences, Aster Nega Publisher, (2010).

<sup>10</sup> Donald N. Levine, Greater Ethiopia: The Evolution of a Multiethnic Society, The University of Chicago Press, (1974) p. 12.

<sup>11</sup> Ngongo, *supra* note 7, pp. 144-156.

request made by the person/company to operate in mining activity. It then provides a clear authorization of operation. The authorization contains the type of minerals allowed to be exploited, the time limit for the permit and the area limit to which operation is allowed. Further, they take into account the rights and interests of local communities where the operation is to be carried out and the need to enter into a new mining contract with the emperor once preliminary exploration in the production of minerals bear fruits. The letters usually close with a guarantee from the emperor over the application of the existing tax or royalty rates from production and there will be no additional payment request from the side of the emperor.<sup>12</sup>

It is this content that leads one to conclude that the imperial letters are minimized versions of extractive resource governance. As such the traditional resource governance structure contains the scope of mining rights, type of minerals governed, fiscal regimes about mining operation, operational area community rights and the like which are all touched upon by the imperial letters examined. The remaining two letters at that point deal with the recognition made by the emperor for the establishment of an association of gold mine operators in Wollega<sup>13</sup> and a denial response for a request of permit extension for operation start.<sup>14</sup> Indicative of his desire to strengthen the operation of natural resource extraction, the emperor expressed his joy and full support for the establishment of the association. This can be taken as a historic move of the recognition by the government on the impact of operators functioning in harmony under a common institution to better protect their interest and rights. The same can be said regarding the easiness the controlling authority of the sector would have in following the execution of operations as per its rules and regulations.

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<sup>12</sup> Id.

<sup>13</sup> Ngongo, *supra* note 7, letter No. 360, p.154.

<sup>14</sup> Ngongo, *supra* note 7, Letter No.365, p. 156.

The second letter contains an explicit rejection of the request for extension of the start of operation time, which shows the serious application of terms of the permit. In this same letter, the request to explore gold in Kaffa was denied on the ground that another permit holder on the same location and operation is yet to start operation. The letter states the possibility of issuing the permit after proper evaluation of prior permit holder's operation and consultation. This is also a major governance guide of the time in recognizing the exclusive right of exploration which later era structures tend to endorse or amend, as mining rights start to be defined as a bundle of rights wherein certain rights are exclusive in nature to the right holder while other rights are shared among multiple operators at a time.

The year 1902 saw no unique imperial letter exchange in connection to mining operations. In fact, there was exchange of various letters made to the Wollega gold miners association in appreciation of their move in buying stocks from foreign markets in the name of the emperor and the country.<sup>15</sup> These stocks are bought using the payments agreed to be made to the government from the proceeding of sale of the production.<sup>16</sup> Claims of doubt as to how the emperor and his country were holding shares of global businesses over that period when all Africans were under the yolk of colonial brutality by many until this age can be answered by mentioning such acts of mine operators of the time.<sup>17</sup>

The other letter of that period worth discussing in this section is the one sent in April 11, 1902 to Alfred Ilg, the long-time trusted advisor of the emperor. The letter bore the name *Leontief as its source* and has a major goal of convincing investors in England and Belgium to spend their money in his

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<sup>15</sup> Ngongo, *supra* note 5, Letter No.376-378 and 401, p. 161&169.

<sup>16</sup> *Id.*

<sup>17</sup> Baron de Jarlsburg, King Menelik Has Investments Here, NewYork Times, (Nov. 7, 1909).

Ethiopian gold operation under the false claim that the sender has secured the emperor's permission to operate in the area.<sup>18</sup> The investor's woes of being swindled by the person had reached the emperor's castle hence he wrote a letter to Ilg in explaining the issue and the need to protect the acts of the individual from further damaging the interest of third parties.<sup>19</sup> This letter was indicative of the widespread practice by individuals of making the bogus claim as to their job in swindling clients to invest their money in the resources of the communities and people of the country at large while they are barely aware of it. In the contents of earlier letters, one can notice denial for extension of operation time by the Emperor. Yet this time, this is replaced by a positive response suggesting wider discretion of the emperor in handling similar questions from the operators on a case-by-case scenario. To this effect, the 1896 letter to a Moscow company engaged in gold mining extends the time of operation to further three years.<sup>20</sup> Two reasons were provided for such generosity: the geographical distance that poses challenge to investors and the bilateral tie between the governments of the two countries.<sup>21</sup> In sum, preferential treatment of operators from selected countries on basis of various considerations is seen as one character of the governance structure of the time.

The act of protecting the investor and facilitating the smooth operation of their work were taken care of, among others, by the issuance of imperial orders and letters explaining the duty of all citizens to cooperate with the permit holders in the provision of the right of way,<sup>22</sup> transportation service, provision of man power, shelter and the like.<sup>23</sup> On various occasions, those who plan to engage in the extractive industry are obliged to ensure they have the required

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<sup>18</sup> Ngongo, *supra* note 5, Letter No.423 and 425, p. 174-176.

<sup>19</sup> *Id.*

<sup>20</sup> Ngongo, *supra* note 7, Letter No. 521, p. 201.

<sup>21</sup> *Id.*

<sup>22</sup> Ngongo, *supra* note 7, Letter No. 866/868/916/934, p. 306-322.

<sup>23</sup> Ngongo, *supra* note 7, Letter No.983, p. 324.



authorization from their respective countries of origin, authorization to operate to ensure their eligibility verified from their country of origin. This was reflected in the content of the 1904 letter requiring a person with interest to engage in the gold mining activity in Ethiopia. The letter specifically mentions the need to have authorization from the government of Germany, which at the time does not have a counsel in Ethiopia, making it difficult for the Ethiopian authorities to verify the claims of the investor. Accordingly, he was required to provide authorization from his country before putting forward a question for consideration.<sup>24</sup>

Of the five letters issued by the Emperor in 1905, one necessarily calls for due consideration. The remaining four letters of this year follow the pattern discussed above.<sup>25</sup> The letter issued to General Lishan on March 21, 1905 introduces various extractive resource governance concepts ranging from, technology transfer, and provision of mining infrastructure to the government to the utilization of resource produced to mining operation itself.<sup>26</sup> The letter claims the emperor's decision to transfer the gold mine originally intended to be exploited by the government to the permit seeking private operator.<sup>27</sup> This was also indicative of the government's participation in the extractive sector. The private parties: engineers from Moscow were allowed to operate for two years on the expectation that they are to plant required machinery for the operation. The cost was to be covered from the proceeds of future production of minerals in the area. The Emperor guarantees to assist in the provision of required manpower to the operation. After the expiry of the two years, the entire machinery would be submitted to the Emperor. The local people who

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<sup>24</sup> Ngongo, *supra* note 7, Letter No. 857, p. 303.

<sup>25</sup> Ngongo, *supra* note 10.

<sup>26</sup> Ngongo, *supra* note 7, Letter No.580, p.220.

<sup>27</sup> *Id.*

were operating on the machine were allowed to continue to be responsible for the functioning of the machine.<sup>28</sup>

The contents of this letter can be considered to form the base for a governance structure that targets the mineral sector development by way of claiming ownership of required machinery and infrastructure from the operators. Further, it had the goal of transferring relevant technology, industrial expertise and skills. As such rules in place at that point, one would argue that, considerably contributed to the mineral development of the nation reaching its modern stage by now.

The move of the emperor to realize his desire in securing mining infrastructure was not merely dictated by the moves and desires of the operators to invest. Rather, he also requires the purchased gold and silver mining machinery to be transported to him with engineers capable enough to operate the same. He has paid the required sum for the company and was requesting the transfer of the property to his possession.<sup>29</sup>

The letter issued in 1906 bearing an extractive sector issue sets out the duty of reporting on the side of the operator.<sup>30</sup> The emperor sounds frustrated by the failure of operators in Wollega for they did not report their work progress. He recalls it has been three years since the mining of gold had begun but no report of the findings was made until that point. Accordingly, he orders the reporting to be done. This is an aspect of governance expressed in the form of follow up after permit of issuing regarding work progress and a result of an operation that serves as a base for calculating tax, royalty and maintaining further conservation of the resources.

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<sup>28</sup> Id.

<sup>29</sup> Ngongo, *supra* note 7, Letter No.665, p. 242.

<sup>30</sup> Ngongo, *supra* note 7, Letter No.643, p. 236.

In another disappointed tone in a letter of October 19, 1907 to Muse Jelardi, the Emperor responded to a request to ceasing operation by a permit holder, citing orders for same coming from his native country.<sup>31</sup> The emperor's response was almost a disapproval of the act of operation stoppage. He stated that the site is wanted by many for operation and endorsed the request. A letter issued days after this communication showcased the personal engagement of the emperor in convincing, and at times, offering to potential investors the benefit of engaging in mining operations of the country. Accordingly, the emperor offers some investor the possibility of operating in a rich area of gold reserve that is open for grasps.<sup>32</sup> Probably, he was referring to the area abandoned by Muse Jelardi. Governance of extractive industry in such a way that attracts local and foreign investment requires identifying resource wealth of a nation, accumulating sufficient data on the same, and inviting interested potential operators to engage in the sector. Thus, this letter can serve as a manifestation of the emperor's investment attraction strategy.

In 1908 Emperor Menilik's mining letters start to reflect the Emperor's power of revocation as operators are acting in defiance of the terms and conditions of a permit.<sup>33</sup> To this effect, the Emperor, in a letter to Muse Fred Markuat, accused operators of failure to start operating on agreed period, failure to provide documentation proving nationality, mistreatment of local employees and not respecting the orders of local officials.<sup>34</sup> These behaviors led to the writing of a letter warning revocation of permit and termination of contract if the operation does not resume within ten days with correction of all the behaviors leading to the accusations.<sup>35</sup> The emperor also made remarks as to a guarantee issued by the government to the sum of 7,500 Ethiopian birr which

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<sup>31</sup> Ngongo, *supra* note 7, Letter No.667, p. 243.

<sup>32</sup> Ngongo, *supra* note 7, Letter No. 673, p.243.

<sup>33</sup> Ngongo, *supra* note 7, Letter No.767, p. 275-76.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

the operator claims a right to collect same from an official in the place of operation.<sup>36</sup> Despite the faults, the investor was treated with good faith to build confidence in the industry.

This same year a letter was issued to the same person as to the notification of assignment of individuals responsible for controlling and recording the extraction of Gold.<sup>37</sup> It is presumed that the operator amended his way of operating and was saved from the revocation risk.

Now we turn to the contents of a mining contract signed in September 16, 1904. An examination of the contents would shed light on general picture of what the content and structure of mining contracts of the time look like. The contract has a total of six terms that govern the relationship between the Emperor and Emmanuel Makres, a mining operator who planned to operate at Tegulet.<sup>38</sup> The first term narrates the background to the contract that Mr. Emmanuel has requested for a fifty-year contract of the mining right in Tegulet wherein he claimed to explore gold deposits. Article two stipulates the duty of the operator to secure the required machinery at his cost. The third term states the operator would hire employees necessary for the operation of the machine, pays their remuneration and, once the operation starts, would secure a 50-year lease term on the area on the condition that the Ethiopian government takes 2/3 of the proceeding of the production. The rate is set at 1/3 to the government and 2/3 to Mr. Emmanuel until the machine is installed if a manual operation results in the production of gold under the fourth term. The duty of delivering equipment of operation including types of machinery upon expiry of the mining lease term is set under Article 3 of the contract. Article 4 reiterates the risk of operation about the cost of machinery or

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<sup>36</sup> Id.

<sup>37</sup> Ngongo, *supra* note 7, Letter No.777, p.279.

<sup>38</sup> Ngongo, *supra* note 7, Letter No. 854, Article 1, p. 301-02.

operation, and stresses that the cost will be covered by the operator and the Ethiopian government will have no responsibility in this regard. The last provision is the termination clause which requires the operator to start work on the agreed date failure of which will result in termination of the contract.

### **2.1.2 Letters to Local Officials**

More than 26 Imperial letters are registered with issues concerning the extractive sector operation for local officials. While the majority of the letters are orders to the officials to guarantee protection to the person and property of foreign operators authorized to operate in the locality of the officials as either study groups / associations concerned in map development<sup>39</sup> or mining operations,<sup>40</sup> some letters also deal with other specific matters including the chance discovery of previously unknown mineral resources.<sup>41</sup>

In a letter addressed to Dejzasmach Gebregziahber, governor of Wollega in August 29/1906, the Emperor provides a direction on a matter of controversy as to whether the gold mine operators are duty bound to allow local officials to register the amount of gold mined on a daily basis or on a monthly one. The operators opted for the later one.<sup>42</sup> While the Emperor favors a daily register<sup>43</sup>, he also warns the official to make sure of not being deceived by

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<sup>39</sup> Ngongo, *supra* note 8, Letter No. 1931, 526: Letter No. 1962, p. 534:

<sup>40</sup> Ngongo, *supra* note 8, Letter No.335, p. 111: Letter No.418, p.133: Letter No. 483, p.148: Letter No. 599, p.175: Letter No. 922, p.255: Letter No.1468, p. 395: Letter No.1493, p. 402.

<sup>41</sup> Ngongo, *supra* note 8, Letter No. 2173, p. 599. The letter issued to 'Fitawrari' yebsa addresses the issue of chance discovery of silver in a gold mining site. The local official has send samples of the new discovery asking permission from the emperor to go to the site to further study the area. The emperor expresses his happiness for the discovery of silver as it is of the first time and confirms the mineral sent to him to be silver.

<sup>42</sup> Ngongo, *supra* note 8, Letter No. 275, p. 96.

<sup>43</sup> The Emperor is found appreciating another local official who asks his blessing to control mine production of English people operating in his area. The emperor accepts

acts of the operators who engage in the act of hiding or avoiding gold from the register. It is known that the amount of production is the basis of calculating tax or profit. The emphasis the Emperor rendered over this issue shows the seriousness of the problem at the time. Another letter issued for the same official clarifies the right of the miners to plant boundary marks in colors. The official seems confused as to the need of a flag for mining operation. It seemed a worry of territorial invasion was in the minds of the official who happen to spot foreigners demarking borders using flags. The letter clarifies the issue.<sup>44</sup>

Another letter under this category shows the role gold has at the time as monetary instrument. An official who explains the difficulty of securing ivory as tax to be paid to the Emperor has pleaded to pay in gold. While the Emperor clearly favors his taxes to be paid in ivory, taking in to account the problem at hand, he states his permission to be paid in gold. In a letter about local labor working on mining sites, the Emperor expressed his concern over the exploitation of the laborers by mine operators. Accordingly, the letter stresses the need to supervise the purpose for which the mine operators are using the local labor force provided by the government in the mining sites.<sup>45</sup>

The engagement of embassies and consular offices in the protection of the interest of their investors in Ethiopia was registered long before the concept of modern foreign investment protection was crafted. In a letter dated October 31, 1908, the Emperor mentioned a compliant reaching his courts from the Italian council regarding Muse Zapa who was prohibited by local officials

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the request and orders the official to weigh and register the daily production, See Ngongo, *supra* note 8, Letter No.289, 100.

<sup>44</sup> Ngongo, *supra* note 8, Letter No. 276, p. 97.

<sup>45</sup> Ngongo, *supra* note 6, Letter No. 1509, p. 406.

from gold mining operation. The Emperor orders the local official at the area to allow him in starting operation with proper follow up.<sup>46</sup>

### **3. Proclamation Era: The Beginning of Modern Governance of Extractive Industries**

The year 1942 is historical in the legal development of Ethiopia. The *Negarit Gazeta*, the official news paper for legislations to this day (renamed as Federal *Negarit Gazeta* following the federal arrangement), was established at that point in history.<sup>47</sup> In its first act, named, Establishment of the *Negarit Gazeta* No.1 of 1942, it states that all proclamations, decrees, laws, rules, regulations, orders, notices and subsidiary legislation including notices of general information concerning matters of public interest are to be published under the responsibility of the ministry of the pen through the modality of the *Gazeta*.<sup>48</sup> The same law makes it a principle that courts and judicial organs take judicial notice of all that is to be published in the *Gazeta*.<sup>49</sup>

A year and half after the establishment of the *Gazeta*, the first legislation with a direct character of extractive resource governance, titled ‘A Proclamation to Prohibit the Export of Gold, Silver and Platinum from Our Empire’ was issued.<sup>50</sup> Though prohibitive in nature, the law was concerned about Gold, Silver and platinum as mineral resources. The absence of other types of minerals in the list may prohibit one from considering it as exhaustive governance and leads to contemplate the reason why these three resources were selected. In 1944, legislation was in place with a bit expanded content

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<sup>46</sup> Ngongo, *supra* note 6, Letter No. 1840, p. 501.

<sup>47</sup> Establishment of the *Negarit Gazeta*, Proc.No.1/ 1942, *Negarit Gazeta*, (1942).

<sup>48</sup> *Id.*, Article 2.

<sup>49</sup> *Id.*, Article 5.

<sup>50</sup> A Proclamation to Prohibit the Export of Gold, Silver and Platinum from Our Empire Proclamation.No.43/, 1943, *Negarit Gazeta*, (1943), [herein after Proclamation to Prohibit].

meant to regulate only Gold and Platinum, titled ‘A Proclamation to Control Transactions in and Concerning Gold and Platinum in Our Empire.’<sup>51</sup>

The 1943 legislation prohibits the export, sending or taking gold, silver and platinum out of the country in any form except with the terms and conditions of a license issued by the ministry of finance or an authorized person.<sup>52</sup> Failure to observe the restriction would result in monetary fine or imprisonment upon conviction.<sup>53</sup> A court is also authorized to order the forfeiture of the seized resource.<sup>54</sup>

From the title of the law and the content thereof, it is clear that the major purpose of the legislation was to regulate the export of mineral resources out of the country. Export was not prohibited but put under provisions to be issued by the Ministry of Finance. The lack of details in the legislation as to the terms and conditions of the license or how they are exercised leaves one to ponder over issues surrounding it. The Ministry, the organ responsible to issue a license and set the terms, can be taken as the major institution in place in the exercise of extractive resource governance at the time.

The 1944 legislation that follows the export restriction law is more detailed in scope. The opening statement to the proclamation serves as an essential source of mineral governance laws before the *Negarit Gazeta* days.<sup>55</sup> Apart from these regulative actions over foreign operators, imperial decrees as old as the 1928s have in essence tried to regulate mineral resources by

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<sup>51</sup> A Proclamation to Control Transactions in and Concerning Gold and Platinum in Our Empire, Proclamation.No.67/1944, *Negarit Gazeta*,(1944),[ hereinafter Transaction Control].

<sup>52</sup> Proclamation to Prohibit, *supra* note 50, Article 2.

<sup>53</sup> Proclamation to Prohibit, *supra* note 47, Article 3.

<sup>54</sup> *Id.*

<sup>55</sup> Transaction Control, *supra* note 51, Preamble.



determining issues on ownership of mineral resources of the country, rights of landowners upon which mineral resources are located, identifications of mineral resources eligible for private disposal, permit to exploit and to export mineral resources, institutional setups to regulate resources and many more.<sup>56</sup>

It is to be noted that following the footsteps of the imperial letter exchanges in the era of Emperor Menilik, these decrees have for long served as governance structures. The preambles of the letters characteristically mention the need for the regular authorization of the department of mines for mining transactions. This, in effect, is a manifestation of an established governance structure.<sup>57</sup>

Looking into the 1951 legislation, one can see that it is dedicated to the regulation of Gold and Platinum transaction.<sup>58</sup> After declaring all gold and platinum in Ethiopia as the property of the empire wherever located, the legislation makes it an offence to possess, put in custody or conceal the raw or refined form of the minerals in an amount that exceeds ten ounces except under the authorization of the ministry of finance.<sup>59</sup> The ministry of finance

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<sup>56</sup> Id. Imperial Decree of 18<sup>th</sup> April 1928 provides all wealth of the subsoil of Ethiopia is state property and in consequence, beyond the power of disposal of the landowner and the exploration of minerals in their natural bed is permitted only to those persons or companies provided with a permit of exploration provided by the Ethiopian Government. Imperial Decree of the 29<sup>th</sup> prohibits the exploitation of minerals in the absence of authorization from the department of mines. Imperial Decree of the 5<sup>th</sup> December 1929 states the prospecting, search, excavating, extraction and collection of minerals prohibited unless a regular authorization is given from department of mines. Same authorization certificate is required from the department for export of minerals. Imperial Decree of the 7<sup>th</sup> November 1931 possession of minerals by persons without authorization from the department of mines raises the presumption that the minerals are products of illicit exploitation of the mineral wealth of the nation.

<sup>57</sup> A detail examination of institutional set ups at different regimes will be made on the chapter evaluating institutional structures in Extractive Industry Governance.

<sup>58</sup> See title of Transaction Control., *supra* note 48.

<sup>59</sup> Transaction Control., *supra* note 51, Article 1 and 3.

seems to take the regulatory power away from the department of mines as in the decree.<sup>60</sup>

The right to transport, import, export, trade or contracting gold and platinum is also allowed only under special authorization of the ministry of finance.<sup>61</sup> The term *special authorization* indicates the possible existence of two types of permits, one ordinary and another special. While the former regulates possession and custody of resources, the other is for the purpose of transacting in these minerals.<sup>62</sup>

Keeping in line with its predecessor, the 1951 legislation does not ban the right of persons to possess, buy or sale personal jewelry and articles of adornment made from gold and platinum.<sup>63</sup> It was clear from the start that the regulatory aspect of the law was not meant to infringe the personal liberty of individuals from utilizing these minerals as long as it has passed through a certain phase of value addition.

The act of concealing the minerals over the stated amount was labeled an offence, entailing seizure and confiscation/ forfeiture, apart from the monetary fine and imprisonment.<sup>64</sup> This legislation also introduced the concept of an incentive mechanism to control illegal acts associated with minerals in which any person who provides information is rewarded a share of the proceedings of the seized resource.<sup>65</sup> Finally, it is the proclamation that banned the age-old

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<sup>60</sup> Id., Article 4 and 7.

<sup>61</sup> Id.

<sup>62</sup> Transaction Control., *supra* note 51, Article 3 talks about authorization for possession and custody of the minerals while Article 4 talks about authorization of the transaction of the minerals.

<sup>63</sup> Proclamation to Prohibit, *supra* note 50, Art 2 and Transaction Control., *supra* note 451, Article 9.

<sup>64</sup> Transaction Control, *supra* note 51, Article 8.

<sup>65</sup> Id.

tradition of using gold as a legal tender among the society, ordering all people in possession of the same to surrender their possession to the government for a market price set as compensation.<sup>66</sup>

#### **4. Mining Proclamation and Regulation of the Empire of Ethiopia**

##### **4.1. The Government's Place in Resource Ownership**

In 1971 Ethiopia saw a comprehensive law intended to govern activities in the mining sector.<sup>67</sup> The law is established on the principle of deeming natural resources of the empire state domain and giving same a sacred trust for the benefit of its people. It also recognizes the role natural resources play to economic growth and welfare of Ethiopians. The preamble to the legislation states the need for employing sound principles of modern technology and resource conservation as well as a compilation of geological maps and statistics of Ethiopia.<sup>68</sup> Further, the preamble emphasizes the role of a clear law on mineral governance in encouraging foreign and domestic investment,<sup>69</sup> which in turn, is a key tool to realize developmental objectives.

The proclamation embarks by a clear repeal of the previous laws in place.<sup>70</sup> It further goes to state all rules, written or customary, in place regarding minerals are to be replaced by this law.<sup>71</sup> A recognition as to the existence of various customary practices governing the operation of mining activities is clear from the tone of these repealing provisions. In its long years of mining

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<sup>66</sup> Transaction Control, *supra* note 51, Article 5.

<sup>67</sup> A Proclamation to Promote the Development of Mineral Resources of the Empire of Ethiopia, Proclamation No. 282/1971, *Negarit Gazeta*, (1972) [hereinafter Proclamation No. 282/1971].

<sup>68</sup> *Id.*, Preamble.

<sup>69</sup> *Id.*

<sup>70</sup> Proclamation to promote, *supra* note 67, Article 2. i.e. Proclamation to Prohibit., *supra* note 47 and Transaction Control., *supra* note 48.

<sup>71</sup> *Id.*

activities, it is impossible to imagine the governance structure was limited to two piecemeal legislations whose scope merely concentrates on a limited area. The repeal thus comes in time as the legislation under discussion is comprehensive both in terms of its scope and the types of minerals and mining operation it purports to administer.

Accordingly, all activities of mining within the boundaries of Ethiopia were made as per the set rules and regulations of this legislation. These activities cover prospecting, exploring, mining, storing, processing, transporting, and disposal of mineral wealth within the boundaries of the country.<sup>72</sup> The regulatory aspect of the proclamation is manifests in the requirement set for a permit, license, certificate and a lease for acts of mineral prospecting, mineral exploration, mineral discovery and mining operation respectively.<sup>73</sup>

An eligibility provision in the proclamation requires a person or an operator to have sufficient working capital and technical knowledge to explore, exploit and market minerals, consistent with pertinent stipulations under the commercial code of Ethiopia.<sup>74</sup> The 1960 commercial code of Ethiopia has set exploitation of mines, including prospecting for and working of mineral oils and exploitation of quarries as acts of trade.<sup>75</sup> Also, the various privileges the then investment law extend to traders are also applicable to those in the mining sector.<sup>76</sup>

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<sup>72</sup> Proclamation No. 282/1971, *supra* note 67, Article 5.

<sup>73</sup> *Id.*, Article 7.

<sup>74</sup> *Id.*, Article 9.

<sup>75</sup> Commercial Code of the Empire of Ethiopia, Proclamation No.166/1960, *Negarit Gazeta*, (1960), Article 5(4)(5)(6).

<sup>76</sup> Proclamation No. 282/1971, *supra* note 67, Article 17.

The law allows the government to participate in mining activities through its agencies or via a commercial enterprise it establishes for such a purpose.<sup>77</sup> The government, as the custodian of sacred resources, is also entitled to require traders in the sector to establish a processing and refining plant in mining areas.<sup>78</sup> It can require the sale of the agreed percentage of equity of foreign investments to Ethiopian nationals and companies planning to operate in the sector.<sup>79</sup> The government has also given itself the pre-emptive right of all or a portion of produced minerals.<sup>80</sup> As such it can order to whom sale of the produced minerals is to be made on the condition of respecting free-market prices.<sup>81</sup>

Where the mining operation ceases, it is the right of the government to take over, without payment of compensation, the land and immovable on the mining area constructed.<sup>82</sup> It can also acquire at a set price all the movables of the lessee at the site after informing the same to the right holder.<sup>83</sup> Taking into account the huge investment mining operations call for both in cash and equipment, the right given to the government in taking over same ensures the transfer of technology to the domestic need as well as enables society at large to benefit from the infrastructure in place.

#### 4.2 Mining Rights and Duties

The overall structure set by the legislature in connection with mining operation is of a two-tier arrangement, i.e., preliminary development rights

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<sup>77</sup> Id., Article 10 a (1).

<sup>78</sup> Id., Article 10 a (2).

<sup>79</sup> Id., Article 10 a (3) and (4).

<sup>80</sup> Id., Article 30(1).

<sup>81</sup> Id.

<sup>82</sup> Proclamation No. 282/1971, *supra* note 67, Article 32(b) 2.

<sup>83</sup> Id., Article 32(c).

and development rights.<sup>84</sup> The first category of rights are largely concerned with prospecting, exploration and discovery while the latter is about mining lease. The regulation devotes a vast share of provisions detailing what the respective rights, obligations and limitation in connection to all these various classifications.

The proclamation, under specific provisions, defines minerals as any substance of economic value incorporating petroleum, natural gas, quarry substance and thermal powers on top of the common metallic and non-metallic mineral classification.<sup>85</sup> The provision which classifies minerals replicates this wider classification.<sup>86</sup> Over that period, there was no separate legal regime applicable for selected types of minerals, making the proclamation the sole and exclusive regime with applicability on all operations in connection to minerals.<sup>87</sup> This is why the proclamation states all the rules set to have applicability on petroleum and natural gases.<sup>88</sup>

Preliminary development rights are concerned with the stages that need to be passed before the actual task of producing minerals. Prospecting permit is one of these stages. This stage, which the law expresses as limited or unlimited both in terms of areas or type of minerals, confers a non-exclusive right.<sup>89</sup> As such it entitles the permit holder to a period of one year<sup>90</sup> with a chance for an

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<sup>84</sup> PArt 2 of Proclamation 282/1972 has five chapters. The first chapter deals with mining rights in general. The second chapter is entitled Preliminary Development Rights. Under this chapter three sections deal with prospecting permit, exploration license and Discovery. The third chapter is titled Development rights. Mining lease and quarry substances are the two sections of this chapter.

<sup>85</sup> Proclamation to promote, *supra* note 667, Article 3(m).

<sup>86</sup> *Id.*, Article 6.

<sup>87</sup> *Id.*, Article 38.

<sup>88</sup> *Id.*

<sup>89</sup> Proclamation No. 282/1971, *supra* note 67, Article 18(b).

<sup>90</sup> Mining Regulation, Legal Notice 396/1971, *Negarit Gazeta*, (1971), Article 6(b), [hereinafter Mining Regulation].

indefinite number of renewals of a similar one year period<sup>91</sup> to determine whether the areas contain minerals in a payable quantity, i.e., economically/commercially viable amount.

The rights conferred to a permit holder as expanded by the regulation are all meant to effectively achieve this purpose. By stipulating the limit and obligation of permit holders, it sets a clear stand as to the seriousness of the controlling office in seeing to it that the resources of the nation are effectively utilized.<sup>92</sup>

Evidencing this, the proclamation states:

*“...[T]he holder of the permit is not prosecuting the prospecting operation, with all reasonable diligence, skill, exactness in accordance with the provisions of the proclamation and the present regulation and the requirements of the controller or the director”<sup>93</sup>*

A prospecting permit is a precondition for the entitlement of application of exploration license.<sup>94</sup> Exploration under the law refers to all operations concerned with the search and prospecting of minerals.<sup>95</sup> It is a step next to prospecting which was concerned solely with the conduct of mineral exploration to ascertain the presence or absence of minerals and mining information.<sup>96</sup> Prospecting permit and exploration license are two highly interlinked mining rights paving the way for the final act of mining operation.

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<sup>91</sup> Id., Article 7(d).

<sup>92</sup> Mining Regulation, *supra* note 90, Article 8 a-c.

<sup>93</sup> Id., Article 10(c).

<sup>94</sup> Proclamation No. 282/1971, *supra* note 67, Article 19(b).

<sup>95</sup> Id., Article 3(e).

<sup>96</sup> Id., Article 3(x).

Unlike the prospecting permit, the law makes exploration license an exclusive right of the licensee.<sup>97</sup>

After the proper filing of an application for an exploration license, the regulator mandates a publication of the application with sufficient detail for third parties in a newspaper of general circulation enabling them to provide an opinion on the application to the extent of an objection.<sup>98</sup> This is a transparency requirement set by the legislator to protect the interest of third parties in general and parties with a particular interest in connection to the application as in the case of avoiding issues associated with or likely to arise with superimposition of mineral rights. If the application meets the requirements and in line with the regulation, a license, which is valid for two years with the likelihood of renewal as of right for the same two years time for three successive periods, can be issued.<sup>99</sup> The holder of an exploration license, in addition to the rights and duties as a prospecting permit holder, has the right to explore the area of license.<sup>100</sup>

A licensee must also renounce every year a stated percentage of the exploration area.<sup>101</sup> The exploration area may extend from one square kilometer to one hundred square kilometers.<sup>102</sup> The obligation of renunciation –except in situations where an agreement between the ministry and the licensee is in tune with ensuring the area eligible for interested third parties –allows no exclusiveness to the extent of the renounced area. Further, where there is no motivation to renounce the exploration area, such undertaking is understood as a mechanism set by the legislator to take away

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<sup>97</sup> Id., Article 19(a).

<sup>98</sup> Mining Regulation, *supra* note 90, Article 13(d) and 14.

<sup>99</sup> Id., Article 18(a).

<sup>100</sup> Id., Article 19.

<sup>101</sup> Id., Article 20(b).

<sup>102</sup> Id., Article 11(b) 2.



areas covered in the license. This ensures the due diligence duty extended to all exploration areas.

The last predevelopment right discussed by the law is discovery. This right entitles a person to a certificate of discovery<sup>103</sup> and a special certificate of discovery.<sup>104</sup> The certificates are evidences of discovery of mineral deposits. Both the acts of prospecting and exploring may lead to economically viable mineral deposit discovery. Yet, at times a person may also discover minerals while not being a holder of either a prospecting permit or an exploration license. This entitles the discovering party to special certificates of discovery.

It is important to note that the law does not outrightly disregard coincidental discovery. It has rather formulated a mechanism to legalize it and make it eligible to be governed by the existing structure. This applies only in a non-exploration license area.<sup>105</sup> In both cases of certificate of discovery, the holder of the certificate is given the exclusive right to explore the discovery and has a preferential right for grant of mining lease.<sup>106</sup>

In the predevelopment mining right category the law has established a non-exclusive right of prospecting and an exclusive right of exploration and discovery. Except for scenarios where a person applies for an exploration license and a mining lease at similar time creating a combined mining right<sup>107</sup>, development rights for minerals flow directly from the issuance of a certificate of discovery. After a mutual agreement on the work program and minimum expenditure to be spent on the operation is set between the ministry and the certificate holder, a mining lease will be issued.<sup>108</sup> The law takes the

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<sup>103</sup> Proclamation No. 282/1971, *supra* note 67, Article 21(b).

<sup>104</sup> *Id.*, Article 22.

<sup>105</sup> *Id.*

<sup>106</sup> Proclamation No. 282/1971, *supra* note 67, Article 21(d).

<sup>107</sup> *Id.*, Article 25.

<sup>108</sup> *Id.*, Article 23(a).

public interest and existing mining rights holder's interest as factors of consideration before issuing a mining lease.<sup>109</sup> As the term public interest is prone to interpretation and not defined even in indicative terms, it gives a wider discretion to the regulating authority to deny or allow mining lease. This may be viewed negatively from the perspective of investment attraction and a negation of the objectives set at the preamble of the proclamation.

Once a mining lease is issued, it confers a variety of rights to the lessee. To this effect, Article 23(b) of the proclamation states:

*(....)mining lease shall confer the right to possession of the surface and subsoil of the mining area and subject to the prescribed conditions, the exclusive right to mine, remove and dispose minerals specified in the lease, including all rights deemed necessary by the minister to ensure the successful and efficient operation of the mine.*

The law further lists the following as the rights of a lease holder<sup>110</sup>

1. Right to enter upon the lands subject to mining lease
2. The exclusive right to mine, store, remove, export and sell the exploited minerals
3. Right to occupy land within or adjacent to the mining area
4. Right to request land expropriation, if negotiation to land acquisition fails
5. Right to construct, operate, maintain all mines and other facilities necessary or convenient for the performance of purposes listed in the mining lease
6. Right to construct a house and other facilities for employees
7. Right to use water from water bodies within and with a reasonable distance from place fop operation

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<sup>109</sup> Id.

<sup>110</sup> Mining Regulation, *supra* note 90, Article 34(a) (b).

8. Right to remove and move earth, wood, store and such other materials in the mining area with the agreement of owners or through ministry approval

Mining lease right may range from five to thirty years, with a preferential renewal right.<sup>111</sup> Similar to the rights, whose survival depends on the special formality of registration, a mining lease shall be entered into a register of an immovable property that is open to the public at large.<sup>112</sup> The proclamation extends this obligation to all mining rights on the pain of making the right null and void.<sup>113</sup> In fact the proclamation introduced a new system of registering all mining rights except those traditionally engaged in mining and obtains their livelihood from same, as it requires even those rights formed prior to the legislation to be registered or risk being extinguished.<sup>114</sup>

The controller is duty bound to notify the third parties about the pending application<sup>115</sup> together with the publication of same in a newspaper.<sup>116</sup> These obligations are clear manifestations of the fact that ensuring the rights to be assigned to the lessee are unassailable rights. Such obligation further protects the infringement of lease area by third parties who failed to object and state their interest during the time framework.

A mining leaseholder is entitled to a surface lease right for mining operation outside his lease area.<sup>117</sup> This right comes into effect upon payment of service fee and compensation in a form of rent.<sup>118</sup> The law goes to the extent of expropriating private holdings if the holding is needed for a mining

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<sup>111</sup> Proclamation No. 282/1971, *supra* note 67, Article 23(c).

<sup>112</sup> *Id.*, Article 23(d).

<sup>113</sup> *Id.*, Article 44(a).

<sup>114</sup> *Id.*, Article 46(a).

<sup>115</sup> Mining Regulation, *supra* note 90, Article 26 (d) (e).

<sup>116</sup> *Id.*

<sup>117</sup> Proclamation No. 282/1971, *supra* note 67, Article 24(a).

<sup>118</sup> *Id.*

operation.<sup>119</sup> The proclamation has already labeled mining purpose a public purpose<sup>120</sup> under the meanings of the civil code of Ethiopia, thereby setting the platform for expropriation with ease. Mining purpose is defined as any work necessary for or incidental to the mining operation.<sup>121</sup>

The position of the law in connection to surface lease is a positive one, fostering the confidence of the investor and showcasing the commitment of the government in ensuring the smooth running of mining operations. This being said, the government reserves the ownership of such area and the acts of prospecting, exploring or mining is prohibited as a matter of principle.<sup>122</sup> The surface can provide only an auxiliary service for the operation on the area indicated on the lease.

The proclamation envisages a situation whereby the ministry might vary or suspend the terms of the mining lease<sup>123</sup> with the consent of the lessee and the terms applied thereupon.<sup>124</sup> The motivation for same emanates from the evaluation made by the ministry that it would be impossible to perform the lease terms and undue hardship will be inflicted on the lessee.<sup>125</sup> In a move to accommodate the interest of the license holder, prior consent implying negotiation on terms of variation and suspension are put in place.

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<sup>119</sup> Proclamation to promote, *supra* note 67, Article 24(b).

<sup>120</sup> See *Id.*, Article 16.

<sup>121</sup> *Id.*, Article 3.

<sup>122</sup> Mining Regulation, *supra* note 90, Article 35(d).

<sup>123</sup> Proclamation to promote, *supra* note 67, Article 26(b).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

Mining rights and obligations under the law take express and implied forms.<sup>126</sup> The proclamation does not refer to express rights and obligations. Yet an express reference is made under Article 14 of the proclamation about implied rights and obligations. In connection to the variation and suspension arising from performance, it is important to make mention of one implied obligation stated by the law; the undertaking on the part of the lessee to perform obligations with promptness and all diligence.<sup>127</sup>

The term diligence is essential that it is even provided with a definition under the proclamation. It constitutes skill, efficiency, prudence, and foresight employed by the right holder while operating and utilizing the modern techniques of operation.<sup>128</sup> This clearly shows the high level of professionalism the government expects from operators. It further suggests the logic behind an inclusion of the exception to the application of the administrative contract provisions on mining rights.<sup>129</sup> Noting the high level of professionalism and cumbersome responsibility, parties with an administrative contract type are expected to act in accordance with the stipulations in such contracts which explicitly expect the contracting parties to perform their duties ‘diligently’.<sup>130</sup> It is important to note that the exclusion of mining-related contracts from the ambit of administrative contracts is a clear indicative of the desire of the legislator in contemplating a much higher duty on the lease or right holder.

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<sup>126</sup> Proclamation No. 282/1971, *supra* note 67, Article 14. Also See Article 3(p) of this proclamation which defines mining rights to constitute prospecting permit, exploration license and mining lease.

<sup>127</sup> *Id.*, Article 14(d).

<sup>128</sup> *Id.*, Article 3(d).

<sup>129</sup> *Id.*, Article 8.

<sup>130</sup> Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, *Negarit Gazeta*, (1960) Article 3172(3). See also Article 3177 entitled *Exceptio Non Adimpleti Contractus*, a principle enshrining the idea as failure in the side of the administrative organ in fulfilling its contractual obligation cannot be a ground to suspend performance by the non-administrative organ.

The following provision sums up the narration made so far:

*[T]he lessee of a mining lease shall promptly and thoroughly carry out all obligations under the lease in a proper and workmanlike manner, developing and maintaining the production of all the exploitable minerals in accordance with the most modern techniques and methods in the industry, at the optimum rate consistent with the extent of the mineral deposits within the mining area, current market conditions and all relevant orders and regulations issued hereunder.*

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The law has provided four mechanisms whereby the mining lease and rights emerging from such can be terminated in connection to the right holder. As such, it can be terminated through transfer, surrender, revocation or expiry of due date.

The mining lease right can be transferred to third parties in writing with the written approval of the ministry through amalgamation, mortgage, assignment, inheritance or any other cause.<sup>132</sup> The transfer does not automatically absolve the transferor from the performance of its obligation under the lease.<sup>133</sup> It shall also not divide the leased land.<sup>134</sup>

Further, there is an obligation of registering the transfer in the register of immovable.<sup>135</sup> Hence, once the lease is transferred to a third party, the benefit emanating from it ceases to exist and they are not available for the third party. The legislator's tendency in allowing right transfer is largely taken as an

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<sup>131</sup> Proclamation No. 282/1971, *supra* note 67, Article 26(a).

<sup>132</sup> *Id.*, Article 31(a).

<sup>133</sup> Mining Regulation, *supra* note 90, Article 38(c).

<sup>134</sup> See *supra* note 148.

<sup>135</sup> Mining Regulation, *supra* note 90, Article 38(b).

investment attracting strategy. Investors will be encouraged to risk investing in mining operations if they are guaranteed that the possibility to transfer their investment to third parties is respected as a matter of principle. The strategy is balanced in that the ministry will have the power to critically appraise a transfer request and has the final say in allowing the same.

A lessee is also entitled to an act of surrendering his lease right by providing a one-year prior notice to the same effect to the ministry.<sup>136</sup> Approval of the request will be made by taking due consideration of the right of persons under the lease.<sup>137</sup> To protect the act of abandoning obligations under the guise of surrender, the proclamation makes it a pre-condition that any liability of the leaseholder is performed before validating surrender.<sup>138</sup> Surrender will ensure the reduction of illegal behaviors whereby right holders may simply abandon places of operation due to various reasons. A person or a company unable to proceed with operation can lawfully surrender and exit his investment.

Expiry of contractual duties and obligations is an obvious way of ending a mining lease if renewal is not sought with the period provided by the law.<sup>139</sup> Revocation, on the other hand, covers those situations arising from breach of provisions of the proclamation or regulation or breach of the conditions associated with the mining lease.<sup>140</sup> While the proclamation explicitly states two of these later conditions for revocation, i.e. failure to mine in a reasonable time after discovery and mining contrary to conservation.<sup>141</sup> There are other

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<sup>136</sup> Proclamation No.282/1971, supra note 67, Article 28(a).

<sup>137</sup> Id.

<sup>138</sup> Id., Article 28(b).

<sup>139</sup> Id., Article 32(a).

<sup>140</sup> Id., Article 27(a).

<sup>141</sup> Id.

conditions implied across the provisions. The contents of the conditions are summarized below.<sup>142</sup>

1. Failure to pay rent/royalty/any sum required from right holder after six months of the due date or failure to discharge any liability due to the government for more than a year of the due date.
2. Wasteful mining activity.
3. Failure to commence operation or suspend or restrain the operation.
4. Failure to meet performance obligation.
5. Failure to improve working conditions imperiling or tending to imperil the health and safety of employees while being notified of the same.
6. Making an intentionally false or misleading statement in the process and during operation.
7. Failure to prosecute the operation with all reasonable diligence and skill as set by law or requirements of the controller/director.

It is important to note at this point that the publicity of these items in news article serves as conclusive evidence of revocation.<sup>143</sup> Yet before the act of revocation, the ministry may provide a grace period for the lessee to amend and remedy the gaps.<sup>144</sup> In this regard, the ministry is authorized to shorten or extend the time set to perform acts under the law for good cause.<sup>145</sup> Revocation is also open for appeal both to the revoking authority<sup>146</sup> and the court of appropriate jurisdiction.<sup>147</sup>

#### **4.3 Fiscal Regimes of EIs Governance**

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<sup>142</sup> Mining Regulation, *supra* note 90, Article 39(a) 1-10.

<sup>143</sup> *Id.*, Article 39(b).

<sup>144</sup> *Id.*, Article 39 (c).

<sup>145</sup> *Id.*, Article 39(d) and Article 45.

<sup>146</sup> *Id.*, Article 39(f).

<sup>147</sup> *Id.*, Article 39(g).



As one of the major contents of a governance structure for extractive resources, high emphasis is rendered to the financial related schemes. The high-hope and expectation these resources will bring to the overall development and economic progress of a nation mandate a governance structure to carefully design the rules meant to control the management of revenues generated from the operation of extractive resources. In this regard, the proclamation has stipulated royalty, income tax and rent as major mechanisms of benefiting from the proceedings of the resource operation.

A royalty at different rates as to categories of minerals collected every 6 months is set by the proclamation.<sup>148</sup> Royalty for petroleum and natural gas is set at 12.5% of the wellhead value of the crude product extracted by the lessee.<sup>149</sup> Metalliferous and non-metallic minerals operators are to pay a maximum rate of 10% of the gross sale<sup>150</sup> while for precious minerals the rate is higher (15%)<sup>151</sup>. Mineral waters and thermal water require a 5% royalty<sup>152</sup> while for quarry substance a 3% rate is set.<sup>153</sup> All the royalty payments are calculated from the gross sale based on the highest price obtainable at the time of sale.<sup>154</sup>

It is also stated that the rate is set under the term "maximum rate"<sup>155</sup> the exact percentage of royalty will take into account for the economic value of the minerals.<sup>156</sup> Such provision tells us that the higher the economic value of the mineral in the market, the higher the possibility of applying the maximum rate

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<sup>148</sup> Mining Regulation., *supra* note 90, Article 44(b).

<sup>149</sup> Proclamation No. 282/1971, *supra* note 67, Article 40(a).

<sup>150</sup> Mining Regulation., *supra* note 90, Schedule x (a) 1.

<sup>151</sup> *Id.*, Schedule x (a) 2.

<sup>152</sup> *Id.*, Schedule x (a)3.

<sup>153</sup> *Id.*, Schedule x (a) 4.

<sup>154</sup> *Id.*, Schedule x(a) 1-4.

<sup>155</sup> *Id.*

<sup>156</sup> Mining Regulation., *supra* note 90, Schedule x(b).

of royalty, and the lower the economic value of the mineral in the market, the lower the possibility of requiring a maximum rate of royalty. Although this can be viewed as encouraging to the investor, the room for improper determination of royalty among various operators as a result of gaps in the institution responsible for controlling the activities is also a major threat of unjustified discrimination.

The governance structure seems generous and encouraging to leaseholders about other considerations it sets regarding royalty. The ministry is with the power to remit royalty payment in part or in whole.<sup>157</sup> This act of grace stands for 5 years.<sup>158</sup> With the approval of the council of ministers, the period can even extend to additional years.<sup>159</sup> Taking into account the high-cost investment put in place and the time required to return on investment, such provisions would enable investors to engage in the extractive resource sector easily. Finally, under all these scenarios, remittance of royalty requires the presentation of a good cause.<sup>160</sup> Yet with proper and convincing reason, the lessee is entitled to invoke an exemption request.

Another important point to note about the mining lease is that such exemption is not allowed for petroleum and natural gas operations. A lessee for petroleum and gas is exempted only from a royalty pay for resources used by it in the course of operation under the lease or while reintroducing such deposit or if petroleum or gas is lost or not used.<sup>161</sup> The lessee has also the option of paying royalty in cash or kind, i.e., in petroleum or gas for part of or

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<sup>157</sup> Proclamation No. 282/1971, *supra* note 67, Article 34(b).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* The term good cause is not defined in the law leaving the room wide open for the discretion of the regulatory authority.

<sup>161</sup> Proclamation No. 282/1971, *supra* note 67, Article 40(c).

the whole production.<sup>162</sup> In the case of royalty payment in kind, the acts of preliminary treatment, transportation and storage of production will be done by the lessee upon payment of the cost for doing the same by the government.<sup>163</sup>

The other major financial aspect of the governance structure is income tax. Without disregarding the income tax applicable for all activities in place at the time, the proclamation goes to state the particulars of extractive resource operations to be taxed.<sup>164</sup> In principle, a flat business income tax rate of 51% is provided both for mining and petroleum and natural gas operating business.<sup>165</sup> The determination of taxable income is set to be made after the deduction of royalty and other eligible taxes due and payable in a fiscal year.<sup>166</sup>

In an illustrative effort of how deductions are made for purpose of calculating income tax, Article 43 of the proclamation explicitly categorized discovery, depreciation, capital allowance and income from different mining activities as costs to be deducted from the income before determining the taxable income.

The legislator has provided two options for mining income tax payment. The lessee can either pay the 51% income tax or enter into a profit-sharing arrangement with the government to provide an agreed percentage of its profits instead of income tax.<sup>167</sup> The profit-sharing arrangement does not only relieve the lessee from its tax obligations, but it extends to relieve it from royalty and other eligible taxes required by pertinent laws.<sup>168</sup> A further

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<sup>162</sup> Id., Article 40(d).

<sup>163</sup> Id., Article 40(e).

<sup>164</sup> Id., Article 34(c).

<sup>165</sup> Id., Article 34 (c) 1 and Article 41(b).

<sup>166</sup> Id.

<sup>167</sup> Proclamation to promote, *supra* note 67, Article 34(c)1 -2.

<sup>168</sup> Id.

safeguard for the lessee of petroleum and natural gas is in place such that if in a fiscal year the amount of income tax and other payments required from him exceed 51% of his profits, the income tax will either be reduced or remitted to ensure that excess is avoided.<sup>169</sup> When even complete remission does not bring the excess down, the excess amount can be carried forward and deducted in subsequent years.<sup>170</sup>

Although at face value a 51% income tax on top of royalty, rent and other payments is cumbersome leading to investment decline, the various arrangements discussed above show the intention of the lawmaker to remedy the gap of in the same. The legislator is caught between finding the balance between ensuring investors attraction towards the sector while at the same time bringing the maximum benefit to the public at large.

Finally, the wide discretion left for the ministry/controller may be taken as a positive attribute for the law governing the sector. Yet the application of the same on fiscal matters calls for a very strict approach. Failure to treat all actors operating in the sector under similar footing and application of varying rules under the justification of national interest may have opened the door for corruption and wastage of resource gain leading to the resource curse.

## **5. Mining Governance in the ‘Derg’<sup>171</sup> Era**

The mining proclamation and regulation of the empire of Ethiopia, as discussed in the prior sections, were in full force as a principle even when the country saw a regime change that purports to follow socio-economic and

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<sup>169</sup> Proclamation No. 282/1971, *supra* note 67, Article 41(c) 1.

<sup>170</sup> *Id.*, Article 41 (c) 2.

<sup>171</sup> Meaning ‘committee’ in the ancient Ethiopic language ‘Geez’, ‘Derg’ refers to the military regime which overthrown Emperor HaileSELLASIE I and reigns in Ethiopia for seventeen years.

political path far different from its predecessor.<sup>172</sup> The provisional Military administration council seemed to have been convinced to avoid double effort by developing a new governance structure for the extractive sector. With a wider recognition of the strategy, the Dergue regime maintained used the contents of the structure with limited amendments. The amendments were demonstrative of the political reality of the time and the winning ideology of the day to which the government in power subscribes.

It is claimed that the ‘hibretesebawinet’<sup>173</sup> principle which the military administration staunchly adhere to eradication of personal gain by providing priority to the community's interest is prioritized.<sup>174</sup> It seeks to fulfill the same among others, by transferring resources it identified crucial for the economic development from the private sector to the ownership of the government after payment of “fair” compensation.<sup>175</sup> Where such total transfer cannot be realized for various reasons, the government considers it as its responsibility to share in the equity of the private sector to ensure the public interest.<sup>176</sup> The room for private sector ownership of resources and activities is availed after the consideration that such will not harm the interest of the society.<sup>177</sup> All this narrative is set in clear term to the preamble of the law that declares the government ownership and control of means of production. The law sets this means of production into three categories; activities undertook exclusively by

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<sup>172</sup>Government Control of Mineral Prospecting, Exploration and Mining Activities Proclamation, Proclamation No. 39/1975, *Negarit Gazeta*, (1975), Article 5(2), [hereinafter Government Control].

<sup>173</sup> Amharic word for socialism.

<sup>174</sup>Government Ownership and Control of the Means of Production Proclamation, Proclamation No. 26/1975 *Negarit Gazeta*, (1975), Preamble,[hereinafter Government Ownership].

<sup>175</sup> Id.

<sup>176</sup> Id.

<sup>177</sup> Id.

the government<sup>178</sup>, activities that may be undertaken jointly by the government and foreign capital,<sup>179</sup> and activities which may be undertaken by the private sector.<sup>180</sup>

The prior governance structure for mining operations is left untouched in connection to their substantive content. The shift is primarily concerned with ensuring the activities henceforth labeled as government-owned, joint or private. The change also seeks to ensure the ownership of those activities by governmental pursuant to legislative rules of nationalization that require private actors operating at the time to either surrender their full control or enable the government to have an equity interest, with fair compensation payment, in their operation as the case may be.

The legislation has put the following extractive resource operations under the ambit of exclusive ownership of the government:

1. Exploration and extraction of precious metals (such as gold and silver), large scale mining of salt pans, and radioactive and nuclear minerals<sup>181</sup>.
2. Petroleum refining and extraction of natural gas<sup>182</sup>

In the second category of joint undertaking by the government and foreign capital on terms to be agreed with the condition of a minimum of 51% equity for the government<sup>183</sup>, the following activities are listed:

1. Exploration and extraction of carbons and hydrocarbons such as petroleum and coal<sup>184</sup>

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<sup>178</sup> Government Ownership, *supra* note 174, Article 2.

<sup>179</sup> *Id.*, Article 3.

<sup>180</sup> *Id.*, Article 4.

<sup>181</sup> *Id.*, Article 2(1) a.

<sup>182</sup> *Id.*, Article 2(1) d.

<sup>183</sup> *Id.*, Article 3(1) and (2).

2. Mining of ferrous and non-ferrous metals<sup>185</sup>
3. Mining of chemicals and fertilizer materials such as potash, phosphate and Sulphur<sup>186</sup>

On the final list of private sector engagement open areas for individuals or business organizations, quarrying<sup>187</sup> is mentioned. Although the fields as import-export trade and wholesale and retail trade<sup>188</sup> are mentioned in generic terms, it is possible to understand the same to apply for trade in connection to mineral products. The final list under this category also bears the term 'others not elsewhere classified',<sup>189</sup> enabling one to find room for an activity in the mining sector if not specifically listed by the other two categories.

Barely three months after the coming to effect of this general law was a specific legislation meant to expand the contents of the general declaration to the extractive sector in particular in place. Proclamation 39/1975, government control of mineral prospecting, exploration and mining activities proclamation recognizes the need to issue a separate law that provides direction to the new economic policy in connection with mineral activities.<sup>190</sup> Affirming the long-standing claim over all mineral wealth of the state domain, it provides a slight recognition of the need to engage foreign private and public capital in some areas of the operation to accelerate the development of the mineral resources.<sup>191</sup>

To the general laws categorization discussed above, the proclamation has made the following amendments:

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<sup>184</sup> Id., Article 3(1) a.

<sup>185</sup> Id., Article 3(1) b.

<sup>186</sup> Id., Article 3(1) c.

<sup>187</sup> Id., Article 4(2).

<sup>188</sup> Id., Article 4(12) and (13).

<sup>189</sup> Id., Article 4(18).

<sup>190</sup> Government Control, *supra* note 172, Preamble.

<sup>191</sup> Id.

1. It included the resources platinum and other precious minerals, and the exploitation of uranium, radium and geothermal power to the government exclusive ownership listing.<sup>192</sup>
2. It cancels the petroleum and natural gas operation that was assigned to the exclusive jurisdiction of government ownership and puts the same under joint government and foreign capital listings.<sup>193</sup> It seems the nationalization dictum was met with the reality of the government's actual operational capacity that a need to engage foreign capital was realized.
3. The terms ferrous and non -ferrous metals were clarified with specific mineral names as iron, copper, and nickel and the category of metallic minerals was added under the joint operation listing.<sup>194</sup>
4. In the private sector category, the term quarry was clarified to incorporate marble, limestone, sand, gravel, stone and other quarrying substance.<sup>195</sup> The prospecting, exploration and mining of industrial clay and minerals necessary for the manufacturing of bricks, chinaware, ceramic, glass and bottle with mineral water and thermal water mining.<sup>196</sup>
5. It gives the Ministry of Mines and Energy the power to issue regulations necessary for the better implementation of the proclamation.<sup>197</sup>

Other than expanding the list of categories, the only additional point made is the recognition provided for the continuing of the mining lease term for operation already in place, as long as the minimum 51% government equity is ensured for mining activities the law set to be undertaken jointly with foreign

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<sup>192</sup> Government Control, *supra* note 172, Article 2(1).

<sup>193</sup> *Id.*, Article 5(1).

<sup>194</sup> *Id.*, Article 3(1) b.

<sup>195</sup> *Id.*, Article 4(1).

<sup>196</sup> *Id.*, Article 4(3).

<sup>197</sup> *Id.*, Article 6.



capital.<sup>198</sup> The job security of employees in the transferred entities or equity shared entities is also protected by the law.<sup>199</sup>

## 6. Conclusion

This article explored the long-standing experience Ethiopia had accumulated in extractive industry governance since era of Emperor Menelik II. As a landmark move in this regard, the emperor established a governance system whereby he authorizes the exploitation of areas by investors on conditions regarding taxes, working conditions, term of permit, the scope of permit concerning the type of mineral to be exploited, and certain investment guarantees from the side of the government. This can be inferred from the various letters issued to operators at different times. These letters were further supported by the duties required by local officials to facilitate the operation of permit holders in the provision of labor, favorable working environment, right of way, and transportation.

A governance structure in a form of legislation first appears in the era of Emperor HaileSELLASE I. Although various imperial decrees were issued regarding the mineral wealth of the nation and the right of the state to act as protectorate and owner of the resource, the first legislation with explicit governance element was the one that prohibits the export of certain selected minerals from the empire. Another legislation of similar nature with a broad aim of governing the transaction of minerals was also enacted during the imperial period.

A detailed governing structure for minerals needed to wait for another three decades. Mining Proclamation of the Empire of Ethiopia 1971 with its regulation was a comprehensive governance structure, albeit its limitation, in

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<sup>198</sup> Id., Article 3(2).

<sup>199</sup> Government Ownership, *supra* note 174, Article 9.

failing to incorporate some major issues of extractive governance of current time as community rights and environmental considerations. The preamble to the proclamation has the economic growth and welfare of the Ethiopian people linked with the exploration and development of mineral resources making the development and extractive governance nexus readily available since the earlier laws of mineral operation governance. It was also stated in the preamble that a statement and clarification of the law concerning mineral development is a key to foster private investment, national and foreign, in the sector. The 'Derg' regime did not repeal the substantive content of the proclamation. Hence a brief look at how the new economic conception of socialism has impacted the governance structure was made.