

A CRITICAL APPRAISAL OF THE LEGISLATIVE POWER OVER MINERAL RESOURCES IN THE ETHIOPIAN FEDERATION

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Abstract

The assignment of legislative power over mineral resources is a contentious issue in a federal constitutional design. This article offers insight into how the Ethiopian Federation assigns legislative power over mineral resources. To this end, it adopts a qualitative research method that combines document analyses and interviews. It finds that the FDRE constitution failed to clearly define the nature and scope of legislative power over mineral resources. It argued that the constitution shared legislative power over mineral resources between federal and state governments. It also found that the federation failed to provide an institutional and legal framework that avoids and solves conflicts over legislative power over mineral resources. Moreover, it finds that the institutional and legal gaps and inconsistencies in the exercise of legislative power over mineral resources have led to the development of a legal framework that contradicts the constitution. Finally, it concludes by proposing recommendations to improve the legal and practical challenges in exercising legislative power over mineral resources within the Ethiopian Federation.

Keywords: *federalism; division of power; legislative power; concurrent powers; mineral resource; Ethiopia.*

1. Introduction

Legislative power is the first dimension of control power over mineral resources. Legislative power over mineral resources refers to the authority to create or establish a legal framework that governs the exploration, extraction, management and distribution of mineral resources.¹ It is one way in which the state exercises its regulatory power

¹John J., Jr. Beardsworth and Matthew A. Stuart. "Petroleum Legislative Frameworks and Contracts in a Federation: Issues for Constitutions, Petroleum Laws, Regulations, and Contracts." 2019; Cameron, Peter D., and

to over mineral resources. It covers diverse issues that arise in the mining sector, including the transfer of mining titles, economic benefits, health and safety practices, environmental and social development standards, infrastructure development, mineral transactions, import and export permits, and other matters affecting the development of natural resources.² The state can exercise its legislative powers in different ways, including through its subscription to international law, or by enacting a national law that includes national constitutions and subsequent legislation.³ In federal systems, legislative power over natural resources is addressed in line with the cardinal principles of federalism, the constitutional divisions of power. Literature on the decentralization of power proposed recommendations as to the ideal ways to assign legislative power over mineral resources. Accordingly, the assignment of legislative power over mineral resources must consider efficiency, capacity, and national interests.⁴ Despite subscriptions in the literature, practice across federations shows little adherence to coherent principles.⁵ The division of legislative power over natural resources requires careful analysis and negotiations between national and subnational stakeholders. Besides the normative framework that advocates for the ideal division of power, the assignment of legislative power over mineral resources depends on the unique political development of the host state, impact of the mining sector, and need to enhance the global competitiveness of the federation.⁶ The form and scope of the division of legislative power over natural resources vary among federations and can be categorized into devolved, centralized, and concurrent systems.⁷

2. Division of Legislative Power Under the FDRE Constitution

The FDRE Constitution followed trends in other federal systems and developments made during the transitional period, and tried to address the division of power in the constitutional text. It divides legislative power into the exclusive power of federal and state governments, concurrent power of both levels of government, and the residual

Michael C. Stanley. *Oil, gas, and mining: a sourcebook for understanding the extractive industries*. World Bank Publications, 2017.

² Haysom, Nicholas, Sean Kane, and Centre for Humanitarian Dialogue. *Negotiating natural resources for peace: Ownership, control and wealth-sharing*. HD Centre for Humanitarian Dialogue, 2009.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Beardsworth Jr & Stuart, *Petroleum Legislative Frameworks and Contracts*; Cameron & Stanley, *Oil, gas, and mining*.

⁷ Brosio, Giorgio. "The assignment of revenue from natural resources." *Handbook of fiscal federalism* (2006): 431.: Bauer, Andrew, Paul Shortell, and Lorenzo Delesgues. "Sharing the wealth: A roadmap for distributing Myanmar's natural resource revenues." *Natural Resource Governance Institute* [online]. Available from: <https://resourcegovernance.org/analysis-tools/publications/sharing-wealth-roadmap-distributing-myanmars-natural-resource-revenues> [Accessed 23 August 2023].

power of regional governments.⁸ It enumerated the exclusive legislative powers of federal⁹ and regional state governments.¹⁰ It expressly confers residual power to the states.¹¹ It also includes the concurrent legislative power of both levels of the government.¹² The first concurrent legislative power is the competence to enact policies and strategies.¹³ It also provided 'generic' concurrency, where the House of Federations determines, if federal regulation is necessary, and also cases that await the enactment of the federal law.¹⁴ The other concurrent power is provided by separating legislative and administrative powers on specific functions between the federal and state governments.¹⁵

3. Division of the Legislative Power Over Natural Resources

The FDRE Constitution divides legislative power over natural resources between the federal and regional governments. It provides the power to enact a law that regulates the utilization and conservation of natural resources is a concurrent power.

⁸ The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation number 1/1995 Federal Negarit Gazette (1995).Article 52(1).

⁹ Ibid, articles 51 and 55, The federal government is the main organ with the enumerated powers, saving some enumerated powers of the regions. Article 51, lists 21 exclusive federal competencies. The exclusive powers of the federal government also include other powers provided under different articles of the constitution such as the power to enact a labor code, commercial code, penal code, approval of federal appointments, and the establishment of federal institutions.

¹⁰ Ibid; Negussie, Solomon. Fiscal federalism in the Ethiopian ethnic-based federal system. wolf legal publishers, 2006; Fiseha, Assefa. "Federalism and the Accommodation of Diversity in Ethiopia." A Comparative Study. Nijmegen: Wolf Legal Publishers (2007).The Constitution lists seven items as exclusive state competencies, such as adopting a state constitution, establishing state police, enacting legislation on state civil service, formulating and approving policies on state economic and social matters, and administering land and other natural resources. There are different views as to the need to incorporate this sub-article in the presence of the residual power of subnational governments.

¹¹ The Constitution of the Federal Democratic Republic of Ethiopia; Fiseha, Assefa, and Zemelak Ayele. "Concurrent powers in the Ethiopian federal system." In *Concurrent Powers in Federal Systems*, pp. 241-260. Brill Nijhoff, 2017.FDRE constitution article 52 as it states: "all powers not given expressly to the federal government alone or concurrently to the federal government and the states are reserved to the states."

¹² The Constitution of the Federal Democratic Republic of Ethiopia, article 98, even though article 98 of the FDRE constitution indicated the existence of concurrent power in the taxation power. However, the unofficial amendment to the constitution has changed it into revenue sharing arrangement. Moreover, the constitution also provides for the concurrent power of the courts. However, it is hard to take this power as a concurrent power as the constitution provides for the delegation of the jurisdiction of federal courts to state courts. Despite such limitations, the detailed exploration of the conational text will reveal that the constitution provided limited areas of concurrent power of the federal and state government.

¹³ The Constitution of the Federal Democratic Republic of Ethiopia, article 51(3) and 52/1.

¹⁴ The Constitution of the Federal Democratic Republic of Ethiopia,article 55/5 and 55/6.

¹⁵ The Constitution of the Federal Democratic Republic of Ethiopia, article 51/5, 55/2/a/ and 52/2/d. It authorizes the federal government to enact laws regarding the utilization and conservation of land and other natural resources, historical sites, and objects and provides the states with the power to administer land and other natural resources under federal laws. Moreover, it divided the legislative and administrative power over natural resources between the federal and regional governments.

It assigns legislative competence to mineral resources by separating legislative and administrative powers between the federal and state governments.¹⁶ Moreover, it provides important principles, guidelines, and rules that have direct significance for controlling mineral resources.¹⁷ However, the constitutional division of power failed to address two important issues: the specific power that falls under concurrent power and the exact power of either tier of government. The lack of clarity regarding the constitutional division of power has led to two basic questions regarding the division of legislative competence over natural resources. First, does the federal constitution assign all primary legislative competences over mineral resources, or is there any room for the residual power of the regional states? Second, does the power of the regional state entail law-making? If so, what is the scope of the federal law?¹⁸ Hence, an attempt was made to assess the nature and scope of the division of legislative power over natural resources.

3.1. The Nature of Legislative Power Over Mineral Resources

The FDRE Constitution assigns legislative power to regulate the “utilization and conservation” of natural resources to the federal government.¹⁸ However, it has failed to define the “utilization” and “conservation” of natural resources. It is not clear from the constitutional text or drafting documents that it intends to vest all legislative power over natural resources to the federal government or to limit it to specific powers. More specifically, it led to questions as to whether it covers the later stages of the extractive sector. Moreover, the Constitution’s assignment of residual power to subnational governments intensified the need to explore areas uncovered by the Constitution. The answer to this question depends on the definition given to the two words: “utilization” and “conservation”. The notion of the conservation of natural resources is straightforward. It refers to activities that intend to preserve natural resources in their natural habitats and avoid the adverse effects of natural resources, if any, on its surroundings. It mainly focuses on preserving the natural resources in the original environment.¹⁹ However, the utilization of natural resources is complicated as it involves the actual use of natural resources. This raises questions as to whether the utilization of natural resources covers all processes involving mineral resources, from the extraction of mineral resources to the final consumer of the finished product. Specifically, does it cover every step in the extractive sector, including mine development, mineral extraction, mineral processing, marketing, exports, and other sector-related activities? There are two views regarding the legislative power over mineral resources.

¹⁶ Ibid.

¹⁷ Ibid art 43, 44, 89 and 92.

¹⁸ Ibid article 51/5.

¹⁹ Dictionary, Blacks Law. "Black's Law Dictionary." URL: <https://dictionary.thelaw.com/truth> (1990).

On one hand, one finds actual practices in the Ethiopian federal system. Over the last three decades, the Federal and regional legal frameworks have failed to define the utilization of mineral resources. The Constitution failed to provide scope for the utilization of natural resources. Moreover, no constitutional case law has directly addressed this issue. Despite this limitation, federal and regional governments actively engage in the law-making process, which sheds light on the operational meaning given to the utilization of natural resources. The federal government enacted mining and mineral transaction laws that extensively regulate the extractive sector.²⁰ These two laws provide an illustrative definition of the utilization of mineral resources. It provided that the utilization of mineral resources covers every aspect of the extractive sector. The draft federal mining policy extended the scope of its application to cover all aspects of the extractive sector.²¹ The reading of federal proclamations and draft mining policy suggests that the federal government holds the opinion that it has the broadest legislative power over mineral resources. Moreover, the regional mining laws provide similar interpretations.²² The Regional states did not seek to assert any residual power over mineral resources. Within this framework, the regional states enacted and amended laws that regulate natural resources.²³ Thus, the federal government enacted a law that governs every area of natural resources, while the powers of the regional states are mainly limited to enacting secondary legislation.

On the other hand, some argue that federal government power is reserved for the utilization and conservation of natural resources, whereas regional states have residual legislative powers. According to my interview with an official in regional states, the federal government's legislative power is limited to the utilization and conservation of mineral resources, which stretches from extraction until mineral resources enter the resource market.²⁴ It is a regional state mandate to regulate the process once minerals reach the resource market. He concluded that regional states

²⁰ Federal Mining Proclamation Number 678/2010; Ethiopian Mineral Resource Transaction Proclamation No.1144/2019), The Federal mining law provides a legal framework regulating the mining operation. It regulates the process from the initial development of the mine until the refined mineral resource is presented to the resource market. The federal mining proclamation excludes smelting and refining its definition of mining and its jurisdiction. On the other hand, the federal mining transaction list out procedure after the extraction of mineral resource. It tried to regulate development that is made once the mineral resource is brought to the resource market. It covers any attempt to increase value in the natural resource such as elating, refining, manufacturing and fabrication, and the final marketing process.

²¹ Ministry of Mines of Ethiopia, "DRAFT-MINERAL-RESOURCES-DEVELOPMENT-POLICY" (2021), It states that the policy applies to mineral development and related activities, which include mining and the use of minerals as raw materials in industrialization, agriculture, construction, jewelry, and other purposes.

²² (Mineral Resource Development Proclamation Number 91/2005; A Proclamation to Amend Oromia Regional State Income Tax Proclamation Number No. 202/2017).

²³ (FDRE constitution) article 52(2)d.

²⁴ 1st interview, Official of the Oromia Regional State Mining Bureau, interview by Author, June 15, 2022, Addis Ababa, Ethiopia, in-person interview.

have residual legislative power, except for matters related to the utilization and conservation of mineral resources.²⁵

The above argument in light of such developments in federal system. The assignment of legislative competence to mineral resources is a controversial issue in federal constitutional design. Federation uses different terminologies to assign legislative competence over mineral resources that stretch from federal systems that rarely provided rule to those that contain detailed provisions.²⁶ In the former case, the assignment of the legislative power over mineral resource is subjected to constitutional interpretation and also extra constitutional documents. Moreover, as noted above, federal systems used different trends to assign legislative power over natural resources. Some federal systems share legislative power over natural resources, while others grant it exclusively to one level of government. On top of this, the assignment of legislative competence over mineral resources is not a one-time business. Rather, it has been subjected to the federal bargaining process, which is continuously on a change. It is often subject to change and negotiation as federal systems adapt to changing economic, political, and environmental circumstances.

The FDRE Constitution specifically used two words to assign legislative power over mineral resources. It chooses to use specific terms to assign legislative power over natural resources: "utilization" and "conservation".²⁷ The constitutional drafters failed to clearly define the meanings of the two words. Moreover, there is no recorded evidence that shows that the constitutional drafter intention in assigning legislative power over mineral resources. Furthermore, unlike other federal systems, Ethiopian constitutional law failed to provide a working definition for the term. Furthermore, it is not subjected to federal bargaining process that aims respond to the confusion. It is not clear from the development of the federal arrangement whether the utilization and conservation of mineral resources could refer to any or all stages of the extractive process, from exploration to final marketing. The literal definition of the two words is essential to address confusion. One of the terms that is used to assign legislative competence to mineral resources is "conservation". It is normally used to imply activities that include the protection and preservation of mineral resources from depletion or degradation or the efficient and sustainable use of mineral resources for present and future generations. On the other hand, the other of term that is used to assign legislative competence to mineral resources is "utilization". The "utilization of mineral resources generally refers to the various processes of extracting, processing, and using minerals from the Earth's crust for different purposes, including mining, beneficiation, smelting, refining, and recycling of mineral materials. However, the extractive sector includes activities that are much broader than the above definition.

²⁵ Ibid.

²⁶ (Haysom & Kane, 2009).

²⁷ (FDRE constitution) article 52(2)d.

Olawuyi, correctly noted that the extractive mineral resource sector covers a broader range of economic activities.²⁸ The major economic activities in the extractive sector can be classified into three major steps: extraction, which involves exploration, development, and mining; processing, which involves processing or beneficiation, smelting, refining, and other value-added activities; and marketing of the resource product.²⁹ Economic activities in the extractive sector are not limited to “utilization” and “conservation” of natural resources. It is clear that the phrase “utilization” of mineral resource did not guarantee a complete assignment of the legislative competence over mineral resources. The former specifically failed to incorporate the later stage of the extractive sector; more importantly, it excludes activities after the resource reaches the resource market until the final product reaches the ultimate consumer level, including the regulation of mineral resource trade and mineral exports. Thus, the “utilization” and “conservation” should not be used to cover all activities related to mineral resources. Activities performed once the minerals reach the resource mark are not covered under the constitutional division of power. The federal government has no power to enact laws that regulate issues outside of the conservation and utilization of natural resources. It is the residual power of regional states to regulate issues that are not covered by the utilization and conservation of natural resources. Thus, the latter view is in line with the spirit of constitutional text.

Once the legislative competence of federal and regional governments is established, the next step is to assess the extent to which either level of government complies with the constitutional division of power. The federal government enacted two basic laws regulating the extractive sector: the mining and mineral transaction laws. Moreover, regional states have enacted a mining law that regulates the extraction of mineral resources in their respective regions. An examination of these laws reveals that federal and state legislative organs partially adhere to the constitutional division of power. As noted above, federal mining law covers the mining stages of mineral development. It regulates the reconnaissance, exploration, exploitation, closure, and post-closure stages of the mining operations. These activities, as noted above, could be considered part of the utilization of mineral resources. Accordingly, the federal mining proclamation falls under the jurisdiction of the federal government to regulate the utilization and conservation of natural resources. On the other hand, the federal government enacted mineral transaction laws.³⁰ It covers the stage from when the mineral leaves the mining site until it reaches the final consumer.³¹ These include mineral refining, smelting, smithery, lapidary, combining, supplying, crafting, transport, mineral trade, and export. A close examination of the proclamation reveals that there is part of the proclamation that falls under the power of the federal government, while some

²⁸ Olawuyi, Damilola S. *Extractives Industry Law in Africa*. Springer International Publishing, 2018.

²⁹ *Ibid.*

³⁰ (Ethiopian Mineral Resource Transaction Proclamation No.1144/2019) preamble, article 2/7; 3/1.

³¹ (Ethiopian Mineral Resource Transaction Proclamation No.1144/2019) article 3/2, It should be noted here that developer who has a mining licensee are governed by the federal mining proclamation.

falls under the residual power of the state. The first part of the proclamation covers refining, smelting, smithery, lapidary, combining, suppling, crafting, processing, and transporting minerals. These activities are conducted before resources reach the final consumer. It is fair to say that these powers are well-covered by the constitutional division of legislative power over mineral resources. On the other hand, the proclamation also addresses issues that arise after mineral resources reach the resource market.³² These includes the regulation of the trade of mineral resources³³ and export of minerals.³⁴ These activities are not part of the utilization of mineral resources. It is part of the reserved power of the regional states. Hence, the part of the proclamation that covers activities once mineral resources reach the resource market is beyond the power of the federal government.

3.2. The Scope of the Legislative Power Over Natural Resources

According to Articles 52(2) d and 51(5) of the FDRE Constitution, the federal government is empowered to enact laws that govern the utilization and conservation of natural resources, whereas regional states are empowered to administer natural resources through federal laws.³⁵ However, it is not clear where the federal government's primary legislative power ends and where the regional state's secondary legislative power begins.³⁶ The lack of clarity regarding the division of legislative power has led to debates and arguments since the establishment of the federal system. Uncertainties are especially evident in the legislative power over land.³⁷ Legislative power over land has been the main issue attracting the interest of politicians, academics, and government agencies.³⁸ After a long debate, it is largely agreed that the power to enact the primary law on the utilization and conservation of land is the competence of the HoPR. Moreover, the federal government must enact a framework of legislation that provides room for subnational governments.³⁹ However, this does not prevent the federal

³² (Ethiopian Mineral Resource Transaction Proclamation No.1144/2019) article 2/7; 3.

³³ (Ethiopian Mineral Resource Transaction Proclamation No.1144/2019) article 11.

³⁴ (Ethiopian Mineral Resource Transaction Proclamation No.1144/2019) article 12.

³⁵ (FDRE constitution) article 52/2/d and 51/5.

³⁶ (Fiseha & Ayele, 2017), Zemelak and Assefa rightly note that the main issue is "whether the power of the states to administer federal law...involves law-making power, including the issuance of secondary legislative power."

³⁷ (Fiseha, 2007; Fiseha & Ayele, 2017); Semahagne, Habtamu Sitotaw. "The Power to Administer Land in Ethiopia: Scrutinizing Federal Legislative Interventions." *Bahir Dar UJL* 6 (2015): 195. The FDRE constitution addresses the legislative competence over land and natural resources under the same article. Even though, the legislative power over natural resources and land are treated under the same article, the two issues did not attract the same attention from academics and politicians. The constitutionality of the diverse laws that regulate rural and urban land is at the center of constitutional law, academic writing, and political discourse. Most disputes and arguments are forwarded against the power of either level of government to regulate land. However, since, both issues are covered in the same sub-article, the arguments that are raised as to the legislative power of either tier of the government to regulate land are pertinent to understand the possible debate that arises against the legislative power over natural resources.

³⁸ (Fiseha, 2007; Fiseha & Ayele, 2017; Semahagne Habtamu Sitotaw, 2016).

³⁹ (Fiseha, 2007; Fiseha & Ayele, 2017; Semahagne Habtamu Sitotaw, 2016); Biyadlegn Meles & et al. v Amhara Regional State, the House of Federation First Emergency Meeting, unpublished, 1989, E.C.

government from expanding its power and enacting laws that are extremely intrusive on the competencies of the regional state.⁴⁰ The federal government's intrusion into regional state jurisdiction has not led to constitutional disputes except in a few cases.

The division of legislative competence in mineral resources remains largely unexplored. Despite these limitations, the federal and state governments have enacted laws to regulate mineral resources. The federal government has enacted mining and mineral transaction laws.⁴¹ The federal mining proclamations regulate the entire mining process in the country. The federal mineral transaction law regulates most commercial activities that involve mineral resources. Regional states have also enacted mining laws but have failed to enact laws that regulate mineral resource transactions. The scope of federal and state mining and federal mineral transaction proclamations is determined by the division of administrative power under the federal proclamations. The Federal proclamations have divided the administration of mining based on the level of mining operations, transactions, and nature of mineral resources. The apparent division of legislative competence at either level of government over mineral resources can be categorized into two trends.

The first trend covers mining operations and mineral resources, which fall within the federal government's administrative competence. The federal mining law divides administrative competence over mining operations based on the nature of the resource and the level of the mining operation.⁴² It specifically identifies mining operations and mineral resources that fall under the administrative competence of federal and regional state governments.⁴³ Accordingly, it enacted a detailed rule that regulated mining operations under the federal government's jurisdiction. It did not see legislative power as a concurrent power but rather as its exclusive competence. It

⁴⁰ (Fiseha, 2007; Fiseha & Ayele, 2017; Semahagne Habtamu Sitotaw, 2016).

⁴¹ (Federal Mining Proclamation Number 678/2010; Ethiopian Mineral Resource Transaction Proclamation No.1144/2019).

⁴² (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020; Federal Mining Proclamation Number 678/2010; The Federal Income Tax Proclamation Number 979/2016, n.d.; Ethiopian Mineral Resource Transaction Proclamation No.1144/2019) The federal mining law has divided the administration of mining based on the level of mining operation, and the nature of mineral resources. The federal mining proclamation defines mineral resources. It also determines the level of a mining operation, as large-scale, small-scale, special small-scale, and artisan mining, based on the level of output and mining area. The regional mining proclamation also followed the federal mining proclamation classifications of mining operations. The regional state government have enacted a law that similarly defines minerals. However, recently, as will be noted here under there is a direct and indirect contradiction between the federal and regional law definition of mineral resource and determine the level of a mining operation. Moreover, the federal tax proclamation provides that definition, and the meaning provided under the federal mining law is applicable for tax purposes as well. The determination made on the above point will have an impact on the revenue potential of the regional states. It should be noted here that the impact of the legislative power of the federal and state government on revenue generating capacity will be addressed in upcoming works.

⁴³ (Federal Mining Proclamation Number 678/2010) article 52, The administrative role of the state is limited to granting licenses to artisan mining, reconnaissance, exploration, and retention licenses concerning construction and industrial minerals; small-scale mining licenses for industrial minerals and construction materials mining by the domestic investor while the federal government has the residual powers.

has fully taken away all the law-making power itself. Moreover, regional states have not enacted laws to address issues that fall under federal government administration. The constitutionality of the Proclamation was not questioned during the drafting process. The issue was not presented to the federal umpiring body. However, following recent developments, regional states have begun to challenge the division of administrative competence over mineral resources, and have enacted rules that are already covered by federal law. For instance, the Oromia regional state mining law, contrary to the federal mining proclamation,⁴⁴ provides that special small-scale mining falls under the jurisdiction of the regional state. It also provides a rule that regulates special small-scale mining.⁴⁵ Moreover, although the federal mining proclamation provided that the administrative role of the state is limited to granting licenses for reconnaissance, exploration, and retention concerning construction and industrial minerals, small-scale mining licenses for industrial minerals, and construction materials mining to domestic investors, regional law has extended the power of the state to cover any investor that engages in the process.⁴⁶ However, regional states did not push for amendments to the federal legal framework. Moreover, its efforts were not supported by the decisions of the Umpiring body.

The second trend covers mining operations that fall under the administrative competence of the regional states. Similarly, federal mining law provides a detailed legal framework that regulates the mining sector. Subnational governments, based on federal mining laws, have enacted rules that regulate the administration of mineral resources.⁴⁷ However, the detailed nature of federal law has limited the regional state's legislative role.⁴⁸ The role of regional legislators is largely limited to the repetition of federal law. There has been limited effort from regional bodies to challenge the detailed nature of federal law or to explore the scope of state legislative power through either political processes or umpiring bodies. Moreover, the regional states chose to create a legal framework that was a repetition of federal law. However, regional mining law has recently attempted to use the space allocated by federal mining legislation.⁴⁹ The

⁴⁴ The Federal Mining Proclamation Amendment, Proclamation Number 816/2016, 2012) article 2.

⁴⁵ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020) article 24/3, 29, 30 and 49/4/b.

⁴⁶ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020) article 27, 28 and 49/4.

⁴⁷ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020), more specifically, the regional law regulates the issuance of exploration, retention, and production license in the case of artisan miners, special small-scale, small-scale, and large-scale mining activities that falls under the administrative competence of the regional states.

⁴⁸ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020).

⁴⁹ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020; Federal Mining Proclamation Number 678/2010), On the other hand, in a limited instance, the regional mining proclamation failed to cover issues that are already addressed under the federal mining law. For instance, the Oromia mining proclamation failed to regulate Reconnaissance. However, it will not be problematic as the federal law is detailed enough to regulate the mining process.

first attempt was to modify the content of federal law.⁵⁰ A minor addition was introduced into the regional mining legal framework. For instance, the Oromia Mining Law provides an additional requirement that the landholder has the right to obtain a share from the mining operation and preferential treatment of the landholder.⁵¹ There are also clear differences between federal and regional mining legislation concerning the definition of mineral resources.⁵² For a long time, federal and state governments have enacted laws that similarly define minerals.⁵³ However, successive amendments made by the federal government have led to differences in the definitions of mineral resources. The first difference emerges in the definition of mineral water.⁵⁴ There is also a difference between the federal and regional states in terms of the inclusion of geothermal energy in the definition of mineral resources.⁵⁵ Moreover, very recently,

⁵⁰ (Federal Mining Proclamation Number 678/2010, 2010), Article 29, (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020) article 26 and 27. For instance, in the cases of large-scale mining operations, the federal mining law provides that the duration for a Large-scale mining license and its renewal is 20 and 10 years respectively. On the other hand, Oromia regional law has reduced the duration to 10 and 5 years respectively. Moreover, the federal mining proclamation provides that the maximum duration for small-scale Mining License and its renewal is 10 and 5 years respectively. On the other hand, regional mining has reduced the duration for small-scale mining to five years.

⁵¹ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020,) article 53.

⁵² (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020,) the federal government has failed to recognize some natural resources, as a mineral resource. Until now the state government did not enact a law that recognizes mineral resource that is not covered by the federal mining law. The regional states adopted a definition closer to that of the federal government. Until now the state government did not enact a law that recognizes mineral resource that is not covered by the federal mining law. The federal government's failure to recognize certain natural resource as mineral resource has limited the claims of regional states.

⁵³ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020) The definition of mineral resource is very crucial as it serves as a basis to determine the administrative and legislative jurisdiction of the central or the subnational government. Moreover, the same elements are used for tax purposes. The effect of the federal government legislative power over the revenue system will be addressed in upcoming works.

⁵⁴ (a proclamation to promote the development of mineral resources, proclamation NO. 52/1993 1993) article 2/14, Oromia regional state mineral development proclamation at supra note 28, article 2/, the federal mining proclamation at supra note 26 (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020; Federal Mining Proclamation Number 678/2010, 2010)article 2, Oromia mining proclamation amendment article 2/9/a. mineral water is one type of mineral resource. Based on the level of the mining operation the administration power is assigned either to the federal or state government. The regional state-enacted mineral development proclamation provides a similar definition. On the other hand, proclamation no. 678/2010, introduced a modified definition of mineral that excludes mineral water from the definition. The new definition of mineral resources costs the state's share of the revenue from royalty and income taxes. However, it takes more than ten years for the regional state took years to align with the federal amendments. For instance, it took ten years for Oromia regional states to amend their laws. Moreover, the change in the definition of mineral resources under the federal mining law did not bring about such a change, except that salty water could be considered a mineral resource under regional laws.

⁵⁵ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020; Federal Mining Proclamation Number 678/2010; Federal Geothermal Resources Development Proclamation No. 981/2016, 2016), geothermal resources development, proclamation number, articles 2/20 and 13/1-4/, according

there has been a clear difference between the division of administrative power over mineral resources and the subsequent lawmaking power.⁵⁶

The Federal Mineral Resource Transaction Proclamation (FM RTP) followed the same approach. The scope of legislative power at either level of government is determined by the division of administrative power under the federal proclamation. It divides the administration of mineral transactions based on the level of mining operations, processing activities, and nature of mineral resources. It followed two trends to determine the scope of legislative competence of either level of government. In the first case, the federal government had the most administrative power over mineral resource transactions.⁵⁷ Accordingly, it provides a detailed rule that regulates most activities involved in mineral resource transactions. The second trend covers mineral transactions that fall under the administrative competence of the regional states. Federal law also covers the issues assigned to regional states. However, the regional state has failed to enact laws that regulate the issues that fall under its administration.⁵⁸

The FDRE Constitution has made legislative power over mineral resources a concurrent power. It generally assigns legislative power over mineral resources to both levels of the government.⁵⁹ It did not divide legislative power over mineral resources based on the level of mining operations, processing activities, or the nature of mineral resources. Moreover, it is not up to federal or regional legislators to make any explicit or implicit divisions of power. Federal or regional governments have no constitutional basis for creating a division of power based on federal or regional proclamation. Thus, it is unconstitutional for federal and regional governments to divide legislative powers over natural resources. The FDRE Constitution explicitly states that legislative power over natural resources is concurrent. The concurrent power of both government levels over mineral resources should be administered in line with

to proclamation no. 52/1993 geothermal energy is one type of mineral resource. The regional states also provide similar definitions. However, geothermal energy was later removed from the definition of mineral resources. Moreover, the federal geothermal energy proclamation recognized it as an independent resource subjected to the control of the Energy Authority. Even though the new law does not abolish the role of the regional states, it provided for a new way of administration. On the other hand, the regional state did not mandate significant change. For instance, the Oromia mining proclamation failed explicitly to avoid geothermal energy in its definition of a mineral resource.

⁵⁶ It should be noted here that a detailed analysis of the development on the division of administrative power over mineral resource is addressed in subsequent parts.

⁵⁷ (Ethiopian Mineral Resource Transaction Proclamation No.1144/2019) article 28/4, the power of the federal government, the ministry of trade and regional cooperation, includes the to issue license and competence certificate for mineral refining, smelting for metallic and associated minerals and mineral export. Set and enforce standards in which smithery, lapidary, combining and refining activities are carried out. The residual power resides over state. Moreover, the federal government has important powers that are essential for the regulation of the mining sector. the federal government is free to delegate some of its power.

⁵⁸ (Ethiopian Mineral Resource Transaction Proclamation No.1144/2019).

⁵⁹ (FDRE constitution; Ethiopian Mineral Resource Transaction Proclamation No.1144/2019) article 51/5 and 52/2/d.

the idea of concurrency. One of the basic features of concurrent powers is that federal law, once enacted, should allow regional legislators to enact laws that meet local concerns. The federal government has no exclusive legislative power on any mineral resource. The Federal Mining and mineral transaction proclamation's attempt to assign exclusive legislative power to certain mining operations, and mineral resources are contrary to the idea of concurrent power. Moreover, constitutional case law does not support this division of power. Thus, it is unconstitutional for the federal government to claim exclusive competence in any part of the mining operations.

The federal mining and mineral transaction proclamation, at least in some areas, attempts to divide the legislative power over mineral resources.⁶⁰ This allows states to enact laws that enable them to adopt federal laws and policies, according to their specific conditions. Based on the space provided by federal legislation, regional state lawmakers have the power to create secondary legislation essential to the administration of federal law. However, it also faces two basic challenges: the detailed nature of federal law and the failure of the regional state to effectively utilize the space accorded to it. Federal mining and mineral transaction laws should guide state action and ensure uniformity by providing federation-wide standards. Meanwhile, it is expected to provide room for regional governments to legislate a detailed legal framework. On the other hand, the federal government enacted a detailed legal framework, even on issues that are assigned to the regional government. It left very limited room for regional states. It is against the idea of concurrent power and constitutional division of power for the federal government to regulate every aspect of the mining operation.

The Federal mining⁶¹ and mineral transaction laws⁶² leave limited space for the state to address regional interests. The regional states may introduce an additional legal framework not covered by federal law. However, until very recently, the regional state failed to take advantage of this limited room. Except for the above cases, the regional state failed to introduce new ideas. Regional states chose to adopt a mining law that was largely a copy of federal legislation.⁶³ There is no purpose for having a regional state law that provides for or regulates issues already addressed by the federal legislation. In addition, the regional state has failed to enact laws to regulate mineral resource transactions. This shows the limited attention given by regional states to exercising legislative autonomy.

The exercise of concurrent power requires an alignment between federal and subnational legislation. Subnational governments are free to enact laws until the center decides to act. Once the center acts, sub-national states are expected to follow

⁶⁰ (Federal Mining Proclamation Number 678/2010; Ethiopian Mineral Resource Transaction Proclamation No.1144/2019).

⁶¹ (Federal Mining Proclamation Number 678/2010).

⁶² (Ethiopian Mineral Resource Transaction Proclamation No.1144/2019).

⁶³ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020).

the change. However, regional states have enacted laws contradicting the federal government's definition of mineral resources. Moreover, it attempted to create a contradictory division of power. The contradiction between federal and regional mining laws concerning the definition of minerals has led to a question as to which laws prevail. As noted here, the FDRE Constitution failed to provide a federal supremacy clause. In its absence, it is difficult to argue that federal law prevails over regional law. However, the regional constitution provides an important tool for determining this issue.⁶⁴ As noted, the regional constitution requires a regional legislator to enact it in line with the federal law. Regional legislators are expected to consider the law and ensure that it is in line with the federal legal framework. Moreover, we must see that this is in line with the objectives of concurrent powers. The notion of concurrent power dictates that once the center enacted a detailed law, the former should give away to the latter. Federal law should serve as the basis for guiding state actions. Regional governments should exercise legislative power in line with the objectives and purposes of having concurrent power. Secondary law should not serve as a basis for challenging the content of the primary law. Thus, the regional government does not have the power to enact laws that repeal the federal laws.

4. Mechanisms for Coordinating the Legislative Power Over Natural Resources

Concurrent legislative power over mineral resources, as noted above, is an area where there will be an overlapping jurisdiction. The exercise of concurrent power requires active involvement of both levels of government. Concurrent powers are the most like areas for conflict between federal and regional laws. Institutions and coordination mechanisms are required to avoid conflict between the two laws.⁶⁵ It is essential to have a system in which the federal and subnational governments regularly communicate and work together. Moreover, it is advisable to establish an umpiring body that settles conflicts after they arise. *In the last 30 years, federal and regional governments have exercised concurrent legislative power over mineral resources. The institutional and legal framework that coordinates the exercise of legislative competence over mineral resources in Ethiopia remains unexplored. Moreover, the role of the process of settling constitutional disputes related to mineral resources has not yet been explored.* Hence, an attempt is made to assess the institutional and regulatory framework that regulates the exercise of legislative competence over mineral resources.

⁶⁴ (The Oromia Regional State Revised Constitution, Proclamation Number 46/2004, 2004).

⁶⁵ (Fiseha, 2007; Fiseha & Ayele, 2017).

4.1. Intergovernmental Relation

The exercise of concurrent power requires cooperation between both levels of the government.⁶⁶ Strong cooperation between the federal and subnational governments is essential for creating an effective legal framework. Federations are expected to establish institutions that facilitate inter-governmental collaboration. One of the primary tools to ensure coordination and cooperation in the law-making process is the existence of intergovernmental relations (IGR) forums.⁶⁷ It is necessary to create an effective intergovernmental relations forum to facilitate cooperation and coordination between the two levels government. Intergovernmental relations forums (informal and/or formal) allow federal and state legislators to consult, communicate, and interact with each other regarding the concurrent laws before promulgation. It helps facilitate their respective roles in the law-making process in areas of concurrent jurisdiction. It is an important forum for legislative organs to avoid conflicting legislations on concurrent functions.⁶⁸

The Ethiopian Federation is no exception to this. As noted above, the FDRE Constitution provides a long list of concurrent powers that require active cooperation between both levels of government. In the last 30 years, there have been attempts to create an intergovernmental relations forum between the legislative organs. However, for most of its history, intergovernmental relations (IGRs) have been limited to informal forums. Moreover, informal forums play a limited role in influencing the law-making process. The federation failed to create active cooperation between the two tiers of government, which could have served as a guiding tool.⁶⁹ The legislative branches of federal and regional governments do not cooperate, support, or coordinate enough. Unfortunately, federal mining and mineral transaction laws are enacted when the formal IGR system is neither developed nor institutionalized. The federal government has played a leading role in enacting the laws that regulate the mining sector. The role of regional states in the law-making process is limited. The federal government's dominant role is the result of the EPRDF, which has controlled the Ethiopian political landscape over the last 30 years. The EPRDF, a highly centralized party, was responsible for policy cohesion in the federation. Laws and policies disused by the party's higher echelons were enacted without significant challenges. The weakening of the ruling EPRD was expected to affect the decision-making process. However, this did not yield the desired results.⁷⁰ A good example is the mineral resource transaction proclamation,

⁶⁶ (Bishop & Shah, 2008b).

⁶⁷ (Fiseha & Ayele, 2017).

⁶⁸ (Fiseha & Ayele, 2017) Assefa and Zemelak note that legislative intergovernmental relations forums are where executive-negotiated draft legislation is turned into law by legislative bodies, which may take many forms such as mirror legislation, agreed policies, and complementary schemes.

⁶⁹ (Bishop & Shah, 2008a).

⁷⁰ Interview With an Expert supra note 3o.

which removes most of the power of regional states to administer mineral transactions.⁷¹ Moreover, the regional state or politician was unable to challenge mining laws enacted during the EPRDF regime.

Since 2021, the Ethiopian federal system has created a formal intergovernmental relations (IGR) forum as a mechanism for coordinating the legislative bodies of the federal and state governments.⁷² It created a legislative intergovernmental relations forum comprising the federal and state legislative organs. One of the powers of the National Legislative Relations Forum is to ensure the enactment of harmonized laws in areas that are vested in both the Federal and Regional States separately and collectively. It aims to allow for frequent interactions between federal and state governments, and is particularly important in areas of concurrent jurisdiction. It further stated that the legislative organs of both governments must consult and communicate with each other to prevent conflicts and inconsistencies in laws. In line with this legal framework, the government is attempting to create an inter-governmental regulatory organ. The draft federal mining policy explicitly states that the federal government must create an intergovernmental organization where entities continuously consult, cooperate, and support each other to enable and accelerate sustainable mining sector development.⁷³ However, as far as the legal framework regulating natural resources is concerned, current practice is too early to judge. Federal and state mining and mineral transaction laws were enacted before the formal IGR system was developed. Despite such limitations, the Proclamation to determine the System of Inter-Governmental Relations communication has laid down the basis for future cooperation and communication between the two levels of government.

4.2. Federal Supremacy

Intergovernmental relations forums are essential for a coordinated and cooperative law-making process. Despite the existence of intergovernmental relations agencies, there are inescapable inconsistencies and disputes between federal and state laws. Therefore, it is essential to create a mechanism to resolve these conflicts. One way to address disputes and inconsistencies between federal and state laws is through federal supremacy clauses. The Ethiopian Constitution is silent on federal supremacy. It is widely held that there are two options on the issue: to hold the existence of the supremacy of federal legislation or sovereignty of the ‘nations, nationalities, and peoples,’ and to argue for the supremacy of state law.⁷⁴

The Federal and regional mineral resource proclamations have been enacted under such circumstances. However, the relationship between federal and regional mining

⁷¹ (Ethiopian Mineral Resource Transaction Proclamation No.1144/2019).

⁷² (Proclamation to Determine the System of Inter-Governmental Relations in the Federal Democratic Republic of Ethiopia’s Determination Proclamation No. 1231/2021 article 6/1.

⁷³ (DRAFT-MINERAL-RESOURCES-DEVELOPMENT-POLICY, 2021).

⁷⁴ (Fiseha, 2007; Fiseha & Ayele, 2017).

laws remained smooth until recently. The federal government plays a leading role in enacting the laws that regulate the mining sector. Regional states have accepted the dominant role of the federal government and enacted laws in line with this. Moreover, unlike land law, regional state laws failed to ensure that the regional states are enacted the mining law in line with federal law. However, following recent developments, as noted above, regional states have begun to enact laws that contradict federal laws. Regional states have challenged federal mining laws. For instance, the Oromia regional state mining law contradicts the division of administrative competence over mineral resources made by the federal mining proclamation.⁷⁵ It provides that a special small-scale mining falls under the jurisdiction of the regional state. It also provides detailed rules that regulate special small-scale mining.⁷⁶ Moreover, regional law has extended its power from regulating domestic investors who engage in large- and small-scale construction minerals and small-scale industrial minerals to cover any investor.⁷⁷ It also provides a detailed legal framework governing its new administrative roles. The supremacy of federal and state laws was neither presented nor challenged before the HoF. Moreover, the relationship between federal and regional laws has not yet been subject to academic research.

Federal and regional mining laws, as noted above, contradict each other on several occasions, which has led to a question regarding the fate of either law. As noted above, the FDRE constitution is silent on the status of either federal or regional laws in cases where there is a contradiction between the two. One must examine constitutional law and the objective of concurrent power to address this issue. In the last 30 years, the federation has been unable to develop a constitutional law that directly addresses this issue. However, constitutional law on legislative competence on land, as noted above, is pertinent here. Constitutional law dictates that federal law should serve as the basis for the actions of regional lawmakers.⁷⁸ Once the federal government enacts a law in line with the constitutional division of power, the regional states are expected to be guided by it. Moreover, the objective of the concurrent power must be considered. If there are any areas where one can apply federal supremacy, it is a concurrent legislative power over mineral resources. The primary objective of providing concurrent power is to simultaneously ensure uniformity and decentralization at the same time. It is assigned with the underlying assumption that the center has a guiding role to play. Therefore, federal law is expected to guide regional law-making. In addition, one must remember that the regional state constitution

⁷⁵ The Federal Mining Proclamation Amendment, Proclamation Number 816/2016, 2012).

⁷⁶ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020) article 24/3, 29, 30 and 49/4/b.

⁷⁷ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020) article 27, 28 and 49/4; 52.

⁷⁸ *Biyadlegn Meles & et al. v Amhara Regional State*, the House of Federation First Emergency Meeting, unpublished, 1989, E.C.

imposes a self-restriction as it requires the regional legislator to enact laws in line with federal law. It serves as a major limitation on the power of the regional states. Thus, state governments must enact laws in line with the ideals of concurrent power.

4.3. Umpiring Bodies

The constitutional division of power leads to disagreement between the tiers of the government. An umpiring body that settles constitutional disputes is a common feature of the federations.⁷⁹ It is an essential institution that maintains a balance in the federal bargain. The need for an umpiring institution increases with the exercise of concurrent powers. The exercise of concurrent power has the potential to lead to constitutional disputes even in the presence of active cooperation between the two levels of government. Hence, it is indispensable to create institutions to settle disputes that may arise during the exercise of concurrent power.

The FDRE Constitution assigns the power to settle constitutional disputes to the House of Federation, a political body.⁸⁰ The HoF is expected to play a key role in resolving constitutional problems. However, the assignment of constitutional review power to a political body has been subject to intense criticism.⁸¹ Moreover, the efficiency of the HoF in Constitutional interpretations is questionable.⁸² Despite such limitations, the HOF has been settling constitutional disputes. However, the role of the HoF in settling constitutional disputes involving mineral resources does not exist. The failure of the HoF to entertain cases involving mineral resources has nothing to do with the harmony of federal and state government actions with the Constitution. In the past 30 years, neither level of government has chosen to utilize the constitutional process. Several factors contribute to this trend, including the existence of the EPRDF, the significance of the mining industry in the economy, and public perception of the HOF. As noted in this work, federal and regional governments have enacted legal frameworks that are in direct contradiction to the Constitution. Moreover, regional governments have enacted laws that contradict federal law. In the presence of such a clear contradiction, federal or regional governments are expected to present claims against the constitutionality of regional or federal law, respectively, or federal supremacy over umpiring bodies. However, federal and regional governments or any interested person failed to challenge the constitutionality of the above laws. Unlike land, which

⁷⁹ (Fiseha, 2007; Nigussie, 2016); However, the composition and power of umpiring bodies varied greatly across federations. Despite such limitations, the Federation generally followed two trends in the assignment of umpiring bodies.

⁸⁰ (FDRE constitution article 62, the Ethiopian second chamber the HOF is consists of the different ethnic groups in the country. Each nation, nationality and people of the country is represented by one member and for each additional one million people there will be one additional sit. the FDRE constitution at supra note 14 doesn't provide any limit as to the maximum number of the sit a given ethnic group. Membership is not based on the principle of territoriality.

⁸¹ (Fiseha, 2007).

⁸² (Fiseha, 2007).

has attracted the attention of the HOF, the constitutionality of the laws that regulate mineral resources still needs to be litigated before the HoF. The federal government and regional state opted not to present any contradictions to the HoF. The Federal and regional governments have taken the issue into their hands. It attempted to enact laws that reflected the views and interpretations of controversial issues. The HoF is not able to develop a constitutional law that would assist us in regulating the extraction of mineral resources. Hence, the umpiring body plays a limited role in regulating exercise of concurrent power over mineral resources.

4.4. Second Chamber

The existence of a second chamber that represents the interests of subnational governments in the center is a common feature of federal systems.⁸³ It is essential to ensure an entrenched representation of subnational interests in the center.⁸⁴ It is indispensable to avoid the arbitrary exercise of legislative power by the federal government. The FDRE Constitution provides for the House of Federation as a second chamber.⁸⁵ As noted above, HoF represents the nation, nationality, and people of the country.⁸⁶ It does not represent the regional state in the federal legislature. Subnational governments are not part of the federal law-making process. However, one may argue that, since states are established mainly based on ethnolinguistic lines, they are indirectly represented in the HOF.⁸⁷ But still, more than half of the regional states in the federation are multi-ethnic, where a member of the HoF represents their ethnic group. Moreover, the HOF has limited legislative function.⁸⁸ Moreover, HOF's consent is not a precondition for federal legislation. The concertation of legislative power in the lower house excluded the second chamber from influencing the law-making process. No legislative mechanism exists through which states can monitor the actions of the House of Representatives. The non-inclusion of states in federal legislature poses the question of the legitimacy of federal government laws. One may argue that the HOF, through its constitutional interpretation, can mitigate problems caused by its lack of legislative power. However, as previously mentioned, its role in constitutional interpretation is far from satisfactory. The accumulation of law-making power in the lower house and the non-inclusion of states in the law-making process have paved the way for federal government laws that are in direct contradiction to the ideas of concurrent power. The mining sector is a good example

⁸³ (Fiseha, 2007).

⁸⁴ (Fiseha, 2007), There has been an enormous variation among second chambers as to the method of selection of members, the regional composition, powers, and roles.

⁸⁵ (FDRE constitution) article 62.

⁸⁶ (FDRE constitution) article 62.

⁸⁷ (Fiseha, 2007).

⁸⁸ (FDRE constitution) Articles 99, 62(7), and 105, The HOF has a limited legislative function to play. The only provisions where one may trace legislative functions are Articles 99, 62(7).

in this regard. Although the lower chamber enacted a law that had an impact on the legislative, executive, and revenue powers of the regional state, the second chamber failed to protect the interests of regional states. The second chamber has been a bystander to the making of federal legislation, that incurs on the interest of the regional state.

5. The Exercise of Legislative Power Over Natural Resources

Once the nature of legislative power over natural resources and the institutional mechanism that regulates its exercise are established, the next point is to assess the extent to which federal and subnational governments act in line with constitutional mandates. As noted above, federal and subnational governments enacted several laws regulating the extractive sector. It exercises legislative power over mineral resources with a limited IGR and lacks a clear federal paramountcy clause, no law-making second chamber, and a political umpiring body. The federal government exercised its legislative powers by subscribing to international law, and enacted national laws that included national constitutions and subsequent legislation. Ethiopia is party to several investment treaties, international human rights laws, and environmental conventions that contain important guidelines that regulate the mining sector.⁸⁹ The federal government enacted a mining law,⁹⁰ supplemented by several delegated legislation, regulations, and directives.⁹¹ It also enacted federal mineral resource transaction proclamation number 1144/2019.⁹² Regional states have enacted proclamations and regulations for the mining sector.⁹³ The federal and regional mining legal frameworks largely cover similar issues and are in line with the Constitution. However, there are instances in which the constitutionality of both legal frameworks has been questioned.

⁸⁹ (Asfaw et al., 2008).

⁹⁰ Federal Mining Proclamation Number 678/2010; The Federal Mining Proclamation Amendment, Proclamation Number 816/2016,) the federal mining law covers important issues that arise in the extraction of mineral resources, including mineral rights, procedures for transferring mining titles, rights and obligations of the developer in the exploration and exploitation of mineral resources, different types of licenses issued by federal and state bodies, environmental and social safeguards, closure and post-closure monitoring, import and export permits, investment guarantees, government participation in the mining sector, and almost any other matter that can affect the development of mineral resources.

⁹¹ (የማዕድን ማምረት እና ምርመራ ሥራዎች የሚገኘው የማኅበረሰብ ልማት ፈንድ ሥራ ላይ የሚውልበትን አግባብ ለመወሰን የወጣ መመሪያ ቁጥር 270-2013; The Federal Mining Regulation Number 423/2018, 2018). The federal government enacted several regulations and directives that regulate the mining sector. These regulations and directives focus on technical and operational aspects, fiscal elements, cost and volume audits, and social and environmental requirements that may require periodic adjustments.

⁹² (Ethiopian Mineral Resource Transaction Proclamation No. 1144/2019) The federal mineral transaction law contained detailed rules that govern mineral resource transactions in the country. It left the limited scope of the regional legislator to enact secondary legislation that regulates issues of local concern. However, the regional states, unlike the mining law, failed to adopt regional mineral transaction laws in line with the federal law.

⁹³ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020).

The federal and regional mining laws contradict the constitution, in the area of the regulation of ownership, legislative power and division of administrative.

The first area in which the constitutionality of the federal and regional mining legal framework is questioned is the attempt to regulate the ownership of mineral resources and the administration of mining titles. The FDRE Constitution vested the ownership of mineral resources in the people and the state.⁹⁴ However, federal and regional legal frameworks have attempted to regulate the ownership rights of mineral resources and the administration of mining titles in contrast to constitutional rules. The difference between the FDRE Constitution and the federal and state mining proclamations led to questions regarding the constitutionality of the latter.⁹⁵

The attempt to split legislative authority over mineral resources is the second area in which the constitutionality of the federal and regional mining legal framework is questioned.⁹⁶ As noted above, federal and regional legal frameworks have attempted to create a division of power.⁹⁷ Federal mining and mineral traction laws followed two approaches to divide legislative power over mineral resources. In the first case, one can find mining operations and mineral transactions that fall under the jurisdiction of the federal government. In such cases, the federal government has exclusive legislative powers. In the second case, there are mining operations and mineral transactions that fall under the jurisdiction of the regional states. In the latter case, the federal government attempted to act in line with the idea of concurrent power and enacted framework legislation. Except for the above-mentioned cases, the regional state strictly adheres to the division of power established by the Constitution.

The third area where the constitutionality of the federal and regional mining legislative framework is contested is its attempt to divide administrative power over mineral resources based on the type of resource, transaction of minerals, and scale of mining activity. Despite the existence of a clear constitutional provision, the federal and regional mining and mineral transaction legal frameworks have made an apparent division of administrative power over the mining sector. It has attempted to list and divide the different powers over mineral resources between federal and regional management bodies. The Federal Mining Law and its amendments have attempted to divide the powers essential for regulating mining operations. It has tried to divide the power to administer the mining sector, including issuing different mining licenses, based on the nature of the mining operations and mineral resources. It attempted to divide the administrative power of federal and state governments by listing the

⁹⁴ It should be noted here that constitutionality of the assignment of the ownership of mineral resources is dealt in upcoming works.

⁹⁵ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020), the constitutional issues that arise about the ownership of mineral resources are addressed in upcoming works.

⁹⁶ (FDRE constitution under Article 52(2) d it provides that the regional states are the main actors to administer natural resources in line with federal laws.

⁹⁷ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020).

different mining license powers of the state while reserving residual power to the center.⁹⁸ Moreover, the amendment made in 2013 further strengthened the power of the federal government.⁹⁹ It has substantially limited the subnational government's power over natural resources. The most profitable mineral resources in the country are under the power of the federal government.

The federal mineral resource transaction proclamation regulates later stages of the extraction sector.¹⁰⁰ It attempts to divide power into the administration of mineral resource transactions. The federal government has the power to issue a license for mineral refining; smelting for metallic and associated minerals; mineral export certificate competence; and enforce standards in which smithery, lapidary, combining, and refining activities are conducted.¹⁰¹ The regional state has the power to issue licenses and certificates of competency, other than those issued by the central government.¹⁰²

Unlike the ownership of mineral resources, subnational mining laws have failed to claim the administration of large-scale mining titles.¹⁰³ Regional states failed to challenge the constitutionality of federal mining and mineral transaction proclamations, which seriously restricted the power of the regional state to administer mineral resources. The regional state tried to enact mining laws in line

⁹⁸ (Federal Mining Proclamation Number 678/2010), Article 46, 52, Part five of this proclamation which is titled "administration" of mining resources has provided the function of the federal and regional state government. It provided that the region should have the power to issue artisanal mining, reconnaissance, exploration, and retention licenses concerning construction and industrial minerals for domestic investors, small-scale mining licenses for industrial minerals, and mining licenses for construction minerals. It also has the power to issue certificates of discovery for minerals other than strategic minerals. On the other hand, the federal government has an unlimited role in issuing licenses and certificates. It has the power to issue reconnaissance, exploration, retention, and mining licenses, other than those issued by the state. Moreover, it has the power to issue a certificate of discovery for strategic minerals and a certificate of professional competence for professionals who wish to engage in consultancy services in the mining sector, conduct tests, and permit the export of mineral samples.

⁹⁹ (Federal Mining Proclamation Number 678/2010; The Federal Mining Proclamation Amendment, Proclamation Number 816/2016, 2012). Under the federal mining proclamation, number 678/2010 Artisanal Mining of metallic minerals like gold and platinum was under the jurisdiction of the regional states. Proclamation number 816/2018 broadened the power of the federal government and has made sub-divisions between special small-scale and non-special, precious and non-precious minerals. Accordingly, the mining administration power of the federal government includes precious minerals irrespective of their scale.

¹⁰⁰ (Ethiopian Mineral Resource Transaction Proclamation No. 1144/2019), It provided important rules that regulated different licenses, certificates, rights, and obligations of the actors, the role of the state, and the procedure for allocating mining rights. It attempts to divide the power to regulate persons who engage in mineral transactions and certificates of competency for individuals who carry out mineral enrichment. It follows a different approach to the administration of mineral resources, as discussed above. The division of power was based on commercial transaction criteria.

¹⁰¹ (Ethiopian Mineral Resource Transaction Proclamation No. 1144/2019) article 28/3 The federal government has taken power to issue refining and smelting license to metallic and associated minerals. It also has the power to issue mineral exporter certificates of competency. It enforces standards in which smithery, lapidary, combining, and refining activities are carried out.

¹⁰² (Ethiopian Mineral Resource Transaction Proclamation No. 1144/2019).

¹⁰³ (A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020).

with federal laws. There is an implied understanding between the two levels of government. This development can be understood by considering the nature of party politics and the level of democracy in the country. The EPRDF had total control over both federal and regional state governments since the creation of the federation. It was a highly centralized party that followed the idea of democratic centralism, which did not provide room for any kind of dissent. It justifies centralized lawmaking in line with its developmental state policy, which gives the center a broad power. Its unique position and ideology enabled the EPRDF to establish a top-down, authoritarian system.¹⁰⁴ On the other hand, there was no strong opposition or organized civil society that challenged the government's actions.

However, between 2015 and 2018, protests encouraged subnational governments to take unilateral actions to assert their interests. The regional states started to challenge the absolute power of the center and called on the participation of the subnational government.¹⁰⁵ This challenge primarily involves reforming regional laws. Some regional governments have begun to challenge the dominance of the central government. For instance, the Oromia regional mining law has broadened the power of the regional government over special mining and has regulated small-scale industrial minerals and any type of construction mineral by any investor.¹⁰⁶ However, regional states did not push for revision of federal law. The efforts of the regional state to reclaim its constitutional mandate have been trivial. Their efforts were not supported by the decisions of the umpiring bodies. Moreover, the federal government has not made any legal effort to amend federal mining and mineral resource transaction laws.

The FDRE Constitution under Article 52(2) d states that regional states are empowered to administer natural resources in line with federal laws. It is clear from

¹⁰⁴ (Yesigat, 2016) The predominant role of the federal government generates from the developmental state orientation of the state and the democratic centralism principle of the ruling party. The EPRDF was a highly centralized party that followed the idea of democratic centralism, where the decision made by the center was accepted without any reservation. The EPRDF government followed a developmental state paradigm that encourage the center to take the leading role in determining development priorities and allocation of wealth in a top-down manner.

¹⁰⁵ Interview with an expert supra note 30.

¹⁰⁶ (Federal Mining Proclamation Number 678/2010; The Federal Mining Proclamation Amendment, Proclamation Number 816/2016, 2012) article 27, 28 and 49/4; 52.

¹⁰⁶ (Federal Mining Proclamation Number 678/2010) article 24/3, 29, 30 and 49/4/b the federal mining proclamation provided that the administrative role of the state is limited to granting licenses reconnaissance, exploration, and retention licenses concerning construction and industrial minerals; small-scale mining licenses for industrial minerals and construction materials mining to a domestic investor. However, the Oromia regional state mining proclamation has extended the power of the state from regulating domestic investors who engage in the large- and small-scale construction mineral and small-scale industrial mineral to cover any investor. It also provides a detailed legal framework that governs the new administrative role of the state. Moreover, the Oromia regional state mining law, contrary to the division of administrative competence over mineral resources made by the federal mining proclamation, provides that special small-scale mining falls under the jurisdiction of the regional state. It also provides detailed rules that regulate special small-scale mining.

the constitutional text that the power to administer mineral resources is the sole competence of sub-national governments. It is the exclusive power of the regional state to administer all mining activities. The Constitution never made any power divisions based on the level of mining operations, the nature of resources, or transactions on mineral resources. The division of mineral resources and mining operations into small-scale, large-scale, special small-scale, and pernicious or non-precious minerals was not created by the constitution. The constitutional division of the large-scale and small-scale mining is reserved for tax purposes rather than for mineral resource administration. Thus, it is unconstitutional for federal and regional legal frameworks to divide administrative powers over mineral resources.

6. Conclusion

This article examined the assignment of legislative power over mineral resources in the Ethiopian federal system. It begins by exploring the nature of the division of legislative power over mineral resources. It finds that the FDRE constitution assigns legislative power over mineral resources in an ambiguous manner. It failed to clearly define the nature and scope of the legislative power over mineral resources. Uncertainty over the nature and scope of legislative power over mineral resources has created confusion between the two levels of government. It argued that the Constitution has concurrent legislative power over mineral resources. Moreover, it finds that the federation lack institutions and mechanisms that coordinate legislative power over mineral resources. The confusion over the nature and scope of legislative power over mineral resources and the lack of institutions and mechanisms that coordinate the lawmaking process have paved the way for federal and regional laws that contradict the Constitution and each other. The following action be taken to improve the legal and practical challenges in assigning legislative power over mineral resources in Ethiopia. The FDRE Constitution should be interpreted in a way that clearly delineates the power of federal and regional governments over mineral resources. Federal and regional governments should coordinate their legislative power over mineral resources. Moreover, federal and regional laws that are incompatible with the constitution should be brought before the House of Federation (HoF) for review.

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