

Legislative Power over Mineral Resources in the Ethiopian Federation: Legal and Practical Challenges

Yared Hailemariam *

Abstract

The assignment of legislative power over mineral resources is a highly contentious issue in federal constitutional design. This article aims to shed light on this issue by examining the assignment and exercise of legislative powers over mineral resources in the Ethiopian Federation. A qualitative research approach was used which included analysis of laws, examining documents and in-depth interviews. The legal framework, policy documents, and decisions of government officials relating to legislative authority over mineral resources were scrutinized. Furthermore, interviews were conducted with key stakeholders involved in the matter to gain an understanding of the actual challenges and difficulties associated with the exercise of this power. An integrated data analysis approach is used. According to the analysis, the Constitution of the Federal Democratic Republic of Ethiopia lacks clarity regarding legislative power over mineral resources. The study also reveals significant gaps in the institutional and legal frameworks governing the exercise of legislative power over mineral resources. These gaps have also resulted in the development of a legal framework that contradicts the principles laid out in the Constitution. The findings highlight the need to address the legal and practical challenges within the Ethiopian Federation.

Keywords:

federalism, division of power, legislative power; concurrent powers, mineral resources, Ethiopia

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1. Introduction

Legislative power is the first dimension of control over mineral resources and encompasses the authority to create or establish a legal framework that governs the extractive sector.¹ It is one of the means which enable the state to exercise its regulatory power to address environmental and socio-economic challenges in mineral extraction. It encompasses a wide range of issues in the mining sector. These include the transfer of mining titles, economic benefits, health and safety practices, environmental and social development standards, infrastructure development, mineral transactions, and import and export permits.²

The state can exercise its legislative powers in different ways, including through the enactment of a national law that includes constitutions and subsequent legislation and through its subscription to international law.³ The realities in a federal system are not far from the developments in other legal systems. The major difference is that legislative power involves dimensions of shared rule and self-rule which are aspects of the division of power at

Acronyms

FDRE	Federal Democratic Republic of Ethiopia
HoF	House of Federation

¹ Anderson, George (2012). *Oil and gas in federal systems*, Oxford University Press; Haysom, Nicholas, Sean Kane (2009), *Negotiating natural resources for peace: Ownership, control and wealth-sharing*, Centre for Humanitarian Dialogue; Beardsworth, J. J. J., & Stuart, M. A. (2019). *Petroleum Legislative Frameworks and Contracts in a Federation: Issues for Constitutions, Petroleum Laws, Regulations, and Contracts*, World Bank

² Ibid.

³ Ibid; Anderson, G (2020), *Natural Resources in Federal and Devolved Countries*. Ottawa, ON, Forum of Federations.

federal and regional levels. Federal systems divide legislative power over natural resources between the central and subnational governments. The literature on the decentralization of power suggests the ideal assignment of legislative power over mineral resources by taking efficiency, capacity, and national interest into consideration.⁴

However, actual practices across federations often fail to adhere to coherent principles.⁵ The assignment of legislative power over mineral resources is influenced by factors such as a state's unique political development, the impact of the mining sector, and the need to enhance the federation's global competitiveness.⁶ Consequently, the form and scope of the division of legislative power over natural resources exhibit significant variation among federations, categorized as devolved, centralized, or concurrent systems.⁷

Ethiopia is characterized by geological features that are associated with diverse mineral resources.⁸ It has a long history of extracting mineral resources for different purposes. The mining sector contributes to economic development, government revenue, foreign currency earnings, and employment opportunities; and it is expected to meet the demand of industries for raw materials.⁹ However, given Ethiopia's vast potential, its overall contribution is minimal.¹⁰ Such a trend is set to change, as the Ethiopian government considers the mining sector as one of its priority areas for its Homegrown Economic Reform Agenda.¹¹

For a long time, the legal framework that regulates the mining sector was administered in a centralized manner. The FDRE Constitution followed trends

⁴ Ibid

⁵ Ibid, Choudhry, Sujit & Richard Stacey (2014). *Oil and Natural Gas: Constitutional Frameworks for the Middle East and North Africa*, Centre for Constitutional Transitions, International Institute for Democracy and Electoral Assistance, and the United Nations Development Project.

⁶ Ibid

⁷ Andrew Bauer, Paul Shortell & Lorenzo Delesgues (2016), *Sharing the wealth: A roadmap for distributing Myanmar's natural resource revenues*, Natural Resource Governance Institute; Brosio, Giorgio (2006), "The assignment of revenue from natural resources", *Handbook of Fiscal Federalism* p. 431.

⁸ Solomon Tadesse (2003). 'Geology, and mineral potential of Ethiopia: a note on geology and mineral map of Ethiopia', *Journal of African Earth Sciences* 36

⁹ Moore Stephens (2018), *Ethiopian Extractive Industries Transparency Initiative Report*, Third EEITI report; National Planning Commission (2020) *A Homegrown Economic Reform Agenda: A Pathway to Prosperity, 2021-2030* (2020), Available at: <https://faolex.fao.org/docs/pdf/eth211967.pdf>

¹⁰ Ibid.

¹¹ Ibid.

in other federal systems, and developments made during the transitional period tried to introduce the idea of devolution of power and divide the legislative power over mineral resources.

Ethiopia constitutes a severely understudied case in mineral resource federalism literature. There is a dearth of discourse on the legal framework and institutional arrangements governing mineral resources. Yet, the nature and scope of the legislative power over mineral resources, the mechanisms for coordination, and how this power is exercised need to be examined. By offering a thorough analysis of Ethiopia's legal and institutional framework governing mineral resources, this article deals with these issues and aims to contribute to a better understanding of Ethiopia's resource governance approach and elucidate the strengths and weaknesses of its legal and institutional framework.

The study employs a qualitative approach that combines doctrinal legal analysis with empirical investigation. The doctrinal part involves a comprehensive analysis of the constitutional and legislative rules that control important areas of resource federalism, with a particular focus on the Oromia region. Interviews are carried out with key stakeholders, mainly federal and regional government officials. These interviews provide essential primary information, enabling a detailed comprehension of the governance landscape related to the subject of research. An integrated analysis approach is utilized to combine interviews, archival records, and legal instruments as sources of data.¹²

The next section discusses the division of legislative power and concurrent power. Following that, the third section specifically focuses on legislative power concerning natural resources. The fourth section addresses the scope of legislative power over mineral resources and examines its extent and the limitations imposed upon it. The fifth section analyzes the mechanisms employed to coordinate legislative efforts concerning natural resources, ensuring effective governance and decision-making. The sixth section delves into the practical implementation of legislative power over mineral resources, exploring the procedural aspects and mechanisms involved. Finally, the sixth section presents a conclusion, synthesizing the insights gained from the preceding discussions.

¹² J Fereday & E Muir-Cochrane (2006). 'Demonstrating rigor using thematic analysis: A hybrid approach of inductive and deductive, Coding and theme development', *International journal of qualitative methods*, 5(1), 80–92.

2. Concurrent of Legislative power in the Ethiopian Federation

The FDRE Constitution introduced an ethnic-based federal system, departing from the previous centralized governance structure. It aimed to address historical grievances, promote self-determination, and accommodate the country's diverse ethnic makeup.¹³ The system grants autonomy to regional states based on ethnic identities, empowering local communities. While positive changes have occurred, challenges and debates persist regarding resource distribution, ethnic tensions, and national unity.¹⁴

One of the hallmarks of the FDRE Constitution is the constitutional division of power between the federal government and regional states. It divides legislative power into the exclusive power of federal and state governments, concurrent power of both levels of government, and residual power of regional governments. It indicates the exclusive legislative powers of federal¹⁵ and regional state governments.¹⁶ It expressly confers residual power to the states.¹⁷ Unlike many other federal systems, the FDRE Constitution does not explicitly list the concurrent legislative powers of the federal government and

¹³ Assefa Fiseha (2007). *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Rev. Ed. Utrecht: Wolf Legal Publishers.

¹⁴ Yonatan Fiseha & Beza Dessalegn (2022), 'Federalism in Ethiopia: Emergence, Progress and Challenges'. In: Keil, S., Kropp, S. (eds) *Emerging Federal Structures in the Post-Cold War Era*. Federalism and Internal Conflicts. Palgrave Macmillan, Cham. https://doi.org/10.1007/978-3-030-93669-3_10

¹⁵ The FDRE Constitution 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.

¹⁶ Solomon Negussie (2006), *Fiscal federalism in the Ethiopian ethnic-based federal system* Wolf Legal Publishers; Assefa Fiseha, *supra* note 13; the FDRE Constitution, Article 51.

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.

¹⁷ *Ibid.* Article 52 of the FDRE Constitution 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."

regional states. However, upon closer examination of the Constitution, it becomes evident that it incorporates concurrent legislative powers at both government levels.¹⁸

The first areas in which concurrent legislative authority was established were social and economic policymaking and regulation. The FDRE Constitution establishes a framework for concurrency over policy and legislation, covering a wide range of social and economic matters.¹⁹ In addition, federal and state governments may pass rules pertaining to civil services, provided that state laws follow the broad guidelines outlined in federal civil service legislation.²⁰

The second form of concurrent legislative power in the Ethiopian federal system is established through the separation of legislative and administrative functions between federal and state governments.²¹ Articles 51(5) and 52(2)(d) of the FDRE Constitution grant the federal government the power to enact laws on the utilization and conservation of land, natural resources, historical places, and artifacts. On the other hand, states possess the power to administer land and other natural resources in accordance with federal law. This arrangement designates the federal government as having legislative power over land and other natural resources while allowing regional states to

¹⁸ Ibid. The FDRE Constitution under Article 52(1) implies the existence of concurrent functional competencies of both the federal and state governments. The FDRE Constitution contains several concurrent powers, including concurrent taxation power and judicial power. Even though Article 98 of the Constitution indicates the existence of concurrent taxation power, it has been unofficially changed into a revenue-sharing arrangement. 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, a detailed exploration of the constitutional text will reveal that the Constitution provides limited areas of concurrent power for the federal and state governments.

¹⁹ Ibid, FDRE Constitution, Articles 51(2& 3) and 52(2); Assefa Fiseha, and Zemelak Ayitew Ayele “Concurrent powers in the Ethiopian federal system”, in *Concurrent Powers in Federal Systems*, pp. 241-260, Brill Nijhoff, 2017. The Constitution grants the federal government the power to develop comprehensive policies, strategies, and plans pertaining to the nation's overall economic, social, and developmental issues, establishing and enforcing national standards and fundamental policy criteria in crucial areas such as public health, education, science, and technology, and the protection and preservation of cultural and historical heritage. Concurrently, the Constitution empowers regional states with the authority to formulate and execute their own economic, social, and developmental policies, strategies, and plans at the state level.

²⁰ Ibid.

²¹ Ibid.

enact laws that regulate the administrative aspects of natural resource use and management.²² However, as noted hereunder, the distinction between these powers remains ambiguous.

The third area is “generic” concurrency, which encompasses two major types of concurrent powers.²³ Under the first type, regional states have the freedom to pass laws until the House of Federation decides whether federal legislation is required or not. Article 55(6) of the FDRE Constitution gives the federal government the authority to enact civil laws that are considered essential for creating and preserving a single economic community. This provision allows the federal government to postpone using its potential authority in a certain area unless it is determined to be a significant federal concern.²⁴ State laws become subordinate to federal legislation as soon as they are passed. In the second type of concurrency, regional states exercise legislative power until the federal law is enacted.²⁵ According to Article 55 of the FDRE Constitution, the power to enact criminal law lies within the federal government's competence. Meanwhile, regional states are permitted to legislate on criminal law issues that have not been addressed by federal criminal legislation, creating concurrent jurisdiction over unspecified criminal matters.²⁶

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ The FDRE constitution Article 55/5 and 55/6

²⁶ See Yenenesh Bahiru (2011). *The Power to Legislate Criminal Procedure Code under the Federal Systems: Issues in Ethiopia* (Unpublished LLM Thesis), pp. 44–47; Abdi Gurmessa (2014) *Criminal Jurisdiction of State Courts under the Constitution of the Federal Democratic Republic of Ethiopia* (Unpublished LLM Thesis), pp. 93–95.

However, there is an argument against the power of regional states over criminal matters. Yenenesh argues that the power to enact a criminal procedure code is vested in the organ that enacts the penal code, and, in our case, it should be done by the federal government. She bases her argument on the modern meaning of the phrase “penal code,” the assignment of substantive law, and experience in other federations. On the other hand, Abdi *et al.* argue that the power to enact a criminal procedure code is that of the regions. Such a conclusion is based on an alternative definition of the phrase ‘penal code,’ the rights of the nation, nationalities, the duality system, and also the existence of residual power.

3. The Nature and 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 as concurrent power.²⁷ It assigns legislative competence to mineral resources by separating legislative and administrative powers between the federal and state governments.²⁸ The federal government has the power to enact laws relating to the utilization and conservation of natural resources, which encompass mineral resources. On the other hand, regional governments are empowered to administer these resources within the federal legal framework.²⁹ Moreover, the Constitution provides important principles, guidelines, and rules that have direct significance for controlling mineral resources.³⁰ It specifically provides for the right to development, environmental rights, the right of society to be consulted on activities that affect it, principles for environmental protection and management, and good governance.

However, the constitutional division of power fails 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 competencies 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? This section examines the nature of the division of legislative power over natural resources, and the next section discusses its scope.

The FDRE Constitution assigns legislative power over the “utilization and conservation” of natural resources to the federal government.³¹ 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 in the federal government or to limit it to specific powers. In particular, this leads to questions as to

²⁷ Ibid.

²⁸ Ibid. Assefa Fiseha & Zemelak Ayitenew, *supra* note 19; FDRE Constitution (Articles 51/5, 55/2/a/ and 52/2/d)

²⁹ Ibid.

³⁰ FDRE Constitution, Articles 43, 44, 89 and 92.

³¹ The FDRE Constitution, Article 51(5).

whether it covers the later stages of the extractive sector, such as processing, marketing, and exportation, or if it only applies to the initial extraction of resources. Moreover, as the Constitution assigns residual power to subnational governments, the exact scope of legislative power over the “utilization and conservation” of natural resources needs to be explored.³²

The FDRE Constitution uses two words, “utilization” and “conservation,” to assign legislative power over natural resources, including minerals. It provides that legislative power over the “*conservation*” of natural resources is the power of the federal government.³³ The notion of *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.³⁴

It also provides that legislative power over the “*utilization*” of natural resources is the power of the federal government.³⁵ However, the *utilization* of natural resources is complicated as it involves the actual use of natural resources, which covers the different stages of the extractive sector. The drafters of the Constitution failed to clearly define the meaning of the word. Moreover, there is no recorded evidence showing the intention of the drafters. This raises questions regarding 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?

The lack of clarity in the Constitution has resulted in conflicting interpretations. There are two views on the issue that have a significant impact on the determination of legislative power over mineral resources. The first perspective focuses on the actual practices in the Ethiopian federal system. Over the last three decades, federal and regional governments have actively engaged in the law-making process, which sheds light on the operational meaning given to the utilization of natural resources. The federal government enacted two proclamations that regulate mining and mineral transactions.

³² Id., Art. 52.

³³ Id. Arts. 51(5), 55(1) & 52(2/d). It should be noted that the Constitution failed to explicitly list conservation while utilizing natural resources. However, it is not an issue in the presence of Article 55(1), which generally vests the legislative power of the federal government in the House of People’s Representatives (HoPR).

³⁴ BA Garner (2004). *Black’s Law Dictionary*.

³⁵ The FDRE Constitution, Article 51 (5) and 55 (1), 52(2/d)

These laws extensively regulate the extractive sector.³⁶ These two laws provide an illustrative definition of the “*utilization*” of mineral resources.³⁷ According to the illustrative definition, the utilization of mineral resources covers every aspect of the extractive sector.

The draft federal mining policy reaffirmed the scope of its application, covering all aspects of the extractive sector,³⁸ and it pursued the same trend.³⁹ The reading of federal proclamations and draft mining policy suggests that the federal government holds the broadest legislative power over mineral resources. Moreover, the regional mining laws provide similar interpretations.⁴⁰ The regional states did not seek to assert any residual power over mineral resources. Within this framework, regional states enacted and amended laws that regulate natural resources.⁴¹ 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 contrary, an alternative perspective contends that the federal government’s power ought to be confined to the utilization and conservation of mineral resources, while residual legislative power should be limited to regional states. This viewpoint gained support from interviews conducted with officials from the regional states. According to these interviews, the federal government’s legislative power is limited to the utilization and conservation of mineral resources, which stretches from extraction until

³⁶ Federal Mining Proclamation Number 678/2010, Article 3; Mineral Resource Transaction Proclamation No. 1144/2019, Articles 3(1), 3(2). The federal mining law provides a legal framework for regulating mining operations. 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 from its definition of mining and its jurisdiction. On the other hand, the Federal Mining Transactions Proclamation lists out procedures after the extraction of mineral resources. It regulates the development that is made once the mineral resource is brought to market. It covers any attempt to increase the value of a natural resource, such as elating, refining, manufacturing, and fabrication, and the final marketing process.

³⁷ Ibid

³⁸ The FDRE Ministry of Mines, Draft-mineral-resources-development-policy, 2021, 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.

³⁹ The Draft Mining Proclamation of the federal government, Article 3

⁴⁰ Mineral Resource Development Proclamation No. 91/2005; A Proclamation to Amend Oromia Regional State Income Tax Proclamation No. 202/2017. The Amhara and Oromia regional states can be cited as examples.

⁴¹ Ibid.

mineral resources enter the resource market.⁴² Once the minerals reach the resource market, they fall under the residual legislative power of regional states.⁴³

It is necessary to thoroughly examine the above ambiguity in light of the experiences of federal systems, constitutional texts, and constitutional case laws. This comprehensive approach will enable us to reach at a more coherent and well-founded interpretation of the Constitution, ensuring a more effective understanding and application of the constitutional division of power.

The ambiguous constitutional language, ‘utilization’ of natural resources, should be seen in light of the contemporary trend in federal systems. The assignment of legislative competence over mineral resources is a contentious and complex issue in federal constitutional design. Historically, classical federations have adopted a decentralized approach, granting subnational governments explicit authority over onshore minerals.⁴⁴ While this approach affirms regional autonomy, it can impede coordinated national strategies on crucial matters such as macroeconomic policy, international trade, and climate change.⁴⁵

The legislative power of federal governments has gradually expanded over time. Modern federations tend to establish centralized federal control, granting exclusive competence over mineral legislation to the federal government.⁴⁶ There are several reasons for the centralization of legislative power over mineral resources, including the increasing impact of the mining sector on the economy, environment, society, and international trade.⁴⁷ Centralizing legislative power over mineral resources allows for a comprehensive and coordinated approach to address these multifaceted challenges effectively.

The Ethiopian Constitution was formulated in the 1990s, during a period marked by a strong inclination towards centralizing legislative power over mineral resources. The factors that contributed to the introduction of this

⁴² Interview with officials in the Oromia Regional State Mining Bureau in June 2022

⁴³ Ibid.

⁴⁴ Kodizie Kwesike Chinonso Acholonu (2011). ‘*Constitutional Approaches to Resource Control in Oil Producing Federations*,’ PhD dissertation, The University of Toronto.

⁴⁵ Ibid; Nicolas & Kane, *supra* note 1; Moonti, Roy (2019), “Regional Autonomy in Realizing Good Governance.” *Substantive Justice International Journal of Law*, 2, 43.

⁴⁶ Ibid. The major exceptions to the recent trend toward a centralized model are the constitutions of Iraq and the Russian Federation which assign legislative power over mineral resources as a concurrent power.

⁴⁷ Ibid.

centralized approach in other federal systems were also present in Ethiopia, including the growing impact of the mining sector on the economy, environment, society, and international trade.⁴⁸ Given the historical context in which the Constitution was developed, it is reasonable to infer that the terms used in the Constitution imply a broader federal power. This interpretation aligns with the centralized governance observed in many countries. By granting the federal government primary legislative power over mineral resources, it promotes consistency, avoids potential conflicts, and ensures efficient management of this vital sector.

A thorough analysis of the constitutional text provides valuable guidance. Upon examining the constitutional text, it becomes clear that the Constitution, in addition to the phrase ‘utilization of natural resources,’ assigns significant authority to the federal government, thereby limiting the residual power of the regional states.

The FDRE Constitution grants the federal government authority over macroeconomic policy, international trade, and inter-regional commerce.⁴⁹ These powers hold significant implications for the later stages of mineral resource extraction, including trade and export. Even with the exclusion of necessary and proper clauses that may follow, these powers indicate that the federal government possesses control over the later stages of the extractive sector, specifically trade and investment.

Considering these powers, it can be argued that although the Constitution employs an ambiguous term, a careful reading of the constitutional text leads to the conclusion that the federal competencies establish a broad federal legislative power over mineral resources. The federal government is assigned essential powers that encompass the later stages of the extractive sector, thereby significantly limiting the role of the regional states.

Furthermore, it is imperative to consider the issue of legislative power over mineral resources in light of the limited number of constitutional cases that have been examined in the country. Although a direct constitutional ruling has not yet been made addressing this specific matter, analysis of significant statutory binding interpretations concerning legislative power over land yields valuable insights into the issue.⁵⁰

⁴⁸ Guluma Gemed (1998). ‘Political Domination, and Exploitation of Mineral Resources in Oromia: From Menilek to Meles’, *The Journal of Oromo Studies*, Volume 5, 1998.

⁴⁹ FDRE Constitution Article 51.

⁵⁰ Assefa Fiseha and Zemelak Ayitenew, *supra* note 19; Habtamu Sitotaw (2016), “The Power to Administer Land in Ethiopia: Scrutinizing Federal Legislative Interventions”,

The Constitution does not allow a narrow interpretation of the phrase ‘the utilization and conservation of mineral resources.’ Instead, it recognizes that the primary legislative authority pertaining to mineral resources is vested in the federal government, particularly the House of People’s Representatives. This interpretation underscores the importance of the federal government’s role in enacting a comprehensive legislative framework that allows subnational governments to develop secondary legislation. It ensures that there is a cohesive and unified system of laws governing mineral resources across the nation. This framework would provide clear guidelines and regulations while allowing subnational governments the flexibility to address specific regional needs and circumstances through secondary legislation.

The preceding discussion unequivocally demonstrates that the term ‘utilization’ serves as an overarching concept encompassing the entirety of essential legislative powers, thereby leaving no residual powers for regional states. Thus, it is fair to affirmatively establish that the Constitution confers upon the federal government extensive legislative authority throughout all stages of the extractive process.

4. The Scope of the Legislative Power over Natural Resources

The FDRE Constitution provides that the federal government has the authority to enact laws related to the utilization and conservation of natural resources, which encompass mineral resources. On the other hand, it empowers regional governments to administer these resources in line with the federal legal framework.⁵¹ However, it is not clear where the federal government’s primary legislative power ends and where the administrative power of regional states begins. The lack of clarity regarding the division of legislative power has led to debates and arguments since the establishment of the federal system.⁵²

Under such circumstances, the federal and state governments have enacted laws to regulate mineral resources. The federal government has enacted mining and mineral transaction laws.⁵³ Federal mining proclamations and regulations govern the extraction of mineral resources in the country. Federal

Bahir Dar UJL 6: p 195; *Biyadglegn Meles et al. v Amhara Regional State*, the House of Federation First Emergency Meeting, unpublished, 1989, E.C.

⁵¹ *Ibid.*

⁵² Assefa Fiseha and Zemelak Ayitenew, *supra* note 19, noted 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.”

⁵³ Federal Mining Proclamation No. 678/2010; Mineral Resource Transaction Proclamation No.1144/2019

mineral transaction laws and regulations regulate most commercial activities that involve mineral resources.⁵⁴ Regional states have also enacted mining laws but have failed to enact laws that regulate mineral resource transactions. An examination of the above proclamations reveals that it has led to an apparent division of legislative power over mineral resources. The scope of the legislative power of federal and state governments over mineral resources is determined based on the division of administrative power under federal proclamations, not federal constitutions. The federal proclamations have divided the administration of mining based on the level of mining operations, transactions, and nature of mineral resources.

The federal government, based on its division of administrative power, has made an apparent division of legislative competence at either level of government over mineral resources, which can be categorized into two trends. The *first trend* covers mining operations, mineral resources, and transactions, all of which fall within the administrative competence of the federal government. The federal mining law clearly outlines the jurisdiction of both levels of government based on the nature of the resource and the scale of the mining operation.⁵⁵ Accordingly, it embodies a comprehensive framework for the regulation of mining operations that fall under the federal government's administrative authority, treating legislative power as exclusive rather than concurrent competence.

Despite such actions, federal mining law has not been questioned for its constitutionality during the drafting process, and the issue has not been brought before the federal umpiring body. Moreover, for a long time, regional states have not attempted to enact laws to address issues that fall under federal government administration. The Federal Mineral Resource Transaction Proclamation follows an approach similar to that of the Federal Mining Proclamation in delineating the scope of legislative power at both federal and regional levels.⁵⁶ Regional states have also failed to enact laws that regulate mineral transactions.

However, 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

⁵⁴ Mineral Resource Transaction Proclamation No.1144/2019

⁵⁵ A Proclamation to Amend Oromia Region Mineral Development Operation Administration Proclamation No 223/2020; Federal Mining Proclamation No. 678/2010 Mineral Resource Transaction Proclamation No.1144/2019)

⁵⁶ Mineral Resource Transaction Proclamation No.1144/2019, Article 28(4)

mining law, contrary to the federal mining proclamation,⁵⁷ 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.⁵⁸ Moreover, although the federal mining proclamation provides that the administrative role of the state is limited to granting licenses for reconnaissance, exploration, and retention of construction and industrial minerals, small-scale mining licenses for industrial minerals, and construction material mining to domestic investors, regional law has extended the power of the state to cover any investor that engages in the process.⁵⁹

The *second trend* covers mining operations that fall under the administrative competence of regional states, as outlined in the Federal Mining Proclamation. In these cases, federal mining law establishes a basic regulatory framework. This allows regional states to create laws that enable them to adopt federal laws and policies based on their specific conditions. Regional state lawmakers have the authority to establish secondary legislation necessary for federal law administration.⁶⁰

However, it faces two fundamental challenges: the detailed nature of federal law and ineffective utilization of the space afforded to them. The federal government enacted a detailed legal framework, leaving limited room for regional states to exercise legislative authority. Consequently, regional governments have been unable to enact regulations that align with their specific needs and priorities because of the restrictive nature of the federal legal framework. Moreover, despite the limited space left by federal mining laws, until recently, regional states have not effectively utilized this limited room for legislative autonomy.⁶¹ Regional governments have failed to utilize the limited opportunities to introduce additional legal frameworks that complement federal laws. Instead, they predominantly adopt mining laws that largely mirror federal legislation.⁶²

⁵⁷ The Federal Mining Proclamation Amendment, Proclamation No. 816/2016, Article 2

⁵⁸ A Proclamation to Amend Oromia Region Mineral Development Operation Administration Proclamation No. 223/2020, Articles 24(3), 29, 30, and 49(4/b)

⁵⁹ *Id.*, Articles 27, 28 & 49(4)

⁶⁰ *Ibid.* More specifically, the regional law regulates the issuance of exploration, retention, and production licenses in the case of artisan miners and special small-scale, small-scale, and large-scale mining activities that fall under the administrative competence of the regional states.

⁶¹ Mineral Resource Transaction Proclamation No.1144/2019; Federal Mining Proclamation No. 678/2010.

⁶² Interviews with Officials in the Oromia Regional State Mining Bureau, June 2022; Interview with an Expert in the Federal Ministry of Mines, June 2022.

Nevertheless, very recently, the regional states have attempted to leverage the provisions of the federal mining legislation. One notable effort has been the modification of federal law, specifically regarding the duration of mining licenses and their renewal, to align better with regional interests.⁶³ Moreover, minor amendments have been introduced to regional mining legal frameworks, including a requirement that grants landholders the right to obtain a share of mining operations and receive preferential treatment.⁶⁴ Furthermore, there are also clear differences between federal and regional mining legislation concerning the definition of mineral resources.⁶⁵

The Federal Mineral Resource Transaction Proclamation adopts an approach similar to the Federal Mining Proclamation.⁶⁶ The Proclamation acknowledges that certain mineral transactions fall within the administrative competence of the regional states. In these cases, federal law indicates the existence of the secondary legislative powers of regional states. However, despite their authority to regulate such matters, regional states have not enacted laws to address these issues within their jurisdictions.

The actions of federal and regional governments need to be analyzed in light of the constitutional division of power, constitutional law and the idea of concurrency. According to the FDRE Constitution, legislative power over mineral resources is explicitly established as a concurrent power, indicating that both federal and regional governments share responsibility, but with different roles and functions. However, it is important to note that the Constitution does not differentiate legislative power based on the division of administrative power outlined in federal legislation, such as the level of mining operations, processing activities, or nature of mineral resources.

Furthermore, the Constitution does not grant federal or regional legislators explicit or implicit authority to create divisions of power concerning mineral resources. In other words, neither level of government has the constitutional mandate to unilaterally partition legislative power over natural resources. Any attempt by either the federal or regional government to divide legislative powers in this domain would be unconstitutional. Therefore, attempts by the

⁶³ Federal Mining Proclamation No. 678/2010, Article 29; and A Proclamation to Amend Oromia Region Mineral Development Operation Administration Proclamation No. 223/2020, Articles 26 and 27.

⁶⁴ A Proclamation to Amend Oromia Region Mineral Development Operation Administration Proclamation No. 223/2020, Art. 53.

⁶⁵ Ibid.

⁶⁶ Mineral Resource Transaction Proclamation No.1144/2019.

federal or regional state governments to divide legislative powers over natural resources are unconstitutional.

The scope of legislative power for the federal government and the secondary legislative power of regional states is addressed under the constitutional law. The landmark case of *Biyadglegn Meles et al v. Amhara Regional State* sheds light on the extent of legislative and administrative authority at different levels of government.⁶⁷

The case offers vital interpretation for figuring out the federal government's principal legislative power and the states' administrative authority. Although the case was mostly about legislative power over land, it has relevance in the determination of the scope of the legislative power over mineral resources which are treated in the same legal provision. Accordingly, it upheld the constitutionality of the state's proclamation, affirming the regional states' power to legislate in areas where federal laws are administered. This ruling underscored the concurrent nature of legislative authority and recognized the states' ability to adapt laws to suit their specific circumstances while operating within the framework of federal law. The regional states possess the authority to enact laws that administer federal laws, within their respective jurisdictions.

As previously indicated, the FDRE Constitution establishes concurrent legislative power over mineral resources. Within the framework of concurrent power, both federal and regional governments are expected to adhere to the principles of concurrency when exercising legislative competence over mineral resources.⁶⁸ A fundamental aspect of concurrent powers is that federal legislation should enable regional legislators to enact laws that address local concerns. It should allow regional legislators to enact laws that regulate specific aspects of mineral resource management, thus contributing to the fulfillment of local objectives and priorities.

It is to be noted that the federal government does not possess exclusive legislative power over any mineral resource. However, the Federal Mining and Mineral Transaction Proclamation attempts to assign exclusive legislative power over mining operations and mineral resources in a manner that undermines the concept of concurrent power. This attempt contradicts the underlying principles of concurrency and is inconsistent with the constitutional framework.

⁶⁷ *Biyadglegn Meles & et al. v Amhara Regional State*, the House of Federation First Emergency Meeting, unpublished, 1989, E.C.

⁶⁸ Assefa Fiseha and Zemelak Ayitenew, *supra* note 19

Federal law should provide primary legislation that leaves room for regional states to enact secondary legislation that addresses local concerns. The federal government is indeed free to amend its laws in line with the idea of concurrent legislative power. Once the center acts in line with the idea of concurrency, sub-national states are expected to follow the lead and enact secondary legislation that addresses local concerns in line with federal laws.

Secondary law should not serve as the basis for contradicting or altering the content of primary law. As evidenced in the case presented here, any attempt by regional governments to modify the content of federal law conflicts with the idea of concurrency. Therefore, any attempt by the regional state to amend the content of federal law is contrary to the principles of concurrency and should be reconsidered.

5. Mechanisms for Coordinating the Legislative Power over Natural Resources

Concurrent legislative power over mineral resources presents a significant area of overlapping jurisdiction between the federal and regional governments. Its exercise necessitates active involvement and cooperation from both levels of government. However, this shared jurisdiction also increases the likelihood of conflicts arising from the disparities between federal and regional laws.⁶⁹ To prevent such conflicts, it is crucial to establish institutions and coordination mechanisms that facilitate effective communication and collaboration between the federal and subnational governments. Additionally, it is advisable to establish an umpiring body to resolve conflicts that may arise. This section identifies the established structures and procedures that regulate the exercise of legislative competence over mineral resources.

5.1 Intergovernmental relation (IGR)

The exercise of concurrent power requires cooperation between both levels of government. Federations are expected to establish institutions and intergovernmental relations (IGR) forums that serve as essential tools for facilitating coordination and cooperation in the law-making process.⁷⁰ These forums, whether formal or informal, enable federal and state legislators to consult and communicate with each other. By engaging in these forums,

⁶⁹ Ibid.

⁷⁰ Assefa Fiseha, and Zemelak Ayitenew, *supra* note 19.

legislative organs can avoid conflicting legislation and ensure that their respective roles are well-defined.⁷¹

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. There have been attempts to create an intergovernmental relations forum between the legislative organs. However, for most of its history, intergovernmental relations have been limited to informal forums, which have had a limited impact on the law-making process. The federation failed to create active cooperation between the two tiers of government.⁷²

Unfortunately, when federal mining and mineral transaction laws were enacted, the formal IGR system was not institutionalized. This lack of a forum that facilitates cooperation and coordination between federal and regional governments led to the development of a legal framework that faces the above-mentioned limitations.

Recent efforts have been undertaken to establish a formal legislative IGR forum that includes federal and state legislative bodies.⁷³ This forum holds the power to ensure the enactment of harmonized laws in areas of shared jurisdiction. Its primary objective is to promote frequent interactions, consultations, and communication between the federal and state governments, aiming to prevent conflicts and inconsistencies that may arise in the regulatory framework.

Furthermore, there are ongoing endeavors to create an intergovernmental regulatory body, as outlined in the Draft Federal Mining Policy.⁷⁴ While the mining law is currently undergoing an amendment process, the functionality of these institutions remains largely limited. As a result, it becomes challenging to assess the effectiveness of the current IGR system in guiding the legal framework that regulates mineral resources. Yet, it is worth noting that regional states are expressing their views in parliamentary hearings, albeit in an informal manner.⁷⁵

⁷¹ Ibid.

⁷² Nigussie Afesha (2022). 'Functional Domains of IGR Forums, House of Federation and Ministry of Peace in Ethiopia: The Need for Clarity'. 16 *Mizan Law Review* 2: 305-338.

⁷³ 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).

⁷⁴ The FDRE Ministry of Mines, Draft Mining Policy 2021.

⁷⁵ Interview with the Legal Department Head of the Ministry of Mines, August, 2023.

This allows them to contribute to the discussions surrounding the regulatory framework and to provide insights and perspectives.⁷⁶ The expeditious implementation of the Proclamation and establishment of an IGR forum between legislative bodies is thus important in facilitating regular interactions, consultations, and effective communication channels between the federal and state governments.

5.2 Umpiring Bodies

Constitutional disagreements between the different tiers of the government are common in a federal system. An umpiring body that settles constitutional disputes is a common feature of the federations.⁷⁷ However, the composition and power of umpiring bodies vary greatly across federations. These institutions become even more crucial when concurrent powers are exercised as they have the potential to give rise to constitutional conflicts.⁷⁸ Therefore, it is necessary to establish institutions that can effectively settle disputes that may arise in the course of exercising concurrent power.

The FDRE Constitution assigns the power to settle constitutional disputes to the House of Federation (HoF).⁷⁹ However, the assignment of constitutional review power to a political body has been subject to criticism.⁸⁰ Moreover, the efficiency of the HoF in Constitutional interpretations is questionable.⁸¹

As discussed previously, both federal and regional governments have enacted legal frameworks that directly contradict the Constitution. In addition, regional governments have passed laws that contradict federal legislation. In such clear cases of contradiction, it would be expected for either level of government to challenge the constitutionality of opposing laws or invoke federal supremacy through umpiring bodies. However, the role of the HoF in settling constitutional disputes that involve mineral resources is very limited.

Neither federal nor regional governments nor any interested parties have taken steps to challenge the constitutionality of these laws. Unlike land-

⁷⁶ Ibid.

⁷⁷ Assefa Fiseha, *supra* note 13; Solomon Nigussie (2016), *Fiscal federalism and decentralization in selected IGAD member countries*, Horn Economic and Social Policy Institute.

⁷⁸ Assefa Fiseha, and Zemelak Ayitenew, *supra* note 19.

⁷⁹ FDRE Constitution, Article 62.

⁸⁰ Assefa Fiseha, *supra* note 13.

⁸¹ Ibid.

related disputes, which have gained the limited attention of the HoF, the constitutionality of the laws regulating mineral resources has not yet been litigated before the HoF. Both the federal government and the regional states have not yet submitted a case to the HoF. Instead, they have attempted to enact laws that reflect their interpretations.

The House of Federation's limited engagement with cases related to mineral resources can be observed by examining multiple interconnected factors. Although mining holds significant national economic importance, it currently remains a sector that is not given due attention.⁸² This understates the intricate political dynamics and competing interests between central and regional stakeholders that would be involved in such cases. Moreover, the existence of a highly centralized dominant party that has controlled both the federal and state governments for the past 30 years has also had an impact. This dominance reduces the incentive to engage with the HoF on mining-related issues.⁸³

5.3 Second chamber

The presence of a second chamber that represents the interests of subnational governments at the federal level is a common feature in federal systems.⁸⁴ Ensuring the entrenched representation of subnational interests is crucial to prevent the arbitrary exercise of legislative power by the federal government.⁸⁵ The HoF was established as the second chamber by the FDRE Constitution.⁸⁶ However, there are notable limitations on the representation of regional states within the HoF, including the absence of state participation and the lack of law-making power.

Unlike other federal systems, the HoF primarily represents the nation, nationality, and people of the country rather than the regional states. As a result, subnational governments do not participate directly in the federal law-making process.⁸⁷ One could argue that states are indirectly represented in the HoF since regional states are mainly established based on ethnolinguistic lines.⁸⁸ It should be acknowledged that over half of the regional states in the federation are multi-ethnic. Moreover, members

⁸² Interview, *supra* note 75.

⁸³ *Ibid.*

⁸⁴ Assefa Fiseha, *supra* note 13.

⁸⁵ *Ibid.*

⁸⁶ The FDRE Constitution, Article 62.

⁸⁷ *Ibid.*

⁸⁸ Assefa Fiseha, *supra* note 13.

represent their ethnic groups rather than the regional state as a whole.⁸⁹ Hence, it is hard to say that those regional states are represented in the law-making process.

Furthermore, the HoF has limited legislative functions and its consent is not a prerequisite for federal legislation. This concentration of law-making power in the lower house prevents the second chamber from influencing the law-making process. It can be argued that the HoF, through its constitutional interpretation power, can mitigate problems caused by its lack of legislative power. However, as previously mentioned, the role of the HoF in constitutional interpretations is far from satisfactory.

6. The Exercise of Legislative Power over Natural Resources

The federal government has enacted a mining and mineral resource transaction law, supported by delegated legislation, regulations, and directives.⁹⁰ 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 Regional states have also enacted proclamations and regulations concerning the extraction of mineral resources.⁹²

The federal mineral transaction law includes detailed rules governing mineral resource transactions.⁹³ However, unlike mining laws, regional states have failed to adopt regional mineral transaction laws in line with federal law. Generally, federal and regional legal frameworks cover similar issues and are

⁸⁹ The 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).

⁹⁰ The Federal Mining Proclamation Amendment, Proclamation No. 816/2016,) 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; Federal Mining Proclamation No. 678/2010; Mineral Resource Transaction Proclamation No.1144/2019.

⁹¹ Ibid.

⁹² A Proclamation to Amend Oromia Region Mineral Development Operation Administration Proclamation No. 223/2020.

⁹³ Mineral Resource Transaction Proclamation No.1144/2019, Article 28(4).

aligned with the provisions of the Constitution. However, there have been instances where the constitutionality of both legal frameworks has been controversial, particularly regarding the regulation of ownership and the division of administrative and legislative powers. Furthermore, inconsistencies between federal and state laws further complicate the legal landscape.

The constitutionality of federal and regional mining legal frameworks comes into question primarily in relation to the regulation of mineral resource ownership. The ownership of mineral resources is addressed in the FDRE constitution in vague and ambiguous terms. It establishes that the ownership of mineral resources lies with the “people and the state.”⁹⁴ Similarly, regional state constitutions contain identical provisions concerning the ownership of natural resources.⁹⁵ However, it is not clear whether the phrase ‘state and people’ assigns ownership of mineral resources to the federal government, regional states, or even ethnic groups.⁹⁶

The ownership of mineral resources is one of the most controversial issues in federal constitutional design. It is the source of the constant struggle between local communities, subnational units and central governments. Despite the ambiguity surrounding the issue, it can be argued that the FDRE Constitution provides joint ownership of mineral resources.⁹⁷

Both the federal and regional legal frameworks have made efforts to regulate ownership rights over mineral resources. The federal mining law, for instance, ambiguously and indirectly attempts to determine ownership by stating that mineral resources “are the property of the Government and all the peoples of Ethiopia.”⁹⁸ The definition of ‘government’ in the law includes the federal government and, where applicable, the states. Recently, regional states

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

⁹⁵ The enforcement proclamation of the Revised Constitution of Oromia regional state, Proclamation No. 46/2001, 8th year, No. 6, 12th of July, 2001; the Revised Amhara National Regional State Constitution, Proclamation No. 59/2001; and the Constitution of the Harari Regional state, 2004, all the regional states provide similar provisions that regulate the ownership of mineral resources.

⁹⁶ Yared Hailemariam, Solomon Niguessie, *et al.* (Forthcoming). Critical Appraisal of the Ownership of Mineral Resources in the Ethiopian Federation. *Ethiopian Journal of Federalism Studies*. The ownership of natural resource and land has been subjected to different interpretation.

⁹⁷ Ibid

⁹⁸ See the Federal Mining Proclamation No. 678/2010, Article 5(1).

have asserted that mineral resources within their respective regions are the property of people residing in those regions.⁹⁹

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.¹⁰⁰ As previously indicated, both federal and regional legal frameworks have attempted to establish a division of power in relation to mineral resources.¹⁰¹ The federal mining and mineral transaction laws have adopted two approaches to divide legislative power in this domain. Firstly, there are mining operations and mineral transactions that fall exclusively under the jurisdiction of the federal government. In such cases, the federal government has exclusive legislative powers.

Secondly, there are mining operations and mineral transactions that fall within the jurisdiction of the regional states. In these instances, the federal government has attempted to align itself with the concepts of concurrent power and has enacted framework legislation. It aims to provide a general framework for regional states to exercise their legislative authority in line with the federal objectives and standards. The regional states adhere to the division of power stipulated by federal laws. Thus, the division of legislative authority over mineral resources is a subject of constitutional debate.

The third area, where the constitutionality of the federal and regional legislative frameworks is contested, is its attempt to divide administrative power over mineral resources. As previously discussed, federal and regional mining and mineral transaction legal frameworks have established a visible division of administrative authority within the mining sector based on factors such as the type of resource, mineral transactions, and scale of mining activities. The Federal Mining Proclamation allocates administrative power based on the nature of the mining operations and mineral resources.¹⁰² The amendment made in 2013 has further strengthened the power of the federal government.¹⁰³ Moreover, the Mineral Resource Transaction Proclamation

⁹⁹ See the Oromia Mining Proclamation 223/2020. The preamble of the Proclamation states, “It is necessary to protect and conserve the mineral resource in our region to be used for the benefit of the people, as it is the natural resource of the people and the regional state.”

¹⁰⁰ The FDRE Constitution, Article 52(2)d, provides that the regional states are the main actors in administering natural resources in line with federal laws.

¹⁰¹ A Proclamation to Amend Oromia Region Mineral Development Operation Administration No. 223/2020.

¹⁰² Federal Mining Proclamation No. 678/2010, Articles 46, 52.

¹⁰³ Federal Mining Proclamation No. 678/2010; The Federal Mining Proclamation Amendment, Proclamation Number 816/2016. Under the Federal Mining.

divides administrative power over the trading and processing of mineral resources.¹⁰⁴ These legislative measures have granted the federal government extensive control over the mining sector.

Subnational mining laws have historically failed to challenge the central government in this regard. Nevertheless, subnational governments, are advocating for the participation of subnational entities in decision-making processes.¹⁰⁵ This demonstrates a growing trend of subnational governments seeking to assert their administrative power within the mining sector.

A notable difference has emerged between federal and regional mining legislation on the definition of mineral resources, and the division of administrative power. The federal and regional mining laws provide divergent definitions of mineral resources.¹⁰⁶ While federal and state governments historically defined minerals similarly, successive amendments by the federal government have resulted in discrepancies. For instance, the federal legislation excluded mineral water from the definition of mineral resources, while regional states recognized it as such. It took more than ten years for regional states to align their definitions with the federal amendments.¹⁰⁷

Another discrepancy lies in the treatment of geothermal energy. Initially, both federal and regional state laws classified geothermal energy as a mineral resource. Geothermal energy has been omitted from the definition of mineral

Proclamation No. 678/2010, artisanal mining of metallic minerals like gold and platinum was under the jurisdiction of the regional states. Proclamation No. 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.

¹⁰⁴ Mineral Resource Transaction Proclamation No. 1144/2019. 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. The regional state has the power to issue licenses and certificates of competency other than those issued by the central government.

¹⁰⁵ Interview, *supra* note 42.

⁸⁷ A Proclamation to Amend Oromia Region Mineral Development Operation Administration Proclamation No. 223/2020.

¹⁰⁷ Article 2(14) of Proclamation No. 52/1993 considers water as a mineral resource. Accordingly, regional states enacted a mineral development proclamation that provides a similar definition. On the other hand, Proclamation No. 678/2010 excludes mineral water. However, regional laws continued for a long time to consider mineral water as a mineral resource.

resources since the enactment of the Federal Mining Proclamation No. 678/2010.¹⁰⁸

Furthermore, as mentioned earlier, there is a recent divergence between the division of administrative power over mineral resources and subsequent lawmaking power. The federal mining proclamation, as noted above allocates special small-scale mining to the central government. However, regional states have challenged this division of administrative power and enacted detailed rules on the issue. For instance, the Oromia regional state mining proclamation has assigned the authority over special small-scale mining to the regional government, and enacted rules that regulate the issue, contesting the federal government's division of administrative power.¹⁰⁹

Likewise, the Federal Mining Proclamation allocates the power to regulate the extraction of small-scale industrial minerals and any construction minerals by foreign investors to the federal government.¹¹⁰ On the other hand, the Oromia regional mining law expands the authority of the regional government over special mining activities and regulates small-scale industrial minerals and construction minerals by any investor.¹¹¹ This inconsistency highlights the need for a harmonized approach to the division of powers that can ensure clarity and coherence in the legal framework.

The legislative power over mineral resources thus necessitates a comprehensive evaluation within the framework of the constitutional division of powers and the concept of concurrent power. Once this division is established, it is expected to be respected and adhered to by both the federal and regional governments.

The FDRE Constitution explicitly addresses ownership, administrative, and legislative power over mineral resources. Accordingly, both the federal government and the regional states are obligated to comply with this division of power. The mining and mineral transaction laws should not be used to regulate matters that are already addressed in the Constitution. It is crucial to

¹⁰⁸ Articles 2(20) and 13(1-4). According to Proclamation No. 52/1993, geothermal energy was one type of mineral resource. The regional states also provided similar definitions. However, geothermal energy was later removed from the definition of mineral resources. On the other hand, for instance, Oromia Regional State did not mandate significant change for a long time.

¹⁰⁹ A Proclamation to Amend Oromia Region Mineral Development Operation Administration, Proclamation No. 223/2020.

¹¹⁰ Federal Mining Proclamation No. 678/2010; Article 52; Oromia mining proclamation, Proclamation No. 223/2020.

¹¹¹ See Oromia Mining Proclamation, Proclamation No. 223/2020.

avoid duplication and ensure that the roles and responsibilities assigned in the Constitution are followed. The scope of power in the hands of either the federal or subnational governments should be clear. In the absence of such clarity, unilateral actions by either level of government –particularly in a contentious context where conflicting claims over mineral resources exist–adversely affect legal certainty.

Unilateral attempts to alter or divide ownership, legislative power, or administrative power over mineral resources are unconstitutional. Therefore, any changes or reinterpretations should adhere to proper constitutional procedures to ensure the integrity of the division of power and uphold the principles of federalism.

The regional state laws that contradict the provisions of the federal law need to be seen in light of the notion of concurrent law-making power. Such acts of a regional government are against the concept of concurrency and the constitutional division of power. The power of the federal government is focused on setting national standards. On the other hand, the secondary legislative power of the regional states is dependent on the federal power, and the regional laws are required to give effect and meaning to the federal law. It is not up to the regional laws to substantially change the content of the federal law.

7. Conclusion

This article has examined the legislative power over mineral resources in the Ethiopian Federation. It has highlighted the challenges surrounding the division of this power and identified several key findings. The FDRE Constitution assigns legislative power over mineral resources in an ambiguous manner because it fails to provide a clear definition of its nature and scope. As a result, ambiguity exists between the federal and regional levels of government regarding their respective jurisdictions. Furthermore, the gaps in institutional framework and mechanisms to coordinate concurrent legislative power exacerbate the problem. The absence of clear guidelines and coordination mechanisms has paved the way for federal and regional laws that contradict the constitutional principle. This situation has created a significant challenge in effectively managing mineral resources and ensuring consistency in the legal framework that regulates the mining sector.

The way forward in addressing the above-mentioned challenges associated with the legislative power over mineral resources in the Ethiopian federal system calls for three measures. *First*, Articles 51(5), 52(2)(d), and 55(2)(a) of the Constitution should be interpreted in a manner that provides a clear delineation of the legislative power of the federal and regional governments

over mineral resources. This interpretation will reduce ambiguity and establish a solid framework for legislative authority. *Secondly*, both the federal and regional governments must establish mechanisms and institutions to effectively coordinate their legislative power over mineral resources. Such coordination is essential to prevent confusion, contradictions, and overlapping laws at federal and regional state levels.

Thirdly, the federal and regional laws that contradict the Constitution and each other concerning mineral resources, specifically over ownership, the division of legislative powers, the division of administrative power, and the definition of mineral resources should be subjected to review by the HoF. The HoF can play a pivotal role in resolving conflicts and ensuring compliance with the Constitution. These measures can indeed address the confusion, contradictions, and lack of coordination in the assignment of legislative power over mineral resources thereby positively contributing to a more streamlined and consistent legal framework that promotes responsible and sustainable management of mineral resources in Ethiopia. _____ ■

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