

Ethiopia's Mineral Resource Ownership and Licensing Framework: Navigating the Federal Fault-Lines

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Abstract

The assignment of ownership of mineral resources and the administration of mining licenses are contentious issues in federations. This article provides a comprehensive analysis of related challenges in the context of the Ethiopian federation. Based on qualitative research involving documentary analysis and in-depth interviews, it sheds light on issues surrounding the assignment of ownership of mineral resources and the administration of mining licenses in Ethiopia. The article reveals that the Constitution of the Federal Democratic Republic of Ethiopia lacks clear and adequate rules for regulating the assignment of ownership of minerals and the allocation of legislative power over mining licenses. It shows, moreover, that federal and regional mining laws exacerbate the confusion by providing a legal framework that violates existing constitutional norms, the principles of decentralisation, and international human rights law. Furthermore, the way in which mining licences are currently administered contradicts the constitutional division of power, as it fails to engage subnational actors in the decision-making process. These findings emphasise the urgent need to address the legal and practical challenges associated with the assignment of ownership of mineral resources and the administration of mining licenses in the Ethiopian federation.

Keywords: mineral resources, ownership of minerals, mining licenses, federalism, Ethiopia

1. Introduction

Renowned for its diverse, abundant minerals, Ethiopia's geological landscape affords extensive opportunities for resource extraction and utilisation (Tadesse, Milesi & Deschamps, 2003). The country has a long history of mining activity, and has seen the mineral sector make a positive impact on numerous aspects of its economy (Debele, 2020). The mining sector has not only contributed to economic development, but also to government revenue, foreign currency earnings, job creation, and meeting the raw material needs of various industries (Stephens, 2018). In recognition of the immense potential of the mining sector, the Ethiopian government has prioritised it as a key area in its agenda for reforming the domestic economy (Stephens, 2018).

Historically, Ethiopia's mining sector operated under a centralised system in

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which absolute mineral rights were vested in the central government. However, a significant shift towards decentralised authority over mineral resources was initiated with the introduction in 1995 of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE). Over the past three decades, Ethiopia has been in the process of devolving power over mineral resources, including the administration of ownership rights. The Constitution vests ownership of mineral resources in the “State and Peoples” of Ethiopia; furthermore, it grants the federal government the power to enact laws on the utilisation and conservation of mineral resources, while assigning the administration of these laws to subnational governments. In addition to the constitutional provisions, federal as well as regional mining legislation has been enacted so as to establish a governance framework for the administration of mineral resource ownership.

The assignment and administration of ownership of natural resources in Ethiopia have generated conflicting interpretations (Zewdie, 2013; Tura, 2018). Moreover, there has been a lack of comprehensive examination that focuses on the mineral resources. This study aims to fill this gap by undertaking a thorough analysis of the legal and institutional framework governing the assignment and administration of ownership of the country’s mineral resources. In so doing, it seeks to enhance our understanding of Ethiopia’s approach to resource governance and shed light on the strengths and weaknesses of its legal and institutional framework in addressing mineral ownership.

To these ends, the study adopts a qualitative approach that combines doctrinal legal analysis with empirical investigation. The doctrinal analysis involves an examination of the constitutional and legislative rules that regulate mineral ownership and mining licence; the empirical investigation involves interviews with key informants (primarily ones serving as officials in federal and regional government), and seeks to ascertain the governance landscape. The study thus incorporates interviews, archival records, legal instruments, and relevant findings in the literature as sources of data.

The article is structured as follows. The first section examines the way in which ownership and control of mineral resources in general is conceptualised, doing so by surveying the applicable theories and legal regimes. The second section focuses on the assignment and administration of ownership of mineral resources in federal systems, aiming to identify the relevant principles and experiences. The third section discusses the transfer of mining licenses and how policy statements regarding mineral resource ownership are put into practice in federal systems. The fourth section assesses the assignment of ownership of mineral resources under the FDRE Constitution. The fifth considers the legal framework for the administration of mining licenses, while the sixth examines the actual administration of mining licenses in Ethiopia. The seventh section presents conclusions and recommendations.

2. Conceptualizing Ownership of Mineral Resources and Mining Licenses

“Ownership” is a complex, multi-layered concept that encompasses diverse arrangements, all of which it make it hard to define in simple terms (Cotulla, 2018). Despite such considerations, it may be said to denote a legal right, interest, or mode of control that a legal system grants a natural or juristic person over a thing or object (Cotulla, 2018; Olawuyi, 2018). Defining ownership

rights over mineral resources presents similar difficulties (Olawuyi, 2018). Olawuyi (2018) underscores these difficulties, pointing out that the notion of ownership rights over mineral resources seems both self-explanatory and yet highly elusive to pin down. It is self-explanatory in that one can discern ownership rights by examining the list of mineral rights granted under the legal system; it is elusive due to the various jurisprudential interpretations and theories that are needed in order to capture the concept (Olawuyi, 2018; Nicholas & Kane, 2009). Indeed, ownership of mineral resources is one of the broadest rights that a legal system can confer in relation to them (Nicholas & Kane, 2009; Olawuyi, 2018).

The state regulates the ownership of mineral resources in different ways, including through the enactment of a national law and through its subscription to international law (Olawuyi, 2018; Anderson, 2020; Acholonu, 2011). It is important to acknowledge at the outset, however, that state sovereignty over mineral resources has been influenced by developments in international public law and human rights law that recognise the rights of both international investors and intra-state actors in relation to mineral resources (Miranda, 2012; Dessanti, 2015).

Countries use three primary approaches to administer mineral resource ownership in their domestic legal frameworks: land ownership, concessions, and the claim system. Under the system of private or non-dominial land ownership system, the ownership of mineral resources is tied to the ownership of the land (Dessanti, 2015). In this system, the regulation of rights of ownership of mineral resources falls within the realm of private law, granting the landowner broad rights, including the authority to veto any development activities. Conversely, the system of state, dominial, or concessioner ownership, which is widely applied around the world, entails that ownership of all subterranean minerals is vested in the state where the resource is located (Dessanti, 2015). Private developers' rights are contingent upon their contractual agreements with the state, as outlined in public law. Lastly, the claim system provides a flexible framework for mineral resource ownership, one wherein the discoverer of the resources is granted the right to extract them, subject to compliance with legal requirements (Okonkwo, 2017). Overall, these different approaches reflect the diverse ways in which ownership rights over mineral resources are structured and regulated, taking into account legal, economic, and social considerations.

Once the nature of mineral resource ownership is determined by the state, the next step involves establishing a comprehensive legal framework that gives substance to the general policy statements (Venugopal, 2014; Cameron & Stanley, 2010). This legal framework is essential for defining the extent of a legal system's rights over mineral resources, including regulating mining licenses (Cameron & Stanley, 2010). By establishing a comprehensive legal framework for mineral resource ownership and mining licenses, a legal system can effectively regulate and govern the rights and obligations of stakeholders involved in mineral resource development. This framework ensures clarity, transparency, and accountability in the management of mineral resources while balancing the interests of the state, investors, and other relevant parties.

The development of a detailed legal framework typically involves consideration of two things: the concessionary system and the permit system (Venugopal, 2014). On the one hand, the concessionary system regulates the mining sector mainly through contracts (Venugopal, 2014; Olawuyi, 2018); on the other, the permit system is commonly employed by countries, particularly those with civil law legal systems, to regulate it primarily through legislation and regulations (Venugopal, 2014; Olawuyi, 2018). The experiences of the major mining countries show that they use a combination of the above approaches to develop a detailed legal framework, attempting to incorporate beneficial elements from both systems (Venugopal, 2014; Olawuyi, 2018).

The state has a crucial responsibility of establishing institutions that are tasked with implementing the legal framework governing the mining sector, including in regard to the transfer of mining titles. Among these institutions, the licensing body plays a pivotal role in overseeing the environmental, social, and financial aspects related to mining operations during the process of transferring mining titles (Venugopal, 2014; Olawuyi, 2018). While the institutional structure may vary, an efficient and effective mineral licensing system should embody certain key characteristics. These include clearly delineated responsibilities between national, regional, and local agencies; sufficient staffing, expertise, and resources for robust administration; rigorous and transparent monitoring of permit-holder compliance; and coordination mechanisms across the government entities concerned (Cameron & Stanley, 2010). By establishing institutions with these key characteristics, the state can enhance the effectiveness and efficiency of the mineral licensing system. This, in turn, contributes to responsible and sustainable mining practices that safeguard the environment, local community interests, and the nation's overall socio-economic development.

3. Mineral Ownership and Mining Licenses in Federal Systems

The regulation of mineral resource ownership within federal systems diverges significantly from that in other legal systems. In federal systems, which predominantly follow the principle of public ownership of mineral resources, a mere policy statement asserting public ownership is inadequate. It becomes imperative to designate a specific level of government within the federal structure as the rightful owner of mineral resources. Furthermore, the legal and institutional framework governing mining licenses must be considered in the light of the division of power.

The regulation of these powers over mineral resources is a highly sensitive political matter within federal constitutional design (Cameron & Stanley, 2010; Nicholas & Kane, 2009). It frequently gives rise to controversies among the central government, subnational governments, and various ethnic groups, all vying for control over the extraction of these resources. Accordingly, the federal constitutional design must diligently seek to strike a delicate balance among competing interests, incorporate diverse perspectives, and facilitate effective coordination (Cameron & Stanley, 2010; Nicholas & Kane, 2009). In particular, has to address the assignment of ownership rights over mineral resources, and the control power over mineral resources (Feehan, 2005; Venugopal, 2014). The latter may be further divided into legislative power and management power over mineral resources.

The literature on decentralisation offers valuable insights and recommendations regarding the optimal allocation of mineral resource ownership. It suggests that ownership should be assigned in accordance with the principle of subsidiarity (Bishop & Shah, 2008; Haysom & Kane, 2009). This means that ownership of mineral resources should be allocated to the lowest level of government that possesses the necessary administrative and technical capacity to maximise the social benefits derived from the extraction of these resources. The government responsible for mineral resource ownership should thus have the capacity to capture resource rent, promote exploration, assign exploration rights, and regulate mineral development activities (Bishop & Shah, 2008; Haysom & Kane, 2009; Olawuyi, 2018).

However, the practice of assigning mineral resource ownership within federations often deviates from coherent principles (Bishop & Shah, 2008; Haysom & Kane, 2009). Federal systems have developed various ways and means for assigning mineral resource ownership. The actual assignment of ownership rights over mineral resources depends on several factors, including the state of evolution of the federal system, the impact of mineral resources on national development, the distribution of these resources, and the human diversity within the federation (Bishop & Shah, 2008; Haysom & Kane, 2009; Wallace, 2016). Nevertheless, despite the many variations that are possible, the assignment of ownership generally follows a subnational-ownership,⁶² central ownership,⁶³ or mixed-ownership⁶⁴ approach.

Once the rights of the state and sub-state actors over the ownership of mineral resources are settled, the next step is the detailed regulation of the ownership of mineral resources in the domestic legal system. Haysom & Kane (2009) note that declaring ownership of natural resources is not enough, as it does not say anything about the rights or duties of different levels of government in the exercise of ownership of mineral resources. As such, the state has to develop a robust legal framework that translates policy statements on mineral resource ownership into actionable provisions (Venugopal, 2014; Cameron & Stanley, 2010). Unlike in unitary systems, however, the assignment of ownership alone does not automatically confer the power to develop legal frameworks governing mining licenses (Haysom & Kane, 2009; Choudhry & Stacey, 2015; Beardsworth et al., 2019); instead, this depends on the assignment of legislative powers, which are other critical issues in the constitutional design related to mineral resources. In this regard, there is no theoretical framework that compels federations to assign ownership and legislative power over mineral resources to the same level of government; indeed, federal systems take a spectrum of approaches to the issue, ranging from consolidating ownership and legislative power to granting such authority to non-owning levels of government (Haysom & Kane, 2009; Choudhry & Stacey, 2015; Beardsworth et al., 2019).

Scholarship on decentralised governance offers valuable guidance for determining the allocation of legislative authority over mineral resources in feder-

62 For example, see Article 109, Constitutional Acts of Canada, 1867 to 1982; Article 249, Constitution of India, 1949.

63 For example, see Article 20(IX) of Brazil's Constitution of 1988 with Amendments through 2017; Article 27 of Mexico's Constitution and Its Amendments, 1917; Article 44 of Nigeria's Constitution, 1999.

64 For example, see the Constitution of the United States of America.

al systems. Experts argue that such assignments should strike a balance among three essential imperatives: efficiency, capacity, and national interest (Haysom & Kane, 2009; Choudhry & Stacey, 2015; Beardsworth et al., 2019). However, the actual assignment of legislative authority depends on the specific political context of the host states, the significance of the mining sector, and the imperative to enhance the global competitiveness of the federation (Choudhry & Stacey, 2015). The choice of the appropriate division of legislative power depends on the unique circumstances and goals of each federation. Be that it may, the division of legislative power over mineral resources generally takes three forms: devolved, centralised, or concurrent (Haysom & Kane, 2009). Once the legal framework that operationalises the policy statement is established, federal systems must establish institutions responsible for administering the transfer of mining rights to developers. It is crucial to develop a transparent and competitive licensing system that ensures fairness and efficiency in the allocation of mining licenses (Olawuyi, 2018; Venugopal, 2014; Cameron & Stanley, 2010). The authority to create such a licensing system is contingent upon the assignment of management power over mineral resources, which is distinct from ownership and legislative powers. Importantly, the assignment of ownership and legislative power does not automatically confer the management power required to establish an institutional framework for regulating mining licenses (Haysom & Kane, 2009; Cameron & Stanley, 2010). As a result, there are intricacies in the assignment of ownership, legislative, and management powers. Federal systems once again exhibit diverse trends, ranging from those that consolidate ownership, legislative, and management powers to those that separate them (Haysom & Kane, 2009; Cameron & Stanley, 2010).

The extensive body of work on the assignment of management power over mineral resources offers pertinent guidance for policymakers. Scholars have identified several important criteria that frameworks should endeavor to satisfy in order to achieve good governance outcomes. It highlights key criteria that should be taken into account, such as transparency, accountability, national interests, government capacity, and the need for consistency across the country (Haysom & Kane, 2009; Cameron & Stanley, 2010). An examination of federal systems reveals significant differences in the management of mineral resources. The approach taken by each federal system in allocating management power depends on various factors, including the unique political context of the host states, the economic impact of the mining sector, and the availability of safe and cost-effective methods of extracting mineral resources (Haysom & Kane, 2009; Choudhry & Stacey, 2015). Choosing the appropriate model requires careful consideration of the specific context, goals, and interests of the federation. Constitutional approaches to the management of mineral resources in federal democracies may generally be categorised into three models: single, split, and joint management (Haysom & Kane, 2009; Choudhry & Stacey, 2015).

4. Assigning minerals ownership under the FDRE Constitution

For a considerable period, the administration of mineral resource ownership was characterised by a highly centralised approach, often framed in terms of private versus public ownership. However, the FDRE Constitution introduces a nuanced understanding of ownership division concerning mineral resources. It designates the ownership of natural resources, including mineral

resources, to both the “State and the Peoples of Ethiopia” (Article 40(3)). The Constitution thus employs two distinct entities, which have been subject to differing interpretations, to allocate ownership rights over mineral resources: the “State” and the “Peoples of Ethiopia”. Furthermore, similar provisions regarding the ownership of natural resources are included in the constitutions of the regional states. However, neither the federal nor regional state constitutions provide detailed guidance on the ownership of mineral resources. It is unclear from a reading of the constitutional texts whether the phrase “state and people” is assigning ownership of mineral resources to the federal government, regional states, or ethnic groups (Article 40(3), FDRE Constitution; Zewdie, 2013; Tura, 2018; Jima, 2021). Addressing this ambiguity and establishing a clear framework for the ownership of mineral resources within the Ethiopian context would contribute to more effective governance of these resources.

The FDRE Constitution employs the term “state” as the first entity to assign ownership of mineral resources. However, the English and Amharic versions of the Constitution ascribe different meanings to this term. In the English version, the term “state” suggests that ownership lies with the federal government (Article 40(3)). Conversely, the Amharic version uses “Mengist”, which can be translated roughly as “government” (Article 40(3)). It remains unclear, then, whether it refers to the federal or regional government. This linguistic ambiguity breeds confusion and competing assertions of control (Zewdie, 2013).

Complicating matters further are federal and state mining laws. The federal mining law stipulates those mineral resources “are the property of the government”, and defines “the government” as “the federal government ... [which] includes states where appropriate” (articles 2(10) and 5(1), Federal Mining Proclamation No. 678/2010). This definition implies that both the federal and regional governments can assert ownership over mineral resources. In contrast, although regional states initially refrained from making ownership claims over mineral resources, some have recently begun asserting that these resources belong to the “region and its people” (Proclamation No. 223/2020). This divergence in perspectives has raised significant questions about the assignment of ownership of mineral resources between the federal and regional governments. Adding to the complexity is the limited constitutional law and scholarly literature addressing the assignment of ownership of mineral resources in Ethiopia. Most scholarly works have focused on the issue of land ownership, leaving a gap in understanding in regard to the nuances specifically of mineral resource ownership.

To address these challenges comprehensively, a thorough examination is necessary of the constitutional provisions, one taking into account legislative history, relevant literature, and comparable cases. Ethiopia has a long tradition of public ownership of mineral resources. Since the era of the imperial regime⁶⁵ and into that of the Derg and the transitional government, centralised public ownership of mineral resources has been the norm, a fact of which the drafters of the FDRE Constitution were aware. Indeed, the role of the central

65 See the Imperial Decree of the Ethiopian Government, 8 April 1928.

government in mineral resource ownership was widely regarded as a given during the drafting process, as evidenced by the lack of discussion or debate on the matter (Tura, 2015).⁶⁶ This lack of substantial deliberation suggests a preference for continuity, and reinforces the understanding that the federal government should retain ownership of mineral resources.

Historical considerations aside, insights from the literature on resource federalism provide valuable guidance on assigning ownership of mineral resources. This body of scholarship, as noted, recommends that in countries where the federal government possesses the necessary capabilities in terms of investment, regulation, and resource distribution, it should assume primary ownership of mineral resources (Bishop & Shah, 2008; Haysom & Kane, 2009). In applying this perspective to Ethiopia, it becomes evident that the federal government, with its relative capacity and capability for investment, regulation, and distribution, is best suited to assume ownership of mineral resources.

Moreover, examining comparable cases, such as Nigeria and South Africa, can shed further light on the assignment of mineral resource ownership. These countries – a federation in Nigeria’s case, a quasi-federation, in South Africa’s – share similarities with Ethiopia, and have recognised the importance of centralising mineral rights in seeking to manage ethnic tensions, enhance the role of mineral resources in national development, and mitigate disparities in the distribution of the latter. From their experience, it is apparent that such central government ownership is crucial for managing ethnic tensions, promoting national development, and addressing resource-related inequalities.

Therefore, in considering historical context, insights from resource-federalism literature, and evidence provided by comparable cases, a compelling argument can be made that the Constitution uses the word “state” to assign ownership of mineral resources to the federal government. This interpretation aligns with the need for continuity, the federal government’s capabilities, and the lessons learned from comparable cases in managing mineral resource ownership within a federal system.

The second entity to which the FDRE Constitution assigns ownership of mineral resources – the “people” – has also been the subject of differing interpretations. The differences between the English and Amharic versions of the Constitution have led to divergent understandings of the term and laid the basis for potential disputes. The English version uses the term “Peoples of Ethiopia”, but does not provide clear guidance on whether this refers to the “nation, nationality, or people” as defined in Article 39(5). This raises questions about whether mineral resource ownership should rest with the federal government, the individual regional states, or the collective population of the country.

Adding to the complexity, the second sentence of Article 40/3 of the FDRE Constitution that deals with land and natural resources states that land is a common property of the nations, nationalities, and people of Ethiopia. However, it does not explicitly address the issue of mineral resource ownership, leaving room for differing opinions and potential conflict. In contrast, the Am-

66 See the Minutes of the FDRE Constitution, Vols 3 and 4, 1995.

haric version of the Constitution uses the phrase “people of Ethiopia” without any qualification, suggesting a unified understanding where the federal government and the entire population of the country are joint owners of mineral resources. Regional state constitutions generally align with the Amharic version of the federal constitution. Here, it is worth noting that the federal mining law explicitly declares that mineral resources “are the property of all the peoples of Ethiopia” (articles 2(10) and 5(1), Federal Mining Proclamation No. 678/2010). But, to compound the confusion, regional state mining laws have been enacted asserting that mineral resources within a specific region are the property of the people of that region (preamble, Proclamation No. 223/2020).

Contradictory approaches to people’s ownership rights over minerals have sparked contention (Powell, 2007; Malone, 2010; Reuters, 2019).⁶⁷ After all, the determination of their ownership rights over minerals is closely tied to the recognition of the economic right to self-determination under the FDRE Constitution. Articles 39 and 40 provide the basis for the right to self-determination (be it political, social, and/or cultural) of the nations, nationalities, and peoples of Ethiopia (Hindeya, 2019; Zewdie, 2013; Tura, 2018). However, there is significant confusion in respect to the recognition of the economic aspect of self-determination, particularly in relation to mineral resource ownership. The literature on economic self-determination and its implications for mineral resource ownership is limited, and constitutional jurisprudence has not addressed this issue in depth; by contrast, important discussions have taken place in the literature that analyses the issue in relation to land, a topic that falls under the same sub-article of the Constitution.⁶⁸

Divergent views exist regarding the recognition of economic self-determination rights and their impact on land ownership. Proponents argue for the recognition of economic self-determination rights, including land ownership. They base their argument on the English version of the Constitution and the exclusion of natural resources in the second line of Article 40(3) of the FDRE Constitution. They contend, furthermore, that Article 39 should be interpreted in line with international human rights instruments, which grant minorities the opportunity to claim ownership and control of land and natural resources (Hindeya, 2019).⁶⁹ By contrast, opponents of this view rely on the Amharic version of the Constitution, as well as regional state constitutions. According to this perspective, the Constitution emphasises the political and cultural aspects of self-determination while neglecting its economic dimension (Zewdie, 2013; Tura, 2018).

The foregoing ambiguities and discussion of the economic right to self-determination and its implications for mineral ownership should be contextualised in relation to the legislative history of the country’s constitution, the relevant international human rights standards, and constitutional provisions that

67 Interview with an expert at the Oromia Mines and Energy Bureau, June 2022.

68 In certain areas, the discourse on mineral resources and land encompasses significant differences that require careful consideration, especially in the context of international human rights law. It is imperative to consider these differences whenever they become relevant to the discussion.

69 Hindeya (2019) argues that the right to self-government, provided under Article 39(3), is used to refer to all aspects of self-determination, including the social, economic, and political. He argues, furthermore, that Article 39(2) of the Constitution provides for the cultural right to self-determination, which should be interpreted in such a way as to allow people to have access to land and natural resources.

address inconsistencies arising from the different versions of the Constitution. To begin with, the legislative history of the Constitution provides important insight in engaging with issues to do with economic self-determination vis-à-vis mineral ownership. One of the primary objectives of the FDRE Constitution was to address the demands of the nations, nationalities, and peoples of Ethiopia for the right to self-determination. Accordingly, it recognised the political, social, and cultural dimensions of the right to self-determination. Zewdie (2013) and Tura (2018) argue astutely, however, that the constitutional drafters overlooked the economic right to self-determination, a lacuna with significant implications for land and natural resource ownership. This view is substantiated by compelling evidence to be found in the minutes of the Constitution.

An examination of these minutes, particularly as regards articles 39 and 40, reveals that the drafters focused primarily on the role of the right to self-determination in addressing the nationalities question (Zewdie, 2013; Tura, 2018).⁷⁰ Their deliberations thus revolved mainly around the social, cultural, and political aspects of the right to self-determination; conversely, little attention was devoted to the incorporation of the economic right to self-determination, let alone the ownership of natural resources. On the eve of the creation of the federation and the division of administrative power over mining titles under the transitional mining law,⁷¹ the drafters thus failed to consider the issue adequately, confining themselves instead to choosing an ownership system for natural resources. Therefore, an analysis of the constitutional minutes does not indicate the existence of an intention to recognise an economic right to self-determination – never mind an intention to recognise an economic right to self-determination which includes ownership of mineral resources as a right of the people.

The issue of recognising the economic right to self-determination and its implications for mineral resource ownership in Ethiopia should also be analysed in the light of the framework of international human rights instruments to which Ethiopia is a party. Article 13 of the FDRE Constitution expressly states that the provisions of Chapter 3, which deals with fundamental rights and freedoms, must be interpreted in accordance with the international human rights instruments ratified by Ethiopia. Furthermore, Ethiopia has ratified significant international treaties governing both procedural and substantive rights in natural resource utilization and management (Hindeya, 2019). However, it is important to note that international human rights laws do not explicitly endorse interpretations that grant exclusive ownership rights of mineral resources to individuals or specific groups, as is the case with land ownership (Usman & Sule, 2016; Farmer, 2006; Lijalem, 2017).⁷² Therefore, the arguments made regarding land ownership are not directly applicable to mineral resources.

Instead, international human rights treaties prioritise the protection of procedural rights, such as the right to prior and informed consent, particularly when extractive activities occur on the lands of indigenous peoples (Usman & Sule, 2016; Farmer, 2006; Lijalem, 2017).

⁷⁰ See also preamble, FDRE Constitution.

⁷¹ A Proclamation to Promote the Development of Mineral resources, Proclamation No. 52/1993.

⁷² Procedural rights include the rights to be informed, to consultation, and to consent to projects that affect them. Substantive rights, each of which has a differing scope, include those in regard to ownership, possession, use, and control.

The debate stemming from the disparities between the Amharic and English versions of the Constitution should be analysed within the framework established by the Constitution itself for resolving such inconsistencies. The FDRE Constitution provides a clear guideline to address this issue, stating that in cases of contradiction, the Amharic version of the Constitution takes precedence and holds legal authority (Article 106). In the case at hand, the Amharic version of the Constitution is unequivocal in declaring the “people of Ethiopia” as the rightful owners of these resources, without any qualifications or restrictions (Article 40(3)). This unambiguous declaration leaves no room for doubt regarding the ownership of mineral resources. It is clear that the Constitution refers to the “People of Ethiopia” as encompassing the entire population. Therefore, based on the discussion thus far, it is logical to conclude that the FDRE Constitution vests the ownership of mineral resources in both the federal government and the entire population.

Once the rights to mineral resources are established, it is important to conduct a brief assessment of the federal and state mining legislation that aims to regulate the ownership of these resources. The FDRE Constitution, as noted above, establishes shared ownership of mineral resources between the federal government and the entire population. Neither level of government has the authority to unilaterally claim exclusive ownership rights for themselves. It is not for the federal and regional state government alone to determine the scope of their power and the nature of their ownership right over mineral resources. It is not advisable to follow such practices in countries such as Ethiopia, where there is a contradictory claim over the ownership of mineral resources. Consequently, it is unconstitutional for either the federal or subnational governments to independently claim sole ownership over mineral resources, as such claims would contradict the fundamental principles of the Constitution (Articles 9(1) and 50(8)). Therefore, it is imperative for Ethiopian authorities to ensure that mining legislation aligns with the constitutional provisions that establish shared ownership.

5. Mining Licenses Under Ethiopia’s Legal Framework

Once the ownership of mineral resources is established, it becomes crucial to develop a comprehensive legal framework that effectively operationalises the general prescription of ownership. The FDRE Constitution grants the federal government the authority to enact laws that regulate mineral resources, while the regional states are responsible for their enforcement (Article 52(2)(d)). However, the constitutional division of power lacks clarity in two significant areas: the specific powers falling under this jurisdiction and the precise powers attributed to each level of government (Hailemariam, 2024).⁷³ Despite these limitations, both the federal and regional mining laws have made an apparent division of legislative power based on their division of administrative competence over mining licenses. It follows two trends in enacting a detailed

73 It should be noted here that the lack of clarity regarding the constitutional division of power has led to two fundamental questions about 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? Secondly, does the power of the regional state entail law-making – and if so, what is the scope of the federal law?

legal framework that regulates mining licenses. (Article 52, Federal Mining Proclamation No. 678/ and Proclamation No. 223/202).⁷⁴

The first trend concerns mining operations that fall within the federal government's administrative competence. In such cases, the federal mining proclamation outlines procedures and requirements for obtaining mining licenses at the federal level. However, regional states have begun to challenge the division made by the federal legislation and have enacted laws that overlap with provisions already covered by federal law. For example, the Oromia regional state's mining law contradicts the federal proclamation by asserting that special small-scale mining licenses fall under the jurisdiction of the regional state. It also introduces regulations specific to special small-scale mining operations (articles 24(3), 29, 30, and 49(4)(b), Proclamation No. 223/2020). It also contradicts the federal proclamation by expanding the states' authority beyond domestic to include any investor engaged in reconnaissance, exploration, and retention of construction and industrial minerals, as well as small-scale mining licenses for industrial minerals and construction materials (Articles 27, 28, and 49(4), Proclamation No. 223/2020).

The second trend pertains to mining operations falling within the administrative competence of the regional states. In such cases, the federal mining law establishes a basic regulatory framework, which is then supplemented by subnational legislation enacted by the regional states (articles 27, 28, and 49(4), Federal Mining Proclamation No. 678/2010). This arrangement allows the regional states to tailor-make laws that align federal regulations with their specific conditions and needs. Regional state law-makers have the authority to establish secondary legislation necessary for the administration of federal law (articles 27, 28, and 49(4), Federal Mining Proclamation No. 678/2010).

However, this trend faces two fundamental challenges.⁷⁵ First, the detailed nature of federal law leaves limited room for regional states to exercise their discretion. Secondly, the regional states have failed to utilise the space afforded to them effectively and adapt the regulations that largely mirror federal legislation. Nevertheless, there have been recent attempts by the regional states to leverage the provisions of the federal mining legislation. Notably, modifications to federal law have been made to the duration of mining licenses and their renewal to better align with regional interests (Article 29, Federal Mining Proclamation No. 678/2010; articles 26 and 27, Proclamation No. 223/2020). Additionally, minor improvements have been introduced to regional mining legal frameworks, including provisions that grant landholders the right to obtain a share of mining operations and receive preferential treatment (Article 53 , Proclamation No. 223/2020).

The above-mentioned division of legislative power does not align with the constitutional division of power and the concept of concurrency. Under the

74 The role of the state is limited to granting licenses for artisanal mining, reconnaissance, and exploration; retention licenses concerning construction and industrial minerals; and small-scale mining licenses to domestic investors for industrial minerals as well as construction material. The federal government has the power to issue reconnaissance, exploration, retention, and mining licenses other than those issued by a state licensing authority.

75 Interviews with officials at the Oromia Regional State Mining Bureau, June 2022; interview with an expert at the Federal Ministry of Mines, June 2022.

FDRE Constitution, legislative power over mineral resources is explicitly established as a concurrent power, meaning that both the federal and regional governments share responsibility while performing different roles and functions. The Constitution does not assign legislative power over mineral resources based on the division of administrative power outlined in federal legislation, such as the level of mining operations or the nature of mineral resources. Furthermore, it does not grant federal or regional legislators explicit or implicit authority to create divisions of power concerning mineral resources. Therefore, any attempts by the federal or regional state governments to divide legislative powers over natural resources are unconstitutional.

The FDRE Constitution establishes concurrent legislative power over mineral resources. Within the framework of concurrent power, it is thus crucial for both the federal and regional governments to adhere to the principles of concurrency when exercising legislative competence over mineral resources. One fundamental aspect of concurrent powers is that federal legislation should enable regional legislators to enact laws that address local concerns. The Federal Mining Proclamation's attempt to assign exclusive legislative power over mining operations undermines the concept of concurrent power. Moreover, once the federal government acts in line with the idea of concurrency, it is expected that subnational states will follow suit. Secondary laws should not serve as the basis for contradicting or altering the content of primary laws. Therefore, regional state law that contradicts the principles of concurrency should be reconsidered.

Once the issues surrounding the legislative competence over mining licenses are resolved, it becomes crucial to examine the nature of the legal framework governing these licenses. In Ethiopia, the federal mining law provides a reasonably detailed set of rules that can be supplemented by a contract. Thus, the federal mining legislation establishes the fundamental regulatory framework for mining licenses in the country. This legislation outlines the procedures for granting mining rights, defines the rights and responsibilities of developers, establishes fiscal terms, sets operational commitments, clarifies the policy on government ownership, ensures security of tenure, addresses the transferability of mining rights, and incorporates environmental and social safeguards (Federal Mining Proclamation No. 678/2010).

In addition to the mining law, the federal standard mining contract complements the legal framework by further defining the rights and obligations of the parties involved in mining operations and providing a clear framework for their engagement. As previously mentioned, some regional states have enacted rules and regulations of their own that largely mirror the federal mining law. Furthermore, regional states have developed their own standard mining contracts that align with their specific needs and objectives.⁷⁶

This comprehensive legal framework, consisting of the mining law and associated contracts at both the federal and regional levels, aims to ensure transparency, accountability, and sustainable mining practices.

⁷⁶ Interviews with officials at the Oromia Regional State Mining Bureau, June 2022.

6. Mining Licenses Under Ethiopia's Institutional Framework

The FDRE Constitution confers management power over mineral resources, including mining licenses, to regional governments (articles 51(5) and 52(2) (d)). Upon close examination of the constitutional text, it becomes evident that regional states have a central role in the management of mineral resources. However, despite this constitutional provision, the Federal Mining Proclamation, as mentioned, establishes its own division of executive power, granting exclusive authority to the federal government in issuing mining licenses (Article 52, Federal Mining Proclamation No. 678/2010).

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According to this division of power, the federal government is not obligated to involve subnational governments and local communities in the decision-making process, which is inconsistent with federal mining laws.⁷⁷ Consequently, mining titles can be transferred without the consent or meaningful participation of regional governments and local populations. The role of subnational governments in decision-making processes is largely restricted to land administration, the licensing of artisanal miners, and the mining of construction materials by domestic investors. Similarly, the participation of local communities is constrained, being limited mainly to activities such as environmental impact assessments, contributions to community development funds, and land compensation. Furthermore, the Draft Federal Mining Law reinforces the dominance of the federal government by strengthening its power in this domain.

It is vital to consider the roles of the federal government, regional states, and local communities in the light of the FDRE Constitution and relevant international human rights instruments. The Constitution explicitly assigns the power to administer natural resources, including minerals, to regional states, stipulating that they have exclusive authority over the administration of all mining licenses, regardless of the scale or nature of the mining operation (articles 51(5) and 52(2)(d)). The federal mining legislation's departure from explicit provisions of the FDRE Constitution is unconstitutional.

Additionally, it is important to consider relevant international human rights instruments in this analysis. Ethiopia is a party to international agreements that emphasise participatory decision-making in natural resource governance (International Justice Resource Center, 2017). The federal and state constitutions both explicitly recognise these international instruments as part of the country's legal framework (FDRE Constitution, Article 13); they also state expressly that the provisions under Chapter 3, which relate to resource administration, should be interpreted consistently with the international instruments adopted by Ethiopia. These instruments play a pivotal role in establishing procedural rights that aim to ensure the meaningful participation of local communities in decisions related to the transfer of mining titles.

This provides a solid basis for affording people a greater say in decisions that affect them directly. Consequently, the mining law's exclusion of local

⁷⁷ See A Proclamation to Amend Oromia Region Mineral Development Operation Administration Proclamation No. 223/202.

communities from the decision-making process clearly violates international instruments that guarantee the rights of local communities to have voice and influence in such matters.

7. Administering the Transfer of Mining Licenses

Since the transitional period of the 1990s, Ethiopia has made commendable efforts to establish decentralized institutions for the regulation of mining licenses, entrusting the Ministry of Mines with a crucial role in administering mining titles falling within the jurisdiction of the federal government; in tandem, regional states have taken proactive measures by establishing their own institutions for overseeing mining-related matters within their jurisdictions. The latter hold extensive licensing powers, including powers to issue reconnaissance, exploration, retention, and mining licenses.

The Ministry of Mines, as noted, plays a key role as the primary authority responsible for the regulation, supervision, and issuance of most mining licenses in Ethiopia. In terms of its mandate, it holds significant power in granting the various types of licenses that are necessary for mineral resource extraction. However, the involvement in this process of subnational actors, including regional states and local communities in mining areas, has been overlooked. Regional states have limited decision-making authority, with their role confined largely to providing information about the availability of mining areas in their jurisdictions.⁷⁸ Similarly, local communities are not represented adequately in the process, as a result of which their voices are not sufficiently included in decision-making.⁷⁹ The allocation of mining titles to developers has instead traditionally been perceived as the sole prerogative of federal licensing authorities.⁸⁰

This centralised and exclusionary approach undermines the constitutional division of power and overlooks the critical roles and contributions that regional states and local communities could play in decision-making. Such an approach fails to recognise that these states and communities have a legitimate claim to be principal actors in the allocation of mining titles. As such, it neglects the expectations of subnational governments and localities, who rightfully view themselves as entities which should have primary responsibility for administering mineral resources. Furthermore, their proximity to mining areas and first-hand experience of relevant social, economic, and environmental factors make their perspectives and aspirations invaluable.

For long, local communities and regional governments refrained from challenging the status quo due to a variety of factors that limited their willingness to question the legitimacy of the federal government's power. The subdued response from regional governments can be attributed chiefly to the dominance of the Ethiopian People's Revolutionary Democratic Front (EPRDF).⁸¹ The EPRDF's control of both levels of government created a political environment where dissent and opposition were discouraged, leading to hesitance

78Interviews with officials at the Oromia Regional State Mining Bureau, June 2022; interview with an expert at the Federal Ministry of Mines, June 2022.

79 Ibid.

80 Ibid.

81 Ibid.

to question the federal government's authority. The ideology of democratic centralism, upheld by the ruling party, reinforced the federal government's dominance in the transfer of mining titles, leaving little space for regional governments to assert their own decision-making powers.

Compounding these dynamics was the ineffectiveness of the central government's response to complaints lodged by local communities. Grievances voiced by local communities were often inadequately addressed or met with limited responsiveness, which further discouraged their active involvement in the decision-making process.⁸² This persistent lack of attention to local concerns created an environment in which communities felt marginalised in deliberations about mining activities in their very own localities.⁸³ However, the nationwide protests that took place between 2015 and 2018 brought the issue of centralised power in the allocation of mining licenses to the forefront of the national debate. The protests served to trigger a significant shift in the attitudes of regional states and local communities, leading them to challenge the exclusive authority of the federal government and demand participation in decision-making processes.⁸⁴

Regional states have thus taken unilateral action to remedy their grievances and assert their interests. This includes expropriating portions of mining areas that were previously licensed by the federal government and reallocating them to benefit the youth in a bid to address local socio-economic concerns.⁸⁵ Additionally, regional states have implemented measures intentionally delaying the transmission to the federal government of information about the status of mining areas, which prolonged the federal licensing process.⁸⁶ Furthermore, regional states have actively granted licenses to small-scale developers in areas originally designated for large-scale mining operations, reflecting their desire to promote local economic development and empower local entrepreneurs.⁸⁷ As for local communities, particularly those in areas with large-scale gold operations and cement factories, they have aggressively sought to assert their role in the granting and renewal of mining licenses. In some cases, they have resorted to violent protests to emphasise their claims and demand greater involvement in decision-making processes.⁸⁸

It is important to acknowledge that these actions by local communities and regional states, driven by their concerns and aspirations, have had unintended negative consequences for the country's investment attractiveness and caused uncertainty within the mining sector (Shaban, 2019; Addis Fortune, n.d.; Onu & Manek, 2017). In response, the federal government has taken various measures to address concerns surrounding mining operations and has shown a willingness to recognise the role of subnational governments to some extent.

Among other things, it has made efforts to address the ownership claims of mineral-bearing states by acknowledging their entitlement to share in the ben-

82 Ibid.

83 Ibid.

84 Ibid.

85 Ibid.

86 Ibid.

87 Ibid.

88 Ibid.

efits derived from the extraction of mineral resources. An example of this is the agreement reached between the federal government and the Oromia regional government, which recognised the equity share of the subnational government in the MIDROC Lege Dembi mining project. Furthermore, the federal government has attempted to engage in discussions with local communities affected by mining operations, demonstrating a commitment to addressing their concerns and grievances (Jima, 2021).⁸⁹ Furthermore, the federal government recognizes the importance of consultation with various sectors of society regarding the mining industry as a whole.⁹⁰ It has organized conferences aimed at identifying gaps within the mining sector, indicating a proactive approach to addressing challenges and improving the regulatory framework (Addis Standard). These efforts underscore the federal government's genuine recognition of the importance of addressing the concerns and grievances of affected communities.

While these measures are positive steps, they have been adopted in an ad hoc, case-by-case manner rather than as part of a comprehensive restructuring of the legal and institutional framework. The administration of mining titles has not undergone thorough reform. The transfer of large-scale mining licenses remains highly centralized and exclusionary, disregarding the legitimate roles of regional and local actors.⁹¹ There is an urgent need for broad legal and institutional reforms to ensure effective participation of subnational governments and communities in decision-making process. Amendments to the existing legal and institutional structures should provide for a clear and consistent framework that guarantees the involvement of subnational governments in decision-making processes related to mining operations. By enacting such reforms, Ethiopia can ensure that the participation of subnational actors is not dependent on ad hoc agreements but enshrined in a transparent, predictable legal framework.

8. Conclusion

This article provides a thorough examination of the assignment and administration of ownership of mineral resources within the Ethiopian federal system. It exposes significant legal and practical challenges in this domain. First, it highlights a lack of clarity in the FDRE Constitution regarding the allocation of ownership of mineral resources, which led to the development of contradictory claims. Furthermore, it finds that the constitution is ambiguous over the assignment of legislative power over natural resources and has failed to incorporate frameworks that guide the law-making process. It also exposed that such a gap has led to the development of laws that violate constitutional principles, international human rights standards, and the concept of decentralization of power. Moreover, it reveals that, in violation of the constitution, the federal government has excluded subnational governments and local communities from the administration of mineral resource ownership. Additionally, it reveals that the above-mentioned legal uncertainty and conditions have led to disagreement and occasionally conflict in the administration of ownership

89 Interview with experts at the Federal Ministry of Mines, June 2022; interview with an official in Oromia Mines.

90 Ibid

91 Ibid.

of mineral resources. In the same vein, it demonstrates that the problem is not even close to being resolved, despite the fact that there was a recent attempt to address some of the issues.

It is recommended that the specific actions listed below be implemented in order to address the issues at hand. First and foremost, a clear and unambiguous interpretation of the Constitution is required to define mineral resource ownership and establish the rights of local communities, subnational governments, and the federal government. This would help prevent contradictory claims and ensure alignment with constitutional principles. Secondly, legislative power over mineral resources, including the issuance of mining licenses, should be administered in accordance with the constitutional division of power. Existing laws that violate constitutional principles, international human rights standards, or the concept of decentralization of power should be reviewed and reformed. Any inconsistencies between federal and regional mining laws, as well as with the FDRE Constitution, must be resolved in accordance with the constitutional procedure. Moreover, such issues should be addressed in the pending draft mining. The federal government should enforce the legal and institutional framework that guides the exercise of concurrent legislative power. Finally, the administration of ownership of mineral resources should be carried out in a manner that respects the constitutional division of powers.

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