



**THE GOVERNANCE OF MINERAL RESOURCES AND
SUSTAINABLE MINING IN ETHIOPIA'S FEDERAL SYSTEM:
OWNERSHIP, CONTROL AND BENEFIT SHARING**

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Declaration

I, the undersigned, declare that this PhD Dissertation entitled: THE GOVERNANCE OF MINERAL RESOURCES AND SUSTAINABLE MINING IN ETHIOPIA'S FEDERAL SYSTEM: OWNERSHIP, CONTROL AND BENEFIT SHARING is my original work, and has not been presented for a degree in any other University or academic institution, and that all source of materials used for the Dissertation are fully acknowledged and properly referenced.

Yared Hailemariam Asfaw

Signature _____

Date_____

SUPERVISOR'S APPROVAL

This dissertation has been submitted for examination with my approval as a supervisor.

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Signature: _____

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ADDIS ABABA UNIVERSITY
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Approval Sheet of the Examining Committee:

This is to certify that the dissertation prepared by Yared Hailemariam Asfaw, entitled THE GOVERNANCE OF MINERAL RESOURCES AND SUSTAINABLE MINING IN ETHIOPIA'S FEDERAL SYSTEM: OWNERSHIP, CONTROL AND BENEFIT SHARING, and submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy (Federalism and Governance Studies), complies with the regulations of the university and meets the accepted standards with respect to originality and quality.

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Supervisor:	_____	_____

Chairman, Center for Federalism and Governance Studies

Name	Signature	Date
_____	_____	_____

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“If I have seen further, it is by standing on the shoulders of giants.”

- Isaac Newton

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DEDICATION

My beloved parents, Hailemariam Asfaw and Tirunesh Tekalign, your unwavering support, immense love, endless sacrifices, and invaluable guidance have laid the groundwork for my existence; in honor of this unparalleled contribution, I dedicate this project to you as a token of my eternal gratitude and admiration.

With deepest love and appreciation,

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ABSTRACT

This doctoral dissertation examines the governance of mineral resources in Ethiopia's ethnic federal system, with a special focus on the key issues of ownership, legislative power, management power, and benefit-sharing, and investigates how these issues interact with and influence the implementation of sustainable mining practices. It is grounded in the Critical Realist Research Paradigm, which offers the methodological flexibility necessary to address complex research questions. Building on this foundational framework, it employed an exploratory qualitative research design as its investigative approach. It uses an integrative qualitative analysis approach, combining doctrinal and thematic analyses. It identifies notable legal gaps, ambiguities, contradictions, institutional shortcomings, and practical limitations across five interconnected areas of concern. First, it found that the FDRE constitution assigns ownership of mineral resources in a contentious manner, resulting in competing claims and interpretations. This ambiguity has led to federal and regional mining laws and centralized licensing systems that violate constitutional rules and human rights laws. Second, it found a lack of clarity regarding the scope and nature of legislative power over mineral resources. It also revealed the absence of legal and institutional mechanisms to coordinate legislative power over mineral resources. The absence of a clear constitutional delineation coupled with legal and institutional mechanisms for coordination has resulted in contradictory laws and regulations that violate constitutional principles. Third, there is a sharp difference between the federal constitution, which recognizes regional states as the main actors in the management of mineral resources, and the subsequent legislative and institutional arrangements that have centralized management power. It also revealed that the centralized management practices have failed to address the economic, social, and environmental impacts at the regional and local levels. Furthermore, it was found that the exclusion of subnational actors from the management mineral resources, combined with the sector's effects, has resulted in ongoing disagreements and conflicts that undermine the sector's overall effectiveness. Fourth, it identified significant constitutional deficiencies, legal uncertainties, institutional challenges, and practical constraints in the governance of economic benefits gained from the extraction of mineral resources. Unlike most federal systems, the FDRE Constitution failed to assign substantial revenue sources from the extraction of mineral resources, allowing the federal government to take advantage of the loophole. Furthermore, it found that the federal system failed to establish a legal and institutional framework that regulates the revenue-

sharing process, resulting in the emergence of practices that undermine the process. Fifth, it found that, despite the attempt to operationalize the concept of a sustainable mining sector, significant shortcomings persist. In particular, the existing governance frameworks fail to effectively incorporate the essential elements of the three pillars of sustainable mining. Furthermore, the federal system is unable to effectively address the sustainability challenges that arise in the mining operations. Based on these findings, it concludes that the Ethiopian federal system faces significant challenges in governance of mineral resources and ensuring sustainable mining practices. Overall, by drawing on Ethiopia's unique experiences, this study contributes to the advancement of the academic and practical understanding of the complex intersection between federalism, mineral resource governance, and sustainability principles. In addition, the study draws attention to a number of issues that require additional research.

KEY WORDS: MINERAL; FEDERALISM; OWNERSHIP, LEGISLATIVE POWER; MANAGEMENT POWER; BENEFIT SHARING; SUTAINABLE MINING; ETHIOPIA

LIST OF ACRONYMS

AfDB	African Development Bank
ACHPR	African Charter on Human and Peoples Rights
ADLI	Agriculture Development Led Industrialization
Art	Article
ASM	Artisanal and small-scale mining
AU	African Union
BIT	Bilateral investment treaty
BNA	British North America Act
CBD	Convention on Biological Diversity
CCD	Convention to Combat Desertification.
CFD	Community Development Fund
CGT	Capital gains tax
CIT	Corporate income tax
CPA	Comprehensive Peace Agreement
CSE	Conservation Strategy of Ethiopia
EC	Ethiopian calendar
ECOWAS	Economic Community of West African States
EEITI	Ethiopian Extractive Industries Transparency Initiative
EFA	Environmental Financial Assurance
EIA	Environmental Impact Assessment
EMP	Environmental management plan
EPA	Environmental Protection Agency
EPE	Environmental Policy of Ethiopia
EPRDF	Ethiopian People’s Revolutionary Democratic Front
EU	European Union
FDI	Foreign Direct Investment
FDRE	Federal democratic republic of Ethiopia
GC	Gregorian Calendar
GDP	Gross domestic product
GMI	Global Mining Initiative
GTP I	Growth and Transformation Plans I
GTP II	Growth and Transformation Plans II
HOF	House of Federation
HOPR	House of people’s representatives
ICCPR	The International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICMM	International Council on Mining & Metals
IESCR	International Covenant on Economic, Social, and Cultural Rights
IFC	International Finance Corporation
IIED	International Institute for Environment and Development
ILO	International Labour Organization
IMF	International Monetary Fund
MIDROC	Mohammed International Development Research and Organization Companies
MMSD	Mining, Minerals, and Sustainable Development
MoFED	Ministry of Finance and Economic Development

MoM	Ministry of Mine
MoMNP	Ministry of Mine and Petroleum
MoR	Ministry of Revenue
NBE	National Bank of Ethiopia
NGO	Non-Governmental Organization
NNP	Nations, Nationalities and Peoples
NRGI	Natural Resource Governance Institute
OECD	Organization for Economic Co-operation and Development
OHS	Occupational Safety and Health
OLA	Oromo Liberation Army
OLF	Oromo Liberation Front
ONLF	Ogaden National Liberation Front
OPEC	Organization of the Petroleum Exporting Countries
PASDEP	Plan for Accelerated and Sustainable Development to End Poverty
PDRE	People's Democratic Republic of Ethiopia
PP	Prosperity Party
PRSP	Poverty Reduction Strategy Paper
PSA	Production-sharing agreement
PSC	Production-sharing contract
PSNR	Permanent Sovereignty over Natural Resources
SDGs	Sustainable Development Goals
SIAs	Social Impact Assessments
SNNP	South Nation, Nationalities, and People
TBL	Triple Bottom line
ToT	Turn over Tax
TYPP	Ten-Year Perspective Plan
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Program (now UN Environment)
UNFCCC	United Nations Framework on Climate Change Control
USA	United States of America
VAT	Value-Added Tax

NOTES

WOREDA: In Ethiopia, a district is known as a "woreda," which is a subnational administrative division of the Federation. The woreda governments, established by State Constitutions, have significant autonomy and decision-making power. They are in charge of enacting policies and delivering essential public services. Their ability to enact district-specific ordinances and regulations enabled them to promote local development and governance. Furthermore, woreda

governments play an important role in budget planning and resource distribution, ensuring that funds are allocated appropriately to meet the needs of the district.

KEBELE: A "kebele," or sub-district, is the lowest level of government in Ethiopia. The term "kebele" refers to the smallest administrative unit in the country's government structure. It is a fundamental building block for local government and community development.

CALENDAR: The Ethiopian calendar lags seven years behind the Gregorian calendar prior to January, and eight years behind during January and the subsequent months. Every effort is made to use the Gregorian calendar. However, when determining the precise Gregorian equivalent is challenging, particularly for dates with incomplete information, the Ethiopian calendar is used. Thus, both calendars are employed "mutatis mutandis," ensuring necessary contextual adaptations in date references.

NAME OF AGENCIES OR INSTITUTIONS: Government agencies and institutions may change their names from time to time. This study adopts a pragmatic approach to institutional nomenclature, prioritizing clarity and historical accuracy. When an agency changes its name, the researcher retains the name that was most descriptive and meaningful during the period of data collection, or the specific events being analyzed. This methodological choice guarantees contextual integrity, enabling readers to grasp the institutional landscape during the research period while ensuring consistency in referencing governmental entities.

ETHIOPIAN NAMES: Ethiopian writers are referred to using a distinct naming style that reflects the country's linguistic and cultural traditions. Citations of Ethiopian authors in academic or literary works typically begin with their given names. The father's name is cited after the given name, as opposed to the standard referencing scheme, which lists family names first, followed by first and middle names. This method ensures correctness when mentioning the author's work and is consistent with Ethiopian naming conventions. As a result, Ethiopian authors' names appear differently in this study.

REGIONAL STATE: In Ethiopia, the subnational governments that make up the federation are known as "regional states." The regional states are granted significant authority and autonomy. Each regional state possesses its own legislature, along with executive, judicial, and fiscal authorities. Ethiopia is composed of twelve regional states as of 2024.

CHAPTER ONE: INTRODUCTION

1.1. BACKGROUND OF THE STUDY

Mining is one of humanity's most ancient economic activities, with its essential relevance recognized across civilizations. ¹Max Planck elegantly described this critical role as he notes, "Mining is not everything, but without mining, everything is nothing."² Indeed, mining plays an indispensable role in human development, while it presents a complex mix of economic, environmental, and social impacts.³ The mining industry drives economic development in many ways, including revenue generation, stimulation of economic growth, technological advancement, job creation, and infrastructure development.⁴ However, it also presents important economic challenges that require careful consideration, such as a volatile global resource market, macroeconomic distortions from resource dependence, limitation of eventual exhaustion of mineral resources and achieving equitable benefit distribution.⁵ Moreover, it has a profound ecological impact, resulting in considerable and enduring damage to the environment, which, in turn, has a significant effect on human well-being and the means of living.⁶ Furthermore, the sector has the potential to generate significant social benefits for host countries and communities as it serves as a source of employment, boosts local economies, and generates income.⁷ In contrast, it also has profound effects on local communities by influencing local economies, demographics, human rights protection, political participation, and social organizations.⁸

1 Damilola's. Olawuyi, *Extractives Industry law in Africa*, Springer, 2018: 32-56; Segura-Salazar, Juliana, and Luis Marcelo Tavares. "Sustainability in the minerals industry: Seeking a consensus on its meaning." *Sustainability* 10, no. 5, 2018:1 -38; Coyle, I., and C. Bruch. "From fragility to resilience: Managing natural resources in fragile states in Africa." (2014): 21- 37

2 Max Planck cited by Dubiński, Józef. "Sustainable development of mining mineral resources." *Journal of Sustainable Mining* 12, no. 1 2013: 1-6.

³ Juliana Segura-Salazar et al., *supra* note 1;

⁴ Uyanga Gankhuyag et al., *Managing mining for sustainable development: A sourcebook* Bangkok, 2018: 11- 100; Akabzaa, Thomas. "Mining in Ghana: implications for national economic development and poverty reduction." *Mining in Africa: regulation and development 2009*: 25-65.; Claudine Sigam et al., *Extractive Industries: Optimizing Value Retention in Host Countries*, UNCTAD, 2012:4:34

⁵ Roderick G. Eggert, October, *Mining and Economic Sustainability: National Economies and Local Communities*, *Mining, Minerals, and Sustainable Development*, No. 19, 2001:6-79

⁶ Bauer, Andrew, et al., "Natural Resource Federalism: Considerations for Myanmar." *Natural Resource Governance Institute* (2018): 16: 59; United Nations. Economic Commission for Africa. "Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes." (2011), <https://hdl.handle.net/10855/21569>

⁷ *Ibid.*; Chuhan-Pole, Punam, Andrew L. Dabalén, and Bryan Christopher Land. *Mining in Africa: are local communities better off?* World Bank Publications, 2017.

⁸ Mensah, Justice. "Sustainable development: Meaning, history, principles, pillars, and implications for human action: Literature review." *Cogent social sciences* 5, no. 1 (2019): 1653531. Akinsemolu Adenike, Contribution of the

The mining industry, as noted above, is a double-edged sword, offering significant economic opportunities while simultaneously posing considerable environmental and social challenges. The overall contribution of the mining industry relies heavily on the intricate interplay of the sector's impacts.⁹ Achieving this balance, among others, requires effective governance, which needs to provide a comprehensive legal and institutional framework. This framework should address the complex relationships between economic and social development, environmental conservation, societal welfare, and other ever-changing dynamics in the mining sector.¹⁰ Historically, governance frameworks for mining have been designed and implemented by host states, often in alignment with international commitments, standards, and initiatives. Since the 1990s, the notion of sustainable mining has arisen as a guiding principle for dealing with the inherent challenges of that arises in the extraction of mineral resources. Accordingly, modern legal regimes have increasingly attempted to incorporate sustainability ideas into regulatory frameworks, though the extent and effectiveness of these efforts vary widely.

In most unitary states, the central government is the main organ that is responsible for exercising the aforementioned powers over mineral resources. The major addition in federal systems is that the above-mentioned issues in the governance of mineral resources are addressed while adhering to the cardinal rule of federalism, the division of powers between central and subnational governments. As a matter of fact, the governance of mineral resources predates the emergence of sustainable mining as a global priority. The governance of mineral resources, encompassing aspects such as ownership, legislative authority, management, and revenue distribution, has historically been a contentious issue since the inception of the classical federal system.¹¹ It has

extractive industry to sustainability in the Middle East and North African (MENA) Region." *J. Sus. Dev. Law and Policy* 11, 1 2020: 210-238.

⁹ *Ibid*; Uyanga Gankhuyag at supra note 13; Roderick G. Eggert at supra note 5

¹⁰ *Ibid*; Arianna Waye, et al., *Sustainable Development and Mining: An Exploratory Examination of the Roles of Government and Industry in Mining, Society, and a Sustainable World*, J.P. Richards (ed.), 2009; 151-182; Bastida, Elizabeth. "Integrating sustainability into legal frameworks for mining in some selected Latin American Countries." *Mining, Minerals and Sustainable Development* 120 (2002): 1-33.

¹¹ George Anderson, *Natural Resources in Federal and Devolved Countries*, *Forum of Federation* 2020: 1-28; Haysom Nicholas and Sean Kane, *Negotiating Natural Resources for Peace: Ownership, Control, and Wealth-sharing*, Geneva: Centre for Humanitarian Dialogue, 2009: 5- 32; Grant Bishop and Anwar Shah, "Fiscal Federalism and Petroleum Resources in Iraq," *International Center for Public Policy Working Paper Series*, Andrew Young School of Policy Studies, Georgia State University, 2008:1-32. The assignment of ownership rights over mineral resources addresses the rights of the federal government, subnational governments, diverse groups, and rarely private bodies. The assignment of control power over mineral resources covers the power to create a legal and institutional framework that regulates

been a complex and often contentious area, necessitating a delicate balance between national interests and subnational autonomy.¹² Federal constitutional designers address these issues guided by federalism literature, federal practice, and the unique characteristics of the host country.

Over the last few decades, the concept of sustainable mining has developed as a topic of discussion in federal systems, reflecting an overall global trend toward sustainable development. Federal systems, to a different degree, have attempted incorporate the sustainable mining into their operations.¹³ To this end, it has largely leveraged power over mineral resources to implement the concept of sustainable mining.¹⁴ However, it is important to remember that the types and levels of sustainability models recognized by the federal system can be very different from one jurisdiction to the next, as specific approaches, priorities, and strategies can differ depending on their unique contexts, resource endowments, governance structures, and socioeconomic factors.¹⁵

Ethiopia is distinguished by geological features associated with a diverse range of mineral resources.¹⁶ Over the years, the mining sector has contributed to economic development, government revenue, foreign currency earnings, job creation, and meeting industrial raw material demands.¹⁷ However, it has also posed significant environmental risks that threaten land, air, water, plants, wildlife, human health, and livelihoods.¹⁸ Additionally, it has a substantial social impact on local communities, often altering traditional ways of life and social structures.¹⁹ On top of this, the mining sector's economic, social, and environmental contribution is expected to grow

the operation of the mining industry, including its environmental, social, and economic consequences. The assignment of benefit sharing encompasses the right to collect and utilize economic benefits from mineral resource extraction.

¹² Anderson, George. "Ownership, Management, and Revenue Sharing of Petroleum Resources in Federal and Devolved Regimes." 2019:199-235; Andrew Bauer, et al, Sharing the Wealth: A Roadmap for Distributing Myanmar's Natural Resource Revenues, Natural Resource Governance Institute, 2016; 1- 57

¹³ Haysom and Kane at supra note 11

¹⁴Ibid

¹⁵ Ibid

¹⁶ Solomon Tadesse 'Geology, and mineral potential of Ethiopia: a note on geology and mineral map of Ethiopia', Journal of African Earth Sciences 36(2003): 73-313.

¹⁷ Moore Stephens, Ethiopian Extractive Industries Transparency Initiative Report, Third EITI Report (2018): 14-46 However, as explained in later chapters, the mining sector's economic contribution is limited in comparison to the country's potential.

¹⁸ Ibid

¹⁹ Ibid

as the federal and regional governments prioritize the industry for its future development endeavors.²⁰

Historically, Ethiopia's mining sector has been governed through highly centralized legal and institutional frameworks that focus on the role of the mining sector in economic development.²¹ The introduction of the FDRE Constitution has brought about important changes in the governance of the mining sector. First, it departed from the previous centralized governance structure, as it attempted to address the classical politics surrounding mineral resources by dividing ownership, legislative, management, and economic benefits from mineral resource extraction within the federal framework.²² It assigns the ownership of mineral resources to the "*state and people*."²³ It also provides that the government, on behalf of the people, holds natural resources and deploys them for their common benefit.²⁴ Moreover, it stipulates that the federal government is charged with adopting legislation for the utilization and conservation of mineral resources.²⁵ Furthermore, it assigns the power to manage mineral resources to regional states according to federal legislation.²⁶ Additionally, it divides the economic benefits of mineral resource extraction between the federal and regional governments.²⁷ On top of this, it acknowledges the important pillars of sustainable development, aligning Ethiopia's mining governance with global trends.²⁸ In addition to the constitutional recognition, the federal government is a signatory to a number of conventions

²⁰ National Planning Commission, A Homegrown Economic Reform Agenda: A Pathway to Prosperity, 2021-2030 (2020): 29-31 Available at: <https://faolex.fao.org/docs/pdf/eth211967.pdf> ; Ministry of Mines and Petroleum, Guide Investor, 2020;_ Ethiopian Press agency, Some 170 Companies Engaged in Ethiopia's Mining Sector, accessed on September, 2022, https://www.ena.et/web/eng/w/eng_3643507 , As can be seen in later chapters, the federal government and regional states are actively engaged in expanding the mining sector through the participation of domestic and foreign investors and state and federal government-owned companies.

²¹ Wondemagegnehu G. Selassie, Mining and Development: An Overview of the Ethiopian Experience Within the Context of Mining Laws, The Ethiopian Bar Review, vol. 2, no. 2, March 2008 115-143; Alemseged Debele, A History of Mining in Wallaga, Western Ethiopia, 1899–1991, Dissertation submitted to the College of Social Sciences of Addis Ababa University, 2020; <https://etd.aau.edu.et/collections/6ee88dea-4e2e-45df-93fd-fb4268a5c711>

²² See the FDRE Constitution, Articles 40(3) and 89(5); 51/5 and 52/1/c; and 97; 98 and 99

²³ See the FDRE Constitution, Article 40/3,

²⁴ Ibid Articles 40(3) and 89(5).

²⁵ Ibid FDRE Articles 51/5 and 52/1/c.

²⁶ Ibid

²⁷ Ibid Article 98.

²⁸ Ibid, Article 43 (1), (2), (3) ;44; 89(6), 92, Teferi Bekele et al., Sustainable Development Laws in Ethiopia: Opportunities and Challenges of Their Implementation, Afe Babalola University, J. of Sust. Dev. Law & Policy, Vol. 9: 2: 2018; 24- 48; Tsegai Berhane Interrogating the Economy-First Paradigm in 'Sustainable Development: Towards Integrating Development with the Ecosystem in Ethiopia, Mizan Law Review, Vol. 11, No. 1, September 2017: 64-87;

and treaties with significant implications for sustainable mining.²⁹ Furthermore, federal and state mining laws recognize sustainable development as a primary goal and establish various procedures and rules to govern the environmental, economic, and social effects of a mining operation.³⁰ Moreover, the federal and the regional governments have created an institutional framework that governs the mining sector. For the last thirty years, the Ethiopian federal system has attempted to regulate the governance of mineral resources and ensure sustainable mining practices.

The governance of mineral resources in decentralized political systems has been a subject of significant research.³¹ However, despite the above developments, the governance of mineral resources in Ethiopia's decentralized political system has received limited attention in the natural resource federalism literature. In particular, there is limited research that focuses on the legal and institutional frameworks as well as the practical arrangements governing mineral resources, particularly regarding ownership, management, legislative authority, and benefit-sharing arrangements. This study aims to fill these gaps by conducting a thorough examination of Ethiopia's approach to mineral resource governance and evaluating the strengths and shortcomings of its legislative and institutional frameworks.

The relationship between governance structures and the sustainability of mining practices is an area of growing academic interest in the world. However, despite such developments there is limited research that explores the role of design and operation in the federal system in promoting sustainable mining practices, with some the exception.³² There is a pressing need for constructive theorizing and empirical evidence to establish how federalism influences the sustainability of mining operations. The same holds true in Ethiopia, as there has been insufficient scholarly investigation into how Ethiopia's federal system addresses the governance of minerals and its connection with sustainable mining. As a result, this study aims to add to the existing body of research, using Ethiopia's federal system as a case study. Thus, the overall goal of this dissertation is to explore how Ethiopia's federal system addresses traditional issues in the governance of mineral resources and its impact on the country's mining practices and outcomes.

²⁹ Tina Hunter, Comparative Perspective on Exhaustible Resource Development in Ethiopia: Lessons from the Norwegian Legal Framework and Experience, in *Ethiopian Yearbook of International Law*, 2017: 49-78.

³⁰ Federal mining proclamation, number 678/2010; Oromia Regional State Mining Proclamation number 223/2020.

³¹ John J. et al Petroleum Legislative Frameworks and Contracts in a Federation: Issues for Constitutions, Petroleum Laws, Regulations, and Contracts, in *Balancing Petroleum Policy: Toward Value, Sustainability, and Security*, ed. Alexander Hardeman, World Bank, 2019: 43-65; George Anderson at supra note 11; Andrew Bauer, supra note 12

³² Ibid

1.2. STATEMENT OF THE PROBLEM

Since the beginning of time, Ethiopia has been extracting minerals from the earth, adhering to traditional rules and institutions.³³ However, modern mining governance dates back to the imperial and Derg regimes, which established highly centralized legal and institutional frameworks that prioritized economic contributions over environmental and social well-being. The introduction of the FDRE Constitution brings significant changes in the governance of mineral resources, ushering in transformative changes throughout the country.³⁴ The FDRE constitution, as noted above, introduced the important developments that are relevant to the mining sector. It introduces the idea of the devolution of power, which also extends to the mining sector. Accordingly, like most federal systems, it divided the power over mineral resources, including ownership, control, and benefits, between federal and state governments. Furthermore, it introduces the concept of sustainable development, emphasizing the importance of responsible and balanced resource utilization.³⁵ While these changes aimed to modernize and improve mineral resource governance, they have generated substantial challenges, particularly in the areas of ownership, control, and benefit-sharing, which have significant implications for the country's federal structure and sustainable development that require systematic investigation.

The assignment of ownership power over mineral resources is a highly sensitive political matter within federal constitutional design.³⁶ 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. Those responsible for the design of the federal constitution have a responsibility to make every effort to achieve a delicate equilibrium between competing interests, to incorporate a variety of perspectives, and to facilitate effective coordination.³⁷ The existing literature on decentralization provides useful insights and recommendations for the optimal allocation of mineral resource ownership. It suggests that ownership should be assigned in

³³ Wondemagegnehu G. Selassie at supra note 21

³⁴ See the FDRE Constitution, The governance of the mining sector underwent significant changes, starting with the transition period. One of the most significant developments is the beginning of the devolution of power over mineral resources, which allows the regional state to play a role in the management of mineral resources while also sharing the economic benefits generated by them. It also attempted to recognize some of the elements of sustainable mining by shifting from a program that solely focused on mining's economic contribution to one that included mining's social and environmental aspects.

³⁵ See the FDRE Constitution, Articles 40(3), 43, and 89(5).

³⁶ *Ibid.*, Haysom Nicholas, and Sean Kane at supra note 11.

³⁷ *Ibid.*

accordance with the principle of subsidiarity.³⁸ On the other hand, the practice of assigning ownership of mineral resources within federations frequently deviates from coherent principles.³⁹

The FDRE constitution addresses the ownership of mineral resources, as it states that they belong to both the "*state and peoples of Ethiopia*."⁴⁰ The constitutional framework, which is reminiscent of the early classical federal systems, evaluates the ownership mineral resources in terms of state versus individual ownership. The FDRE Constitution's assign the ownership of mineral in a manner that created significant interpretative challenges. The constitution employs two distinct entities, to allocate ownership rights over mineral resources: the "*State*" and the "*Peoples of Ethiopia*," which been subjected to different interpretations emanating from the difference in the English and Amharic version of the text. It is unclear from the reading of the constitutional texts whether the phrase "*state and people*" assigns the ownership of mineral resources to the federal government, regional states, or both ethnic groups.⁴¹

The above ambiguities have manifested in practical challenges, as the federal and state mining laws further complicates the matter. The federal mining law states that mineral resources "*are the property of the government*" and defines the government as "*the federal government... and... includes states where appropriate*."⁴² This definition implies that both federal and regional governments can assert ownership of mineral resources. The regional states, on the other hand, initially refrained from making ownership claims over mineral resources; however, in recent times, some of these states have begun asserting that these resources belong to the "*region and its people*."⁴³ The disparity in viewpoints has resulted in the emergence of significant concerns

38 Ibid, Grant Bishop and Anwar Shah, at supra note 11

39 Ibid

40 The FDRE constitution article 40/3.

41 Ibid., Amhara National Regional State Constitution, Proclamation Number 59/2001; the Harari Regional State Constitution, 2005; and the Oromia Regional State Revised Constitution, Proclamation Number 46/2004. In particular, it is not clear whether the word "state" refers to the federal or regional government. Moreover, the phrase "people of Ethiopia" has been subjected to different interpretations that mainly emanate from the differences between the English and Amharic versions of the constitution. The English version of the Constitution uses 'Peoples of Ethiopia'. It is not clear whether it adopted joint ownership of mineral resources between the federal government and the specific nation, nationality, and people in the country. On the other hand, the Amharic version of the same text uses the word "people" without any qualification. It seems that it considers the people of the country as one entity and suggests that the federal government and the entire population of the country are joint owners. On the other hand, regional state constitutions followed the Amharic version of the federal constitution.

42 Federal Mining Proclamation Number, Proclamation 678/2010, article 2/10, 5/1

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

regarding the assignment of ownership of mineral resources between the federal government and the regional governments.

Uncertainties surrounding mineral resource ownership have resulted in contradictory arguments, significantly affecting the Ethiopian Federation's operations. Throughout the years, ambiguity regarding the ownership of mineral resources has resulted in the development of conflicts on multiple levels. Ethnic groups that rely on the right to self-determination have made attempts to assert exclusive ownership over mineral resources, which has resulted in conflicts with the federal government and led to clashes that led to obstruct mineral development projects for those groups.⁴⁴ Furthermore, ownership disputes have also arisen at the inter-regional level, with regional states claiming ownership of mineral resources located beneath their territory.⁴⁵ The limited constitutional law that addresses the assignment of ownership of mineral resources in Ethiopia is another factor that contributes to the difficulties that are already present.

On the other hand, the assignment of ownership of mineral resources has not yet been investigated. The majority of scholarly works have focused on the issue of land ownership, leaving a gap in our understanding of the specific nuances of mineral resource ownership. Furthermore, there has been little research into the relationship between mineral resource ownership and sustainable mining practices. As a result, the goal of this dissertation is to look into the dynamics of mineral resource ownership within the Ethiopian Federation, including its implications for control and benefits from resource development, as well as the impact on the federation's long-term development of minerals. By addressing these knowledge gaps, this study aims to improve our understanding of the complexities of mineral resource ownership in Ethiopia.

44See The ONLF Statement on Military Operation Against Illegal Oil Facility in Ogaden, 24 April 2007 accessed January 2020, <http://www.onlf.org/pressAug062006.htm>; Reuters, Gunmen kill five miners in Ethiopia, <https://www.reuters.com/article/us-ethiopia-crime-idUSKCN1R01HD> accessed January 2020; the Guardian, Ethnic Somali rebels kill 74 at a Chinese oil field in Ethiopia <https://www.theguardian.com/world/2007/apr/25/ethiopia> accessed January 2020; Reuters, Ethiopia denies rebels chased oil and gas firms away, https://www.reuters.com/article/ozatp-ethiopia-oil-gas-20100902-idAFJ0E6810PD20100902_; accessed January 2020,

45 Ethiopian insight, draft article that threatens Addis Ababa's autonomy <https://www.ethiopia-insight.com/2021/03/12/draft-article-threatens-addis-abebas-autonomy/> accessed in June 2021; The Unrepresented Nations and Peoples Organization (UNPO), Oromo: Urban Expansion Plan Halted, but What is Next? <https://unpo.org/article/18868>, accessed March 2020.

Control power over mineral resources is the second issue in the governance mineral resource. It determines the government's organ that makes and administers laws related to mining.⁴⁶ The first dimension of control power over mineral resources is legislative power over mineral resources. The literature on non-centralization advises on the need to consider efficiency, capacity, and national interest in the assignment of legislative authority.⁴⁷ The FDRE Constitution divides legislative power over natural resources between the federal and regional governments.⁴⁸ But the constitutional division of powers does not address two significant issues: the specific power that falls under concurrent power, and the exact power of either tier of government.

The FDRE Constitution assigns legislative power over the “*utilization and conservation*” of natural resources to the federal government.⁴⁹ However, it is not clear from the constitutional text or drafting documents that it vests all legislative power over natural resources in the federal government or limit it to specific powers. It leads to questions as to whether it assigns all primary legislative competencies over mineral resources or does it leave room for regional states to retain some power. In particular, does the federal government's power cover the later stages of the extractive sector, such as processing, marketing, and exportation, or does it apply only to the initial extraction of resources? Moreover, the Constitution's assignment of residual power to subnational governments further intensifies the need to explore the exact scope of legislative power over the “*utilization and conservation*” of natural resources.

Moreover, the FDRE Constitution, in addition to the federal government's power to enact laws related to the utilization and conservation of natural resources, empowers regional governments to administer these resources in line with the federal legal framework.⁵⁰ However, it is not clear where the federal government's primary legislative power ends and where the administrative power of regional states begins. It is not clear whether the regional state's power includes the ability to make laws. If so, what is the scope of the federal law? The lack of clarity regarding the division

46 Haysom and Kane, supra note 11

47 Ibid

48 See FDRE Constitution Articles 51/5 and 52/1/c.

49 Ibid

50 Ibid

of legislative power has led to debates and arguments, especially regarding the issue of land, since the establishment of the federal system.⁵¹

The exercise of concurrent legislative power creates a significant area of overlapping jurisdiction, necessitating mechanisms that ensure active participation and cooperation from both levels of government, as well as resolving conflicts caused by differences between federal and regional laws.⁵² Such coordination is required to avoid confusion, contradictions, and overlapping laws at the federal and regional state levels. However, the Ethiopian federal system lacks the institutions and mechanisms required to coordinate concurrent legislative power over mineral resources.⁵³ For long, the existence of the federal supremacy clause in Ethiopian federation has been subjected to debate. The federal system failed to create an effective intergovernmental forum, formal or informal, to coordinate the legislative process. Moreover, the Ethiopian federal systems' umpiring body in addition to being largely unoperational on the issues related to mineral resources, faces design and operation challenge that limits its effectiveness.

Under the above constitutional ambiguity and in the absence of clear guidelines and coordination mechanisms, the federal and regional governments have enacted their own laws, regulations, and directives to govern the mining industry.⁵⁴ The law-making process resulted in significant inconsistencies and contradictions with the Constitution, as well as clashes between the federal and regional legal frameworks. In particular, as noted here, both legal frameworks have contradicted the FDRE constitution, particularly regarding the regulation of ownership of mineral resources, legislative powers and management power. The FDRE Constitution assigns the ownership of mineral resources in an ambiguous manner contributing to the development of contradictory federal and state mining laws and interpretation, significantly affecting the operation of the federal system. The confusion as to the scope and nature of the legislative power over mineral resources coupled with the absence of clear guidelines and coordination mechanisms, has led to the development of

⁵¹ Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Rev. Ed. Utrecht: Wolf Legal Publishers, 2007: 283- 339.

⁵² Assefa Fiseha and Zemelak Ayele "Concurrent powers in the Ethiopian federal system" In *Concurrent Powers in Federal Systems*, Brill Nijhoff, 2017:241-260.

⁵³ Ibid

⁵⁴ 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; Federal Mining Proclamation No. 678/2010; Mineral Resource Transaction Proclamation No.1144/2019; A Proclamation to Amend Oromia Region Mineral Development Operation Administration Proclamation No. 223/2020.

laws that deviate the constitutional division of power and the notion of concurrency. Despite the existence of clear assignment of management power over mineral resources, the federal and regional states enacted laws that directly contradict the constitution and human right instruments.

Furthermore, inconsistencies emerge between federal and state laws, especially in the area of the management power of either level of government.⁵⁵ Moreover, a key concern has emerged regarding the federal government's ability to use its legislative power to influence the revenue share of regional state governments. As noted here, income tax and royalty from large-scale mining operations are shared revenues, where the federal government enacts tax laws, while the states are entitled to a portion of the proceeds. On the other hand, experience in the federal system reveals that it uses the definition of mineral resources and level of mining operations that are provided under the federal mining legislation for tax purposes. Such trend has allowed the federal government to unilaterally define what constitutes a "mineral resource" and the threshold for "large-scale" mining operations, which has an impact on the state government's revenue share. For instance, the federal government's failure to recognize natural resources, such as groundwater and hydropower, as mineral resources have limited regional states' claims from the revenue generated.⁵⁶ Furthermore, the federal government, with its apparent power to determine the scale of mining operations, is with the discretion to reduce the exclusive revenue of the state government to a shared one.

Ethiopia, as noted above, constitutes a severely understudied case in mineral resource federalism literature. There is a dearth of discourse on the legal framework and institutional arrangements that govern mineral resources. Consequently, this work examines the nature and scope of legislative power over mineral resources, the mechanisms for coordination, and the exercise of this power. By offering a thorough analysis of Ethiopia's legal and institutional framework governing legislative power over mineral resources, this work 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.

⁵⁵ Ibid

⁵⁶ Ibid; Oromia Regional State Mining proclamation, proclamation number 97/2003; the Oromia Regional State Mining proclamation, proclamation number 227/2017, For instance, underground water was included under the definition of a mineral under the federal mining legislation; later on, it was removed from the list, costing the state its share of the revenue from royalty and income taxes.

Management power over mineral resources is the second dimension of control over mineral resources, which is one of the critical issues addressed in federal constitutional design. The management power over mineral resources cover several regulatory function of the state including transferring mineral titles, administering exploration and exploitation, and managing post-closure activities.⁵⁷ The literature on natural resource federalism recommends the ideal way for assigning management responsibilities, including government capacity, the need for national consistency, accountability, and national interest.⁵⁸ The FDRE Constitution states that subnational governments shall administer land and natural resources per federal law.⁵⁹ Regional state constitutions also provide similar provisions.⁶⁰ The Constitution's textual readings indicate that regional states are the primary actors in mineral resource management.

Despite the existence of a clear division of power, the management of mineral resources is one of the areas where there is a power struggle between the federal and state governments. Since transitional mining legislation, the federal and state mining laws and federal mineral transaction laws provide for a division of management power over mineral resources, which deviates from the constitutional text. Over the last thirty years, the Federal Law has undergone several revisions to strengthen the federal government's role in mineral resource management. The federal mining and mineral transaction laws have divided the management of mineral resources between federal and state governments based on the level of mining operations, transactions, and nature of mineral resources.⁶¹ It has allowed the federal government to dominate the management of the most

⁵⁷ John J. et al. at supra note 31; Andrew Bauer at supra note 12; Haysom and Kane at supra note 11; In addition to this, the government also exercises secondary management power that has a profound impact on resource management, including land management, regulation of imports and exports, and the like, which can give governments the power to influence decisions on mineral resource development.

⁵⁸ Ibid

⁵⁹ See the FDRE Constitution, Article 52/2/c.

⁶⁰ For instance, see the Revised Amhara National Regional State Constitution, proclamation number 59/2001; The Constitution of the Harari Regional State, 2004; The Oromia Regional State Revised Constitution, proclamation number 46/2004

⁶¹ Federal Mining Proclamation, Proclamation No. 678/2010, article 52; Ethiopian Mineral Resource Transaction Proclamation No. 1144/2019, According to Article 52 of the federal Mining Proclamation, the role of the state is limited to granting licenses to artisan mining, reconnaissance, exploration, and retention licenses concerning construction and industrial minerals, and small-scale mining licenses for industrial minerals and construction material mining by domestic investors. The federal government has the power to issue reconnaissance, exploration, retention, and mining licenses other than those issued by a state licensing authority. Currently, the federal government has the authority to provide licenses for the significant mining of industrial minerals as well as metallic, precious, and semi-precious minerals. The federal government also has the power to issue certificates of discovery for strategic minerals and certificates of professional competence for professionals who wish to engage in consultancy services in the mining

important parts of the mining sector. In these areas, it provides highly centralized management and planning for the mining sector, and largely excludes regional states from the decision-making process. It allowed the federal government to regulate the mining sector without the consent and effective participation of the regional state and local people. The role of the regional state and local communities is limited to land administration, environmental impact assessment, community development, and land compensation.

The federal mining proclamation, as noted above, has enabled the federal government to create a highly centralized management practice that ignores the specific needs and concerns of subnational actors. The federation's practice of managing mineral resources reveals that subnational actors are largely excluded from the management of mineral resources. For a long time, the state government has opted not to claim management power over mineral resources.⁶² However, a notable difference emerged between federal and regional mining legislation on the division of management power.⁶³ Moreover, resource-bearing regional states complained about the intrusion by the federal government and sought to enhance their role in the management of mineral resources.⁶⁴

However, limited research exists regarding this subject matter, with the exception of those that focus on land management. To this end, this work undertakes an exhaustive examination of the institutional and legal structures that regulate the management of mineral resources in Ethiopia. It evaluates the constitutional framework governing the management of mineral resources in Ethiopia and the manner in which federal and regional administrations exercise their constitutional authority to manage mineral resources. It aims to contribute to a better understanding of the legal, institutional, and practical gaps in the management of mineral resources in the Ethiopian federal system.

sector, conduct testing, and provide permission to export mineral samples. The Federal Mineral Transaction Law further divides the licensing and certification of competencies for each type of mineral transaction. The federal government has the power to issue licenses and certificates of competency for mineral refining and smelting of metallic and associated minerals, as well as mineral exporter certificates of competency. It also has the power to enforce standards in which smithery, lapidary, combining, and refining activities are conducted. Regional states have residual power. Moreover, the regional state has some specific powers, including the power to issue mineral supplier certificates and craft All transaction certificates, including export licenses, should be conducted according to the standards set by the federal government.

⁶² Oromia Region Mineral Development Operation Administration No 93/2007

⁶³ A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020 article 47, Federal Mining Proclamation Number 678/2010 article 52/2,

⁶⁴ Addis Fortune newspaper, <https://addisfortune.net/articles/authorities-in-the-dark-over-dangotes-threat-to-cess-ethiopian-operation/>, accessed on January 10, 2020;

The assignment of economic benefits from mineral resources is one of the controversial issues in federal constitutional design. Proponents of centralization based their argument based on economic theories, which relies on efficiency and equity grounds.⁶⁵ On the other hand, supporters of the active role of the subnational government in revenue generation base their claims on economic and political grounds.⁶⁶ The FDRE Constitution, subsequent amendments, and the decisions of both Houses regulate economic benefit from extraction of mineral resources by providing their own taxing powers and revenue sharing.⁶⁷

The FDRE Constitution adopts a unique approach to delineate specific tax sources for federal and regional governments.⁶⁸ Accordingly, it assigns specific tax sources based on the level of mining, taxpayers involved, and specific revenue sources.⁶⁹ It utilizes a combination of exclusive federal taxes and exclusive regional taxes to allocate mining proceeds.⁷⁰ Furthermore, the constitution incorporates distinct procedures for regulating undesigned revenue sources. These procedures outline specific guidelines and processes for managing revenue from unspecified sources.⁷¹

The FDRE constitution, as noted above, designates specific tax powers to the federal and regional governments, distinguishing it from other federations. However, it does not specifically assign the most profitable mining revenues to either level of government. Although there has been advancement in the assignment of undesigned revenue sources, considerable revenue streams associated with mining continue to be unassigned.⁷² On the other hand, the federal government has

⁶⁵ Ehtisham Ahmad and Eric Morru, *Fiscal Policy Formulation and Implementation in Oil-Producing Countries*, Editors J.M. Davis, R. Ossowski, and A. Fedelino International Monetary Fund, 2006; 216-246; George R. Anderson, *Water resources management in federal systems*, *Federal Rivers Managing Water in Multi-Layered Political Systems* Edited by Dustin E. Garrick, George R.M. Anderson, Daniel Connell, and Jamie Pittock, 2014: 558–561.

⁶⁶ Ibid

⁶⁷ See Solomon Nigussie, *Fiscal federalism and decentralization in selected IGAD member countries*, Horn Economic and Social Policy Institute, 2016: 25-42. the FDRE Constitution, which provides revenue sources under the titles ‘federal power of taxation’, ‘state power of taxation’, ‘concurrent power of taxation’, and ‘undesigned power of taxation’ in Articles 96, 97, 98, and 99, respectively, which also cover mineral resources.

⁶⁸ The FDRE Constitution Articles 96, 97, and 98. there are two notable exceptions that warrant attention. First the federal government is solely responsible for the administration of customs duties. Second, the sole responsibility for land-use fees lies with the regional states.

⁶⁹ Senbeta Sisay Regassa, and Yakob Bekele Hundie "Ethiopia." In *The Forum of Federations Handbook of Fiscal Federalism*, Cham: Springer International Publishing, 2023; 124-159

⁷⁰ Tadesse, L. *Income Tax Assignment Under the Ethiopian Constitution: Issues to Worry About* *Mizan Law Review*, 4(1) (2010):32-51

⁷¹ The FDRE constitution Article 99

⁷² Ibid These revenue sources include excise taxes over individuals, traders, and private enterprises, as well as value-added tax (VAT) designations, capital gains taxes (CGT), contract-based payments and government equity

enacted laws and signed agreements with mining companies that enable it to collect revenue that falls under areas one consider as undesignated sources of revenue.⁷³ As a consequence of this, the federal government has been able to amass revenue from undesignated sources over the course of the past quarter of a century. Additionally, certain regions have started to follow the same pattern.⁷⁴

The FDRE constitution, as amended, and the decisions of the two Federal Houses provide a long list of shared revenue sources that are relevant to the mining sector.⁷⁵ The revenue streams encompass income taxes, specific components of excise taxes, value-added tax (VAT), royalties, and dividends from joint ventures. In addition, it stipulates that the federal government is responsible for levying and collecting taxes, which are then shared with the regional states in accordance with the decision made by the House of Representatives.⁷⁶ However, Ethiopia's federal system has been struggling for a long time to establish a robust and transparent legal and institutional framework that guides the revenue-sharing process. Over the last three decades, instead of providing a comprehensive legal framework, the federal system has developed two general revenue-sharing formulas.⁷⁷ In addition, the process of revenue-sharing is managed by a number of different federal agencies. Having become aware of these deficiencies, the federal government has recently made an effort to develop legal and institutional frameworks for regulating the revenue sharing programs process.⁷⁸ It enacted the System for the Determination of the Division of Federal Subsidies and Joint Revenues Proclamation, which provides a legal and institutional basis for regulating the revenue-sharing process.⁷⁹ However, the administration of shared revenue is still carried out in a manner that precedes the enactment of the proclamation.

The regulation of economic rent from mineral resource extraction is one of the critical issues in federal constitutional design. The design and implementation of the legal framework, which regulates the economic benefit of mineral resource extraction, have been subjected to extensive study. However, limited research exists regarding the subject matter in the Ethiopian federal

participation. Moreover, there are also sources such as community development funds and environmental rehabilitation funds.

⁷³ The Federal Mining Proclamations No. 678/2010

⁷⁴ A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020

⁷⁵ Tadesse Lencho at supra note 70

⁷⁶ Ibid

⁷⁷ የኢ.ፌ.ዴ.ሪ የፌዴሬሽን ምክር ቤት 1 ቀን 2011 ዓ.ም የጋራ ገቢዎች አስተዳደር እና የማከፋፈያ ቀመር ላይ ያስተላለፈው ውሳኔ 03 page

⁷⁸ Ibid; HoF Study document about the revised revenue share formula June 2019

⁷⁹ System for the determination of the Division of the Federal Subsidy and Joint Revenues Proclamation No. 1250/2021

system. The existing literature is focused on fiscal federalism issues in the Ethiopian federal system in general. Hence, the current work aims to fill this gap as it assesses the specific legal, institutional, and practical challenges that arise in the administration of economic benefit from the extraction of mineral resources in the Ethiopian federal system.

The FDRE Constitution incorporates the idea of sustainable development into Ethiopia's legal system.⁸⁰ It seeks to implement sustainable mining by leveraging traditional power over mineral resources, encompassing both control and benefit-sharing aspects. Accordingly, the federal and state governments have aimed to promote sustainable mining through the use of their legislative authority.⁸¹ Furthermore, it used its management power to build institutions tasked with regulating mineral resource extraction and managing its economic, social, and environmental impacts.⁸² Moreover, the federal and state governments have utilized their fiscal power to regulate the economic benefit that is generated from the extraction of mineral resources. Despite the incorporation of the idea of sustainable development into Ethiopia's legal system and the federal government's efforts to establish a legal and institutional framework, the sector has failed to meet expectations and faces significant challenges. The sector, despite the country's vast potential, generates a limited contribution to fiscal revenue, economic growth, and jobs.⁸³ Furthermore, the environmental management of the mining sector is far from a success. The management agencies including the environmental protection agency and the MoM, failed to adequately assess, monitor, and enforce mining and environmental laws.⁸⁴ Moreover, the actual management of the sector has

⁸⁰Teferi Bekele et al at supra note 28; Gedion Asfaw, et al., Ethiopia: Protecting Nature in a Developing Decentralized Country, in *Environmental Governance and Decentralization*, edited by Albert Breton, Giorgio Brosio, Silvana Dalmazzone, and Giovanna Garrone, Edward Elgar Publishing, 2007; 111-139.

⁸¹ The federal mining proclamation, Proclamation No. 678/2010, The federal Income tax proclamation, proclamation number 979/2016, Environmental Impact Assessment Proclamation No. 299/2002 The federal government has used its legislative and fiscal authority to establish a legal framework for incorporating and implementing the concept of sustainable mining in the mining industry. This was accomplished through mining, environmental, and income tax legislation, which laid the groundwork for the industry's adoption of sustainable mining practices.

⁸² Ibid.

⁸³ Moore Stephens, at supra note 17

⁸⁴ VOA Horn of Africa, Ethiopia Agrees to Suspend MIDROC Gold Mining After Protests, <https://www.voanews.com/africa/ethiopia-agrees-suspend-midroc-gold-mining-after-protests> , accessed January 2021; The new humanitarian, EXCLUSIVE: Health woes, outrage, and toxins near Ethiopia gold mine, EXCLUSIVE: Health woes, outrage, and toxins near Ethiopia gold mine <https://www.thenewhumanitarian.org/investigation/2020/05/27/Ethiopia-Oromia-Shakiso-gold-mine-health-problems> , accessed in January 2021; Engida Bayou, Factors Affecting the Sustainable Livelihood of Artisan Gold Miners: A Case of Sakaro Locality, Odo-Shakisso Woreda, Oromia Reginal State, 2011; Ministry of Mines, Ethiopia, October; Artisanal Mining Activities in Ethiopia: Challenges and Opportunities, 2012

failed to address multiple social challenges, including changes in social structure, lack of economic opportunity, and lower compensatory amounts.⁸⁵ Local communities have frequently voiced their concerns regarding the sector through various means, such as property destruction and the halting of mining operations.⁸⁶ However, the federal government's use of its traditional power over mineral resources to promote sustainable mining has not been thoroughly examined. Over all, this study set to examine the design and operation of the governance of mineral resources in Ethiopia's federal system and its impact in ensuring sustainable mining practices in the country.

1.3. GENERAL OBJECTIVE OF THE STUDY

This dissertation aims to critically analyze the design and operation of the governance (systems of rules, institutions, structures, processes, and mechanisms) of mineral resources in Ethiopia's federal system and its impact on the sustainability of mining practices. It systematically examines the intricate interactions between constitutional design, legal frameworks, institutional mechanisms, and practical implementation, focusing on key governance issues surrounding mineral resources, including ownership structures, legislative power, management mechanisms, and benefit-sharing frameworks, as well as their effects on promoting sustainable mining practices. Ultimately, it aims to enhance academic discussions on mineral resource governance within federal systems and to guide evidence-based policy recommendations to improve governance of mineral resources and foster sustainable mining in Ethiopia's federal system.

1.4. SPECIFIC OBJECTIVES OF THE STUDY

As previously stated, the purpose of this study is to critically examine the governance of mineral resources within the Ethiopian federal system and its impact on guaranteeing sustainable mining practices. Based on this context, it has established the following specific objectives:

1. Analyze the assignment of ownership of mineral resources and administration of mining titles within Ethiopia's federal system, emphasizing notable ambiguities, inconsistencies, or conflicts that arise between the federal government and subnational entities. Furthermore, it explores how the ownership of mineral resources impacts the sustainability of mining practices.
2. Examine the nature and scope of legislative power over mineral resources within the Ethiopian federal system; identify and diagnose inconsistencies, conflicts or uncertainties, and

⁸⁵ Ibid

⁸⁶ bid

institutional gaps in the exercise of legislative power; and assess the extent to which legislative power is used to integrate sustainability principles in the mining sector.

3. Investigate the management power over mineral resources within the Ethiopian Federation by conducting a thorough analysis of the legal framework, practical implementation, and evaluation of the institutional structure. It further examines the role of the management framework in advancing sustainable mining practices.
4. Evaluate the governance of economic benefits arising from mineral resources within the Ethiopian Federal System by thoroughly analyzing the legal, institutional, and practical challenges related to the assignment of revenue and the revenue-sharing process; and assess the degree to which sustainability considerations are incorporated into the administration of economic benefits derived from mineral resources.

1.5. **RESEARCH QUESTIONS**

This dissertation aims to investigate how does Ethiopia's federal system address the critical issues in the governance of mineral resources and its impact on ensuring sustainable mining practices?

To achieve this objective, the following specific research questions were asked:

1. How does Ethiopia's Constitution divide ownership rights over mineral resources between federal government and subnational actors? What ambiguities and contradictions are present in the allocation? How does the Ethiopian federal system administer mining rights? what are the areas of ambiguities, inconsistencies, or conflicts? What impact does the allocation of ownership of mineral resources have on encouraging sustainable mining practices, especially in ensuring economic, environmental and social sustainability?
2. What is the nature and scope of the legislative power that federal and regional governments having over mineral resources? What are the areas of inconsistencies, disputes, or ambiguities? What mechanisms and institutions are in place to address these inconsistencies? How much does a legal framework is utilized to incorporate sustainability considerations into its design?
3. In what ways does the actual management power over mineral resources deviate from the constitutional division of power in Ethiopia's federal system? What are the legal, practical, and institutional limitations that are faced in the management of mineral resources? How does the de facto institutional framework incorporate sustainability considerations into its operations? What practical and institutional barriers exist to putting principles into practice?

4. How does the Ethiopian federal system govern the economic benefits generated from the extraction of mineral resources? What legal and institutional limitations and implementation gaps are encountered in the assignment and exercise of revenue power involving the extraction of mineral resources? What are the legal, institutional, and practical challenges in sharing revenue generated from the extraction of mineral resources? What are the constraints encountered to incorporate sustainability considerations into the administration of the economic benefits generated from the extraction of mineral resources?

1.6. SCOPE OF THE STUDY

Ethiopia is marked by a range of geological features that contain a variety of minerals, which are distributed unevenly throughout the Federation. These minerals have enormous potential for economic and social development, but they also pose economic, social, and environmental risks.⁸⁷ It's important to note that, currently, not all minerals have comparable economic, environmental, and social implications on stakeholders, including the government. Accordingly, this dissertation focuses on the extraction of precious metals, industrial and construction minerals (by foreign investors). The selection of these mineral categories was based on their influence on government revenues, gross domestic product, environmental concerns, social well-being, and capacity to shed light on the problems that arise during the development of mineral resources.⁸⁸ Thus, the findings may not be fully applicable to other types of natural resources extraction.

In addition, the term "mining" encompasses a wide variety of economic activities that involve the extraction and processing of mineral resources.⁸⁹ Each stage of mining has its own unique characteristics and presents a unique set of social, environmental, and economic challenges that necessitate the control and regulation of the state.⁹⁰ This study addresses extraction activities, such as prospecting, exploration, development, and production, which account for the majority of mining operations in the Ethiopian Federation. Given the low number of mining operations that have reached this stage, the discussion excludes the closure and post-closure stages of extractive-

⁸⁷Moore Stephens, at supra note 17

⁸⁸ Ibid

⁸⁹ UNEP, Mining and Sustainable Development II: Challenges and Perspectives, Industry and Environment Volume 23 Special Issue, 2000; 1–96. The Ethiopian Federal Mining Operations Proclamation Number 678/2010, Article 2, defines mining as any activity involving mineral extraction, storage, treatment, processing, transportation, and disposal. It is a term used to cover a broad range of economic activities that can be classified as extractive-related, processing-related, and final marketing activities. Our discussion focuses on extractive-related activity, including prospecting, exploration, development, production, closure, and post-closure.

⁹⁰ Ibid

related activities. However, references to these stages will be made whenever necessary to understand the issues being explored.⁹¹ Thus, the findings are largely limited to the early stages of extractive activities.

The mining sector can be divided into several scales. This dissertation focuses on assessing large-scale mining as defined in the Federal Mining Proclamation.⁹² Large-scale mining was chosen as the focal point because of its importance in understanding the challenges that arise in mineral resource development, as well as its economic, social, and environmental implications. As a result, the study does not address the issues surrounding small-scale, informal, and artisanal mining, as they are beyond the scope of this research.

The Ethiopian Federation is made up of twelve regional states and two city administrations. On the other hand, mineral extraction activities are primarily carried out in particular regions, with some periodical changes. This study focuses on the Oromia and Benishangul Gumuz regional states, which were chosen based on their mineral production levels and potential. It is important to note that, whenever possible and necessary, the research will attempt to include practices from other regions in order to provide a complete analysis. Additionally, the study draws on experiences and governance practices from both established and emerging federal systems to shed light on and contextualize the intricate issues related to the governance of Ethiopia's mining industry.

The research examines the incorporation of sustainable mining ideals within the governance of mineral resources in Ethiopia's federal system. The analysis is limited to the regulatory and institutional aspects. A quantitative evaluation of the environmental, social, and economic impacts of the mining sector was not included in this study's scope. Consequently, the results mainly focus on governance-related elements, reserving other dimensions for further exploration.

Ethiopia's mining industry is subject to periodic modifications and upgrades to the legal and institutional framework that governs the industry. The scenario is presented in the analysis as it was in August of 2024; any later changes to the regulatory landscape are not included in the study. In light of this, it is expected that readers will take into mind the scope of this work as they are experiencing it.

⁹¹ Claudine Sigam and Leonardo Garcia at supra note 4

⁹² The federal mining proclamation, Proclamation No. 678/2010,

1.7. THE SIGNIFICANCE OF THE STUDY

This study offers significant practical and theoretical contributions by exploring the relatively underexamined domains of mineral resource governance and sustainable mining within the context of Ethiopia's federal system. Its findings are poised to inform policy reforms, advance academic discourse, and provide actionable insights for stakeholders at both federal and regional levels, while also offering lessons for other federal systems facing similar challenges.

Practically, the research provides invaluable insights for policymakers in the Ethiopian Federation. It provides critical insights for Ethiopian policymakers at the federal and regional levels about the constitutional, legal, institutional, and operational challenges in ownership structures, legislative power, management mechanisms, benefit-sharing frameworks, and the promotion of sustainable mining practices. It generates evidence-based recommendations to guide policy reforms that are essential to ensure efficient governance of mineral resources and foster sustainable mining practices. The research is especially relevant, taking into account Ethiopia's current initiatives to reform the legal framework governing the mining sector. The findings will enable federal and regional stakeholders to develop more effective governance approaches that balance resource extraction with environmental protection and socioeconomic development. Furthermore, the study's insights are not limited to Ethiopia; they offer valuable lessons for other federal systems grappling with similar challenges in mineral resource governance. It provides a framework for addressing conflicts over resource ownership, control, and revenue sharing in multi-tiered governance systems, making it a relevant resource for policymakers globally.

It advances theoretical understanding in several key areas. Through the presentation of empirical evidence from Ethiopia's ethnic federal system, the study advances federalism theory in the governance of mineral resources. It sheds light on how the ethnic dimension of federal systems affects treatment of the governance of mineral resources, offering new perspectives on the challenges of decentralization in resource-rich divided federations. Furthermore, it enhances theoretical comprehension in the fields of natural resources, environmental federalism, and sustainable development studies, offering a new perspective on how decentralized governance of mineral resources impacts sustainable mining practices.

The study's comprehensive nature makes it a significant contribution for academic discussions and a vital tool for policymakers and stakeholders. The study's interdisciplinary approach makes it a

valuable resource for academic discussions, bridging gaps between law, political science, and environmental studies. It serves as a vital tool for policymakers, legal scholars, and practitioners, providing actionable insights to improve mineral resource governance and promote sustainable development.

1.8. LIMITATIONS OF THE STUDY

It is extremely uncommon to come across research that did not encounter obstacles that manifested in a variety of forms. It is essential to formulate strategies to efficiently address and manage the challenges and limitations that may emerge throughout the research process. A number of obstacles were encountered during the course of this research project. These included financial limits, difficulties in gaining access to data, participant reluctance or resistance to information sharing, and safety concerns during the data collection process. As the researcher worked on this study, he ran into a number of difficulties that were related to funding. For the purpose of overcoming this issue, the researcher executed a number of solutions, some of which included the development of collaborative relationships with institutions for the purpose of pooling resources and the employment of economic data collection methods. In addition to this, the researcher encountered challenges in acquiring timely access to data that was relevant to the study. In order to ensure that the process of data gathering was as efficient as possible, the researcher adopted a proactive approach and worked in conjunction with the relevant authorities. Furthermore, the researcher experienced misunderstandings regarding the objectives of the study as well as the value of the research when conducting interviews. In order to address the concerns of the participants, the researcher first provides clarification regarding the objectives of the study, then highlights the potential advantages, and lastly describes the measures that were utilized to safeguard the data and assure anonymity. Moreover, the researcher has had a tough time moving around freely and gathering information due to the precarious security situation that exists in the country. To address this, the researcher employed a number of different approaches and actively sought out additional data from a wide range of sources. In conclusion, it is of the utmost importance to acknowledge that, in addition to the limitations that have been discussed earlier, it is impossible to disregard the possibility of personal bias and subjectivity that is inherent in this sort of qualitative research. Although the researcher has made significant efforts to maintain the validity and reliability of the instruments by triangulating data from a range of sources and points of view, it is expected to have some impact.

1.9. RESEARCH METHODOLOGY

A well-designed research methodology is the cornerstone of academic investigations, offering a systematic framework for data collection, analysis, and interpretation, ensuring that the study is rigorous, repeatable, and capable of producing reliable findings. In this study, the research methodology is carefully organized to achieve these objectives by integrating numerous interconnected components, each of which plays a vital role in ensuring the study's coherence, credibility, and scientific integrity. This encompasses the research paradigm, the study design, the data sources, the sampling strategies, the procedures for data collection and analysis, as well as the metrics for validity and reliability, and the ethical concerns that are involved. The integration of these components results in a cohesive and robust methodological framework that generates robust, reliable, and ethically sound findings about the governance of mineral resources within Ethiopia's federal system.

1.9.1. RESEARCH PARADIGM

This study employs a critical realist research paradigm as its philosophical framework guiding the research process and interpretation. This paradigm facilitates a comprehensive understanding of the subject by allowing a through the examination and interpretation of observable phenomena in conjunction with the underlying mechanisms in mineral resource governance.⁹³ From an ontological point of view, critical realism allows the investigation multiple layers of reality, which include the empirical, actual, and real. This multi-layered approach enables a thorough investigation of the governance of mineral resources and the sustainable mining, beyond mere appearances. From an epistemological point of view, critical realism integrates allows the integration of objective evaluations of legal and institutional frameworks with subjective interpretations of the experiences of stakeholders. It acknowledging that our understanding of reality is not purely objective; rather it is shaped by conceptual frameworks, societal norms, and cultural contexts prevalent.⁹⁴ Thus, this paradigmatic approach allows for a deeper exploration that

⁹³ Fletcher, Amber J. "Applying critical realism in qualitative research: methodology meets method." *International Journal of Social Research Methodology* 20, no. 2 (2017): 181-194. Sayer, Andrew. *Method in Social Science: A Realist Approach*. London: Routledge, 2010;

⁹⁴ Danermark, Berth, Mats Ekström, Jan Ch Karlsson, and Liselotte Jakobsen. *Explaining Society: Critical Realism in the Social Sciences*. London: Routledge, 2002.

offers a comprehensive picture of the complex dynamics in the governance of mineral resources and their impact on sustainable mining practices in Ethiopia's federal system.⁹⁵

1.9.2. RESEARCH DESIGN

This study uses an exploratory qualitative research design that is in line with the critical realism philosophy.⁹⁶ This methodological choice is particularly well-suited to investigate areas where little is known, such as the governance of mineral resource and sustainable mining in Ethiopia's federal system. It offers several benefits include allowing the capacity for a thorough examination of the governance dynamics, incorporate contextual understanding, methodological flexibility, and enhanced theoretical understanding.⁹⁷ It makes it possible to in-depth investigation of the complex interactions between federal and regional authorities, as well as official and informal governance institutions. Additionally, it promotes a thorough and context-specific understanding of challenges and opportunities in mineral resource governance in Ethiopia's federal system. Furthermore, the methodology's flexibility allows for the incorporation of new insights and emerging themes as the study advances, which is crucial in a subject with constantly changing regulations and practices. Moreover, it significantly enhances theoretical understanding of governance of mineral resources in federal systems and offers practical policy recommendations. Thus, the design facilitates an in-depth investigation in to the governance dynamics in Ethiopia's federal mining sector, ultimately offering practical policy recommendations for improving governance practices.

1.9.3. SOURCES OF DATA, AND SAMPLING TECHNIQUES

This study utilizes a variety of primary and secondary data sources to analysis of the governance of mineral resources and its impact on sustainable mining practice in Ethiopia's federal system. The data is collected from both primary and secondary sources that are essential to capture both formal and informal dynamics of governance of mineral resources It employs primary data sources, including legislative and policy documents, as well as interviews. The legal and policy instruments encompass federal, and regional constitutional documents; international legal

⁹⁵ Easton, Geoff. "Critical realism in case study research." *Industrial Marketing Management* 39, no. 1 (2010): 118-128; Edwards, Paul K., Joe O'Mahoney, and Steve Vincent, eds. *Studying Organizations Using Critical Realism: A Practical Guide*. Oxford: Oxford University Press, 2014."

⁹⁶ Stebbins, R. A. *Exploratory research in the social sciences*. Vol. 48. Sage, 2001; Denzin, Norman K., and Yvonna S. Lincoln, eds. *The Sage handbook of qualitative research*. sage, 2011.

⁹⁷ Robert K. Yin, *Case Study Research and Applications: Design and Methods*, 2017; Matthew B. Miles, A. Michael Huberman, and Johnny Saldana, *Qualitative Data Analysis: A Methods Sourcebook* 2014.

instruments; federal and regional state government legislation; administrative regulations; policy frameworks; strategic plans; decisions from the House of Federation; and standard mining contracts. These documents provide important guidance as to nature of the formal structures and regulatory mechanisms governing mineral resources in Ethiopia. Interviews with federal and state governments officials and experts and also independent experts is the other approach for primary data collection. It provides significant information about the governance and sustainability dynamics of Ethiopia's mining industry.

The secondary data sources encompass a range of academic literature, including peer-reviewed journal articles, books, monographs, conference proceedings, and research dissertations. It plays a critical role in contextualizing the study within the existing body of scholarship which essential for identifying theoretical frameworks, knowledge gaps, comparative perspectives and experience. Additionally, to further enhance the analysis and offer a more comprehensive view of the opportunities and difficulties in mineral resource governance, a range of secondary data sources are also used, such as government reports, policy analyses, reports from international organizations, industry studies, and media coverage.

As noted above, the study employed semi-structured interviews as the main approach for primary data collection. The research population includes officials and experts from the Ministry of Mines, the Ministry of Finance, and the mining bureaus of Oromia and Benishangul-Gumuz regional states, in addition to independent experts. Purposive sampling was carefully used to choose responders who are familiar with the issues to be addressed. Attention has been given to the informant's experience and expertise regarding the issue at hand. Efforts have made to ensure that the participants adequately represent a range of stakeholder perspectives and governance levels. Accordingly, Interviews were performed based on these criteria with three federal ministry officials from the Ministry of Mines, one expert from the Ministry of Finance, and two officials from the mineral-rich regions of Oromia and Benishangul-Gumuz states. In addition, interviews were carried out with two experts from the federal government, four experts from the regional level, and two independent experts. These experts included legal scholars, licensing specialists, and environmental specialists. During the interview process, the research adeptly employed the idea of data saturation, guaranteeing that enough depth of information was collected to offer thorough insights into the governance of mineral resources.

Other primary sources include international, domestic, and regional legislation; decisions; policy documents; and strategic plans dealing with mineral resource governance and sustainable mining. To gather doctrinal primary data, the following steps are undertaken: identify pertinent sources, explore legal databases, government and institutional websites, libraries and archives, and engage with stakeholders. This process seeks to identify the legal gaps and ambiguities concerning the ownership of mineral resources, the administration of mineral rights, legislative authority, management of mineral resources, revenue generation, and sustainable mining practices.

Furthermore, the study examines archival documents that provide official interactions as a significant empirical resource.⁹⁸ This requires reviewing a range of documents, including annual reports, interministerial communications, and legislative proceedings. To collect archival records, the following processes are taken: identify relevant archives, search online catalogs, visit archives in person, and examine secondary sources. The documents were chosen based on a variety of criteria, including their significance to understanding the issues of sustainable mining, mineral resource governance, and the representation diverse perspectives.

A systematic literature review of diverse sources is conducted to extensively assess scholarly works on Ethiopia's mining industry, with an emphasis on those that investigate governance of mineral resources and sustainability practices. A structured, transparent, and reproducible approach is employed to identify relevant sources. This approach in particular makes various significant contributions, such as a basis for theoretical frameworks for analysis, knowledge gap identification, comparative points of view, methodological insights, and contextualization of empirical data.

As previously stated, the study draws on a diverse set of secondary data sources, such as policy assessments, reports, industry studies, and media coverage. To obtain such resources, the following actions are taken: identify relevant sources, visit government and institutional websites, libraries, and archives, and engage with stakeholders. In the meantime, official government publications, reports from recognized international organizations, peer-reviewed industry studies, and reliable news sources were given top priority.

⁹⁸ Ventresca, Marc J., and John W. Mohr. "Archival research methods." *The Blackwell companion to organizations* 2017: 805-828; Das, Roshni, Kamal K. Jain, and Sushanta K. Mishra. "Archival research: A neglected method in organization studies." *Benchmarking: An International Journal* 25, no. 1, 2018: 138-155.

1.9.4. DATA ANALYSIS

The study employs an integrated analytical strategy, combining doctrinal and thematic analysis, to undertake a thorough and rigorous inquiry. This dual approach has three main benefits: a thorough analytical framework, increased study rigor through methodological triangulation, and increased validity of findings through multiple data verification.⁹⁹ Doctrinal analysis, which has been demonstrated to be an effective method for investigating legal, policy, and institutional frameworks, serves as the primary analytical tool.¹⁰⁰ Complementing the doctrinal analysis, a thematic analysis was used to identify key power dynamics, institutional relationships, and governance challenges that may not be apparent from the analysis of formal legal frameworks alone.¹⁰¹ The integrated analytical approach follows a systematic three-dimensional model: sequential integration, analytical triangulation, and interpretive synthesis.¹⁰²

1.10. ETHICAL DILIGENCE

The research world provides ethical norms and standards for studies involving human participants. It is crucial to adhere to these ethical norms and standards when conducting research involving human participants. This is necessary to preserve the credibility and integrity of the study. Accordingly, in this study, the ethical rules and standards established in contemporary academic circles were adhered to in their entirety. It included gaining the participants' consent in a clear and informed manner, allowing them to withdraw from the study at any time, and protecting the confidentiality and anonymity of the data. By adhering to these ethical norms, the research was able to maintain high levels of integrity, respect the rights of the participants, and establish the dependability and trustworthiness of the data acquired.

⁹⁹ Fereday, Jennifer, and Eimear Muir-Cochrane. "Demonstrating rigor using thematic analysis: A hybrid approach of inductive and deductive coding and theme development." *International journal of qualitative methods* 5, no. 1, 2006: 80-92; O'cathain, A et al Three techniques for integrating data in mixed methods studies. *Bmj*, 2010, 341; Vogl, Susanne. "Strategies to integrative mixed methods analysis.",2023: 491-499.

¹⁰⁰ Babbie, E. R. *The practice of social research* Nelson Education,2015; Hutchinson, Terry, and Nigel Duncan. "at supra note 96; Mark Van Hoecke, "Legal Doctrine: Which Method(s) for What Kind of Discipline?" in *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* ed. Mark Van Hoecke, Oxford, 2011: 1-18.

¹⁰¹ Ibid Ian Bryman, *Social Research Methods*, Oxford: Oxford University Press, 2016 The analysis followed a systematic process of data familiarization, code generation, theme identification and refinement, contextual definition, and results reporting.

¹⁰² Uwe Flick, *An Introduction to Qualitative Research*, London: SAGE Publications, 2018.

1.11. THE ORGANIZATION OF THE WORK

This dissertation is organized in eight separate chapters. The first chapter introduces the dissertation, outlining the essential background of the study, problem statement, research objectives, research questions, and methodology employed for the analysis. The second chapter presents a comprehensive analysis of the pertinent literature that underpins this study. Specifically, it sheds light on the theoretical and empirical foundations necessary to address this research topic. It is positioned within the framework of existing literature and contemporary studies, emphasizing gaps in knowledge and underscoring the importance of research. The third chapter offers a comprehensive historical overview of the legal and institutional frameworks that regulate the extraction of mineral resources, as well as the development of the concept of sustainable mining in Ethiopia. The fourth chapter looks at the issue of mineral ownership and the mining licenses and their contribution to the realization of sustainable mining within the Ethiopian Federation. It specifically examines how Ethiopia's federal system addresses legal, practical, and institutional issues on the assignment of mineral resource ownership and administration of mining licenses and implications for sustainable mining. The fifth chapter analyzes the manner in which Ethiopia's federal system manages legislative authority concerning mineral resources. This analysis assesses the nature and scope of legislative power, the mechanisms for regulating its exercise and resolving conflicts, and its effectiveness in ensuring sustainable mining practice. The sixth chapter looks at how the Ethiopian Federation manages the extraction of mineral resources. It investigates the legal, institutional, and practical factors that influence the governance of mineral resource management and their effects on ensuring sustainable mining. The seventh chapter will examine how the Ethiopian Federation regulates the economic benefits from the extraction of mineral resources. It specifically explores the design and application of the legal and institutional framework that collects the economic benefit that arises from the mining sector. Furthermore, it evaluates the federal government's use of fiscal power over the economic benefits of mineral resources in order to achieve sustainable development. The final chapter presents the research outcomes. It presents a summary of the major findings, an overarching conclusion, recommendations, and also identifies areas for future research.

CHAPTER TWO

THE GOVERNANCE OF MINERAL RESOURCE AND SUTAINABLE MINING IN FEDERAL SYSTEMS: A COMPREHENSIVE REVIEW

2.1.CHAPTER INTRODUCTION

This chapter investigates the complex interplay between federalism, mineral resource governance, and sustainability, with the aim of laying a solid theoretical and conceptual foundation for the remainder of the work. It begins with a comprehensive overview of the definition, fundamental concepts, and principles. It investigates the definition of minerals and the mining process, the evolution of the idea of sustainability in the extractive industry, and the elements of a sustainable mining framework. After presenting the fundamental ideas, the subsequent sections, which are based on both classical and contemporary theories of federalism, investigate the specific interplay between federalism and mineral resource governance. It investigates the notion of ownership of mineral resources, the theoretical foundations for the assignment of ownership of minerals, the factors that influence the assignment of ownership rights, and the various practices that are observed across federal jurisdictions. Furthermore, it offers a comprehensive analysis of the regulation of legislative power over mineral resources in federal systems, encompassing factors that influence decision-making, the considerations that are involved in the allocation of legislative authority, and the practices that are known to occur in a variety of federal contexts. Moreover, it investigates the management of mineral resources by analyzing the characteristics of management power, the various perspectives that are involved in its assignment, the factors that have an impact on decisions, and the practices that are observed in various federal contexts. In addition to this, it investigates the regulation of the economic benefits that are derived from the extraction of mineral resources within the federal system, focusing on the recommendation regarding the treatment of the revenue, the factors that influence decision-making in this domain, and the trends that have been observed across various federal jurisdictions. The final section explores the unique connection between federalism and mineral governance, along with the consequences for sustainable mining practices. Overall, this chapter establishes a foundation for a deeper exploration of the connection between federal systems and the governance of mineral resources, along with the influence these systems have in promoting sustainable mining practices.

2.2.UNDERSTANDING MINERALS, MINING, AND SUSTAINABLE DEVELOPMENT

2.2.1. MINERALS

The term "mineral" has been defined in various ways across different fields of study and legal frameworks.¹ In the field of mineralogy, the term "mineral" refers to elements or chemical compounds that generally have a crystalline structure and are produced as a result of geological processes.² Accordingly, the International Mineralogical Association has identified over 5,300 mineral species with different chemical and physical properties.³ Economists have also provided a definition of minerals that focuses on the economic value of resources. It defines minerals as a natural substance that has economic value and is extracted from the surface of the earth.⁴

The legal definition of a mineral is broader than that of earth sciences, although it is narrower than the economic definition of minerals. Black's Law Dictionary defines a mineral as any beneficial, inactive, or dead substance that is present in the earth's soil or rocks beneath it and that was formed or deposited in its current location only by natural processes.⁵ However, the specific legal definition of minerals shows a significant difference in scope, as some of the legal systems provide a wider definition that covers most nonrenewable natural resources, including petroleum, water, or peat, while others use a restricted definition of minerals to cover some inorganic substances that are formed in a biogeochemical process and exist in different forms under or on the surface of the earth.⁶ The U.S. federal government provides one of the broadest, but also one of the most ambiguous, definitions of minerals in its section on national mining and minerals policy.⁷ According to the Nigerian Minerals and Mining Act, a mineral is defined as any material found in or on Earth that is formed by or subjected to geological processes, except for petroleum and waters that do not include any minerals.⁸ Ethiopia's federal Mining Proclamation provides a comparable definition that covers all natural resources with the exception of water and petroleum.⁹

¹ Nickel, Ernest H. "Definition of a mineral." *Mineralogical Magazine* 59, no. 397 (1995): 767-768; Damilola's Olawuyi, *Extractives Industry Law in Africa*, Springer, 2018.

² Ibid

³ Ibid

⁴ Ibid

⁵ See Bryan A. Garner, *Black's Law Dictionary*, 11th edition, 2019.

⁶ Damilola's Olawuyi, *supra* note 1

⁷ See the national mining and minerals policy of U.S. Code: Title 30, Section 21a. It defines minerals as "all minerals and mineral fuels, including certain non-solid substances such as petroleum and natural gas." Even though this definition is wide, it is a problematic one as it uses the word "minerals" in the definition and also unusually includes petroleum and natural gas in the definition.

⁸ See The Nigerian Minerals and Mining Act No. 20/2007, article 164.

⁹ See the Ethiopian federal Mining Operations Proclamation number 678/2010, Article 2/19.

Furthermore, the South African mining law, similar to its African counterpart, provides a similar definition of mineral resources.¹⁰

The definitions given above show that different legal systems have different approaches when defining minerals.¹¹ However, one can note that these definitions share similarities. To begin with, most definitions see minerals as natural substances, with the exception of petroleum, water, and peat, and having different forms found in or on the land. In addition to this, a close reading of those definitions indicates that there are at least four basic elements of mineral resources.¹² In the first place, it must be a substance that occurs naturally and is formed through a natural process. This excludes anthropogenic compounds, which are compounds that are the result of human effort. In the second place, the mineral must be stable and solid at room temperature in the majority of legal systems, whereas in some other legal systems, this is not a preliminary requirement. The third requirement is that it must be abiogenic and come from inorganic sources. In the fourth place, it should have a crystalline structure and an ordered arrangement of its elementary particles.

2.2.2. MINING

The term "mining" refers to a wide range of commercial endeavors that stretch from the exploration of mineral resources until they reach the final consumer.¹³ Accordingly, modern legal systems, including the Federal Mining Proclamation of Ethiopia, define mining as any activity that involves mineral extraction, storage, treatment, processing, transportation, and disposal.¹⁴ It covers a broad range of economic activities that pose unique economic, social, and environmental risks, and challenges.¹⁵ It is possible to classify mining activities as extractive-related activities, including exploration, development, and mining; processing-related activities, such as processing or beneficiation, smelting and refining, and other value-added activities; and final marketing of the product to the ultimate consumer, which involves marketing, transport, and storage. As stated in Chapter 1, our discussion is limited to the first group of extractive-related activities.

10 See the South African Mineral and Petroleum Resources Development Act 28/2002.

11 Damilola's Olawuyi, *supra* note 1

¹² *Ibid*

13 *Ibid*; Uyanga Gankhuyag et al., *Managing mining for sustainable development: A sourcebook* Bangkok, 2018: 11-100; Elias T. Ayuk, Antonio M. Pedro, and Paul Ekins, *Mining in a Global Economy: Gearing Extractive Industries Toward Sustainable Development*, 2 UN Environment International Resource Panel, 2019; 8-49.

14 See the Federal Mining Operations Proclamation number 678/2010. In Article 2, a similar definition is given by the Nigerian and Kenyan Mineral and Mining Acts.

15 Damilola's Olawuyi at *supra* note 1, Claudine Sigam et al., *Extractive Industries: Optimizing Value Retention in Host Countries*, UNCTAD, 2012:4:34

Extractive-related activities involve different steps, including prospecting, exploration, development, production, closure, and post-closure, characterized by unique features, as well as social, environmental, and economic challenges that require the control and regulation of the state.¹⁶ The first step is prospecting or reconnaissance, which entails searching for minerals using a variety of instruments and techniques to estimate the size of a mineral deposit and assess its potential economic worth.¹⁷ The state's role in this stage is mainly limited to issuing exploration licenses, as the social, environmental, and economic impacts of the operation are minimal.

Following successful reconnaissance, exploration is necessary to determine the presence, extent, and economic worth of minerals.¹⁸ The state follows a different approach to issuing exploration licenses.¹⁹ In most cases, the host government grants licenses to companies to explore, without transferring any further rights to mineral resources.²⁰ In some cases, governments provide licenses or engage in contracts with firms to explore that also recognize the right of explorers to develop mineral resources in cases of discovery.

Mineral development follows a successful exploration process, which shows the existence of a valuable mineral. It involves detailed planning and also the construction of the mining project.²¹ It requires detailed geological and geothermal studies that map the ore body and substantiate the economics of the mine, which enables detailed mining planning.²² Furthermore, the efficient development of the mines and their commissioning once they are completed are crucial parts of this stage. At this stage, the state plays a crucial role in ensuring that the mining plant is designed and developed in a manner that generates maximum economic and social benefits, and that its adverse environmental and social impacts are well addressed.²³

16 Ibid

17 See the Federal Mining Operations Proclamation No. 678/2010, Article 2/27.

18 Id Article 2/8.

19 See Federal Mining Operations Proclamation number 678/2010.article 2

20 The Nigerian Minerals and Mining Act No. 20/2007, Article 164; see the South African Mineral and Petroleum Resources Development Act No. 28/2002 and the Federal Mining Operations Proclamation No. 678/2010, Article 2

21 Ibid

22 Damilola's Olawuyi, supra note 1; Willfors Ingela, et al. United Nations Handbook on Selected Issues for Taxation of the Extractive Industries by Developing Countries. United Nations, 2018; 11-23

23 Claudine Sigam and Leonardo Garcia at supra note 15

Production begins once the mines are fully developed and commissioned.²⁴ In the mining operation's production stage, mineral resources are extracted and processed.²⁵ Due to that most economic, social, and environmental issues are significantly present.²⁶ The state is expected to ensure that mining companies comply with the diverse obligations outlined in mining laws and contracts, which include financial terms, operational commitments, environmental responsibilities, health and safety obligations, and social commitments.

The closure of a mine occurs once the mineral deposit is exhausted or if the operation is not economically viable.²⁷ It happens when the mineral development has reached its economic limits and the cost is equal to or greater than the production revenue. The main issues at this stage are the exhaustion of mineral resources and the social and environmental effects of mine decommissioning.²⁸ The host government is expected to regulate the closure of a mine in a manner that would not result in environmental and social disasters. In addition, the government needs to ensure that the mine is closed after mineral resources are properly extracted.

The rehabilitation and reclamation stage of mineral development focuses on the restoration of the mineral development sites. It aims to rehabilitate the adverse effects of mineral development. It aims to rehabilitate the adverse effects of mineral development. It should be noted here that rehabilitation and reclamation occur not only at the end of mining operations, but are progressive and are ongoing activities that need to be progressively undertaken during the life of a mine.²⁹ Furthermore, reclamation work must be conducted for a long time after the closure of a mine. The state plays an important role in creating a legal and institutional framework to regulate the rehabilitation process and minimize the impact of the extraction of mineral resources on environmental integrity or social wellbeing.

²⁴ Ibid

²⁵ Willfors, Ingela et al, supra note 22; Kirsten Dales and Paul Cordy, Mining and Life on Land in Mining, Materials, and the Sustainable Development Goals (SDGs) 2030 and Beyond Edited by Cristian Parra, Brandon Lewis, and Saleem H. Ali, CRC Press, 2020: 149-171.

²⁶ Ibid, Damilola's. Olawuyi at supra note 1

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

2.2.3. THE EVOLUTION OF THE IDEA OF SUSTAINABLE MINING

Mining is one of humanity's oldest endeavors, with archaeological findings dating back to 43,000 BC in Swaziland. For the majority of its history, the mining sector has prioritized resource extraction to meet human needs, with little regard for the environment or local communities' concerns.³⁰ The environmental legacies of certain historical mining practices are still evident today in various regions across the globe, illustrating the enduring repercussions of mining activities conducted with such perspective.³¹

The initial comprehensive examination of the impacts of mining can be traced back to Georgius Agricola's influential treatise "De Re Metallica" (1556), which meticulously recorded the adverse impacts of mining operations on the natural environment.³² This seminal work was succeeded by important economic theories that profoundly influenced resource management discourse: Thomas Malthus's "Essay on the Principle of Population" (1798) cautioned against the perils of resource depletion in the face of population expansion; John Stuart Mill's "Principles of Political Economy" (1848) presented the notion of a stationary state economy; and Harold Hotelling's "The Economics of Exhaustible Resources" (1931) laid the mathematical groundwork for sustainable resource management practices.³³ However, these scholarly contributions remained largely academic, with minimal practical impact on mining operations, till the early 20th century.³⁴ However, the human development activities, including mining, continued to be seen mainly in terms of meeting the needs of economic growth and with little regard for the effects they would have on environment and society.³⁵

³⁰ Roderick G. Eggert, Mining and Economic Sustainability: National Economies and Local Communities, Mining, Minerals, and Sustainable Development, No. 19, 2001:6-79; Moomen Abdul-Wadood et al., "The Drive towards Consensual Perspectives for Enhancing Sustainable Mining," Resources 9, no. 12: 2020, 1-16

³¹ Ibid

³² Markus Wagner and Friedrich-Wilhelm Wellmer, A Hierarchy of Natural Resources with Respect to Sustainable Development—A Basis for a Natural Resources Efficiency Indicator, 2016: 91-121;

³³ Mill, John Stuart, The principles of political economy, with some of their applications to social philosophy (5th ed.): London, Parker, 2 v. 1862; Hotelling, Harold, The economics of exhaustible resources: Journal of Political Economy, v. 39, no. 2, 1931; 137-175; Leontief, W.W., Carter, A.P., and Petri, P. The future of the world economy—A United Nations study: New York, Oxford University Press, 1977

³⁴ Segura-Salazar, Juliana, and Luis Marcelo Tavares. "Sustainability in the minerals industry: Seeking a consensus on its meaning." Sustainability 10, no. 5 (2018):1 -38Moomen, Abdul-Wadood, supra note 30.

³⁵ Mohanty, Nilmadhab, and Aarushi Goyal. "Sustainable Development: emerging issues in India's mineral sector." Research Study, 2012;

The period following World War II was marked by an unprecedented intensification of mining, which was driven by the rapid industrialization and technological advancements that occurred during this time. The development of open-pit mining techniques, chemical processing methods, and mechanized equipment resulted in unprecedented environmental impacts, raising global concerns about the sustainability of human development.³⁶ In response, the environmental movement of the 1960s acknowledged the threat to the global economy and advocated for significant policy change.³⁷ Among which the Club of Rome resulted in the document (The Limits to Growth), which underscored the urgent need to change the prevailing development paradigm and served as a basis for what would be later built as the Sustainable Development (SD) paradigm. Moreover, these initiatives resulted in the introduction of foundational environmental legislation, marking the first step toward sustainable practices.³⁸ The introduction of these regulations compelled mining companies to take environmental impacts into account in their operations, representing a significant initial move towards sustainable practices.³⁹ However, these efforts, were primarily concerned with mitigating on specific environmental impacts, such as pollution reduction, waste management, and land reclamation and largely limited to national laws.⁴⁰

In the decades that followed the initial environmental efforts, the 1970s and subsequent decades witnessed the rise of more holistic strategies, sustainable development, profoundly influencing how industries worldwide are envisioned, including mining. This concept has evolved from early environmental conservation ideas to into its current status as a guiding principle for global development over the course of time.⁴¹ Several landmark initiatives were held that progressively

³⁶ Ibid

³⁷ Roderick G. Eggert, supra note 30; Moomen, Abdul-Wadood, supra note 30; Hall, Charles AS. "The 50th anniversary of the limits to growth: does it have relevance for today's energy issues?" *Energies* 15, no. 14, 2022: 49-53.

³⁸ Ibid

³⁹ Ibid

⁴⁰ Juliana Segura-Salazar et al., supra note 34. Mohanty, Nilmadhab, and Aarushi Goyal, at supra note 35 Azapagic, A. Developing a framework for sustainable development indicators for the mining and minerals industry. *J. Clean. Prod.* 2004, 12, 639–662; Giurco, D.; Cooper, C. Mining and sustainability: Asking the right questions. *Miner. Eng.* 2012: 29, 3–12.

⁴¹ Ibid, Moomen, Abdul-Wadood, supra note 30.; Juliana Segura-Salazar et al. at supra note 1 it should be noted from the start that, despite their relationship, the concepts of sustainable development (SD) and sustainability represent distinct yet complementary frameworks in both theory and practice. Sustainability is commonly perceived as the ultimate objective or ideal condition of human-environmental systems, defined by the enduring preservation of environmental, social, and economic health. This state represents three essential principles: environmental integrity (preserving life-supporting ecosystems and biodiversity), social equity (guaranteeing fair distribution of resources and opportunities across generations), and economic prosperity (generating value while honoring ecological limits).

defining and refining both the concept and practical implementation of the idea of sustainable development: the Stockholm Conference (1972) established UNEP and introduced "eco-development"; the Brundtland Commission (1987) provided the seminal definition of sustainable development; the Rio Earth Summit (1992) produced Agenda 21 with specific mining guidelines; the Millennium Development Goals (2000) incorporated environmental targets; The AU formally adopted the ideals of sustainable development and established continental benchmarks for sustainable resource governance; Rio+20 (2012) introduced the Sustainable Development Goals (2015) provided the most comprehensive framework to date, with mining directly impacting 11 of the 17 goals.⁴² Through these key international conferences and initiatives, a fundamental shift occurred from unlimited growth paradigms to an integrated understanding of economic development, environmental protection, and social equity.⁴³ Furthermore, the concept of sustainable development has evolved from a theoretical concept to a practical guiding principle

Sustainable development, on the other hand, embodies the dynamic processes and pathways through which principles, approaches, strategies, and policies are systematically crafted and executed to advance toward the ideal state of sustainability. This understanding, focused on processes, sees sustainable development not as a final destination but as a dynamic framework that directs societal change towards sustainability—the optimal condition where economic growth, environmental care, and social fairness coexist in harmony.

⁴² Moomen, Abdul-Wadood, *supra* note 30; Wennersten, R.; Qie, S. United Nations Sustainable Development Goals for 2030 and Resource Use. In *Handbook of Sustainability Science and Research*; World Sustainability Series; Leal Filho, W., Ed.; Springer: Cham, Switzerland, 2018: 317–339. This time period saw key milestones that aided the evolution of sustainable development as a transformational concept, led by global and continental institutions. The UN takes the leading role in the development of the idea of sustainable development. The United Nations Conference on the Human Environment (Stockholm Conference), which formed UNEP and coined the term "eco-development," established the basis for future sustainability measures by highlighting the significance of balancing economic growth and environmental protection. Furthermore, the World Commission on Environment and Development (the Brundtland Commission) defines sustainable development as the interconnectedness of economic growth, social equity, and environmental protection, laying the groundwork for global sustainability efforts. In addition, the United Nations Conference on Environment and Development (UNCED), Rio Earth Summit, produced Agenda 21, the Rio Declaration on Environment and Development, the Framework Convention on Climate Change (UNFCCC), and established the Commission on Sustainable Development (CSD), emphasizing the importance of sustainable development. Moreover, while the MDGs were not primarily focused on mining, it did incorporate environmental targets, such as ensuring environmental sustainability, into the global development agenda, emphasizing the importance of sustainability across all sectors. Added to that, the United Nations Conference on Sustainable Development Rio+20 (2012) adopted the SDGs, which give the most complete framework for sustainable development to date, with mining directly affecting 11 of the 17 goals. It aims to boost economic growth while mitigating environmental dangers and ecological scarcity. In addition to the progress done at the UN level, there are regional initiatives introducing the concept of sustainable development. The AU formally adopted sustainable development with its 2000 Constitutive Act and advanced it through Agenda 2063 in 2015. The African Mining Vision established the basis for sustainable resource governance in the continent. It emphasized the need for transparency, equity, and environmental stewardship in the mining sector. In addition, important entities such as the United Nations Environment Programme (UNEP) and the United Nations Development Programme (UNDP) promote sustainability and offer recommendations on sustainable mining methods.

⁴³ *Ibid*

that influences long-term progress, international protocols, and national policies. The mining industry has not been exempted from this evolution like other industries have been. The evolution of the concept of sustainable development has fundamentally altered the way mining operations are conceived, planned, and executed at both international and domestic levels, with a focus on economic viability, environmental stewardship, and social responsibility.⁴⁴

In the last few decades, in parallel with the above evolution of the idea of sustainable development, international agencies, mining companies, governments, civil society, and research institutions have made several attempts that aimed to particularly operationalize and consolidate the sustainability in the mining industry context.⁴⁵ Several landmark initiatives have shaped this evolution: Mining, Minerals and Sustainable Development (MMSD) report 2002, which established foundational principles for responsible mining; the Extractive Industries Transparency Initiative (EITI) established in 2003 aimed to promote transparency and accountability in the management of oil, gas, and mineral resources; the International Council on Mining and Metals (ICMM) introduced its Sustainable Development Framework in 2003, followed by the Mining Principles in 2020 and 2022, aimed to mainstream the idea of sustainable mining; the International Finance Corporation (IFC) Performance Standards, updated in 2012 from their 2007 version, provided further guidance manage environmental and social risks and impacts; the World Bank's Climate-Smart Mining Initiative launched in 2019, which specifically addresses the mining sector's role in the low-carbon transition and Zero-Carbon Mine initiative, aimed at achieving zero-carbon emissions in mining operations.⁴⁶

⁴⁴ Han Onn, A.; Woodley, A. A discourse analysis on how the sustainability agenda is defined within the mining industry. *J. Clean. Prod.* 2014; 84, 116–127; Laurence, D. Establishing a sustainable mining operation: An overview. *J. Clean. Prod.* 2011: 278–284.

⁴⁵ Alan Bond and Angus Morrison-Saunders, *Environmental impact assessment and the quest for sustainable mining*, in *Mining and Sustainable Development: Current Issues* Edited by Sumit K. Lodhia, 2019: 47-65

⁴⁶ Juliana Segura-Salazar et al., *supra* note 34. These major initiatives have their flagship contribution. The International Institute for Environment and Development (IIED) produced the Mining, Minerals, and Sustainable Development (MMSD) Report with the support of the World Business Council for Sustainable Development, which established fundamental principles for sustainable mining. It emphasized the importance of balancing economic, environmental, and social considerations in the mining sector. Furthermore, the Extractive Industries Transparency Initiative (EITI), a collaboration of governments, businesses, civil society organizations, investors, and international organizations, sets a global standard for good governance in the extractive industry. It brought significant achievement in ensuring transparency and accountability in the governance of mining sector. In addition, the International Council on Mining and Metals (ICMM), created by mining companies, developed the Sustainable Development Framework, and Mining Principles, that aimed to mainstream the idea of sustainable mining. Moreover, the International Finance Corporation (IFC) under the world bank, established environmental and social sustainability performance

These collective efforts demonstrate a significant global effort to introduce a paradigm shift in the mining industry, moving away from isolated environmental concerns and toward comprehensive sustainability frameworks that integrate economic viability, environmental stewardship, and social responsibility.⁴⁷ Through these initiatives, considerable progress was made in elucidating the concept of sustainability within the sector, its fundamental components, and the intricate connections that exist among these components.

The above development has led to the emergence of 'sustainable mining' as a distinct operational paradigm. The idea of sustainable mining is noted as an ideal mining operation characterized by the integration of preservation of environmental well-being, social progress, and economic prosperity, ensuring that the current generation meets its needs without compromising the future generations ability to meet their needs.⁴⁸ It operationalized the idea of sustainable mining based on the Triple Bottom Line (TBL) model, which establishes three fundamental pillars: economic sustainability, social sustainability, and environmental sustainability, core elements of sustainable mining.⁴⁹ Moreover, it sees sustainable mining as an ongoing process that promotes strategies where these elements are equally important and cumulatively enforced in a balanced manner.⁵⁰ However, it should be noted here that building on this TBL foundation, contemporary frameworks have incorporated additional dimensions that reflect evolving priorities in sustainable

requirements, which have become a benchmark for sustainable mining practices. Plus, the World Bank's Climate-Smart Mining Initiative provides technical assistance, funding, and policy recommendations to encourage sustainable mining operations. Similarly, the Zero-Carbon Mine Initiative, which involve mining companies, technology providers, and research institution, encourages the development and application of innovative technologies that minimize the carbon footprint of mining operations.

⁴⁷ Han Onn, A.; Woodley, at supra note 44; Laurence, D. at supra note 44.

⁴⁸ Bond, C. J. "Positive peace and sustainability in the mining context: beyond the triple bottom line." *Journal of Cleaner Production*, 2014: 84, 164-173.

⁴⁹ Ibid; Alan Bond and Angus Morrison-Saunders at supra note 45; Moomen, Abdul-Wadood, supra note 30; Moran, C.J., Lodhia, S., Kunz, N.C., & Huisingh, D. Sustainability in mining, minerals and energy: New processes, pathways and human interactions for a cautiously optimistic future. *Journal of Cleaner Production*, 2014: 84, 1-15; Caron, J.; Durand, S.; Asselin, H. Principles and criteria of sustainable development for the mineral exploration industry. *J. Clean. Prod.* 2016, 119, 215–222; it should be noted here that despite the above efforts and growing prominence of the concept of sustainability in the mining sector, achieving consensus on its core elements remains a significant challenge. Systematic reviews of mining sustainability literature reveal that there has long been considerable variation in perspectives regarding elements of sustainability, leading to a fragmented understanding of its application in mining. To address this conceptual fragmentation, international organizations, industry bodies, and academic researchers have undertaken substantial efforts to develop an integrated framework that synthesizes diverse perspectives. By engaging diverse perspectives, it becomes feasible to identify common ground that serves as a basis for effectively addressing the complexities of sustainable development in the sector. Accordingly, the Triple Bottom Line (TBL) has emerged as a critical tool in this regard.

⁵⁰ Ibid

development. These include governance mechanisms, technological innovation, intergenerational equity, and Indigenous peoples' rights.⁵¹

The extraction of minerals, as noted above, generates significant economic opportunities by generating fiscal revenue, encouraging economic growth, creating jobs, and bringing development benefits to local communities.⁵² It also brings economic challenges, including a volatile resource market; macroeconomic impacts caused by booms, busts, and structural changes in an economy; the eventual exhaustion of mineral resources; and the governance of the sector.⁵³ Economic sustainability envisions mining activities that go beyond mere profitability to encompass long-term economic viability, equitable benefit distribution, and growth while minimizing its adverse effects.⁵⁴ It recognizes the finite nature of mineral resources and promotes responsible extraction, economic diversification, adoption of sustainable mining practices, economic linkage, intergenerational equity, and resource rent optimization. The realization of economic sustainability requires coordinated action from multiple stakeholders, including the government, companies, civil societies, and local communities. The government has diverse policy choices available to ensure sustainable mining operations.⁵⁵ Governments play a pivotal role in achieving this by implementing regulatory frameworks, fiscal policies, and initiatives that promote sustainable practices. The most common and widely used include the regulatory and fiscal power to ensure economic benefits from mineral extraction, leading to sustainable outcomes by regulating revenue

⁵¹ Ibid; Juliana Segura-Salazar et al., *supra* note 34 Owen, J.R., & Kemp, D. Social license and mining: A critical perspective. *Resources Policy*, 38(1), 2013:29-35.

⁵² Uyanga Gankhuyag et al, *supra* note 13; Thomas Akabzaa, *Mining in Ghana: Implications for National Economic Development and Poverty Reduction in Mining in Africa Regulation and Development* Edited by Bonnie Campbell, Pluto Press, 2009: 25-65; Robin Boadway and Anwar Shah, *Fiscal Federalism: Principles and Practices of Multi-Order Governance*, Cambridge University Press, 2009. It should be noted from the start that the economic impact of mineral extraction shows significant differences as it depends on several factors, including the share of the sector in the national economy and exports, the volatility of the resource markets, the nature, location, and value of the resource, and the quality of the government in handling the impacts.

⁵³ Roderick G. Eggert at *supra* note 30; Anthony J. Venables, "Using Natural Resources for Development: Why Has It Proven So Difficult?" *Journal of Economic Perspectives* 30(1), 2016: 161-184; Michael L. Ross, "What Have We Learned about the Resource Curse?" *Annual Review of Political Science* 18, 2015: 239-259

⁵⁴ Ibid; Alan Bond and Angus Morrison-Saunders at *supra* note 45; Moomen, Abdul-Wadood, *supra* note 30.

⁵⁵ Uyanga Gankhuyag, *supra* note 13; Tina Hunter, *Comparative Perspective on Exhaustible Resource Development in Ethiopia: Lessons from the Norwegian Legal Framework and Experience*, in *Ethiopian Yearbook of International Law*, 2017: 49-78. Mining, and Sustainable Development Project. *Breaking new ground: mining, minerals, and sustainable development: the report of the MMSD project*. Vol. 1. Earthscan, 2002.

generation, collection, management, and utilization, resource extraction regulation, economic linkage development, and infrastructure enhancement.⁵⁶

It is hard to find industries that present a high environmental problem, such as the mining sector.⁵⁷ Its substantial environmental footprint is unparalleled in scale and complexity.⁵⁸ Uyanga rightly noted that it is difficult to find “environmental media- land, air, water, and flora and fauna- that will not be affected by the extraction of mineral resources.”⁵⁹ The environmental impacts of mining inflict significant and enduring harm on human health and well-being. The phrase ‘environmental sustainability’ calls for the preservation of environmental quality on a long-term basis, while allowing human activities in ways that do not have an indefinite effect on ecosystems.⁶⁰ It emphasizes on the need to protect the natural environment through effective and proactive environmental management tools that encourage the use of environmentally friendly technology and the treatment of the adverse effects of mineral extraction. The environmental sustainability of the mining sector depends on the active involvement of the government, mining companies, international communities, and the community that surrounds the mining project. The government take the line share to create a responsible mining sector that addresses the diverse environmental impacts of mineral extraction in a transparent and accountable manner. The government uses regulatory and fiscal power to mitigate or, if possible, to avoid environmental externalities.⁶¹ Governments uses traditional forms of regulation to set out environmental standards and the roles and responsibilities of actors in the mining process.⁶² The traditional environmental protection mechanisms including environmental impact assessment, environmental

⁵⁶ Ibid Governments play a critical role in achieving economic sustainability through infrastructure development, capacity building, and robust monitoring systems.

⁵⁷ Ibid; Miranda, M., Chambers, D., & Coumans, C., "Framework for Responsible Mining: A Guide to Evolving Standards," Center for Science in Public Participation, 2017; Northey, S.A., et al., "The Water Footprint of Mining Operations: A Methodological Framework and Application," Journal of Cleaner Production, 2019.

⁵⁸ Uyanga Gankhuyag et al at supra note 13.; Laurence, D., "at supra note 44

⁵⁹ Ibid

⁶⁰ Uyanga Gankhuyag et al at supra note 13.; Moomen, Abdul-Wadood, supra note 30. Schoenberger, E. Environmentally sustainable mining: The case of tailings storage facilities. Resource. Policy 2016, 49, 119–128

⁶¹ Ibid Arianna Waye, et al., Sustainable Development and Mining: An Exploratory Examination of the Roles of Government and Industry in Mining, Society, and a Sustainable World, J.P. Richards (ed.), 2009; 151-182 Hashempour, Morteza, and Mehdi Ghazanfari. "Comparison of Environmental Laws of Mines in Iran, Australia, Chile, India, Turkey, Canada, South Africa, and China." Karafan Quarterly Scientific Journal 18.1, 2021: 139-151.

⁶² Ibid. There are diverse national and international legal tools that intend to avert the environmental challenges of mining operations. There are over 1,000 international instruments that contain “hard” and “soft” laws of mining. Moreover, there are different national legislation and contracts that serve as the main source for environmental regulation.

management, land reservation, environmental rehabilitation funds, notification of operational risks, monitoring, and auditing, access to information and engagement during the life of a mine.⁶³ Additionally, Governments uses non-traditional forms of regulation, performance standards, and economic instruments to regulate the environmental effects of mineral extraction by assessing the environmental performance of the sector.⁶⁴

Mining activities are embedded in society and have a direct impact on the local community surrounding a mining site. The mining sector has the potential to provide important social benefits for host countries and communities by serving as a source of employment, economic development, and income.⁶⁵ It also has a significant social impact on local communities by affecting social structure and order, human rights protection, conflict, and health and safety.⁶⁶ Social sustainability refers to the ability of society to have access to resources to meet its current needs and the needs of future generations without causing damage to the society surrounding the mining site.⁶⁷ It focuses on social justice and emphasizes ensuring an equitable share of the benefits and burden of mining activities.⁶⁸ Local communities should receive information about mining operations and participate in decision-making regarding issues affecting their lives. In addition, it advises that the local community affected by the mining operation is entitled to compensation. Moreover, it provides that the local community surrounding the mining site should be entitled to share the benefits or profits from mining activities. The social sustainability of mining depends on active cooperation between government mining companies and local communities during the different stages of mining development to fairly share the benefits and burdens of mining activities.⁶⁹ The government, has diverse policy choices available to ensure sustainable mining operations including its regulatory and fiscal powers to address the societal effects of mineral resource extraction. It uses its regulatory power to ensure that the interests and concerns of the local

⁶³ Ibid

⁶⁴ Moomen, Abdul-Wadood, supra note 30; Mohanty, Nilmadhab, and Aarushi Goyal, at supra note 35

⁶⁵ Chuhan-Pole, Punam, Andrew L. Dabalen, and Bryan Christopher Land. Mining in Africa: are local communities better off? World Bank Publications, 2017; Mancini, L., & Sala, S., Social impact assessment in the mining sector: Review and comparison of indicators frameworks, Resources Policy, 2018: 57, 98-111.

⁶⁶ Ibid

⁶⁷ Moomen, Abdul-Wadood, supra note 30.; R. G. Eggert, supra note 30.

⁶⁸ Ibid

⁶⁹ Mohanty Nilmadhab, et, at supra note 35; Rey-Martí, Andrea, et al. "Developing models to assess the social impact of mining: An exploratory study through necessary conditions analysis (NCA)." Resources Policy 83, 2023.

community regarding mineral extraction are heard and compensated for sustained damage.⁷⁰ Moreover, it uses its regulatory power to ensure that human rights are respected in the mining process and address conflicts that involve mineral resources.⁷¹ It also uses its regulatory power to provide an important legal framework that ensures the social sustainability of mining, including impact assessments, Community consultation, engagement and protection, community development funds, compensation for land disposition, health and safety standards and human right instruments.⁷² In some instances, it uses economic instruments that aim to share the benefit from the extraction of mineral resources.⁷³

The notion of sustainable mining' has been a primary consideration in the design and application of domestic legal frameworks that regulate the extraction of mineral resources.⁷⁴ However, legal systems show a significant difference in their approach to operationalizing the idea of sustainable mining. For instance, the idea of a sustainable mining sector has assumed considerable importance in major mining countries, including Australia, Brazil, Canada, and South Africa.⁷⁵ It provides an optimal mix of legal, regulatory, fiscal, environmental management, and social development policy tools and approaches.⁷⁶ On the other hand, there are those that provide for the idea of sustainable development in a fragmented manner.⁷⁷ It still need to be enhanced in order to include new internationally recommended good mining practices⁷⁸ This divergence in regulatory

⁷⁰ Ibid

⁷¹ Oli Brown and Erin Blankenship, *Natural Resource Management and Peacebuilding in Afghanistan*, the United Nations Environment Programme, 2013.

⁷² Ibid

⁷³ Ibid

⁷⁴ Alan Bond and Angus Morrison-Saunders at supra note 45; Mvile, Benatus Norbert, and Obadia Kyetuza Bishoge. "Mining and sustainable development goals in Africa." *Resources Policy* 90, 2024: 104710.

⁷⁵ Mohanty Nilmadhab, et, at supra note 35; Monteiro Nathalie Barbosa Reis, et al. "Mining law: In search of sustainable mining." *Sustainability* 13, no. 2, 2021: 867; Twum Kojo, et al "Sustainable Mining in Emerging Economies: A Case of Reputable Mining Companies in Africa." *Responsible Management in Emerging Markets: A Multisectoral Focus*, 2021: 345-373; McPhail, Kathryn. "Enhancing sustainable development from oil, gas, and mining." *Extractive Industries*, 2018: 342. Cruz, James Thiago Leite. "Mining Industry and the Sustainable Development Goals in Brazil's Amazon." *SDGs in the Americas and Caribbean Region*. Cham: Springer International Publishing, 2023. 1-32.

⁷⁶ Ibid; Fuisz-Kehrbach, S.-K. A three-dimensional framework to explore corporate sustainability activities in the mining industry: current status and challenges ahead *Resource Policy* 2015: 111–115; Deb, M.; Sarkar, S.C. *Issues of Sustainable Development in the Mines and Minerals Sector in India in Minerals and Allied Natural Resources and Their Sustainable Development: Principles and Perspectives with Emphasis on the Indian Scenario*, Springer, 2017: 978-981

⁷⁷ Ibid; Juliana Segura-Salazar et al., supra note 34; Jenkins, Heledd, and Natalia Yakovleva. "Corporate Social Responsibility in the Mining Industry: Exploring Trends in Social and Environmental Disclosure." *Journal of Cleaner Production* 14(3-4), 2021: 271-284.

⁷⁸ Ibid AMLA. 2017 African Mining Legislation Atlas (AMLA) Project. Available at <http://www.globalforumijd.org/cops/african-mining-legislation-atlas> (accessed 15 March 2021).

approaches and implementation capacity has important implications for achieving global sustainable development objectives in the mining sector.

In tandem with the development of legal and institutional frameworks both internationally and domestically, the global mining sector has undergone a significant shift toward the voluntary adoption of international environmental and social standards.⁷⁹ Mining companies are increasingly adopting rigorous international best practices throughout their operations, shaped by a multifaceted interaction of market dynamics, stakeholder expectations, and risk management factors.⁸⁰ Mining companies operating in these environments frequently implement comprehensive standards that align with global frameworks, such as the International Finance Corporation (IFC) Performance Standards, the International Council on Mining and Metals (ICMM) Principles, the Initiative for Responsible Mining Assurance (IRMA) and the Global Reporting Initiative (GRI).⁸¹ This evolution reflects the changing dynamics of the industry and the increasing demands for sustainability from various stakeholders. The shift towards the voluntary adoption of international environmental and social standards in the global mining industry signifies a profound change in how mining companies conduct their business. The benefit of this trend, in some cases exceeding local regulatory requirements, is especially noticeable in regions with evolving regulatory frameworks. Mining companies by exceeding local regulatory requirements and aligning with global best practices, not only improve their own performance but also aim to enhance their operational resilience, improve stakeholder relations, and contribute to sustainable development.

2.2.4. THE GOVERNANCE OF MINERAL RESOURCES AND SUSTIANBLE MINING IN FEDERAL SYTEMS: AN OVERVIEW

The mining industry, as noted above is one of the oldest economic activities having an intricate economic, environmental, and social effects. The overall contribution of the mining industry relies heavily on the intricate interplay of the sector's various impacts. Achieving this balance, among others, requires effective governance, a comprehensive legal and institutional framework, that address the complex relationships in the mining sector. Historically, the host state, subject to international commitments, standards, and initiatives, has designed and operated a governance framework that regulates the mining sector. In federal systems is the governance of mineral

⁷⁹ Ibid

⁸⁰ ibid

⁸¹ Ibid

resources are addressed while adhering to the cardinal rule of federalism, which is the division of powers between central and subnational governments.

Scholars have offered distinct definitions of federalism depending on historical and cultural context; nonetheless, it can be seen as an organizing principle that advocates a system of governance wherein power is systematically and constitutionally divided between central and regional authorities for ensuring elements of shared and self-rule, thereby accommodating unity and diversity within a large political union.⁸² It establishes a mechanism for balancing centralized power with localized decision-making. It ensures that decisions are made at the most appropriate jurisdictional level by allowing the central government to address matters of national significance, while regional authorities handle local matters according to their specific contexts and needs. It facilitates the development of context-sensitive policies that reflect the unique needs and preferences while maintaining national coherence and standards.⁸³

Federal systems are designed to address multiple governance challenges, with governance of mineral resources being one of the most complex and contentious issues.⁸⁴ The governance of mineral resources, i.e., ownership, control, and benefit sharing, has been a long-standing concern in the federal system.⁸⁵ as noted herein under, the governance of mineral resources, constitutes

⁸² R.L. Wattss, *Comparing Federal Systems*, Montreal & Kingston, McGill-Queen's University Press, 1999; Burgess, Michael. "Comparative Federalism: Theory and Practice." (2006); Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Rev. Ed. Utrecht: Wolf Legal Publishers, 2007; Elazar, Daniel J. *Exploring Federalism*. The University of Alabama Press, 1987; Thomas Fleiner and Lidja R. Basta, 'Federalism, Federal States and Decentralization 'in Basta and Fleiner (eds) *Federalism and Multiethnic States: the Case of Switzerland*, 2nd ed. (Fribourg, PIFF Vol. 16, Helbing and Lichtenhahn, 2002):1.

⁸³ Ibid

⁸⁴ George R. M. Anderson, "Ownership, Management, and Revenue Sharing of Petroleum Resources in Federal and Devolved Regimes." 2019:199-235; Andrew Bauer, et al, *Sharing the Wealth: A Roadmap for Distributing Myanmar's Natural Resource Revenues*, Natural Resource Governance Institute, 2016; 1- 57; George Anderson, *Natural Resources in Federal and Devolved Countries*, Forum of Federation 2020: 1-28; Haysom Nicholas and Sean Kane, *Negotiating Natural Resources for Peace: Ownership, Control, and Wealth-sharing*, Geneva: Centre for Humanitarian Dialogue, 2009: 5- 32; Grant Bishop and Anwar Shah, "Fiscal Federalism and Petroleum Resources in Iraq," International Center for Public Policy Working Paper Series, Andrew Young School of Policy Studies, Georgia State University, 2008:1-32. Eccleston, Richard, and Timothy Woolley. "From Calgary to Canberra: Resource Taxation and Fiscal Federalism in Canada and Australia." *Publius: The Journal of Federalism* 45 (2) 2014: 216–243. Broadway, Robin "Natural Resource Shocks and the Federal System: Boon and Curse?" Proceeding from the Conference on Fiscal Federalism and the Future of Canada September 28-29, 2006; Okpanachi, Eyene, *Federalism and Natural Resource Management: A Comparative Study of Intergovernmental Conflict over Oil and Gas in Canada and Nigeria*, 2018

⁸⁵ Ibid It has historically exerted influence on the design and implementation of federal arrangements. Furthermore, it continues to shape contemporary federal dynamics, particularly with regard to constitutional frameworks, political economy, institutional architecture, and intergovernmental relations. This influence extends to fiscal arrangements, environmental regulations, social policies, and indigenous rights recognition.

one of the most critical issue in the design and implementation of federal systems.⁸⁶ This challenge manifests as a dynamic equilibrium requiring careful balancing of multiple interests, and competing priorities across different levels of government, a complex interplay that, when mismanaged, can trigger significant governance failures, socio-economic disruptions, and inter-jurisdictional conflicts.⁸⁷ Several structural and contextual factors the nature of equilibrium in the governance of mineral resources including the distribution of mineral wealth; the economic implications of resource extraction; environmental impacts; social consequences; resource-related conflicts; and identity politics.⁸⁸ In addition to these enduring issues, contemporary challenges such as climate change, indigenous peoples rights, and evolving environmental standards further influence equilibrium in the governance of mineral resources.⁸⁹ Therefore, federal systems must navigate these terrains in mineral resource governance and develop context-specific rules, principles, and approaches that reflect their unique historical, political, and social contexts while meeting emerging global standards and expectations.⁹⁰

The extraction of mineral resources, as noted above, has significant economic, environmental, and social consequences.⁹¹ As noted in, federal systems have historically regulated the governance of mining sector in line with the cardinal rule of federalism, the division of power.⁹² In line with such division of power, the government organ assigns with governance of mineral resources traditionally attempted to address economic, environmental, and social impacts of mining sector to varying degrees. With the emergence of the idea of sustainable mining as a global paradigm, the federal system attempts to establish robust governance frameworks that integrate sustainable It attempt to operationalize the idea of sustainable mining while balancing centralized power with regional autonomy. However, the evolution of sustainable mining governance exhibits distinct trends in classical and emerging federations.

⁸⁶ Ibid

⁸⁷ Ibid; Andrew Bauer, et al, *Sharing the Wealth: A Roadmap for Distributing Myanmar's Natural Resource Revenues*, Natural Resource Governance Institute, 2016; 1- 57; Johnston, Jason Scott. "The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism." *U. Colo. L. Rev.* 74, 2003: 487. Kamran, Nafees. "Resource Federalism in India: The Case of Minerals." *Supremo Amicus* 28, 2022: 331

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Ibid; Dobra, John. "Divergent mineral rights regimes." *Fraser Institute*, 2014.

⁹¹ Uyanga Gankhuyag and Fabrice Gregoire, *supra* note 1; Thomas Akabzaa, *supra* note 52.

⁹² Watt *supra* note 82; Elazar *supra* note 82

Classical federal systems, have strategically leveraged the traditional power over mineral resources to integrate sustainable mining through gradual institutional evolution and policy innovation.⁹³ However, this adaptation has manifested differently across various federal jurisdictions, reflecting diverse political, economic, and social contexts.⁹⁴ Conversely, emerging federal system, especially those formed following the introduction of sustainable mining, has made notable progress in incorporating sustainable development principles into their constitutional frameworks, benefiting from contemporary understanding of sustainability challenges.⁹⁵ In these federations, the notion of sustainable development is frequently established as a guiding principle or acknowledged as a fundamental right, providing a strong constitutional foundation for sustainable resource governance.⁹⁶ This constitutional mandate guides both central and subnational governments to exercise traditional power over mineral resources, facilitating the creation and enforcement of mining laws, policies, and regulations that prioritize sustainable mining practices.⁹⁷

2.3.FEDERALISM AND THE OWNERSHIP OF MINERALS RESOURCE

2.3.1. CONCEPTUALIZING OWNERSHIP OF MINERAL RESOURCES AND MINING LICENSES

Ownership is a nuanced and intricate notion that can include a wide range of arrangements, making it difficult to articulate in simple terms.⁹⁸ It typically indicates a broad authority over property that encompasses, but is not restricted to, the rights to possess, enjoy, or transfer in various forms. However, ownership rights are far from absolute rights as there are different limitations that arise as a result of the development of different legal frameworks.⁹⁹ Thus, the concept of ownership denotes the nature, scope, and extent of the legal rights, interests, or controls that a legal system grants to a person over a property.

⁹³ Ibid

⁹⁴ Novoa V, Laura, Sustainable Development and Its Relationship with Mining and Law, Rocky Mountain Mineral Law Foundation ed. (1997)

⁹⁵ Ibid

⁹⁶ FDRE constitution article 40/3; The Constitution of the Republic of South Africa, 1996, Article 24/a/iii; The Constitution of Kenya, 2010, Article 10/2/d; 42; 60; 69.

⁹⁷ Ibid; Novoa V, Laura at supra note 95; Pring George, Sustainable Development: Historic Perspectives and Challenges for the 21st Century, in United Nations Development Programme 1999;

⁹⁸ Lorenzo Cotulla Reconsidering Sovereignty, Ownership, and Consent in Natural Resource Contracts: From Concepts to Practice, European Yearbook of International Economic Law, 2018: 143-174; Theodore Okonkwo, Ownership and Control of Natural Resources under the Nigerian Constitution 1999 and Its Implications for Environmental Law and Practice, International Law Research, Vol. 6, No. 1 (2017): 1-27

⁹⁹ Ibid

Defining ownership rights over mineral resources is a highly contested issue in the literature on extractive resources. Olawuyi emphasizes the difficulty of defining the concept of mineral resource ownership, stating that defining ownership rights over mineral resources either requires no explanation because they are self-explanatory or is so elusive that it is extremely difficult.¹⁰⁰ It is self-explanatory in the sense that one can depict the ownership rights of mineral resources by observing the list of mineral rights are granted under a legal system. It is elusive that the legal systems that govern the ownership of mineral resources follow several rules, jurisprudential interpretations, and theories that have evolved to capture the idea of ownership of mineral resources.¹⁰¹ Despite this, the ownership of mineral resources denotes one of the widest rights over mineral resources.¹⁰²

Historically, the regulation of the ownership of mineral resources has been seen as falling under the sovereign authority of the state. However, it is important to acknowledge at the outset that state sovereignty over mineral resources has been influenced by developments in international public law and human rights law that recognize the rights of both international investors and intra-state actors in relation to mineral resources.¹⁰³

The regulation of mineral resource ownership has been viewed as an extension of the state's sovereignty. However, such an assumption was found to be incorrect in the majority of Africa, Asia, and Latin America, where colonized people lost ownership and control of natural resources to their colonial masters, resulting in the concept of permanent sovereignty over natural resources.¹⁰⁴

¹⁰⁰ *ibid*

¹⁰¹ *Ibid.*; Haysom and Kane at *supra* note 84, There were several theoretical concepts that informed the regulation of ownership of mineral resources: absolute ownership, qualified ownership, non-ownership, ownership of strata, and servitude theories.

¹⁰² *ibid*

¹⁰³ Lilian Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, *Vanderbilt J. of Trans. Law*, Vol. 45, No. 3, 2012: 785; Claudia Dessanti, *Indigenous Peoples' Right to Self-Determination in International Law Intra Vires*, 1:1 2015: 45; Endalew Lijalem, *Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Legal Developments Arctic Review on Law and Politics*, Vol. 8, 2017, pp. 222-245

¹⁰⁴ *Ibid* The right to Permanent Sovereignty over Natural Resources (PSNR), which has its roots in the decolonization struggle, has expanded due to legal developments in international public and human rights law. The emphasis on the principle of permanent sovereignty over natural resources has gradually developed from a primarily rights-based principle to one that also incorporates duties and diversifies its content. Originally, it was seen as the right of the state to freely dispose of its natural resources. Through time, it has evolved to become the right of states and peoples to freely determine the utilization of natural resources. Furthermore, it broadened by extending its scope to include diverse natural wealth and marine resources. Moreover, it deepened by increasing the number of resource-related rights and providing duties such as environment, international investment, and the rights of indigenous peoples.

Developing states rely on the principle of permanent sovereignty over natural resources to achieve control over natural resources, including the ownership of mineral resources. However, over time, international public law led to the development of duties that restricted the state's absolute sovereignty over mineral resources.¹⁰⁵

Substate actors exert pressure on the Westphalian concept of state sovereignty.¹⁰⁶ International human rights law addressed this development by placing restrictions on the state's sovereignty regarding its resources and ownership of natural resources.¹⁰⁷ The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the African Charter on Human and Peoples Rights (ACHPR) establish both procedural and substantive rights concerning natural resources for marginalized groups.¹⁰⁸ The ICCPR, ICESCR,¹⁰⁹ made control over natural resources an integral part of the right to self-determination.¹¹⁰ The ACHPR also recognizes the right to natural resources under Article 21, as it states, "All peoples shall freely dispose of their wealth and natural resources."¹¹¹ Moreover, it imposes an obligation on the state to consult people on the development endeavors that affect their lives.¹¹² However, it should be noted here that it is far from full ownership rights; rather, it mostly

¹⁰⁵ Ibid

¹⁰⁶ Ricardo Pereira & Orla Gough, *Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-determination of Indigenous Peoples under International Law*, Melbourne Journal of International Law, 2013, p. 459.

¹⁰⁷ Ibid; Endalew Lijalem at supra note 103

¹⁰⁸ Farmer, Alice. "Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries." *NYU Int'l L. & Pol.* 39 (2006): 417; Lillian Aponte. "The role of international law in intrastate natural resource allocation: sovereignty, human rights, and peoples-based development." *Vand. J. Transnat'l L.* 45 (2012): 785. The procedural rights include the right to be informed, consultation, and consent to projects that affect them. The substantive rights include ownership, possession, use, and control, with different scopes.

¹⁰⁹ J  r  mie Gilbert, the right to freely dispose of natural resources: utopia or forgotten right? *Netherlands Quarterly of Human Rights*, Vol. 31/2, 2013: 314–41; see article 1 of the ICCPR and ICESCR, article 1 paragraph 2.

¹¹⁰ Ibid., Article 47 of the ICCPR and Article 25 of the ICESCR reaffirmed the right to natural resources.

¹¹¹ Ibid., Article 21 of the African Charter of Human and Peoples' Rights, or the Banjul Charter

¹¹² Ibid; Federica Cittadino, *Indigenous Rights, and the Protection of Biodiversity: A Study of Conflict and Reconciliation in International Law*, Doctoral Program in International Studies, School of International Studies, University of Trento, 2010, James Summers, *The Idea of the People: The Right of Self-Determination, Nationalism, and the Legitimacy of International Law*, Helsinki: Martinus Nijhoff, 2004: 138. The people's right over natural resources are the right of the people that seek to exercise the right to self-determination, which could be a portion of the population of a society within a state or the whole population in a state. The relationship between state sovereignty and the right of the people over natural resources, as J  r  mie notes, "goes to the heart of the fundamental complexity of the international legal system." Despite such controversy, the human rights framework has not addressed the controversial issue. It proposes a balance between the States' permanent sovereignty over natural resources and the people's right over natural resources; the latter serves as a restriction on the former.

involves procedural rights that ensure the participation of people in the development of mineral resources.¹¹³

In particular, there are groups of people who have claimed the right against the state. Among these groups, the debate is particularly important for two groups: ethnic groups and indigenous people.¹¹⁴ Ethnic groups are one of the first groups of communities that aim to exercise the rights of the people under international human rights law. There is intense debate as to whether ethnic groups could be beneficiaries of this principle, including the ownership of mineral resources.¹¹⁵ A key question in this debate is whether ethnic groupings qualify as "peoples" to exercise the right to self-determination under international human rights instruments. It is widely held that the international human rights instruments were never meant to cover ethnic groups.¹¹⁶ It was not designed to address the claims of ethnic groups over natural resources. As a result, the rights of ethnic groups depend over mineral resources depends on the nature of the right to self-determination recognized in domestic legislation. Moreover, the exploration of global experience on the issue reveal that states resist recognizing the rights of ethnic groups over mineral resources, fearing that such recognition could undermine national sovereignty or lead to secessionist movements. despite such tendency, the recognition of ethnic groups can claim ownership or control over mineral resources varies widely across countries.

Furthermore, since the 1960s, there has been consistent development in international human rights law in recognizing the rights of indigenous peoples over natural resources.¹¹⁷ The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is an important instrument that

¹¹³ Tilahun Weldie, *The Right to Self-Determination under the Ethiopian Constitution: A Legal Tool for Indigenous Peoples' Protection against Land Alienation?* *Journal of African Law*, 63, University of London, 2019: 359–383.

¹¹⁴ Usman Nasir, *Issues in Mineral Resource Ownership and Control: International Trend and the Nigerian Question*, in *Rule of Law, Governance Dispute Resolution, and Contemporary Legal Issues in Nigeria*, edited by Gre C. Nwakoby and Uruch Ben Odoh, 2016: 457

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

¹¹⁷ Federica Cittadino, *supra* note 112. International Labor Organization Convention 107 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations 328 U.N.T.S. 247; ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries, 1650 U.N.T.S. 38. Tilahun Weldie at *supra* note 113, Jacqueline Hand, *Government Corruption and Exploitation of Indigenous Peoples*, 3 *Santa Clara J. Int'l L.* 262, 2005. Several definitions and criteria are used by different organizations to identify an indigenous group. The definition is by Martínez Cobo and the African Commission on Human and Peoples Rights. Indigenous peoples' struggles were first recognized through the adoption of International Labour Organization (ILO) Convention 107. Several efforts have been made since then to gain recognition. Moreover, the ICCPR, ICESCR, and African Charter provide a suitable legal basis for the recognition of the legal obligations of states as to the protection of indigenous rights.

recognizes the rights of indigenous people, where the type of resource determines their natural rights over natural resources.¹¹⁸ It recognized the state's ownership rights over mineral resources. However, it provided important procedural rights that encouraged indigenous people in the decision-making process, including the right to prior and informed consent for the development of extractable resources located on indigenous people's land.¹¹⁹

Once the state and the divers group over right mineral resources are settled, the next stage is to determine the nature of the ownership of mineral resources. The contemporary legal framework employs three main approaches to govern mineral resource ownership: land ownership, concessions, and the claim system. The private ownership/accession/non-domanian/ land ownership system has its roots in Roman law. It assumes that "whatever is fixed to the soil belongs to the soil." It provided that the ownership of mineral resources follows the ownership of the land.¹²⁰ The owner of the resource had a broad right over the mineral resource, including the right to veto development.¹²¹ The regulation of ownership rights over mineral resources is a matter of private law.¹²² However, statutory exceptions that give the state ownership of mineral resources have largely limited the effect of this system.¹²³

The state ownership/dominial/concessioner system has its origins in the French Revolution and French law, provided that the ownership of land and mineral resources are separate. The state ownership system ensures that all the subterranean minerals and resources are owned by the state in which they are located.¹²⁴ The rights of private developers depend on their contractual dealings with the state. The regulation of ownership rights over mineral resources is a matter of public law.¹²⁵

118 United Nations Declaration on the Rights of Indigenous Peoples, 2007. Doc no. A/RES/61/295

119 Ibid article 32/2

120 Usman Nasir, at supra note 114

121 Ibid

122 Mitchell, Paul. "Taxation and investment issues in mining." *Advancing the EITI in the Mining Sector: A Consultation with Stakeholders*, Extractive Industries Transparency Initiative, Oslo (2009): 27-31; Peter D. Cameron and Michael C. Stanley, *Oil, Gas, and Mining Sourcebook for Understanding the Extractive Industries*, the World Bank Part I Extractives for Development, 2017.

123 Ibid., private ownership has been modified to incorporate the government's ownership of mineral resources as a guardian of national wealth.

124 Ibid

125 Lorenzo Cotulla at supra note 98; John J. et al *Petroleum Legislative Frameworks and Contracts in a Federation: Issues for Constitutions, Petroleum Laws, Regulations, and Contracts*, in *Balancing Petroleum Policy: Toward Value, Sustainability, and Security*, ed. Alexander Hardeman, World Bank, 2019: 43-65;

On the other hand, the claim system provided a fluid system of ownership of mineral resources, where the finder of the mineral resources has the right to extract the resources in line with the law's requirements. The latter system originates in German law and is rarely applied in the US to settle disputes between the two systems. Moreover, there are legal systems that use a combination of the above approaches and provide a complex mix of ownership systems.¹²⁶

After the state determines the nature of ownership of mineral resources, the next step is to establish a comprehensive legal framework that provides substance to general policy statements.¹²⁷ The legislative framework needs to provide a detailed rule that translates the ownership of mineral resources into practice.¹²⁸ As noted here, countries follow two major approaches to the content of mining law: concessionary and permit/contractual systems. Despite organizational differences, the legal framework is expected to cover the nature of the right to mineral resources, how the right will be transferred, how the right will be rented and exercised, and how the right will be terminated.

After establishing a legal framework that governs the ownership of mining resources, the state must establish institutions to implement the legal and policy framework. It is necessary to develop a strong institution equipped with capable human resources with an effective organizational structure and intergovernmental coordination, which are needed to effectively implement the policy and legislative framework.¹²⁹ While the institutional structure may vary, it needs to create an efficient and effective mineral licensing system that has well-defined institutional responsibilities, security of tenure, institutional capacity to administer mining licenses, monitoring and oversight activities, and coordination among government institutions.¹³⁰ It is possible for the state to improve the effectiveness and efficiency of its mineral licensing system by establishing institutions that possess these key characteristics. This, in turn, contributes to mining practices that are responsible and sustainable, which protect the environment, the interests of local communities, and the overall socioeconomic development of the nation.

¹²⁶ Krill Borrisov and Mikhail Pakhim, *Economic Growth and Property Rights on Natural Resources*, Economic Theory, 65, European University at St. Petersburg, Department of Economics, 2018: 423–482.

¹²⁷ Janeth Warden-Fernande, *Indigenous Communities and Mineral Development*, Mining, Minerals, and Sustainable Development, no. 59, 2001: 1–31; Chinonso Tansi Anozie, *Ownership of Natural Resources Beneath the Surface: An Appraisal of the American and Nigerian Systems*, 2017; Usman Nasir, *supra* note 114,

¹²⁸ It should be noted here that the detailed analysis of the legal and institutional framework will be made in subsequent sections.

¹²⁹ *Ibid*

¹³⁰ Peter D. Cameron and Michael C. Stanley and Michael Stanley, *et al* *supra* note 121

2.3.2. THE ASSIGNMENT OWNERSHIP OF MINERAL RESOURCES AND FEDERALISM

The above discussion about the assignment and administration of ownership of mineral resources is carried out with the assumption that there is one level of government that possesses state sovereignty over mineral resources. However, in the federal system, this assumption is changed, as the ownership of mineral resources in most cases is subject to federal contestation. In most federal systems, ownership of mineral resources is often a central component of constitutional negotiations.¹³¹ Ownership of mineral resources is a highly sensitive political issue that requires a delicate balance between national and subnational interests. In particular, it frequently leads to controversies among the central government, subnational governments, and various ethnic groups, all of which vie for control over these resources. Accordingly, Federal constitutional design must diligently seek to strike a delicate balance between competing interests, incorporate diverse perspectives, and facilitate effective coordination. It is imperative to designate a specific level of government within the federal structure as the rightful owner of mineral resources.

The ownership of mineral resources has been enshrined in most Constitutions or other significant documents.¹³² Federal systems use different terminologies to assign ownership of mineral resources. Many federal constitutions are explicit regarding the ownership of mineral resources and use the term "ownership."¹³³ In some instances, the term 'ownership' is not directly used in a constitution; rather, alternative phrases or terms are used, such as vesting, dominion, prerogative authorities, and powers.¹³⁴ Furthermore, some constitutions, such as the United States and Australia, failed to regulate the ownership of mineral resources.¹³⁵

The literature on the assignment of ownership over mineral resources advocates that the optimal assignment of ownership is inseparable from the capacity of the owner to efficiently manage the

¹³¹ George Anderson, at supra note 84; Haysom & Kane at supra note 84; Grant Bishop and Anwar Shah, at supra note 84

¹³² John J. Beards worth Jr et al at supra note 88

¹³³ See the Canada Constitution Act 1867, Article 92/a; the Constitution of India, 1949, Article 249; the Iraqi Constitution, 2008, Article 2011; the Mexican Constitution, Article 27; the Nigerian Constitution of 1999, Section 44.

¹³⁴ See the Argentinean Constitution 1994, Article 124, "Provinces have the original dominion..."; the Indonesian Constitution, Article 33/3, "... shall be under the powers of the State"; and the Kenyan Constitution 2010, Article 62, "vest in the national government."

¹³⁵ George Anderson, supra note 84

resource.¹³⁶ It advises that state ownership of mineral resources should be assigned to the level of government that possesses sufficient administrative and technical capacities.¹³⁷ The ownership of mineral resources should be assigned to the government organ whose management will maximize the social surplus from their extraction.¹³⁸ The government that owns mineral resources needs to have the capacity to capture resource rents, promote exploration, assign exploration rights, and regulate the development of minerals.¹³⁹ When subnational governments are competent to perform the above function, it is desirable to decentralize the power that will bring decisions closer to society that will be affected by the extraction of mineral resources.¹⁴⁰ On the other hand, it recommends that minerals that has a significant impact to be owned by the national government.¹⁴¹

2.3.3. FACTORS AFFECTING THE ASSIGNMENT OF OWNERSHIP

Existing literature falls short of examining the factors that influence a particular ownership model.¹⁴² Moreover, there is limited empirical research on this issue, and the existing literature largely focuses on a specific federation.¹⁴³ However, an examination of federal systems reveals that the Federation adopts varied approaches in allocating the ownership of mineral resources among private entities, central authorities, and subnational governments. Several factors influence the assignment of ownership rights over mineral resources, including the evolution of the federal system, role of mineral resources in the national or local economy, resource distribution, and ethnic or other group composition in the federation.¹⁴⁴

136 Grant Bishop & Anwar Shah at supra note 84, it should be noted here that the administration of mining license is administered in subsequent section.

137 Ibid.; Haysom and Kane at supra note 84; Bianca Sarbu Ownership and Control of Oil: Explaining Policy Choices Across Producing Countries Taylor & Francis Group 2014

138 George Anderson, at supra note 84; Brosio, Giorgio, and Raju Jan Singh. "Raising and sharing revenues from natural resources." Washington, DC: World Bank, 2015: 1-35; Roy Bahl and Bayar Tumennasan: How should revenues from natural resources be shared in Indonesia? Reforming intergovernmental fiscal relations and the rebuilding of Indonesia: the "big bang" program and its economic consequences edited by James Alm, Jorge Martinez-Vazquez, and Sri Mulyani Indrawati, 2004:199-234

139 Ibid

140 Ibid

141 Ibid

142 Martin Lukan, The Political Economy of Non-Renewable Resource Ownership and Control, A thesis submitted to the Faculty and the Board of Trustees of the Colorado School of Mines in partial fulfillment of the requirements for the degree of Doctor of Philosophy (Mineral and Energy Economics); Luong, Pauline Jones, and Erika Weinthal, Oil Is Not a Curse: Ownership Structure and Institutions in the Soviet Successor States. New York: Cambridge University Press, 2010.

143 Grant Bishop & Anwar Shah at supra note 84; Anne G. Wallace, Natural Resource Ownership and Use Rights Under Civil, Islamic, and Customary Legal Systems, 2016: 1-29

144 Haysom & Kane at supra note 84

An examination of the experience of federal systems reveals that the evolution of the federal system has had a significant impact on the assignment of ownership rights over minerals.¹⁴⁵ For instance, in federal constitutions written prior to the first half of the twentieth century, such as Australia and Canada, the ownership of sub-surface mineral resources was either ignored or seen as the undesignated power of sub-national governments.¹⁴⁶ These federations have adopted such a trend, mainly because the subnational governments that form the federations have maintained their claim over mineral resources, lacked awareness of the existence of mineral resources, and limited the economic importance of the sector.¹⁴⁷ Later, with the change in the above-mentioned barriers, the federal government, at least in most cases, started to push for some level of ownership. For instance, in Australia and Canada, despite the subnational ownership of mineral resources, the debate between the federal and subnational governments over the ownership of offshore resources ended with the confirmation of the ownership of the former.¹⁴⁸ However, in the subsequent political settlement, federal and regional governments agreed to reach a compromise that accommodated their interests.¹⁴⁹ On the other hand, emerging and post-conflict federations were informed about the debate about the ownership of mineral resources and were able to address the issue in the constitutional design. It provides for the active role of the regional states. Furthermore, these federations use ownership of mineral resources as a tool to address the claims of diverse groups.¹⁵⁰

The role of mineral resources in the national or local economy had a significant impact on the choice of ownership regime. As noted above, mineral extraction has a significant impact on overall economic development and environmental and social well-being.¹⁵¹ In the normal course of things, both the federal and state governments will have the interest to own the resource that will pave the way for its management and benefit from resource extraction. The interest of either level of

¹⁴⁵ Bianca Sarbu, *supra* note 137

¹⁴⁶ Lorena Viñuela, et al., *Intergovernmental Fiscal Management in Natural Resource-Rich Settings*, Report No. 91343, World Bank, 2013; George Anderson, *supra* note 84.

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid*

¹⁴⁸ *ibid*

¹⁴⁹ *Ibid*, In Australia, the states ceded ownership and management of the “coastal waters” within three miles of the shore and gave a subordinate role in joint management for the offshore zone. In Canada, the provinces were given equal powers within a joint management arrangement and were allowed to benefit from offshore petroleum revenues as if they were onshore.

¹⁵⁰ Haysom and Kane at *supra* note 84; Peter D. Cameron and Michael C. Stanley at *supra* note 122

¹⁵¹ Elias T. Ayuk, Antonio M. Pedro, and Paul Ekins, *supra* note 13

government will significantly increase in cases where resource extraction has a significant impact.¹⁵² In such cases, the determination of ownership is not only made based on economic consideration but is also a result of the complex bargaining process that involves diverse actors that have different claims over mineral resources.¹⁵³ A good example in this regard is the Nigerian federation, where the oil-producing southern states since independence actively advocate for the maintenance of their ownership over natural resources and special treatment from the revenue generated thereof.¹⁵⁴ The claim for ownership of natural resources was unsuccessful, but subnational governments were able to incorporate the principle of derivation into the division of revenue from mineral resources. In addition to this, in Canada, mineral resources have a profound impact on the economy and the revenue of mineral resource-bearing states. Due to that, provinces have shown their firmness in their ownership of natural resources.

The nature of the distribution of mineral resources is crucial to the regulation of the ownership of mineral resources.¹⁵⁵ The variation in natural resource endowment is not such an important issue, especially when different regions are endowed with different natural resources or when the rent to be generated from the resource is not as significant.¹⁵⁶ But, in cases where the rent to be generated from natural resources is significant and these resources are distributed unevenly, it presents unique challenges. The uneven distribution of natural resources and the subsequent economic impact heightened demand and even caused conflicts over mineral resources in many parts of the world.¹⁵⁷ In most cases, the resource-bearing region claims ownership of mineral resources, while non-producing regions and the central government push for central ownership.¹⁵⁸ The constitutional response to competing claims of ownership showed a significant difference. In some cases, despite a serious claim from resource-bearing states, the federal constitution opts for central ownership of resources. In Nigeria, as noted above, the federal constitution explicitly rejects such

¹⁵² Haysom & Kane at supra note 84

¹⁵³ Ibid., George Anderson, supra note 84.

¹⁵⁴ Brosio, Giorgio, and Raju Jan Singh. "Raising and sharing revenues from natural resources." Washington, DC: World Bank (2015); Roy Bahl and Bayar Tumennasan, supra note 138

¹⁵⁵ Ibid

¹⁵⁶ Fiona Nunan, Governance of Natural Resources, Evidence on Demand, supports the professional development of climate, environment, infrastructure, and livelihoods advisers at DFID, 2016:1-41.

¹⁵⁷ Haysom & Kane at supra note 84, argue that the contestation and claim over natural resources revolve around the ownership, management, and share of benefit from the extraction of the resources.

¹⁵⁸ Peter D. Cameron and Michael C. Stanley at supra note 122

claims, irrespective of the strong claim of the resource-producing state.¹⁵⁹ In other cases, the federal constitution either accepts the ownership claim of the subnational government or leaves it for future constitutional bargaining. As a good example, constitutional drafters were able to agree to use the ambiguous ownership provisions that provided that those natural resources are owned by all the people of Iraq.¹⁶⁰

The composition of federal systems is a decisive factor in the assignment of ownership of mineral resources. Ownership claims over natural resources can be raised by diverse groups. The nature of the demand, its scope, and the groups forwarding the claim also differ significantly. The political saliency of demand for natural resources varies greatly and is often tied to scarcity, variability, value, location, and impacts on economic development, social, and environmental integrity.¹⁶¹ The scope of the claim over natural resources could be local, regional, or national. The scope is determined by the value of the resource, its geographical concentration, its environmental and social impacts, and the economic development of the state. Furthermore, the claim over mineral resources shows significant differences, ranging from the recognition of the nominal ownership title to extensive control and benefit from the extraction of mineral resources.¹⁶² The federal system's response to claims over ownership of the resource depends on the existence of other diversity markers. In homogenous federations, constitutional designers are much more concerned with the role of mineral resource ownership in national development.¹⁶³ In divided societies, constitutional designers are more concerned with using the wealth generated from mineral resources as a tool to accommodate antagonistic claims.¹⁶⁴ For instance in Iraqi constitution and the CPA of the Sudan, the constitutional drafters were concerned about, how to use the ownership to address competing claims over mineral resource.

¹⁵⁹ See the Nigerian Constitution of 1999, Sec. 44.3. "Federal proprietorship" of minerals is affirmed.

¹⁶⁰ See the Iraq Constitution 2010, Article 111, which provides that natural resources are owned by all the people of Iraq in the regions and governorates.

¹⁶¹ George R. Anderson, at supra note 65

¹⁶² Peter D. Cameron and Michael C. Stanley at supra note 122

¹⁶³ Ibid., Haysom and Kane at supra note 84

¹⁶⁴ Anne G. Wallace at supra note 143; Haysom and Kane at supra note 84; Lorenzo Cotulla at supra note 98

2.3.4. THE PRACTICE IN THE ASSIGNMENT OF OWNERSHIP OF MINERAL RESOURCES

Despite the literature prescription for the assignment of ownership of mineral resources, the exploration of federal systems reveals that it has been subjected to different trends. The practices among federations can be categorized into three main types: central government ownership, subnational government ownership, and a mixed approach.¹⁶⁵ Classical federations, to a large degree, assign ownership of mineral resources to state governments, either explicitly or implicitly. In early federal systems, the ownership of mineral resources was either ignored or implicitly vested in subnational governments as an undesignated power.¹⁶⁶ In other federations, the ownership of mineral resources is explicitly vested in the sub-national governments. This approach is followed in several federal settings, including Australia¹⁶⁷, Canada¹⁶⁸, and India.¹⁶⁹ These federations, as noted above, have adopted such a trend mainly because subnational governments have maintained their claim over resources, technology, communication, and infrastructure barriers, lacked awareness about resources, and limited the importance of the sector.¹⁷⁰ However, with the change in the above-mentioned barriers, the federal government started to push for some level of ownership, which, in most cases, resulted in a limitation in the state's ownership of subsoil onshore resources.¹⁷¹

Modern and emerging federations have different regimes that regulate the ownership of natural resources. The federal government is the main organ assigned to the ownership of natural resources.¹⁷² Several factors contributed to the development of such practices, including the enhanced role of mining in the global economy, technological advancement, the national revolution, the end of colonial rule, conflict, the social and environmental importance of the mining

¹⁶⁵ Ibid

¹⁶⁶ See the US Constitution in the 10th Amendment, In the United States, the ownership of subsurface resources follows the ownership of the land; thus, depending on whether the land is private, state, or federal, the ownership of onshore resources can be private, state, or federal, respectively.

¹⁶⁷ As per the Australian Constitution Act 1900, states have jurisdiction over mineral resources in their jurisdictions.

¹⁶⁸ See the Canadian Constitution Act of 1867, article 109.

¹⁶⁹ See the Constitution of India, 1949, Article 249: "States own all the land and natural resources in their territory."

¹⁷⁰ Ibid

¹⁷¹ Lorena Viñuela, et al., supra note 146; George Anderson, supra note 84, As noted above, The federal government retains rights over offshore assets and those found on federal land.

¹⁷² Ibid

¹⁷² Haysom and Kane at supra note 84; Grant Bishop & Anwar Shah at supra note 84

sector, and the recognition of diverse claims by an ethnolinguistic group.¹⁷³ Moreover, these federations attempted to provide a more detailed treatment of resource ownership that recognized different competing claims. Under this approach, one finds several federal countries, including Brazil,¹⁷⁴ Mexico,¹⁷⁵ and Nigeria.¹⁷⁶

Federal constitutions could assign ownership of mineral resources to both orders of the government, either explicitly or implicitly. The Constitution may choose to implicitly share the ownership of mineral resources between the central and state governments. In such cases, ownership is determined by the necessary implication, either from extra-constitutional legal arrangements or the de facto control of such resources.¹⁷⁷ For instance, in USA, initially, the founders failed to express ownership of mineral resources, leaving this matter to subsequent developments. The Tenth Amendment to the Constitution, which reserves residual powers to the states, has allowed states to recognize both private ownership of subsurface minerals and state claims over minerals.¹⁷⁸ On the other hand, the federal government claims control over mineral resources on federal lands, creating a dual system. There are constitutions that expressly share and vest ownership of mineral resources between central and subnational governments.¹⁷⁹

2.3.5. SUSTAINABLE MINING AND OF OWNERSHIP OF MINERAL RESOURCES

The regulation of ownership of mineral resources in federal systems, as noted above, far exceeds the introduction of the idea of sustainable mining. It is also noted that federal systems have updated their original tools that govern the mining sector—ownership, control, and benefit-sharing—to operationalize the ideas of sustainable development. However, saving the limited research that highlights the impact of the nature of the ownership structure—public and private—on the economic contributions of the mining sector, there is limited research that explores the relationship between the ownership of mineral resources and sustainable mining.¹⁸⁰ Martin Lukan notes the

173 Ibid

174 See the Constitution of Brazil, 1988, article 20(IX), which provides that mineral resources shall be the property of the central government;”

175 See Constitution of Mexico, 1917, Article 27, which provides that the center owned the mineral resources.

176 See the Nigerian Federal Constitution 1999, Article 44.

177 Haysom and Kane at supra note 84; Grant Bishop & Anwar Shah at supra note 84,

178 Leshy, John D. The mining law: a study in perpetual motion. Routledge, 2015. Keiter, Robert B. "Public lands and law reform: putting theory, policy, and practice in perspective." *Utah L. Rev.*, 2005: 1127.

179 See the Pakistan constitution 2010, article 172.

180 Martin Lukan, supra note 142; Pauline Jones, and Erika Weinthal, supra note 142

gap as he states limited literature that explores the significance of the assignment of ownership of mineral resources on economic growth, environmental wellbeing, and social wellbeing.¹⁸¹

Despite the relative lack of literature on the issue, an exploration of the experience of the federal system reveals that the effect of the assignment of ownership of mineral resources in ensuring sustainable development largely depends on the assignment of control and revenue powers over mineral resources. However, the link between the three issues is not straightforward, as they are treated separately in federal systems.¹⁸² Moreover, no theoretical framework compels the state to assign ownership of mineral resources to follow the assignment of management or revenue power.¹⁸³ Hence, it is essential to examine the impact of the assignment of ownership of mineral resources vis-à-vis the assignment of control and revenue powers.

The experience of federal systems shows diverse trends ranging from federal systems that merge ownership, control, and revenue power to those that grant control and revenue power to the non-owning level of government.¹⁸⁴ In cases where the ownership of minerals is followed by control and revenue power, the owner of mineral resources has a greater chance of influencing the outcome of the extraction process.¹⁸⁵ In particular, in cases where the ownership of the resource is followed by the legislative power, which the first dimension of the control over the mineral resources, which will be discussed here, the owners of the resource have the chance to not only define the ownership of mineral resources that belong to the state or a private person, but also influence the economic, environmental, and social impacts of mining.¹⁸⁶ Furthermore, the active involvement of the owner of the mineral resources in the management of the extraction of mineral resources, which the second dimension of the control over the mineral resources, enables them to influence the mining process, which determines the economic, environmental, and social impacts of mining operations.¹⁸⁷ It enables the owner to affect operational efficiency and economic outcomes related to mineral extraction. Furthermore, it promotes and encourages ecologically friendly measures that reduce the operation's impact of mining operation. Moreover, it allows it to manage the social

¹⁸¹ Ibid

¹⁸² Ibid.

¹⁸³ Ibid; *Novoa V*, Laura at supra note 95; *Pring George* at supra note 95

¹⁸⁴ Ibid

¹⁸⁵ Ibid

¹⁸⁶ Ibid.; Andrew Bauer, Paul Shortell, and Lorenzo Delesgues at supra note 88

¹⁸⁷ Ibid

repercussions of mining activities and resolves possible conflicts between mining firms and local residents, resulting in more sustainable outcomes.

In cases where the ownership of a mineral resource is followed by revenue-raising power, creates fundamental implications for economic governance and development outcomes in the mining sector. This convergence as noted in later chapters, enables the owner of the mineral resource—whether federal or regional—to exercise substantial control over the entire revenue management cycle, from collection through allocation and expenditure.¹⁸⁸ It enables the owner to determine revenue collection, manage revenue, and regulate spending in a manner that transforms mineral wealth into other forms of capital.¹⁸⁹

In other instances, a constitution can assign control and fiscal powers over the development of minerals to non-owning organs of the state.¹⁹⁰ In such cases, the ownership of resources has a nominal effect on economic growth and environmental and social wellbeing.¹⁹¹ It serves a symbolic purpose, showing the level of attention given to the national endowments. However, the recognition of the ownership of mineral resources alone will have a significant impact, especially in the case of diverse groups such as ethnic groups and indigenous groups. The recognition of ownership rights will serve as a basis for playing a meaningful role in the management of mining operations that affect them.

2.4. FEDERALISM AND THE CONTROL OF MINERAL EXTRACTION

Resource control is a controversial concept that represents many things in different scenarios, rendering, it to have no precise meaning.¹⁹² Some see it as total power over resources by the citizens of a state or region, while others see it as the participation of stakeholders in the resource management process.¹⁹³ Despite such limitations, it generally refers to legislative, executive, and

¹⁸⁸ Haysom & Kane at supra note 84.

¹⁸⁹ Ibid See the Constitution of Brazil, 1988, article 20/IX.; It should be noted here that the relationship between control power over mineral resources, economic benefit, and sustainable mining is addressed in a subsequent chapter.

¹⁹⁰ Giorgio Brosio and Juan Pablo Jimenez, The Intergovernmental Allocation of Revenue from Natural Resources: Finding a Balance between Centripetal and Centrifugal Pressure, in *Decentralization and Reform in Latin America*, edited by Giorgio Brosio, 2012: 290- 318;

¹⁹¹ Haysom & Kane at supra note 84

¹⁹² Michael Takim Otu and Miebaka Nabiebu, Ownership of Mineral Oils in Nigeria: The Need for Judicial Review of Legislation Affecting the Niger Delta Region *International Journal of Law, Humanities, and Social Science*, Volume 3, Issue 5, 2019: 1–29.

¹⁹³ Ibid

judicial powers over natural resources.¹⁹⁴ Control power over natural resources is a key issue that must be addressed in any constitutional design.¹⁹⁵ In federal systems, the power to control mineral resources is addressed in line with one of the cardinal principles of federal systems, the constitutional division of power.¹⁹⁶ The control power over mineral resources, which includes the law-making and management power is divided between central and subnational governments.¹⁹⁷ Moreover, as noted here in the distribution of these control powers between central and subnational governments varies significantly across federal systems, reflecting different historical, political, and economic contexts.

2.4.1. LEGISLATIVE POWER OVER MINERAL RESOURCES AND FEDERALISM

2.4.1.1. CONCEPTUALIZING THE LEGISLATIVE POWER OVER MINERAL RESOURCES

The first dimension of control over mineral resources is the legislative power over the development of mineral resources, which answers the authority to make laws that regulate the extraction of mineral resources. The Legislative power over mineral resource development is one way the state regulates the extraction of mineral resources.¹⁹⁸ It encompasses the authority to create or establish a legal framework that governs the extractive sector. The state can exercise its legislative powers in different ways, including through its subscription to international law, or by enacting national law that includes national constitutions and subsequent legislation.¹⁹⁹ International law provides an important basis to regulate the mining sector.²⁰⁰ There are several treaties, including international investment treaties, international human rights law, and environmental conventions and treaties, that contain important guidelines for the development of the mining sector.²⁰¹

The major legal framework that regulates the mining sector is the domestic legal system.²⁰² Constitutions, subjected to modifications, provide general rules and principles governing the

¹⁹⁴ Haysom & Kane at supra note 84; George R. Anderson at supra note 65

¹⁹⁵ Ibid., Oli Brown and Michael Keating at supra note 71,

¹⁹⁶ Ibid

¹⁹⁷ Andrew Bauer at supra note 186.

¹⁹⁸ Ibid; Novoa V, Laura at supra note 95; Pring George at supra note 95

¹⁹⁹ Ostensson, Olle; Parsons, Bob; Dodd, Samantha. A Comparative Study of the Mining Tax Regime for Mineral Exploitation in Kazakhstan World Bank, 2014; Peter D. Cameron et al at supra note 122

²⁰⁰ Farmer, Alice. Et al, at supra note 108; Lilian Miranda, at supra note 103

²⁰¹ ibid. Several international human rights instruments and environmental conventions also have a strong impact on the regulation of mineral resources.

²⁰² Ibid

extraction of mineral resources.²⁰³ The constitutional regulation of the extraction of mineral resources shows significant differences that stretch from general guidelines to those that contain detailed provisions.²⁰⁴ Despite such differences, a constitution is not enough to govern the detailed issues that arise in the development of minerals. The state has to develop a comprehensive legal framework that governs the complex issues that arise in the extraction of mineral resources, which can be organized in the code or fragmented legislation.²⁰⁵ In addition to this, it is common to see regulations focusing on issues that may need periodic adjustments.²⁰⁶ Regulations focus on technical and operational elements, fiscal elements, cost and volume audits, and social and environmental requirements, which may require periodic adjustments.

There are two major approaches to the content of mining law: concessionary and permit/contractual systems.²⁰⁷ The former refers to a legal system that regulates mining through contracts, which stipulates the nature, scope, and extent of the rights and interests granted to the license holder. The basic principles that regulate the relationship between the licensee and the government are provided in the contract. It is also supplemented by mining law, which sets out the general principles of mining operations.²⁰⁸ The latter refers to countries, especially civil law legal systems that regulate mining, mainly through a legal framework. Mining laws or regulations provide a detailed rule that regulates the rights and obligations of the parties in the mining process. In recent years, efforts have been made to incorporate parts of the contract to ensure efficiency and flexibility.²⁰⁹ The experiences of 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.²¹⁰

Notwithstanding the national differences in the organizational approach, the content of the legal framework that governs the extraction of mineral resources shows significant differences from

²⁰³ Haysom and Kane at supra note 84.

²⁰⁴ Ibid

²⁰⁵ Ibid.

²⁰⁶ Ibid,

²⁰⁷ Peter D. Cameron et al at supra note 122; Ostensson, Olle; Parsons, Bob; Dodd, Samantha. at supra note 199; Giorgio Brosio and Raju Jan Singh at super note 154, The choice depends on the technical and administrative capacity of the government. It has to be noted here that the demarcation between concession and contractual regimes is much weaker than thought, as it lies mostly in the control of production.

²⁰⁸ Ibid. Damilola's Olawuyi at supra note 1.

²⁰⁹ Ibid

²¹⁰ Ibid

jurisdiction to jurisdiction.²¹¹ However, there are different prescriptions as to the content and issue that should be addressed in the ideal mining law.²¹² Despite such limitations, our examination of most mining countries reveals that ownership of minerals, economic contribution, environmental and social protection, and investment guarantees are the major issues addressed by mining laws.²¹³

As noted above, once the assignment of ownership of the mineral resource is settled, the effective administration of mineral extraction requires a detailed legal framework that regulates the transfer of mining rights from the owner of the resource to its developers.²¹⁴ The legislation is expected to cover the nature of the right that can be created over mineral resources, how the right will be transferred, how the right will be rented and exercised, and also how the right will be terminated.²¹⁵ It is necessary to regulate the nature of the mining rights that will be transferred to developers and the type of license that will be issued.²¹⁶ Furthermore, it need to provide detailed rule that regulates different methods to allocate mineral title and rights from the owner of the resource to its developers, including a competitive process, a negotiated agreement, a free-entry process and also the issue of retention.²¹⁷ Moreover, it need to provides the rights and duties of developers in the mining process.²¹⁸ In addition to this, it need to provide clear ground and a transparent procedure for the termination of mining rights.²¹⁹

Furthermore, as noted here, the legal framework has provided detailed rules that aim to ensure that the extraction of mineral resources led to significant social and economic development while also

²¹¹ Ibid

²¹² Ibid., The ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector, 2009. <http://documentation.ecowas.int/download/en/publications/Ecowas%20Directive%20and%20policies%20in%20the%20minning%20sector.pdf> . accessed on January 16, 2020;

²¹³ George Anderson, at supra note 84 See federal mining law proclamation number 678/2010; Nigerian Minerals and Mining Act No. 20/2007; South African Mineral and Petroleum Resources Development Act No. 28/2002;

²¹⁴ Ibid

²¹⁵ Andrew Bauer et al, supra note 186. Varsha Venugopal, Assessing Mineral Licensing in a Decentralized Context: The Case of Indonesia, Natural Resource Governance Institute, Policy Paper, October 2014 Michael Stanley et al., at supra note 121. However, it should be noted here that the design of the detailed legal framework that regulates the administration of the ownership of mineral resources shows significant differences. The difference mainly emanates from several factors, including historical development, political orientations, and the importance of mineral resources. Despite the difficulty, there are different subscriptions by international agencies as to the ideal nature of the legal framework, including that it needs to exhibit transparent and competitive procedures for the award of mining rights, a clear legal or contractual framework that regulates the rights and obligations of the developer, security of tenure, transferability of mining rights, a clear policy on government ownership, and environmental and social safeguards.

²¹⁶ Ibid; Peter D. Cameron et al at supra note 122; Ostensson, Olle; Parsons, Bob; Dodd, Samantha. supra note 199

²¹⁷ Ibid.

²¹⁸ Ibid

²¹⁹ Ibid

addressing the economic challenges and social and environmental harm.²²⁰ The legal framework needs to provide a mechanism that enhances the economic contribution of the mining sector, addresses the complex macroeconomic issues in the extraction of mineral resources, and ensures that the economic benefit from the extraction of mineral resources is reinvested. It needs to guarantee mineral resources are exploited in a way that enhances the economic contribution of the mining sector by regulating the extraction of mineral resources and enhancing forward and backward economic linkages, employment, and infrastructure development. Furthermore, it is expected to establish structural budget rules, setting up natural resource funds, and public financial management, which can mitigate the risks associated with resource dependence and promote sustainable economic development.²²¹ Moreover, it needs to facilitate the strategic investment of these funds, promote long-term economic stability, and encourage diversification within the economy.²²² Additionally, as noted herein, the legal framework has to provide a means to avert the environmental challenges that arise in mining operations through traditional and non-traditional forms of regulating the environmental impacts of mining activities.²²³ Moreover, the legal framework needs to address the social impact of mineral resource extraction, including areas that are not subjected to mining, impact assessments, community development plans, compensation for the disposition of land, health and safety standards, setting oversight mechanisms, public participation in decision-making, and access to information.²²⁴

On top of this, the legal framework needs to be designed in a manner that effectively attracts investment while protecting state interests. It needs to develop a legal framework that balances the interests of investors, be it domestic or foreign and the state in the different mining cycles. To this end, it needs to be stable over time, transparent, easy to understand and administer, and balance the needs of investors with the needs of the government. A well-structured legal framework that integrates these elements, create a conducive atmosphere for investment while safeguarding governmental interests.

²²⁰ Uyanga Gankhuyag and Fabrice Gregoire, *supra* note 1; Thomas Akabzaa, *supra* note 52

²²¹ *Ibid*

²²² *Ibid*

²²³ *Ibid*

²²⁴ Andrew Bauer, *at supra* note 186

2.4.1.2. LEGISLATIVE POWER OVER MINERAL RESOURCES AND FEDERALISM

In most unitary states, the central government legislature can exercise the aforementioned legislative powers over mineral resources in different ways. A major addition to federal systems is that legislative power over mineral resources is often a central component of constitutional negotiations.²²⁵ Legislative power over mineral resources is frequently contested in federal systems, necessitating a delicate balance between national interests and subnational autonomy.

The assignment of legislative power over natural resources, including mineral resources, is a critical issue in the federal system. Central and subnational governments often maintain strong claims, which will enable them to control not only the formulation and implementation of mining policies, which plays a crucial role in determining the economic, environmental, and social impacts of mining operations within the federation.²²⁶ Moreover, this interest is inherently dynamic, as changing economic conditions, technological advancements, and environmental issues may impact the interest of either party, which in the end require a reevaluation and possible adjustment of the balance of power between federal and state authorities. Constitutional designers should allocate legislative power in a way that harmonizes the interests of both levels of government. Moreover, the operation of the federal system needs to be flexible enough to entertain issues that arise through time.

The existing literature on decentralization power provides guidance on how legislative power over mineral resources should be allocated, considering factors such as efficiency, capacity, and national interests.²²⁷ In particular the literature on the decentralization recommends that it is an area where there will be overlapping jurisdiction and active cooperation between both levels of government. It advises that the federal government should have the power to enact framework legislation that meets international commitments; set national standards and goals that guide the extraction of mineral resources across the federation; manage transboundary economic,

²²⁵ Haysom and Kane at supra note 84

²²⁶ Ibid

²²⁷ Ibid; Grant Bishop and Anwar Shah at supra note 118 The first key consideration wheatear it led to the enactment of laws that led to efficient management of mineral resources in a way that maximizes economic benefits while minimizing negative externalities. The second consideration is the capacity of the different levels of governments to effectively regulate the complex issues that arise in the extraction of mineral resources. The third consideration relates to the national interest to be served by such assignments, especially the need for coherent national policies and international commitment. The ideal allocation of legislative power over mineral resources in federal systems often involves a nuanced balance of these considerations

environmental, and social impacts; ensure a level playing field for investment; and maintain consistency in key areas of regulation. It also notes that the division of power should leave room for states to enact laws that enable them to meet their specific conditions.²²⁸ The subnational government should be active in enacting subsidiary legislation that addresses local concerns, such as specific environmental vulnerabilities or unique social contexts.²²⁹ This dual approach allows for the maintenance of national coherence while accommodating local variability.

2.4.1.3.FACTORS AFFECTING ASSIGNMENT OF LEGISLATIVE POWER

In addition to the normative framework that advocates for the ideal division of power, the federal system's response to the division of legislative power over mineral resources depends on the unique political development of the host states, the impact of the mining sector, and the need to enhance the global competitiveness of the federation.²³⁰

As noted above, the historical evolution of the federal system has had a remarkable impact on the governance of mineral resources. The same holds true for the assignment of legislative power over the extraction of mineral resources.²³¹ The classical federations opted to give the sub-national government an active role over legislative power over the extraction of mineral resources, either explicitly or impliedly. A good example is Canada, where the 1982 Constitutional Amendment explicitly strengthened the power of the provincial legislature to make laws relating to the extraction of mineral resources.²³² Moreover, in Australia, development of the federal system has

228 Ibid

229 Assefa Fiseha at supra note 83

²³⁰ Sujit Choudhry and Richard Stacey, *Oil and Natural Gas: Constitutional Frameworks for the Middle East and North Africa*, Center for Constitutional Transitions, International Institute for Democracy and Electoral Assistance, and the United Nations Development Project, 2014: 15 - 68, there is no universal or best approach to the division of legislative power over the development of mineral resources; each country is expected to decide for itself the best approach that it should follow.

231 Ibid

²³² See the Canadian Constitution Act 1867, Section 92A. According to the Constitutional Act of 1867, Sections 92/5 and 109, the provinces that formed the federation are now Ontario and Quebec, Nova Scotia, and New Brunswick, the three provinces that created the Canadian federation with the legislative power to regulate the extraction of mineral resources. However, the control of mineral resources in the newly formed Prairie provinces in the western territories was under the control of the federal government until 1930. The successive efforts of the three western provinces resulted in the transfer of rights over mineral resources through the enactment of the Natural Resources Transfer Agreements (NRTAs).

resulted in a division of power that provides extensive legislative power to the state government.²³³ However, subsequent developments have allowed the central government to play an active role in ensuring nationwide standards and a coordinated legal system. On the other hand, the experience of the emerging federation reveals that legislative power over the development of mineral resources is, in most cases, vested in the central government.²³⁴ The central government's predominant role emanates from the need to create an organized and uniform legal framework.²³⁵ However, the concentration of power in the central government has led to several challenges, including conflict, an inflexible legal regime, and a failure to address local challenges and claims.²³⁶

The extraction of mineral resources, as noted above, brings economic and social benefits, as well as environmental and social challenges. The importance of understanding these challenges evolves over time, which intensifies the constant struggle between central and subnational governments over legislative power over mineral resources.²³⁷ The economic impact of mineral extraction, which changes over time, coupled with the diversity factor and uneven distribution of mineral resources, ignites competition between the central and subnational governments.²³⁸ Depending on the nature and scope of the claim, federal systems attempt to address it in its constitutional design. In classical federal systems, where the subnational government has significant legislative power, efforts are made to strengthen the central government's role to enhance its influence on the economic impact of the mining sector.²³⁹ Moreover, emerging federations created after the economic prominence of the extractive sector tend to assign significant power to the center, while allowing subnational governments to play a limited role.²⁴⁰

The emergence of the need to address the environmental and social impact of the extraction of mineral resources and to ensure coordination, uniformity across federations, and meeting international obligations puts pressure on the assignment of legislative power over mineral

233 Haysom and Kane at supra note 84; Grant Bishop and Anwar Shah at supra note 118; Kodizie Kwesike Chignons Achelous, *Constitutional Approaches to Resource Control in Oil-Producing Federations*, Thesis submitted in conformity with the requirements for the degree of Master of Laws at the Faculty of Law, University of Toronto, 2011

²³⁴ Ibid

²³⁵ Ibid

²³⁶ Ibid

²³⁷ Ibid

²³⁸ Ibid

²³⁹ Ibid

²⁴⁰ Ibid

resources. The effect is especially seen in federations that were formed before the prominence of the environmental and social impact of mineral resources, which tend to vest legislative power in the subnational government.²⁴¹ The limited constitutional role of the federal government in the regulation of the mining sector has become an obstacle in addressing national challenges and meeting international obligations. These federal systems attempt to introduce some centralization of legislative power over the development of mineral resources.²⁴² On the other hand, emerging federations tend to recognize development and provide for the federal government's active role in areas that need coordination, uniformity across federations, and meeting international obligations. The extraction of mineral resources, as noted above, has a profound impact on the national economy, particularly in developing federal systems. Recognizing the mining sector's potential to drive economic growth, many of these nations have reopened their mining industries to foreign investment. One way to attract foreign investors in the sector is to create internationally competitiveness in legal regimes.²⁴³ A well-designed legal framework must strike a balance between the economic interests of the state and those of investors. This balance ensures that investors can achieve a fair return on their investments while the government receives an equitable share of revenues. Moreover, such a framework must remain stable, at least for the duration of the investment, and address environmental sustainability and social well-being.²⁴⁴ In line with this goal, most developing federations are trying to divide power between the center and the state government in a manner that ensures the creation of international competitiveness in legal regimes. It assigns the power to regulate the legislative power over mineral resources in a manner that will enable them to create a legal system which will enhance its international competitiveness.

2.4.1.4. PRACTICE IN ASSIGNMENT OF LEGISLATIVE POWER IN FEDERAL SYSTEMS

The actual assignment of Legislative power over mineral resources in federal systems is a complex issue. The complex nature of the assignment of legislative power over mineral resources largely stems from the diverse issues covered by the mining law. As noted above, mining law covers

²⁴¹ Ibid; André Plourde, Oil and Gas in the Canadian Federation, World Bank Conference on Oil and Gas in Federal Systems, 2010: 1-27

²⁴² Ibid

²⁴³ Ibid

²⁴⁴ Ibid, Furthermore, there are several institutions that have developed tools to assess the annual global competitiveness of developing countries, including the international competitiveness of fiscal regimes.

various economic, social, and environmental issues that change over time within federal systems. These issues, coupled with evolving global markets and environmental priorities, make it difficult to achieve a simple division of power. This inherently dynamic exercise of legislative power over mineral resources often necessitates the use of broad, all-encompassing terms in constitutional frameworks to effectively delineate jurisdictions. This approach allows for flexibility in interpretation and application as circumstances change over time.

Despite the normative framework and the above-mentioned factors that shape the division of legislative power over mineral resources show a significant difference. Savings marginal difference: Legislative power over mineral resources can be categorized into devolved, centralized, and concurrent systems.²⁴⁵ A devolved system refers to the division of legislative power over mineral resources, which favors the decentralization of legislative power. Under this model, subnational governments have broader autonomy in regulating the mining sector. The federal government's role is limited to broad issues affecting the nation at large, while many leave issues of legislative power over mineral resources to the state government.

The federal constitution can devolve legislative power over the development of mineral resources explicitly for state governments. In such cases, the state government plays a predominant role in enacting the law governing the different stages of mineral resources. A good example is Canada, which vests legislative power of mineral resources over provincial governments.²⁴⁶ The federal government's role was limited. The central government has the power to regulate resources beneath the land owned by the central government, such as first reservations and national parks.

Federal systems can devolve legislative power over the development of mineral resources implicitly. In these cases, the constitutional arrangement is silent on legislative power over mineral resources. The development of the federal system has resulted in a division of power that provides much of the legislative power over mineral resources to the state government. The primary example in this regard is the Australian constitutional experience, in which the constitution failed to provide a detailed regulation of the legislative power over mineral resources. However, the

²⁴⁵ Andrew Bauer et al, *supra* note 186

²⁴⁶ See the Canadian constitution act 1867, Section 92A (1)

member states of the Australian Commonwealth maintained their legislative power over mineral resources through various statutes.²⁴⁷

The central system refers to federations that vest legislative power over mineral resources in the central government. Under this model, the form and scope of the division of legislative power show great variation, but the federal government has extensive power in regulating the development of mineral resources. In addition to setting national standards and criteria for the development of minerals, the federal government provides a detailed rule that governs the different stages of mineral resource development. The role of the subnational governments is limited to, depending on the division of executive power, enforcing the laws of the central government. However, depending on constitutional order, the federal government can delegate some of its legislative power over the development of mineral resources to state governments. This approach is preferred by emerging federations that intend to establish the dominant role of the central government. A good example of the central control model is the Nigerian federation, in which the federal constitution vests extensive power over the development of mineral resources in the hands of the central government.²⁴⁸

The shared system refers to federations where the Constitution assigns legislative power over mineral resources in a manner that ensures that both the federation and the state governments exercise, at some point, at least some of the power.²⁴⁹ These powers were introduced in response to the limitations faced in making a clear division of power, ensuring uniformity in the enforcement of the law, avoiding conflict of jurisdiction, guiding the function of the state, or providing flexibility in the distribution of powers. Shared legislative power over mineral resources can be assigned, either explicitly or implicitly.

In the implied shared system, the constitutional document is silent on the legislative competence of either the national or sub-national governments; rather, legislative power over specific portions of such mineral resources is vested in either the federal or state governments by necessary implication, drawn from extra-constitutional legal arrangements or the circumstances of the de facto control of such resources.²⁵⁰ The United States provides a nuanced example of this approach,

247 Kodizie Kwesike Chignons Achelous, *supra* note 232

248 see the Nigerian Constitution of 1999 Section 44 (3)

249 Assefa Fiseha at *supra* note 83

250 *ibid*

although it is worth mentioning that it does not solely fall into this category. The United States Constitution does not directly address specific issues. Rather, a combination of factors determines its content. These factors include the residual powers clause in the Tenth Amendment, the property clause in Article IV, Section 3, Clause 2, and the judiciary's interpretations, which have shaped the roles of the federal and state governments. The result is a system in which the federal government holds authority over minerals on federal lands, while states typically have control over state and private lands within their borders. Nevertheless, an ongoing legal and political debate persists surrounds this division.²⁵¹

The federation could also explicitly assign legislative power over specific portions of such mineral resources to either the federal or state governments.²⁵² This approach, which is widely followed in emerging federations, tries to share legislative power over a particular activity or all activities of mineral resource development between federal and state governments.²⁵³ In such cases, the federal government's power is reserved for enacting framework legislation that is actively implemented by state governments. The state government enacts subsidiary legislation that sets detailed rules that affect natural resource development.²⁵⁴ For example, the FDRE constitution, despite the arguments mentioned below surrounding the exact scope of the concurrent legislative power of the federal government, has provided that the legislative power over mineral resources is a concurrent power.²⁵⁵ Overall, the Federal and sub-national governments are required to have serious consultations and bargaining.²⁵⁶ Furthermore, the Constitution is expected to provide a detailed provision regulating shared legislative power and an intergovernmental arrangement that assists the exercise of shared power.²⁵⁷

2.4.1.5.LEGISLATIVE POWER OVER MINERAL RESOURCE AND SUSTAINABLE MINING

251 Kodizie Kwesike Chignons Achelous, supra note 232; Haysom and Kane at supra note 84

252 Ibid

²⁵³ Ibid

254 John J. Beards worth Jr et al at supra note 88

²⁵⁵ Assefa Fiseha at supra note 83

256 Ibid

²⁵⁷ Sujit Choudhry and Richard Stacey at supra note 229

The extraction of mineral resources, as noted above, creates substantial economic opportunities and poses threats to the environment and society that require appropriate governance and regulation.²⁵⁸ Countries have sought to establish legal frameworks that promote efficient resource extraction, while ensuring environmental and social well-being. As noted above, the development of the legal framework that governs the mining sector has been influenced to several global trends, particularly the idea of sustainable mining. International best practices emphasize the need to incorporate sustainable mining into the mining sector.²⁵⁹ Moreover, as noted above, for decades, sustainable mining has been a key consideration in the design of the legal frameworks that regulate the mining sector.²⁶⁰ It has driven reforms in the extractive sector with serious attempts to incorporate ideals into the legal systems of both developing and developed countries.²⁶¹ However, significant differences exist in the operationalization of the concept of sustainable mining. These discrepancies arise from varying governance systems, divergent interests, resource dependence, and differing levels of development within the host countries.²⁶²

The story holds true in federal systems, with the exception that the above developments are made in line with the division of power. Federal systems, to a different degree, attempt to operationalize the idea of sustainable mining.²⁶³ Legislative power over mineral resources is one of the tools used to promote sustainable mining in their mining sector. Federal systems, depending on division power, try to create a legal framework that operationalizes international best practices for sustainable mining in their mining sectors. Federal systems, among others, enact laws that address economic, social, and environmental issues that arise in the extraction of resources. However, as noted above, the legal framework regulating the sustainable development of mineral resources shows a significant difference, which stretches from countries that provide a comprehensive framework to emerging ones.²⁶⁴

258 Juliana Segura-Salazar et al at supra note 31

259 Moomen, Abdul-Wadood, supra note 30; Uyanga Gankhuyag supra note 13

260 Bastida, Elizabeth. "Integrating sustainability into legal frameworks for mining in some selected Latin American countries." 2002: 120; Alan Bond and Angus Morrison-Saunders at supra note 45

261 Oli Brown and Michael Keating at supra note 71,

262 Ibid

263 Deb, Mihir, and Sanjib Chandra Sarkar, at supra note 76; Fuisz-Kehrbach, Sonja-Katrin at supra note 76.

264 Ibid; Novoa V, Laura at supra note 95; Pring George at supra note 78.

As noted above, the extraction of minerals will generate significant economic benefit and challenges.²⁶⁵ The legal framework needs to provide a mechanism that enhances the economic contribution of the mining sector, addresses the complex macroeconomic issues in the extraction of mineral resources, and ensures that the economic benefit from the extraction of mineral resources is reinvested.

Federal systems, depending on the division of legislative power, use law-making power to ensure mineral resources are exploited in a way that enhances their overall economic contribution, avoiding waste at different stages of mineral extraction.²⁶⁶ In particular, it regulates the nature of extraction of mineral resources, production linkage of the mining sector, and contribution of mining to society.

Federal systems use lawmaking authorities to provide a detailed rule that controls the efficiency of the extraction of mineral resources, including the initiation of extraction, the efficiency of extraction, and the full development of mining fields. In particular, it provides rules for the approval of mining licenses, development plans, notification of obligations, technological requirements, license renewals, and fees.²⁶⁷

The production linkage between the mining sector and the rest of the economic sector has a profound impact on national economic development.²⁶⁸ It is common to see federal systems that use their lawmaking authorities to attempt to enhance the backward economic linkages between mining and other sectors through the local procurement of goods and services and employment opportunities for citizens.²⁶⁹ Moreover, it attempts to create forward linkages between the mining sector and other industries in the economy to maximize economic benefits from mining

²⁶⁵ Uyanga Gankhuyag supra note 13; Thomas Akabzaa, supra note 52

²⁶⁶ As noted above, The economic sustainability of the mining sector, among others, depends on four interlinked processes that requires the active involvement of the government: the effective extraction of minerals, the collection of the economic benefit, the management of the adverse economic effect of mining, and also the investment of the proceeds of mining into sustainable development goals. The last three points are highly related to fiscal power of the state hence, are addressed in subsequent chapters.

²⁶⁷ Uyanga Gankhuyag supra note 13; UN Economic Commission for Africa, African Governance Report V: Natural Resource Governance and Domestic Revenue Mobilization for Structural Transformation, 2018:17-35; The South Africa Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA as amended); The Nigerian Minerals and Mining Act of 2007; the FDRE mining proclamation, proclamation number, 6778/2010

²⁶⁸ Ibid

²⁶⁹ Ibid, Federal Mining Proclamation, Proclamation Number 678/2010, Article 38/1/h It can be implemented through taxes on the employment of foreign employees and the use of imported goods and services, as well as quotas that provide for a minimum number of local employees, the minimum percentage of local goods and services to be bought by the country, and also the percentage of goods and services provided in the host country.

activities.²⁷⁰ It also exercises its lawmaking authority by providing social responsibility and community development initiatives that generate spillover benefits that stimulate broader economic activity.²⁷¹

Furthermore, as noted here, the extraction of significant mineral resources has the potential to generate substantial economic benefits. It so gives rise to complex macroeconomic and Political Challenge that require strong government intervention.²⁷² This involves addressing fluctuating and unstable mineral prices, adapting to internal shifts in the structure of a national economy as the mineral sector grows, and tackling the political challenges frequently linked to mineral dependence.²⁷³ To navigate these issues, federal systems are expected to utilize their legislative power to create comprehensive frameworks that manage the impact of the mining sector on the economy.²⁷⁴ It is expected to establish structural budget rules, setting up natural resource funds, transparency mechanisms, and public financial management, which can mitigate the risks associated with resource dependence and promote sustainable economic development.²⁷⁵

As mentioned, the extraction of mineral resources is seen as a depletion of national wealth. Governments are shifting their perspective to view the benefit generated from these resources as a form of national wealth that should be preserved and reinvested rather than merely extracted and spent. To achieve this, effective regulation of the economic benefits derived from mineral extraction is essential, with a strong emphasis on reinvesting these revenues into building other forms of wealth and capital.²⁷⁶ In order to accomplish this objective, federal systems, among others, are expected to use their legislative power to direct investment of the proceeds from mining into sustainable alternatives.²⁷⁷ Accordingly, it facilitates the strategic investment of these funds, promotes long-term economic stability, and encourages diversification within the economy.²⁷⁸

²⁷⁰ Ibid; National Planning Commission, A Homegrown Economic Reform Agenda: A Pathway to Prosperity, 2021-2030 (2020): 29-31 Available at: <https://faolex.fao.org/docs/pdf/eth211967.pdf> accessed, June, 2022

²⁷¹ Ibid

²⁷² Uyanga Gankhuyag and Fabrice Gregoire, supra note 1; Roderick G. Eggert, supra note 30

²⁷³ Ibid

²⁷⁴ Ibid

²⁷⁵ Ibid

²⁷⁶ Ibid

²⁷⁷ Ibid; Tina Hunter, at supra note 75

²⁷⁸ Ibid

The extraction of mineral resources, as noted above, leads to the generation of a large volume of waste, air emissions, discharge of liquid effluents, damage to land, and destruction of habitat, which cause serious and lasting damage to human health and livelihoods.²⁷⁹ The negative environmental impacts of mining activities are inevitable, but most of them can be reduced if not avoided. Federal systems, like most countries, adopt different tools to avert the environmental challenges that arise in mining operations, including traditional and nontraditional forms of regulation.²⁸⁰ It usually uses traditional forms of regulation to set out environmental standards in the mining process, including areas that are not subjected to mining, environmental impact assessments, environmental standards for the different stages of the extraction, community consultation and engagement in the extraction process, oversight mechanisms, and remedies for environmental damage.²⁸¹ On the other hand, there are also federal systems that use non-traditional regulation, performance standards, and economic instruments to regulate the environmental effects of mineral extraction.²⁸²

The mining sector as noted above, has the potential to provide important social benefits for host countries and communities by serving as a source of employment, economic development, and income.²⁸³ It also has the potential to have negative social impacts by affecting the social structure and order, human rights protection, conflict, and health.²⁸⁴ The key challenge in the mining sector is the constant quest to optimize the positive contribution of the sector while mitigating its adverse effects if possible.²⁸⁵ Federal systems, like most countries, use legislative power to enhance the

²⁷⁹ Arianna Waye, Denise Young, *supra* note 92

²⁸⁰ Uyanga Gankhuyag *supra* note 13; The South Africa Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA as amended); The Nigerian Minerals and Mining Act of 2007; the FDRE mining proclamation, proclamation number, 6778/2010

²⁸¹ *Ibid*,

²⁸² *Ibid*; Federal systems, such as those in Canada, the United States, and Australia, have used a diverse policy toolkit to manage the environmental implications of mineral extraction, moving away from the old command and control approach. The federal and regional governments provide a legal framework that incorporates a variety of policy instruments, such as performance standards, economic instruments, information-based instruments, flexible permitting, and other non-traditional regulations, to steer the mining industry toward more sustainable practices. These non-traditional forms of regulation are effective in enhancing the competitiveness of mining companies and also ensuring the protection of environmental standards. In addition, governments, mining companies, and international financial institutions provide for a standard that aims to address or minimize the environmental impact of the mining industry.

²⁸³ Chuhan-Pole et al at *supra* note 65

²⁸⁴ Uyanga Gankhuyag *supra* note 13.

²⁸⁵ Andrew Bauer, at *supra* note 286

positive social contributions of the mining sector.²⁸⁶ It attempts to achieve this goal by providing legal requirements and guidelines that cover the different aspects of mining, including the areas that are not subjected to mining, impact assessments, setting standards, providing oversight mechanisms, benefit-sharing, compensation for disruptions to livelihoods, local content requirements, public participation in decision-making, and access to information.²⁸⁷

2.4.2. MANAGEMENT POWER OVER MINERAL RESOURCES AND FEDERALISM

2.4.2.1. CONCEPTUALIZING THE MANAGEMENT OF MINERAL RESOURCES

The management of the power over the extraction of mineral resources basically encompasses a range of executive powers of the state over the mining sector. It covers diverse executive powers that are essential for enforcing its legislative and policy framework and ensuring that the extraction of mineral resources leads to economic and social development, with a limited impact on environmental and social well-being.²⁸⁸ The state exercises its management power over mineral resource development by regulating the diverse stages of mining operations, including the transfer of mineral rights, exploration and exploitation regulations, closure and post-closure monitoring,

²⁸⁶Uyanga Gankhuyag supra note 13; The South Africa Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA as amended); The Nigerian Minerals and Mining Act of 2007; the FDRE mining proclamation, proclamation number, 6778/2010

²⁸⁷ Ibid; Environmental Protection and Biodiversity Conservation Act 1999, Australia, <https://www.legislation.gov.au>, accessed , January, 2024; Canadian Environmental Assessment Act, 2012, <https://laws-lois.justice.gc.ca>, accessed , January, 2024; Mines and Minerals (Development and Regulation) Act (1957) of India, <https://www.indiacode.nic.in>, accessed , January, 2024,; National Environmental Policy Act (NEPA) (1969) of USA, <https://www.congress.gov>, accessed , January, 2024 Federal systems, developed or emerging, use their legislative power over mineral resources to introduce different tools that are designed to maximize the positive contributions of mining while mitigating its adverse effects. Developed federations, such as the United States, Canada, and Australia, used their legislative power to develop a well-established framework that addresses the social impacts of mining, including social impact assessments and standards, human rights, benefit-sharing and compensation, local content requirements, public participation and access to information, and oversight mechanisms. Moreover, emerging federations, such as Ethiopia, South Africa, and India, have made significant strides in using the legislative power over mineral resources to address the social impacts. However, there are significant differences in their approaches and effectiveness due to variations in institutional capacity, historical context, and governance structures.

²⁸⁸ Christmann, Patrice. "Mineral resource governance in the 21st century and a sustainable European Union." *Mineral Economics* 34, 2021: 187-208; Litvinenko, Vladimir S., Evgenii I. Petrov, Daria V. Vasilevskaya, Aleksandr V. Yakovenko, Igor A. Naumov, and Maksim A. Ratnikov. "Assessment of the role of the state in the management of mineral resources." *Записки Горного института* 259 (eng), 2023: 95-111.; Parker, Rachel, and Stephen Cox. "The state and the extractive industries in Australia: Growth for whose benefit?" *The Extractive Industries and Society* 7, no. 2 ,2020: 621-627

transportation networks, import and export permits, and almost any other matter that can affect the development of mineral resources.²⁸⁹

Ownership of mineral resources, as noted above, could be vested in the private person, the state, or any of the combinations. The state, which is considered a guardian of national wealth, is expected to regulate the exercise of ownership of mineral resources to ensure that their development of mineral resources positively contributes to the betterment of society.²⁹⁰ However, it should be noted that the state license's role depends on the nature of the ownership of mineral resources. In cases where land and mineral resources are privately owned, the state's role is mainly limited to regulating preferential rights to develop mineral resources. The mineral resource owner determines the extraction of mineral resources. The role of the state is to ensure that the extraction of mineral resources contributes to economic development with minimal social and environmental costs. In other cases, the state plays a decisive role in transferring the mining titles to future developers. First, the government must decide whether to extract mineral resources from a particular location.²⁹¹ The government's decision to extract mineral resources must be supported by proper information about the economic, social, and environmental impacts of mining operations. Second, the government must choose an appropriate company that will extract mineral resources. The government is expected to assess the financial, technical, and experience of the mining company to ensure that it grants licenses to companies with sufficient technical and financial capacities.²⁹² Depending on the legal system under study, the government may transfer the mineral title in a competitive regime or chose to proceed with the production through a state-owned monopoly.²⁹³ In the case of competitive assignment, rights over mineral resources are assigned and transferred on a competitive basis.²⁹⁴ The State award of mineral rights could follow

²⁸⁹ Andrew Bauer, at supra note 186; Haysom and Kane at supra note 84; Uyanga Gankhuyag supra note 13; Depending on their impact on mining operations, some of these powers can be considered primary, whereas others are secondary. The transfer of mineral title, administration exploration, exploitation, closure, and post-closure, which directly influence the mineral resource lifecycle, could be taken as primary management powers. Secondary management powers, which are not directly related to mineral extraction, give governments the power to influence decisions on mineral resource development and are considered secondary powers. It includes land management, regulation of imports and exports, etc., and has a profound impact on resource management. The current discussion focuses on the primary management of mineral resources.

²⁹⁰ Ibid.; Peter D. Cameron et al at supra note 122

²⁹¹ Haysom and Kane at supra note 84

²⁹² Ibid.,

²⁹³ Grant Bishop & Anwar Shah at supra note 84

²⁹⁴ Ibid,

open mineral access on a first-come, first-served basis, or a competitive or tender approach. In cases where the state decides to use a monopoly to extract mineral resources, it captures resource rents while pursuing national objectives. However, this approach is rarely used, especially after the collapse of socialist countries and the subsequent push by world lending organizations, such as the World Bank, for privatization of the mining sector.²⁹⁵

Once the mineral title is transferred to developers or governments decide to retain it, the next stage is the regulation of the exploration and exploitation process.²⁹⁶ At this stage, countries monitor and enforce compliance by the mining company with the terms specified in the license and mining law. The primary concerns are the optimal extraction of the mining process, regulation of the environment, and the social impact of mineral development.²⁹⁷ Accordingly, as noted below, governments use their monitoring and enforcement powers to ensure that the extraction of resources is conducted in a manner that produces optimal economic benefits, addresses its impact on the macroeconomy, and the economic benefits are utilized in a sustainable manner.²⁹⁸ Moreover, as noted above, it uses its monitoring and enforcement power to safeguard compliance with environmental and social standards and ensures that mining operations are carried out without causing significant social or environmental harm.²⁹⁹

The impact of mining operations extends to the post-development stage of the mining cycle. In particular, the economic importance (to some extent) and the environmental and social effects of mining activities extend to the closure and post-closure stages.³⁰⁰ Countries use management powers to ensure that mining operations are closed once mineral resources are exhaustively extracted. Moreover, it uses management power to ensure that the closure of mining operations is conducted in a manner that does not cause social or environmental harm. Once the extraction of mineral resources is stopped for any reason, the mine will bring a unique environmental and social challenge that needs to be properly managed.³⁰¹ The government must create an efficient management structure that addresses the unique environmental and social impacts of mineral

²⁹⁵ Haysom and Kane at supra note 84; Andrew Bauer et al, supra note 186

²⁹⁶ Ibid

²⁹⁷ Ibid

²⁹⁸ Ibid

²⁹⁹ Ibid

³⁰⁰ John J. Beards worth Jr et al at supra note 88

³⁰¹ Haysom and Kane at supra note 84; Andrew Bauer, at supra note 186

extraction in a transparent and accountable manner.³⁰² It should be noted here that the regulation of the post-development effects of mineral extraction is not limited to the later stages of mining operations; rather, it extends through the mining cycle. Governments should assess the post-developmental impacts of extractive activities before granting permission for projects to proceed. Moreover, once the decision is made to end the mineral extraction, the government should properly manage the adverse effects of the extraction in the post-development stages.

2.4.2.2.ASSIGNMENT OF MANAGEMENT POWER OVER MINERAL RESOURCES

In federal systems, the role of the state in managing mineral resources is exercised in accordance with the fundamental principle of the federalism—the division of power.³⁰³ The division of management power over mineral resources frequently results in a competition between the federal government and subnational entities, both aiming to promote their interests in resource extraction. Furthermore, local communities and indigenous peoples, as non-state actors, also assert their rights in the management of mineral resources.³⁰⁴ Finding a balance among these conflicting interests requires a thoughtful strategy that harmonizes the priorities of the national government, the concerns of regional authorities, and the rights and needs of local communities.³⁰⁵ This challenge lies at the heart of constitutional designers' task when delineating the roles and responsibilities of different levels of government in the management of mineral resources.³⁰⁶

In federal systems, in general, the assignment of executive power is a complex and multifaceted process that can be comprehensively understood through the lens of both first and second-generation theories of fiscal federalism.³⁰⁷ The literature on the assignment of management power

³⁰² Ibid

³⁰³ John J. Beards worth Jr et al at supra note 88; Andrew Bauer et al, supra note 186; Haysom and Kane at supra note 84; Sujit Choudhry and Richard Stacey at supra note 229

³⁰⁴ Que, Sisi, Liang Wang, Kwame Awuah-Offei, Yao Chen, and Wei Yang. "The status of the local community in mining sustainable development beyond the triple bottom line." *Sustainability* 10, no. 6 (2018): 1749.; Kurniawan, Nanang Indra, Päivi Lujala, Ståle Angen Rye, and Diana Vela-Almeida. "The role of local participation in the governance of natural resource extraction." *The Extractive Industries and Society* 9, 2022: 101029. As noted above, recent developments in international human rights instruments have emphasized the importance of local community participation in mineral resource management. Key considerations include: free, prior, and informed consent (FPIC), benefit-sharing mechanisms, environmental and social impact assessments, and dispute resolution mechanisms.

³⁰⁵ Ibid; Houlihan, Erin C., and Sharon P. Hickey. *Constitutional Approaches to Decentralization: Elements, Challenges and Implications: Fourth Women Constitution-Makers' Dialogue*, 2022. International Institute for Democracy and Electoral Assistance (International IDEA), 2023.

³⁰⁶ Haysom and Kane at supra note 84; Sujit Choudhry and Richard Stacey at supra note 229

³⁰⁷ Ibid, Oates, Wallace E. "On the evolution of fiscal federalism: Theory and institutions." *National tax journal* 61, no. 2, 2008, 313-334.

over mineral resources suggests several criteria for power assignment, including the government's capacity, the level of consistency required across the country, transparency and accountability, and the national interest involved.³⁰⁸ The assignment of management power over mineral resources must consider the ability and capacity of either level of the government to address the diverse issues that arise in the extraction of mineral resources.³⁰⁹ In particular, it must consider its impact on effective mineral resource extraction and enhance the competitiveness of the federation.³¹⁰ In most cases, mineral resources are unevenly distributed within the federations. The constitutional drafter weighed the benefits of uniform governance against the need to treat resources differently in different parts of the country.³¹¹ Management should also assess its impact on creating transparent and participatory governance processes.³¹² Transparent and inclusive management that integrates the views and concerns of stakeholders is essential to address the adverse impacts of the mining sector. The constitutional drafter must consider the national interest to be protected by the national or subnational government regulation of mineral resources as well as a particular aspect of resource development.³¹³

2.4.2.3.FACTORS AFFECTING THE ASSIGNMENT OF MANAGEMENT POWER

Examination of federal systems reveals significant differences in the actual assignment of the management of mineral resources. The federal system's response to the division of management power over mineral resources, in addition to the normative framework, depends on the unique political development of the host states; the economic, social, and environmental effects of the mining sector; and the cheaper and safer means of mineral resource extraction.

The evolution of federal systems has had a profound impact on the assignment and management of mineral resources. In the early stages of federal experiments, most constitutions were either silent on the issue of management of mineral resources or expressly delegated such matters to the sub-national government.³¹⁴ There are several reasons for assigning the management of mineral

308 Haysom and Kane at supra note 84; Sujit Choudhry and Richard Stacey at supra note 229; Grant Bishop & Anwar Shah at supra note 84; Bianca Sarbu at supra note 137

³⁰⁹ Ibid

³¹⁰ Ibid

³¹¹ Ibid

³¹² Ibid

³¹³ Ibid

³¹⁴ Ibid, George Anderson, at supra note 84

resources to subnational governments. Federations adopted such a trend mainly because the subnational governments maintained their claim over mineral resources, communication, and transport infrastructure barriers; lacked awareness of the existence of mineral resources; and limited the economic and environmental importance of the sector.³¹⁵ For instance, in Canada, Argentina, and the US, the subnational government has extensive power in the management of the development of mineral resources.³¹⁶ Later, with the change in the above-mentioned barriers, the federal government, at least in most cases, started to push for management power.³¹⁷ However, in an unprecedented manner, the federal constitutions adopted after the second half of the 20th century are explicit in providing management power over the development of mineral resources, which is shared between the central and subnational governments.³¹⁸ As noted hereunder, there are several reasons for such development, including increasing awareness of the economic, environmental, and social impacts of mineral extraction.

As noted above, the management of mineral resources in federal systems reflects the complex interplay between federal and subnational governments. The relationship between the two constantly evolves with a continuous increase in the multifaceted economic, social, and environmental impacts of the extraction of mineral resources. Federal governments often advocate for playing an active role in managing vital mineral resources, as this involvement is essential for ensuring efficiency, coordination, and uniformity across the federation.³¹⁹ Conversely, subnational governments emphasize local stewardship, arguing that their involvement is essential for addressing localized concerns and promoting sustainable practices.³²⁰ Accordingly, federal systems, in line with such development, attempt to strike the right balance that takes into account the specific economic, environmental, and social contexts, as well as the distribution of powers and resources within the federation. Classical federations modified their assignment of

³¹⁵ Kodizie Kwesike Chignons Achelous, *supra* note 232; Sujit Choudhry and Richard Stacey at *supra* note 229.

³¹⁶ *Ibid* the Canadian Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (Can.). Article 92; Australian Constitution Act 1900 (Cth) (Austl.). U.S. Const. (United States). In Australia, the Australian Constitution does not explicitly mention the issue, as noted here in under, such omission lead to the development shared resource management. Moreover, the U.S. Constitution doesn't initially address the issue. However, the Tenth Amendment which granted residual power to the states allowed the later to have authority over resources. However, through time the center started to obtain important powers.

³¹⁷ *Ibid*

³¹⁸ *Ibid*; Constitution of the Federal Republic of Nigeria 1999 Section 39

³¹⁹ Haysom and Kane at *supra* note 84; George Anderson, at *supra* note 84

³²⁰ *Ibid* For instance, countries such as Brazil, Mexico, Nigeria, Russia, and Venezuela federal governments acting as primary managers of their mining sectors.

management power in a manner that recognized the active role of the central government in the management of mineral resources. Moreover, emerging federations, which favored management structures that gave the central government a primary role, are acknowledging the growing importance of subnational governments in the management of mineral resources.³²¹ These approaches demonstrate the evolving tendencies that affect the role of either level of government in the management of mineral resources.³²²

Advancements in science and technology have also have profoundly impacted the assignment of management of mineral resources, as it changes the resources and mining areas that will be subjected to extraction. Technological advancements such as deep-sea mining, hydraulic fracturing (fracking), and automated drilling, have enhanced the capacity of mining companies to extract mineral resources faster, safer, and more efficiently in places and at depths that would have been impossible.³²³ The extraction of mineral resources in areas that were formerly considered impossible has called for a debate as to the role of the central and subnational governments. The ability to extract minerals in new areas has raised questions about which level of government should manage these resources. In many cases, the management of resources outside traditional mining areas has ignited controversy between central and subnational governments. For instance, in Australia, Canada, and Nigeria, the federal and regional governments, through a political settlement, agreed to accommodate the interests of the constituent units adjacent to the offshore zone while acknowledging the demands of the federal government.³²⁴ These agreements often involve revenue-sharing mechanisms and joint oversight frameworks to ensure equitable distribution of benefits. In emerging federations, technological advancements have led to a more significant role for the federal government in the mining sector.³²⁵ This shift reflects the need for centralized coordination to address the environmental, social, and economic challenges associated with resource extraction. However, it also raises concerns about the autonomy of subnational governments and their ability to address local needs.

³²¹ Ibid; see the Venezuela (Bolivarian Republic of) 1999 (rev. 2009) constitution, Article 156.16; Constitution of the Federal Republic of Nigeria 1999 Section 39

³²² Ibid

³²³ Ibid.; Kodizie Kwesike Chignons Achelous, *supra* note 232; Sujit Choudhry and Richard Stacey at *supra* note 229.

³²⁴ George Anderson, at *supra* note 84

³²⁵ Ibid

2.4.2.4.PRACTICES IN THE ASSIGNMENT OF MANAGEMENT POWERS IN FEDERAL SYTEMS

The “management of the natural resource” is explicitly addressed only in a few constitutions.³²⁶ On most occasions, constitutional drafters use all-encompassing terms as to the institution that regulates the management of the industry. However, these constitutions also show significant differences concerning which aspects of management are included in the constitutional text and the level of detail or specificity with which management authority is conferred.³²⁷ There are also a few constitutions in which one cannot find reference to the management of natural resources. The main reason for the lack of reference in the constitutional text is that the phrase denotes different activities that evolve constantly over time.³²⁸ Despite this difficulty, constitutional approaches to the management of mineral resources in federal democracies can be categorized into three models: single, split, and joint management.

Single management structures vest the management of mineral resources exclusively with one level of government, either central or state governments.³²⁹ In these federations, constitutions avoid any kind of ambiguity regarding the level of government that manages the mining sector, normally by taking a broad-brush approach that generally assigns activities to the government.³³⁰ The level of government that holds the power to manage the development of mineral resources exercises extensive power over the extraction of mineral resources. However, it is difficult to find a federation in which the management of mineral resources is vested solely in the hands of subnational governments.³³¹

The practices of these federal systems suggest two trends. In developing or emerging federations, it is common for the federal government to have strong control over the development of mineral resources.³³² In Brazil, Mexico, Nigeria, Russia, and Venezuela, the states have very limited powers regarding the management of the industry.³³³ The central government's strong involvement

326 See the Constitution of Iraq, 2005, Article 112, which provides that ‘the federal government, with the producing governorates and regional governments, shall undertake the management of natural resources, oil, and gas’.

327 Sujit Choudhry and Richard Stacey at supra note 229

328 Ibid

329 Ibid

330 See article 27 of Constitution of Mexico, 1917, and Article 177.

331 Ibid

332 George Anderson, at supra note 84

333 Ibid

is justified based on its relative expertise, technical capacity, and coordination capability in managing mineral resources, which have national, economic, political, environmental, and social importance. However, the concentration of power in the hands of the central government is not advised, as it may lead to the neglect of local concerns over mining operations, such as environmental degradation, social conditions, and local content issues.³³⁴ On the other hand, in most classical federations, it is either part of the residual power of the state or delegated expressly to the sub-national government. For instance, in Canada, Argentina, Australia, and the US, the states actively regulate the extraction of mineral resources. However, the devolution of full management power to subnational governments is not advised, especially in developing countries, as it might encourage ‘race-to-the-bottom policies.’³³⁵

Split management systems are known for their allocation of specific management tasks to institutions at different levels of the government.³³⁶ Recently, with the increase in their ability to regulate mineral resource extraction, resource-producing regions have sought greater say in the management power over the extraction of mineral resources in a manner that enables them to exert more comprehensive control over economic, social, and environmental effects.³³⁷ However, there are compelling reasons that require the central government to play a strong role in their management.³³⁸ As noted above, Central governments have the necessary expertise, technical capacity, and coordination capability to address the management of mineral resources that are of national importance.³³⁹ Accordingly, there are federal systems that divide the management of mineral resources allocate specific aspects of power over mineral resources to the central and subnational governments.³⁴⁰ It assigns important powers that require a high level of expertise, technical capacity, and coordination capability to the central government.³⁴¹ However, it decentralizes and assigns local powers that can be easily administered by the subnational government.³⁴² For example, in South Africa, the provincial government plays a leading role in

³³⁴Haysom and Kane at supra note 84; Sujit Choudhry and Richard Stacey at supra note 229

³³⁵ Ibid

³³⁶ Ibid

³³⁷ Ibid

³³⁸ Ibid

³³⁹ Ibid

³⁴⁰ Ibid

³⁴¹ Ibid

³⁴² Ibid

the development of the early stages of mineral extraction, whereas the national government has control over the later stages.³⁴³

A joint management structure refers to federal systems that assign the management of mineral extraction to central and subnational governments. It refers to the division of power that promotes the active involvement of both federal and state governments. It is introduced in response to the unique issues that arise in the management of mineral resources, including the need for cooperation, limitations in making a clear division of power, uniformity in enforcement, and avoiding conflict of jurisdiction. As noted above, the extraction of mineral resources covers a diverse area that requires active involvement and cooperation of both levels of government in the management of mineral resources. The introduction of a joint management structure is essential to address the need for active involvement and cooperation of both levels of government to address the diverse issues that arise from the nature of the extraction of mineral resources.³⁴⁴ Moreover, it avoids the difficulty from a technical and efficiency perspective, specifically addressing the division of power in the constitutional text between the federal government and the states. Furthermore, it is essential to establish national standards administered by the central government, while subnational governments also play a role in the management activities that impact their regions.³⁴⁵ In addition, it was introduced to avoid potential confrontations and conflicts that may arise from the overlap between the powers of the federal government and the states.³⁴⁶ In order to address such limitations, federal systems introduce joint management structures that balance the interests of the central government and subnational governments.³⁴⁷ However, it should be noted that there are relatively few instances of truly "joint" management, as one level of government takes the lead in mineral resource management.³⁴⁸ Moreover, it is difficult to administer and can lead to confrontations and conflicts between central and state governments. Thus, it is advised to have a clear legal framework that sets out the power of either level of government, how

³⁴³ *ibid*

³⁴⁴ *ibid*

³⁴⁵ *ibid*

³⁴⁶ *ibid*

³⁴⁷ Sujit Choudhry and Richard Stacey at *supra* note 229; Kodizie Kwesike and Chignons Achelous at *supra* note 322

³⁴⁸ George Anderson, at *supra* note 84, For example, in Canada, offshore resources are managed through joint federal-provincial agreements, while in Australia, mineral resources are governed by a combination of federal and state regulations.

responsibilities are shared, a procedure to solve disputes that arise in joint management, and strong intergovernmental relations that promote active coordination and cooperation.³⁴⁹

2.4.2.5. MANAGEMENT OF MINERAL RESOURCE AND SUSTAINABLE MINING IN FEDERAL SYSTEMS

Mining is a complex and multi-stage process with economic, environmental, and social impacts in each phase. International best practices stress, among other things, the importance of government management of the mining sector to maximize benefits and minimize harm. There has been a growing recognition of the role of the management power of the government in ensuring that the extraction of mineral resources generates maximum social and economic benefits with limited social and environmental impacts during various stages of mineral extraction. Moreover, efforts have been made to develop international best practices that allow the extraction of mineral resources without affecting environmental integrity or social wellbeing.³⁵⁰ The experience of the countries reveals that there have been several attempts to reform the management of the extractive sector. However, significant differences exist in the organization and performance of management bodies.³⁵¹

The idea of management of the economic, environmental, and social impact of mining operations far exceeds the development of the idea of sustainable mining. With the emergence of the idea of sustainable mining, the aforementioned developments are further considered in accordance with the division of power, which is a defining characteristic of such systems. Federal systems, to a different degree, attempt to operationalize the idea of sustainable mining in the management of mineral resources.³⁵² Federal systems, depending on division power, try to create a management structure that operationalizes international best practices for sustainable mining in their mining sectors. Classical federations, which had for long used their management power over mineral resources to address social, environmental, and economic issues that arise in the extraction of mineral resources, are increasingly incorporating sustainable development goals into their

³⁴⁹ Ibid

³⁵⁰ Haysom and Kane at supra note 84; Sujit Choudhry et al at supra note 154; George Anderson, at supra note 84

³⁵¹ Ibid

³⁵² Deb, Mihir, and Sanjib Chandra Sarkar, at supra note 76; Fuisz-Kehrbach, Sonja-Katrin at supra note 76.

operations.³⁵³ Moreover, in emerging federations, sustainable development has become a primary consideration in the management of the mining sector.³⁵⁴ Even though the experience among federations varied, federations attempted to create an effective management practice that strikes a balance between economic advantages and environmental and social well-being, which is necessary for realizing sustainable mining practice.

Federations, to varying degrees, attempt to ensure the economic viability of the mining sector at different stages of mining by regulating its economic contribution, its impact on the macroeconomy, and also the utilization of its procedures. It is common to see federal systems that aimed enhances the economic contribution of the mining sector, by regulating nature of resource extraction, fostering economic linkages, and making development contributions.³⁵⁵ Federal systems, in most cases control the extraction of mineral resources by regulating the initiation of extraction, efficiency of extraction, and full development of mining fields. Furthermore, it governs backward and forward linkages between the mining sector and the larger economy, which are critical for ensuring sustainable growth.³⁵⁶ Additionally, it regulates development contributions in the mining sector, extending beyond the support of core mining operations, and creates spillover benefits that encourage wider economic activity. Moreover, federal systems use legal and institutional frameworks to regulate the macroeconomic and political challenges that impact the mining sector on the economy.³⁵⁷ In addition, in line with the development in other systems, federal systems have also stated to regulate the utilization of the proceeds from mining into sustainable alternatives.³⁵⁸

³⁵³ Elmira Tajvidi, et al. "A review of studies on sustainable development in mining life cycle." *J. Cleaner Production* 229, 2019: 213-231; Jo-Anne, et al "Regulation of resource-based development: governance challenges and responses in mining regions of Australia." *Environment and Planning C: Government and policy* 31, no. 4 (2013): 585-602.

³⁵⁴ Wokocho, R. Aduche. *Resource control in Nigeria: the legal and regulatory challenges and implications* Civinics Publishers (Nig.), 2005; Sorensen, Paul. "Mining in South Africa: a mature industry?" *International journal of Environmental studies* 68, no. 5, 2011: 625-649; Zvarivadza, Tawanda. "Sustainability in the mining industry: An evaluation of the National Planning Commission's diagnostic overview." *Resources Policy* 56, 2018: 70-77; Ihase S. O Omoijuanfo, Michael U. Ukponu & Zacchaeus O. Opafunso (Mineral Extraction and Governance in the Nigerian Mining Industry: An Examination of Regulatory Conflicts Amongst Nigeria's Three Tiers of Government. *The Journal of Sustainable Development, Law and Policy*. Vol. 15:1., 2024: 26-80

³⁵⁵ Ibid; Söderholm, Patrik, and Nanna Svahn. "Mining, regional development and benefit-sharing in developed countries." *Resources Policy* 45, 2015: 78-91.

³⁵⁶ Ibid

³⁵⁷ Ibid

³⁵⁸ Ibid; Tina Hunter, at supra note 75

Furthermore, it seeks to promote environmental sustainability within the mining industry by implementing an array of both traditional and nontraditional environmental regulations.³⁵⁹ It implements various traditional environmental regulations to ensure environmental sustainability, such as off-limit mining operations, impact assessment and management plans, environmental monitoring, and supervision. Furthermore, it uses non-traditional forms of regulation, performance standards, and economic instruments to control the environmental effects of mineral extraction by evaluating the sector's environmental performance.³⁶⁰

Furthermore, it attempts to ensure social sustainability in the mining sector through measures aimed at mitigating negative social impacts while maximizing the benefits for local communities. It enforces a variety of strategies, such as impact assessments, community development plans, compensation for land disposition, and health and safety standards.³⁶¹

2.5. THE ECONOMIC BENEFIT FROM THE EXTRACTION OF MINERAL RESOURCE AND FEDERALISM

2.5.1. CONCEPTUALIZING THE REGULATION OF THE ECONOMIC BENEFIT FROM THE EXTRACTION OF MINERAL RESOURCES

The extraction of minerals, as noted above, presents complex economic challenges and opportunities in any nation.³⁶² Governments play a crucial role in navigating this complex landscape. As noted above, it employs its regulatory and fiscal powers to maximize economic and social benefits while addressing adverse environmental and social consequences.³⁶³ Fiscal power, particularly tax regimes, play an important role in ensuring that the mining sector generates optimal

³⁵⁹ Moomen, Abdul-Wadood, supra note 30; Mohanty, Nilmadhab, and Aarushi Goyal, at supra note 35; Jain, Ravi. Environmental impact of mining and mineral processing: management, monitoring, and auditing strategies. Butterworth-Heinemann, 2015;

³⁶⁰ Ibid

³⁶¹ Ibid; Moffat, Kieren, and Airong Zhang. "The paths to social license to operate: An integrative model explaining community acceptance of mining." Resources policy 39,2014: 61-70

³⁶² Uyanga Gankhuyag et al, at supra note 13. Thomas Akabzaa at supra note 67, Jeffrey D. Sachs and Andrew M. Warner, "The curse of natural resources," European Economic Review 45, no. 4-6, 2001: 827-838; Roderick G. Eggert at supra note 30.

³⁶³ Ibid; Tina Hunter, supra note 55, The government uses its legislative and management powers over mineral resources to regulate the economic, social, and environmental aspects of the mining sector, as discussed in the previous section. Hence, our discussion mainly focuses on the government's use of fiscal power to regulate the manufacturing sector.

economic benefits. to this end it is used to influence the nature of the resource extraction, collect economic benefits, environmental and social impact of mining operations.³⁶⁴

Taxing power is a multifaceted tool that governments use to promote responsible mineral resource extraction. It can be used to influence the nature of resource exploitation, stimulate economic linkages, and facilitate the development of mining infrastructure.³⁶⁵ The government can use its Tax Regime to stimulate efficient and responsible mineral resource extraction by providing cuts, waivers, exemptions, accelerated depreciation allowances, investment guarantees, loss carryforwards, and performance-based tax structures. Governments can also use Tax Regime to strengthen the economic linkages of the mining sector through tax breaks and exemptions. Furthermore, governments can use Tax Regime to encourage and facilitate the development of critical infrastructure for the mining industry using tax breaks, exemptions, and preferential treatment.³⁶⁶

The extraction of minerals generates significant economic rent, prompting the government to use Tax Regime to capture a portion of these benefits for public welfare.³⁶⁷ Governments use a wide variety of tax and non- tax instruments to collect economic rent from mineral development.³⁶⁸

³⁶⁴ Ibid., Shah, Anwar. "Non-renewable resource revenue funds: critical issues in design and management." In *Taxing Choices for Managing Natural Resources, the Environment, and Global Climate Change: Fiscal Systems Reform Perspectives*, Cham: Springer International Publishing, 2023:153-170; Henstridge, Mark, and Alan Roe. "The Macroeconomic Management of Natural Resources." *Extractive Industries: The Management of Resources as a Driver of Sustainable Development*, 2018: 161; Van der Ploeg, Frederick, and Anthony J. Venables. "Short-versus Long-Term Considerations." *Extractive Industries: The Management of Resources as a Driver of Sustainable Development*, 2018: 179. the success of mining companies is determined by several factors, including the nature of mineral deposits, technologies used, markets for minerals, business environment, and legal framework.

³⁶⁵ Bauer, Andrew, and Uyanga Gankhuyag. "Natural resource taxation and revenue sharing in Asia," *OECD Fiscal Federalism Studies: Local Public Finance and Capacity Building in Asia Issues and Challenges*, 2020: 155; McMahon, Gary, and Susana Moreira. "The contribution of the mining sector to socioeconomic and human development," 2014: 1-45; Otto, James M. "The taxation of extractive industries." *Extractive Industries: The Management of Resources as a Driver of Sustainable Development*, 2017: 275-297. `

³⁶⁶ Ibid

³⁶⁷ Ibid., James M. Otto *Mining Taxation in Developing Countries* UNCTAD, July 2000; Nazneen H. Barma & Kai Kaiser & Tuan Minh Le & Lorena Viñuela. "Rents to Riches? The Political Economy of Natural Resource-led Development," *World Bank Publications*, The World Bank, number 2381, June. 2012, The government justifies its claim of economic rent by arguing that the extraction of minerals depletes national wealth. However, the ability of the government to capture the economic rent without affecting the efficient extraction of minerals has been subjected to ongoing debate. Otto correctly noted that the academic literature demonstrates the non-distortionary nature of resource rent tax, which views economic rent as a surplus that investors can remove without changing their behavior. The practice suggests to the contrary, as resource taxes on economic rent can distort, to varying degrees, all sorts of decisions regarding the development of nonrenewable resources.

³⁶⁸ Boadway, Robin, and Michael Keen. "Rent taxes and royalties in designing fiscal regimes for nonrenewable resources." In *Handbook on the economics of natural resources*, Edward Elgar Publishing, 2015: 97-139.

Revenue from the extraction of mineral resources is justified based on ownership claims, efficiency, and equity grounds, as well as the adverse socio-economic impact of the mining sector.³⁶⁹ It should be noted here that revenues generated from the mining sector depend on the government's ability to design transparent, stable, and attractive tax regimes and institutions that are specifically tailored to the mining sector's distinctive challenges and opportunities.³⁷⁰ The design of the tax regime involves identifying appropriate tax categories, and establishing suitable tax thresholds and bases.

The primary responsibility of policymakers is to determine the optimal tax categories.³⁷¹ The optimal design of mining tax regimes requires careful consideration of sector-specific characteristics, including the presence of economic rent, non-renewable nature of resources, capital intensity, inherent risks, and location-specific factors.³⁷² These unique attributes often necessitate the implementation of specialized tax legislation for mining operations, which is distinct from ordinary business transactions.³⁷³ Moreover, extensive academic research has provided valuable insights into the appropriate tax designs that need to be implemented under different circumstances.³⁷⁴ Accordingly, governments, depending on their unique circumstances, made a policy decision to employ a diverse array of taxation tools, including but not limited to mineral royalties, corporate income tax, resource rent tax, and various fees and levies, to generate revenue from natural resource extraction, both *ex ante* and *ex post*.³⁷⁵

³⁶⁹ Kenneth J. McKenzie Fiscal at supra note 223,

³⁷⁰ Ibid

³⁷¹ Readhead, A., Tarus, V., Lassourd, T., Madzivanyika, E., & Schlenker, B. The future of resource taxation: policy ideas to mobilize mining revenues International Institute for Sustainable Development and African Tax Administration Forum, 2023, <https://www.iisd.org/publications/guide/future-of-resource-taxation> .

³⁷² Daniel, Philip, Michael Keen, Artur Świstak, and Victor Thuronyi, eds. International taxation and the extractive industries. Taylor & Francis, 2016; International Monetary Fund, "Fiscal Regimes for Extractive Industries: Design and Implementation." 2012. Several characteristics set the mining industry apart, including economic rent, scarce or irreplaceable resources, capital intensity and risk, payment to the mineral owner, regulatory oversight of taxpayer conduct, location-specific resource considerations, uncertainty, and unequal information access.

³⁷³ Kenneth J. McKenzie at supra note 77 and James M. Otto at supra note 357

³⁷⁴ Ibid

³⁷⁵ Ibid Baunsgaard, T. A primer on mineral taxation, IMF Working Paper WP/01/139, 2001. Depending on the jurisdiction under examination, the mining industry is subject to a combination of mineral royalties, income tax, resource rental, and other fees. In addition to this, in some jurisdictions, especially in Africa, it is also subject to government equity, bonus production sharing, and other contract-based arrangements.

The policy makers' secondary responsibility is to determine the appropriate level and method for calculating each type of tax.³⁷⁶ This includes determining the optimal tax rates, bases, and structures that balance revenue generation and investment attractiveness.³⁷⁷ The best practices in mining taxation have emerged from extensive research and international experience, and provide valuable insights into the selection of the most effective tax rates, bases, and structures.³⁷⁸ However, practices across countries vary significantly due to differences in the mining industry, including geological potential, stage of sector development, administrative capacity, and broader economic and political considerations.³⁷⁹

Moreover, the government strategically uses taxing power to shape and regulate the mining sector's social and environmental challenges through exemptions and incentives.³⁸⁰ This includes offering tax exemptions or incentives to companies that surpass environmental standards, engage in community development, or adopt sustainable mining practices.

2.5.2. THE REGULATION OF THE ECONOMIC BENEFIT FROM THE EXTRACTION OF MINERAL RESOURCES IN FEDERAL SYSTEMS

Unitary systems place the above-mentioned revenue raising power over the economic benefit from the extraction of mineral resources in the hands of the central government.³⁸¹ However, constitutional designers in federal systems need to address these issues while upholding the fundamental principle of federalism: the division of powers.³⁸² In fact, as noted above, the regulation of the revenue raising power over mineral resources has been one of the tradition issues

³⁷⁶ McLure, Charles E. "The assignment of oil tax revenue." *Fiscal Policy Formulation and Implementation in Oil-Producing Countries*, Washington, DC: International Monetary Fund 2003: 204-15.; Qiao, B., & Shah, A. Revenue sharing from natural resources: principles and practices In *Fiscal Systems Reform Perspectives on Managing Natural Resources, Environment, and Climate Change*, Springer, 2023: 121–151

³⁷⁷ *Ibid.* Boadway, R., & Keen, M. at supra note 368;

³⁷⁸ *Ibid*

³⁷⁹ *Ibid*

³⁸⁰ *Ibid*

³⁸¹ Qiao, B., & Shah, A. at supra note 375

³⁸² Arellano-Yanguas, et al. extractive industries, revenue allocation, and local politics. No. 2014-4. UNRISD Working Paper, 2014:1-8; Martinez-Vazquez, J. The impact of fiscal decentralization: issues in theory and challenges in practice Asian Development Bank Economics Working Paper Series, No. 254, 2011: 1-11

in federal constitutional design.³⁸³ Initially government focused on using revenue raising power for the collection and utilization of economic benefit from the mining sector. Over time, the focus has shifted from generating financial benefits through extraction to a broader role in regulating the impacts of mineral resource extraction. Modern federal systems, regardless of their approach to decentralization of fiscal powers, in line with the above development as to the role of fiscal power in the extraction of mineral resources, utilize their revenue raising power to varying degrees to impact the outcomes of mining operations. It utilized revenue raising power, to promote efficient extraction of mineral resources, collect economic benefits, influence the environmental and social outcomes of mining operations.³⁸⁴

2.5.3. THE ASSIGNMENT OF REVENUE FROM MINERAL RESOURCES IN FEDERAL SYSTEMS

The assignment of revenue from natural resource development is a major challenge in federal constitutional design. The critical component of the design is the balance between centralization and decentralization. In general, the assignment of revenue power is made by taking several considerations that suggest the need for either centralizing or decentralizing revenue sources. These considerations include economic efficiency, equity, need, and administrative feasibility.³⁸⁵ Moreover, there are arguments in support of and opposition to the power of either level of government to raise revenue from the extraction of mineral resources. Support for the predominant role of the central government is based on economic theories, which base its claim on efficiency and equity grounds. On the other hand, supporters of the active role of the subnational government in revenue generation base their claims on economic and political grounds.³⁸⁶

The normative argument in support of the dominant role of the central government in the assignment of revenue from the extraction of mineral resources is based on economic theories that stress the potential efficiency and equity considerations that need to be taken into account.³⁸⁷ It

³⁸³ Qiao, B., & Shah, A at supra note 375; McLure, Charles E. at supra note 375; Bird, R.M. Subnational Taxation in Developing Countries: A Review of the Literature World Bank Policy Research Working Paper No. 5450, 2010; Brosio, G. Oil revenue and fiscal federalism In J. M. Davis, R. Ossowski, et al (Eds.), Fiscal Policy Formulation and Implementation in Oil-Producing Countries, 2003 :273-293.

³⁸⁴ Uyanga Gankhuyag at supra note 13

³⁸⁵ Kenneth J. McKenzie, at supra note 77; Robin Broadway and Michael Keen at supra note 68

³⁸⁶ Ibid

³⁸⁷ George Anderson, at supra note 84; Roy Bahl and Bayar Tumennasan, supra note 138. James Otto at supra note 364; Accordingly, most federations, with the notable exception of Mexico, provide that the revenue from the extraction of evenly distributed and economically less important resources is assigned to the local government.

argues that the federal government is in a better position to efficiently determine, collect, and administer revenue from the extraction of mineral resources and also address the macroeconomic and microeconomic impacts of mineral extraction.³⁸⁸ Moreover, it highlights how the decentralization of revenue-raising powers impacts the quality of public services and taxes at the subnational level, which results in inefficiency and induces firms and individuals to migrate.³⁸⁹

It also argues that the federal government's dominant role is justified based on equity grounds: to avoid fiscal imbalance and misspending.³⁹⁰ The extraction of mineral resources creates a fiscal imbalance between resource-bearing and non-resource-bearing subnational governments.³⁹¹ Even in the absence of benefits from the extraction of mineral resources, the resource-producing state will have a better per-capita revenue-raising capacity and lower expenditure responsibility. The assignment of revenue from the extraction of mineral resources to the subnational government will intensify the fiscal imbalance between resource-bearing and non-barring regions.³⁹² The difference in revenue-raising capacity affects the provision of comparable public services at a comparable tax, which will lead to inefficiencies and inequities, encourage unhealthy fiscal competition, and undermine national stability.³⁹³ Thus, it is also advised to assign power to the central government, which will reduce fiscal imbalance and allow for some redistribution.³⁹⁴

The expenditure of substantial revenue from the extraction of mineral resources requires a strong spending capacity. However, subnational governments, especially in most developing countries, lack the capacity to absorb additional revenue generated from the extraction of mineral resources. Moreover, there is a high possibility, especially in developing countries, of local elites capturing

388 Ibid

³⁸⁹ Ehtisham Ahmad and Eric Morru, *supra* note 65, The reduction in tax and the improvement in public service delivery encourage or induce firms and individuals to migrate to take advantage of the tax benefits, leading to inefficient tax competition between resource- and non-resource-bearing states. However, the applicability of this argument is subject to debate. First, there is limited data that shows the migration of businesses and individuals to take advantage of the tax cut. Moreover, this argument is irrelevant to most African countries, where natural resources are frequently located in very remote, and sometimes even inhospitable, areas.

³⁹⁰ Roy Bahl and Bayar Tumennasan, *supra* note 138

³⁹¹ George Anderson, *at supra* note 84

³⁹² Ibid However, the affordability and effectiveness of such an arrangement are doubtful, as it is hard to come up with an arrangement that addresses all the challenges.

³⁹³ Ibid

³⁹⁴ Lorena Viñuela et al., *supra* note 146

revenue, which causes misspending. The assignment of revenue from the extraction of mineral resources to the central government is a solution that avoids misspending and corruption.³⁹⁵

On the other hand, political and economic arguments support the active role of subnational governments in raising revenue from the extraction of mineral resources, including the local effect of mineral extraction, the non-mobile nature of the business, the ownership claims of the local government, the need for additional investment and maintain national unity.³⁹⁶ Many of the impacts of mineral resource extraction are felt in producing regions. Producing regions need to be compensated, and these impacts need to be internalized in taxes and fees.³⁹⁷ Extraction of mineral resources is not a mobile economic activity. Local governments, especially in cases where mineral resources are relatively small, can effectively collect revenue.³⁹⁸ Diverse groups maintain different levels of ownership claims regarding mineral resources. The assignment of revenue addresses claims against mineral resources.³⁹⁹ Furthermore, the extraction of mineral resources forces the producing region to make investments to adjust to additional pressure on local infrastructure.⁴⁰⁰ The assignment of some level of refund revenue is essential to address additional costs and investments.⁴⁰¹ In addition, the subnational government's claim over revenue from the extraction of mineral resources is seen in its ability to maintain national unity.⁴⁰²

2.5.4. FACTORS INFLUENCING THE ASSIGNMENT OF THE REVENUE FROM MINERAL RESOURCE EXTRACTION

As noted above, the assignment of revenue from mineral resource extraction is influenced by different economic principles.⁴⁰³ Despite the recommendations of the normative literature, the examination of federal systems reveals that the actual allocation of revenue for the extraction of mineral resources partially conforms to normative arguments. The assignment of revenue from

395 Giorgio Brosio and Raju Jan Singh supra note 154, However, some argue that the problem is not only limited to the subnational government; rather, the central government is not immune from the issue. The latter view is supported by the experience of developing and developed federations. For instance, the centralization of revenue power in the Nigerian federation failed to avoid misspending and corruption in the sector.

³⁹⁶ Roy Bahl and Bayar Tumennasan, supra note 138

³⁹⁷ Ibid, Giorgio Brosio and Raju Jan Singh, supra note 154

³⁹⁸ This argument loses its strength in the case of large-scale mining, especially in developing countries that lack the capacity and technology to administer the sector.

³⁹⁹ Ibid

400 George Anderson, supra note 84

⁴⁰¹ Ibid

⁴⁰² Ibid

403 Peter D. Cameron et al at supra note 122 The major exception to this is the United States and Canada, which provide extensive revenue-raising power to the subnational governments.

mineral resource extraction in several federal systems is influenced by political and economic considerations.⁴⁰⁴ Kenneth J. McKenzie noted that philosophical and technical arguments about the assignment of revenue from mineral resource extraction often matter less than the political culture and traditions of the federation.⁴⁰⁵ The assignment of revenue from mineral resource extraction is the result of political bargaining and historical legacies, including formation of the federation, the size of natural resource endowments, conflict resolution mechanism and the feelings of community ownership over local resources.⁴⁰⁶

The evolution of the federal system is one of the most essential factors in determining the assignment of revenue-raising powers. As noted above, in the early stages of the classical federations, such as Canada, Argentina, Australia, and the US, the subnational government had extensive revenue-raising power in the extraction of mineral resources.⁴⁰⁷ However, over time, the federal government began to exercise wide revenue-raising power. On the other hand, the emerging constitutions adopted after the second half of the 20th century, with the increase in the international price of commodities, granted the central government extensive revenue-raising power. For instance, in Mexico, Nigeria, Russia, and Venezuela, the federal government has significant revenue-raising power.⁴⁰⁸ In addition, the return to democracy and devolution, especially in the 1990s, paved the way for the introduction of constitutions that tend to decentralize the allocation of revenue from the extraction of mineral resources.⁴⁰⁹ However, recent efforts have been made to reassign revenue from the extraction of mineral resources to the central government. These movements are inspired by an increase in the international prices of commodities, which leads to an increase in economic rent. Moreover, federal systems also have introduced new tax instruments without reducing the share of subnational governments. Argentina, Brazil, Bolivia, Canada, and Colombia are good examples.⁴¹⁰

404 Ibid

405 Kenneth J. McKenzie, at supra note 77; James Otto M. Otto, Fiscal Decentralization and Mining Taxation, the World Bank Group Mining Department, March 2001: 1-15

406 Haysom and Kane at supra note 84; Roy Bahl and Bayar Tumennasan, supra note 138

407 Ibid

408 George R. M. Anderson, supra note 12

409 Giorgio Brosio and Raju Jan Singh supra note 154

410 Haysom and Kane at supra note 84; Roy Bahl and Bayar Tumennasan, supra note 138

The assignment of revenue from the extraction of mineral resources is not usually very contentious in federations, where it constitutes only a small part of the total government revenues.⁴¹¹ On the other hand, the claim over revenue from the extraction of mineral resources will increase as rents from natural resources account for a large share of total government revenues. The intensity of the claim substantially increases in cases in which mineral resources are unevenly distributed across the federation. A good example is the Nigerian federation. The concentration of natural resource endowment in the Niger Delta region, which constitutes a significant share of the national GDP, has created conflict between the central and resource-rich subnational governments that seek to enhance their share of economic rents.⁴¹² The efforts of resource-bearing states have been paid off as their share of the extraction of natural resources is enhanced. Despite their enhanced share of the rent from the extraction of natural resources, the people residing in resource-rich regions are dissatisfied with the existing arrangement, as they do not meet their expectations, leading to serious political and social unrest.⁴¹³

The extraction of mineral resources plays a role in causing, prolonging, and resolving conflicts that call for government response.⁴¹⁴ The main issue at the heart of most mineral resource disputes is the sharing of revenue from minerals.⁴¹⁵ Dispute over mineral resources in itself, or with other diversity markers, requires a government policy response.⁴¹⁶ The division of revenues from the extraction of mineral resources can be used to avoid conflicts.⁴¹⁷ The constitutional division of revenue-raising power is critical for finding an overall consensus on conflicts regarding the division of revenue from mineral resources.⁴¹⁸ For instance, in the CPA, the division of revenue between warring parties was a critical element in the peace agreement.

Modern states are characterized by diversity expressed in terms of ethnolinguistic and religious differences, and regional economic inequality. The diversity of the ground, which differs in nature, scope, and relevance, has a direct impact on the institutional designs that are needed to

411 Ibid

412 Ibid

413 Ibid

414 Abiodun Alao, *Natural Resources and Conflict in Africa: The Endowment Tragedy*, University of Rochester Press, 2007.

415 Ibid,

416 Oli Brown and Michael Keating at supra note 71

417 Roy Bahl and Bayar Tumennasan, supra note 138

418 Ibid

accommodate them.⁴¹⁹ Moreover, in limited instances, one can find a single diversity marker as the sole mobilizing factor for political affection. In most cases, one can find multiple diversity markers can be found both collectively and in a reinforced manner. Diverse groups maintain ownership claims to a special share of revenue from the extraction of mineral resources. Their claim is highly dependent on the constitutional provision of ownership of mineral resources, regional identities, and devolution of power.⁴²⁰ The claim of benefit by any of these organs also shows a significant difference, ranging from revenue sharing to the total control of the ultimate benefit from the development of natural resources. However, the federation's response to such claims shows a significant difference, as some federal systems recognized such claims, while others did not. In federations where the subnational government has ownership over mineral resources, it is common to see that they should be entitled to have a special share of revenue.⁴²¹ The assignment of revenue to the subnational government is aimed at compensating production areas for the depletion of wealth and the negative impact on their production.⁴²²

2.5.5. PRACTICE IN THE ASSIGNMENT OF REVENUE-RAISING POWER FROM MINERAL RESOURCE IN FEDERAL SYSTEMS

The assignment of revenue-raising power in federal systems, particularly concerning mineral resources, is a complex and diverse process. As previously noted, several factors influence the assignment process. Accordingly, federal systems follow different approaches to allocate revenue from the extraction of mineral resources.⁴²³ This includes assigning revenue power based on tax-by-tax sharing, tax-basis sharing, revenue sharing and Intergovernmental transfers.⁴²⁴

The assignment of separate taxes is the first way to distribute the economic benefits generated from the extraction of mineral resources. Constitutional designers can specifically assign different revenue-raising authorities to different levels of the government. In such cases, central or subnational governments are entitled to have the tax and non-tax power to collect benefits from the extraction of mineral resources.⁴²⁵ Federal systems follow different trends when assigning

⁴¹⁹ Ibid The unique features of each diversity maker have a direct impact on the institutional designs that seek to facilitate the successful accommodation of these diversity makers.

⁴²⁰ Ibid

⁴²¹ Peter D. Cameron et al at supra note 122

⁴²² Ibid

⁴²³ Roy Bahl and Bayar Tumennasan, supra note 138; Grant Bishop & Anwar Shah at supra note 84

⁴²⁴ Brosio, G. at supra note 382 Bauer, Andrew, and Uyanga Gankhuyag, at supra note 364

⁴²⁵ Qiao, B., & Shah, at supra note 375

separate taxes. For instance, Canada adopts a highly decentralized approach to natural resource taxation. Provinces have extensive jurisdiction over natural resources, encompassing mineral extraction royalties, provincial corporate income taxes, and property taxes. The federal government enforces a federal company income tax called the Goods and Services Tax (GST).⁴²⁶ India's taxation system for mineral resources is both intricate and multifaceted. The Central Government imposes a corporate income tax and a goods and services tax, which are shared with the states. State governments have jurisdiction over mineral production royalties and state VAT for certain mineral products that are not subject to GST.⁴²⁷ On the other hand, the United States has a decentralized structure that involves substantial state-level taxation of mineral resources. The federal government has jurisdiction over federal corporate income tax and federal excise tax. However, state governments levy substantial taxes such as corporate income and property taxes.⁴²⁸

Tax-based sharing is another method in which the economic benefits generated from the extractive are distributed in the federal system. Tax base sharing is rooted in the concept of concurrent taxation powers, which enables multiple levels of government to levy and collect taxes on the same taxpayer base. This strategy gives subnational governments the authority to raise revenues through supplementary tax rates, while still maintaining coordination with the national tax system.⁴²⁹ Tax-base sharing is a prominent component of many federal systems. Its application shows a significant difference.⁴³⁰ Canada employs a tax-based sharing system for corporate income tax specifically for resource businesses. The federal government is responsible for establishing the base and collecting corporate income tax, whereas provinces have the authority to impose additional corporate income tax on the same basis.⁴³¹ Tax-based sharing is applicable to both corporate and personal income taxes in the United States. Under these circumstances, the federal government determines the tax basis and collects federal income tax, whereas states have the option to impose state income taxes, often using the federal tax base as a starting point.⁴³² Switzerland utilizes a distinctive tax-base sharing system in which the federal government imposes federal income tax,

⁴²⁶ Ibid

⁴²⁷ Haysom and Kane at supra note 84; Roy Bahl and Bayar Tumennasan, supra note 138

⁴²⁸ Qiao, B., & Shah, at supra note 375; Kenneth J. McKenzie, at supra note 77

⁴²⁹ Ibid

⁴³⁰ Ibid, Boadway, R., & Flatters, F. Efficiency and Equalization Payments in a Federal System of Government: A Synthesis and Extension of Recent Results Canadian Journal of Economics, 15(4), 1982: 613-633.

⁴³¹ Lorena Viñuela et al., supra note 146; Roy Bahl and Bayar Tumennasan, supra note 281

⁴³² Ibid

while cantons have the authority to levy their own income taxes. This grants them significant autonomy in determining the tax rates and defining the tax base.⁴³³

The revenue-sharing regime for the economic benefit from the mining sector is another way of distributing the economic benefits from the extraction of mineral resources.⁴³⁴ Revenue sharing entails the allocation of collected revenues among various levels of government, usually by the central government.⁴³⁵ Revenue sharing is conducted both on the vertical lines between the central and state governments and on the horizontal lines between the state governments.⁴³⁶ Federal systems show significant differences in sharing the revenue from the extraction of mineral resources. There exist a wide range of disparities in the extent of revenues subjected to revenue sharing, rules for revenue sharing, the approach used to share the revenue, the content and nature of the formulas, determining the group of people can claim and the institutions that administer the revenue-sharing process.⁴³⁷ Each alternative has its own advantages and disadvantages that need to be properly weighed. The great variation across the federation in handling revenue sharing from the extraction of mineral resources underscores the complexity of designing effective systems that balance the competing objectives.⁴³⁸ As was already said, governments need to set up resource revenue sharing plans to meet a number of different, and sometimes competing goals that can justify the revenue sharing.⁴³⁹

Intergovernmental transfers serve as a crucial mechanism for the allocation of revenues generated from natural resources.⁴⁴⁰ The design of an intergovernmental transfers of revenue from mineral resource extraction require careful considerations of several considerations, including vertical and

⁴³³ Ibid

⁴³⁴ Bauer, Andrew, Uyanga Gankhuyag, Sofi Halling, David Manley, and Varsha Venugopal. "Natural Resource Revenue Sharing." Natural Resource Governance Institute, 2016; Beyond direct taxation or intergovernmental transfers, extractive activities share benefits in a variety of ways. These include giving priority to regions that produce natural resources when delivering social services and infrastructure, requiring companies to make in-kind payments, allowing companies to make voluntary payments to communities, directly benefiting from commodity access, and reaping nonfiscal benefits.

⁴³⁵ Ibid. For instance, in Sudan, Iraq, which is currently producing oil fields, Nigeria, and Indonesia follow this approach.

⁴³⁶ Sujit Choudhry and Richard Stacey at supra note 229

⁴³⁷ Lorena Viñuela et al., supra note 146; Roy Bahl and Bayar Tumennasan, supra note 138; Morgandi, Matteo. "Extractive Industries Revenues Distribution at the Sub-National Level." Revenue Watch Institute, June 2008, 16-36. For instance, based on resource revenue sharing systems, countries can be divided into three groups: those that treat natural resource revenues the same as other non-resource revenues, those that distribute them by derivation, and those that distribute them by indicators.

⁴³⁸ Ibid

⁴³⁹ Andrew

⁴⁴⁰ Ibid

horizontal equity, efficiency, and transparency.⁴⁴¹ Intergovernmental transfers may be categorized as either unconditional or conditional. Federal systems can opt for unconditional transfers that give subnational governments the ability to use the funds in any way they deem appropriate, taking into account their own priorities and the circumstances of their respective communities.⁴⁴² Federal systems can also implement conditional transfers to influence local spending decisions. Conditional transfers are associated with particular spending requirements or policy objectives, guaranteeing that funds are utilized for their intended purposes. However, it undermines budgetary autonomy and flexibility. In Brazil, the central government mandates that resource revenue transfers be earmarked for specific line items, thereby restricting the discretion of subnational governments in planning the expenditure of these revenues.⁴⁴³

2.5.6. THE REGULATION OF THE ECONOMIC BENEFIT FROM THE EXTRACTION OF MINERAL RESOURCE AND SUSTIANBLE MINING

The extraction of mineral resources, as noted above, generates significant economic opportunities but also poses challenges. Achieving a balance between costs and benefits is crucial to ensure sustainable development.⁴⁴⁴ Comparative analyses of various countries reveal diverse approaches to ensuring the sustainability of mining operations, with notable variations in organizational strategies and performance.⁴⁴⁵ Despite these differences, the fiscal power is essential to influence the impact of the mining sector. In particular, use revenue raising power ensure the efficient extraction of mineral resources, to collect the economic benefits from the extraction of mineral resources, and address the social and environmental impacts of mining operations.⁴⁴⁶

Federal systems, as noted above, have a long history of regulating the economic benefit from the extraction of mineral resources, a practice that predates the contemporary concept of sustainable mining. Traditionally, these systems have utilized fiscal power to regulate the economic contributions of the mining sector. However, with the evolution of the idea of sustainable mining, federal and state governments, to a different degree, have progressively adapted their fiscal power

⁴⁴¹ Bauer, Andrew, at supra note 438; Ahmad, Ehtisham, and Giorgio Brosio. "Handbook of Fiscal Federalism." Cheltenham, UK: Edward Elgar Publishing, 2006.

⁴⁴² Ibid

⁴⁴³ Ibid; Boadway and Shah, at supra note 52

⁴⁴⁴ McMahon, Gary, and Susana Moreira at supra note 364; Otto, James M. "at supra note 364.

⁴⁴⁵ Ibid

⁴⁴⁶ Ibid., the success of mining companies is determined by several factors, including the nature of mineral deposits, technologies used, markets for minerals, business environment, and legal framework.

to incorporate the idea of sustainable mining.⁴⁴⁷ Accordingly, depending on the division of revenue-raising power, federal and state governments have attempted to use revenue-raising power for regulating the economic benefits of mineral extraction. This approach allows to influence the extraction of minerals, and collect economic benefits.⁴⁴⁸ It is also used to influence the environmental and social outcomes of mining operations.

Sustainable mining fundamentally requires the efficient extraction of mineral resources to maximize economic benefits. As noted, federal systems, along with regulatory power, use fiscal power, particularly revenue-raising power, to enhance the mining sector's economic contributions. More importantly, despite the variation in the assignment of revenue-raising power, the government assigned the revenue-raising power is expected to use its tax regime in a manner that maximizes the economic contributions of the mining sector by influencing the nature of resource exploitation, stimulating economic linkages, and facilitating the development of mining infrastructure.⁴⁴⁹

Extraction of mineral resources generate significant economic rents.⁴⁵⁰ The economic impact of the mining sector relies on the state's capacity to collect financial gains from the extraction of mineral resources.⁴⁵¹ In the federal system, depending on the assignment of revenue-raising powers, governments must establish an effective legal and institutional framework that enables them to reap the benefits of the extractive sector. Accordingly, the government organ assigned with the revenue-raising power is expected to design an efficient tax regime that incorporates a wide variety of fiscal and non-fiscal instruments to collect economic rents from mineral development.⁴⁵² Moreover, in addition to the legal framework, the federal system needs to create efficient institutions that ensure a fair share of the benefits is acquired for the country.⁴⁵³

Moreover, the federal systems, in addition to the legislative power, strategically uses fiscal power to shape and regulate the mining sector's environmental and social challenges through exemptions

⁴⁴⁷ Deb, Mihir, and Sanjib Chandra Sarkar, at supra note 76; Fuisz-Kehrbach, Sonja-Katrin at supra note 76.

⁴⁴⁸ Uyanga Gankhuyag and Fabrice Gregoire at supra note 5

⁴⁴⁹ The FDRE Constitution, Article 98

⁴⁵⁰ Ibid

⁴⁵¹ Sujit Choudhry, Richard Stacey at supra note 22

⁴⁵² Boadway, Robin, and Michael Keen. "Theoretical perspectives on resource tax design." In *The taxation of petroleum and minerals*, Routledge, 2010; 29-90.

⁴⁵³ Kenneth J. McKenzie, at supra note 77

and incentives.⁴⁵⁴ This approach represents an innovative governance strategy that transforms fiscal policy from a mere revenue collection mechanism into a strategic tool for sustainable development. Federal systems use fiscal power to mitigate or, if possible, to avoid environmental externalities by using non-traditional forms of regulation. This includes offering tax exemptions or incentives to companies that surpass environmental standards, fiscal rewards for implementing advanced environmental management technologies, and engaging in environmental reclamation efforts.⁴⁵⁵ Moreover, it uses economic instruments that aim to promote social sustainability. This includes offering tax exemptions to companies that engage in corporate social responsibilities, community development, or share the benefit from the extraction of mineral resources.⁴⁵⁶

2.6. CONCLUSION

The main objective of this chapter is to provide the necessary context and analytical tools to conduct a critical evaluation of the governance of mineral resources and its intricate relationship with sustainable mining practices in Ethiopia's federal system in subsequent chapters. It began with the examination of core concepts in the governance of mineral resources within federal systems and sustainable mining practices. It unveiled complexities, contradictions, and developments in the ideas, principles, and concepts related to mineral, mining, and sustainable mining practices. Subsequently, it examined four critical issues in the governance of mineral resource within federal systems: ownership rights, legislative power, management mechanisms, and benefit sharing arrangement. The analysis shows that the success of the governance of mineral resources relies on these four interconnected components. Furthermore, it indicates that federal systems managed each of these dimensions independently based on various considerations. In line with such understanding, the chapter explored how federal systems establish clear ownership frameworks that promote efficient extraction of mineral resources. To this end, it explores the theoretical bases for the assignment of ownership of minerals, factors that influence the assignment of ownership rights, and diverse practices observed across federal jurisdictions. It revealed that the regulation of ownership of minerals in federal systems extends beyond simple legal titles. It encompasses complex layers of rights, interests, and varying legal and institutional frameworks. In addition to this, it evaluates the manner in which legislative power over mineral resources is

⁴⁵⁴ Ibid

⁴⁵⁵ Moomen, Abdul-Wadood, supra note 30; Mohanty, Nilmadhab, and Aarushi Goyal, at supra note 35

⁴⁵⁶ Ibid

administered within federal systems. It was discovered that the regulation of legislative authority over mineral resources is handled differently in different federal systems. It revealed the different treatment in the legislative power over mineral resources, emanating from the fact that federal systems strive to strike a balance between competing theoretical considerations and practical factors when making decisions. Furthermore, it evaluates the management of mineral resources, which represents the second dimension of control power over mineral resources. It critically examines the nature of management power, assignment perspectives, and factors that influence assignments and practices across the federation. The examination of these issues reveals that designing effective management frameworks in federal systems is often a challenging task. Despite such challenges, federal systems guided by theoretical consideration, and its unique circumstances, have developed unique management structures. Moreover, it explored the regulation of economic benefits from mineral extraction, which has proven to be particularly significant in the design of the federal constitution. The study discovered that the administration of economic benefits derived from mineral extraction in the federal system is a complicated process guided by theories of fiscal federalism and also practical considerations on the ground. It revealed that the federation adopted a different legal and institutional approach to administering the economic benefit from the extraction of mineral resources. The chapter also assess the intricate relationship between sustainable mining and the governance of mineral resources in federal systems. It reveals that the allocation of ownership, legislative power, management power, and revenue-generating power, to a different degree, has an impact on the sustainability of mining practices.

CHAPTER THREE

THE GOVERNANCE OF MINERAL RESOURCES AND THE TRANSITION TO SUSTAINABLE MINING IN THE ETHIOPIA'S FEDERAL SYTEM

3.1.CHAPTER INTRODUCTION

The mining sector in Ethiopia has a long history. Furthermore, the governance of mineral resources in Ethiopia has a rich and notable history, marked by significant changes over the years. This chapter aims to offers a brief account of this evolution focusing on the major legal and institutional development through a thorough examination of the significant milestones and changes that have taken place in the governance of minerals within the country. Additionally, it explores the nation's initiatives to integrate the principle of sustainable mining into its legal framework. To this end, the chapter is structured into seven sections. The second section offers a comprehensive examination of the geological formations and mineral resources linked to Ethiopia. It lays the groundwork for comprehending the mineral resources wealth, and potential capabilities of the country at large. In the third section, the legal framework that regulated the extraction of minerals in pre-modern Ethiopia is investigated, with a particular emphasis placed on the gold mining. Specifically, it sheds light on the traditional governance structures that have had an impact on mining activities. The fourth section examines the evolution of mineral resource governance during the early twentieth century. This section offers a thorough examination of the shift from unstructured practices to a formal legal and institutional framework, emphasizing the evolution of mining policies that tackle both economic and environmental issues. The fifth section examines the major addition made in the governance of mineral resources during the socialist Derg regime. This analysis examines the significant changes in the management of mineral resources, emphasizing legal developments, alterations in institutional frameworks, and their effects on local communities and the environment. The sixth section explores the important milestones made in the governance of mineral resources during the transitional period, where the concept of devolution of power introduced. It examines important reforms and key policies that have emerged in recent decades, emphasizing Ethiopia's initiatives to align its mining practices with the idea of devolution power. The seventh section examines Ethiopia's journey to integrate the idea of sustainable mining to its legal framework. The final section, based on the previous sections present the concluding remark of the chapter.

3.2.GEOLOGY, MINERAL RESOURCES, AND MINING IN ETHIOPIA

Ethiopia has a surface area of approximately 1.14 million km² which features a diverse geological landscape rich with various mineral resources.¹ This enormous landscape is one of Africa's most geologically diverse regions, with geological features ranging from the oldest Precambrian to the most recent Cenozoic volcanic and sedimentary formations. Precambrian rocks cover 25%, Paleozoic and Mesozoic sediments cover 25%, and Tertiary and Quaternary volcanic and sedimentary rocks cover 50% of the country's total surface area.²

Since the late 19th century, numerous surveys have been conducted on this diverse geological composition. These surveys have been carried out by entities from the private sector, international organizations, and the government of Ethiopia. The results of geological surveys have shown that these rocks are connected to a variety of mineral resources.³ Among these endowments, precious metals like gold, along with industrial and construction minerals, are regarded as the primary sources of investment in the mining sector.⁴

Ethiopia is projected to have a gold deposit of more than 500 metric tons, solidifying the country's status as Africa's greatest gold reserve.⁵ The occurrence of Gold has been associated with metamorphic meta-volcano sedimentary belts in a variety of terrains within the Arabian-Nubian Shield. This shield is further subdivided into greenstone belts belonging to the southern, western,

¹ Solomon Tadesse 'Geology, and mineral potential of Ethiopia: a note on geology and mineral map of Ethiopia', *Journal of African Earth Sciences* 36(2003): 73-313; Ministry of Mines and Petroleum, *Guide Investor*, 2020;

² *Ibid*; Getaneh Assefa, *Mineral Resource Potential of Ethiopia*, Chemical Society of Ethiopia, Vol. 5, no. 2, 1991: 111–137; World Bank Group, *Strategic Assessment of the Ethiopian Mineral Sector*, 2014; Ernesto Abbate, Piero Bruni, and Mario Sagri, *Geology of Ethiopia: A Review and Geomorphological Perspectives*, in *Landscapes and Landforms of Ethiopia*, edited by Paolo Billi Editor, *World Geomorphological Landscapes*, Springer, 2015: 29–58. The Precambrian rocks formed in the late Proterozoic age are found in the northern, western, eastern, and southern parts of Ethiopia. It contains a wide variety of sedimentary, volcanic, and intrusive rocks associated. The eastern, central, and northern regions of the country are home to marine and continental deposits that date back to the Late Paleozoic and Early Mesozoic periods. Tertiary volcanic and sedimentary rocks cover a large part of Ethiopia. The Tertiary volcanic rock covers most of the Ethiopian highlands, while the Tertiary sedimentary rock covers most parts of the Somali region. Quaternary volcanic rocks and sedimentary rocks occur in the rift valley and other parts of the country, including Gambella, the southern tip of SNNP.

³ *Ibid.*; the history of modern geological studies and mineral exploration dates back to 1838. However, the major studies were carried out after 1960, which marked the establishment of the Ethiopian geological survey institutes.

⁴ *Ibid.*, Metassebia Hailu, *Opportunities and Challenges of Large-Scale Private Gold Mine Investments in Ethiopia: Tri-Partite Interest and Contest*, A thesis submitted in partial fulfillment of the requirements for the award of a Master of Arts (MA) Degree in Public Administration and Development Management, College of Business and Economics, Addis Ababa University, 2018

⁵ *Ibid*

southwestern, and northern regions.⁶ Primary gold deposits that are particularly noteworthy are the Lega Dembi deposit, which has more than 250 tons of gold reserves, the Sakaro deposit, which has roughly 50 tons of gold reserves, and the Tulu Kapi deposit, which has an estimated 48 tons of gold reserves available.

Ethiopia also has a high potential for industrial and construction minerals found in a variety of geological zones, including Proterozoic basement rocks, Late Paleozoic to Mesozoic sediments, and Cenozoic volcanic deposits. Ethiopia has a significant potential for industrial minerals such as coal, diatomite, kaolin, bentonite, silica, barite, gypsum, lithium, and tantalum, which are utilized in a wide range of industries including construction, ceramics, paints, electronics, filtration, plastics, glass, detergents, and paper.⁷ Moreover, it has significant potential for construction minerals. These include limestone, clay, silica sand, gypsum, and pumice.⁸

The Ethiopian mining sector has experienced significant growth, thereby overcoming numerous challenges. Currently, nearly 200 international and local companies are engaged in the prospecting,

⁶ Ibid, The southern greenstone belt contains the Adola-Kenticha, Hageremariam-Arero, and Moyale areas. The Adola - Kenticha belt comprises Lega-Dembi, Sakaro, Okote, Wollena, Kumudu, Megado-Serdo, Dawa-Digati, Bore, Abay River, Haranfama, and many other primary gold deposits. The Hageremariam-Arero greenstone region also hosts gold. The Moyale greenstone consists of the Haramsam, Hassamte, and Chamuk and has good potential for gold. The western and southwestern belt, which stretches more than 600 kilometers, comprises the Gambella, Wollega, and Benishangul Gumuz Regions. In the Gambella region, the Akobo greenstone has attracted the attention of several investors since the Italian invasion. The West Wollega region has gained the attention of both domestic and foreign investors since the late 19th century. The major areas with good potential for gold include Tulu Kami, Metti, Laga Baguda, Chokorsa, Tulu Kapi and Ankori, Kata, Oda Godare, Bomu, Menghi, Bascia, and Ciomos. The Benishangul-Gumuz region is one of the traditional sources of gold. The main regions that have been found to have good potential for gold mining are Ablarus, Epar, Galesa, Dull, Ashashire, Dish, and other regions. The Northern Belt has been known to host gold since ancient times. The major areas of primary gold occurrences include Terakimti, Adi Zeresenay, Zager, Asgede, Mia Koka, and Niraqqe.

⁷ Solomon Tadesse at supra note 1; Getaneh Assefa at supra note 2 There are considerable quantities of industrial minerals spread out throughout a number of different geological zones, which is another important component of Ethiopia's mineral richness. The basement rocks of the Proterozoic period contain significant amounts of tantalum, graphite, and chromium. The Kenticha tantalum deposit alone contains more than 100,000 tons of reserves of tantalum. In addition to considerable coal reserves in the Yayu deposit, along with substantial phosphate and diatomite resources, the sediments that date back to the Late Paleozoic to Mesozoic period contain enormous potash deposits in the Danakil Depression that surpass 1.3 billion tons. Cenozoic deposits, which contain significant formations of bentonite, kaolin, and gypsum, contribute further to this diversity. Emerging lithium resources, on the other hand, give new potential for the development of industrial minerals.

⁸ Dure Mulatu, Lulit Habte, and Ji Whan, The Cement Industry in Ethiopia, *Journal of Energy Engineering*, Vol. 27, No. 3, 2018: 68–73. Construction minerals represent the third significant category of Ethiopia's mineral resources, with limestone deposits estimated to exceed 30 billion tons, mainly found in the Mekelle, Dire Dawa, and Dejen regions. Clay deposits of over 50 million tons are found across the Ethiopian Rift Valley, and the region boasts extensive decorative stone resources, with marble reserves surpassing 200 million cubic meters and granite reserves exceeding 180 million cubic meters. The construction mineral deposits have significantly contributed to the growth of Ethiopia's fast-developing construction sector and cement industry.

exploration, and development of large-scale mining operations that fall under the jurisdiction of the federal government.⁹ In addition to this, there are thousands of mining operations that falls under the mining license jurisdiction of the regional states.¹⁰

Currently, numerous domestic and foreign companies are involved in various stages of large-scale gold-mining operations.¹¹ The major mining companies that are involved in the extraction and development of large scale gold that are either in production and development stage include MIDROC Gold in Lege-dembi, Sakaro, and Metekel;¹² KEFI in the Tulu Kapi Area;¹³ Akobo Gold in Akobo area,¹⁴ Oromia Mining SC in Oromia,¹⁵ and Zumbara in Benishangul-Gumuz Regional State.¹⁶ In addition, several mining companies are at different stages of gold exploration, including Aberdeen International Inc., Stratex International, Ezana Mining Development Plc, and G&B Central African Resources Ltd.¹⁷

The extraction of industrial minerals in Ethiopia has a complex history.¹⁸ Ethiopia has previously extracted large quantities of industrial minerals such as potash and tantalum, but with limited

⁹ The federal mining proclamation number 678/2010 Article 52; Ministry of mine, List of mining license at the federal level 2024; Ethiopian Press agency, Some 170 Companies Engaged in Ethiopia's Mining Sector, https://www.ena.et/web/eng/w/eng_3643507 accessed January, 2024

¹⁰ Ibid; IP 1, IP 3, and IP4

¹¹ Ibid

¹² Ibid; IP 1, IP2, IP, 3 and IP 4, The Lega Dembi gold mine is the most important large-scale gold mine in Ethiopia. It started its operation under the Derg regime. Later, the federal government sold the Lega Dembi gold mine to Midroc Gold Mine plc. Currently, MIDROC Gold Mine plc operates in three major areas: Lege-dembi, Sakaro, and Metekel. Out of which, the Lega Dembi mine in southern Ethiopia produces an average of four tons of gold per year.

¹³ Ibid; Addis Standard, Kefi Gold & Copper announces key infrastructure progress at its Tulu Kapi gold project in Ethiopia, <https://addisstandard.com/kefi-gold-copper-announces-key-infrastructure-progress-at-its-tulu-kapi-gold-project-in-ethiopia/> accessed August, 2024; Tulu Kapi is the other large-scale gold mine that has been under development for the last few decades. The ownership of the Tulu Kapi large-scale gold mine has shown remarkable change through time. Currently, KEFI Minerals obtains the licenses for the exploration, development, and production plant at Tulu Kapi. KEFI Minerals, in April 2015, had planned to produce up to 115,000 ounces (3,565 kg) of gold per year. However, due to several reasons, the plan failed to materialize. Currently the project is set to start production.

¹⁴ Ibid Addis Standard, Akobo Minerals hits gold ore body at Segele mine in Gambella, set to start pilot production <https://addisstandard.com/news-akobo-minerals-hits-gold-ore-body-at-segele-mine-in-gambella-set-to-start-pilot-production/> accessed, June 2023, the Akobo region, which is the southernmost part of the Western Ethiopian Shield, has been associated with extensive alluvial gold production since the end of the 19th century. Recently, Akobo Gold in the Akobo area has obtained a license to exploit gold in the Akobo area and is set to start production.

¹⁵ Ibid

¹⁶ Ibid.; Reporter, Council approves four large-scale gold mining licenses, Ethiopian reporter, <https://www.thereporterethiopia.com/12051/> accessed January, 2023; Mining Business Africa, <https://miningbusinessafrica.co.za/four-large-scale-gold-mining-licenses-approved-in-ethiopia/> accessed on September, 2021

¹⁷ Ibid

¹⁸ IP 1, IP2, IP, 3 and IP 4, Morgan, D. J. "Industrial Minerals and Artisanal Mining Study (Ethiopia World Bank Energy Access Project): summary of activities, findings and recommendations of industrial minerals sub-project." (2007).

success. Over the past few years, the government has been very active in the task of granting mining licenses to allow for the extraction industrial minerals. The key minerals include soda ash, feldspar, salt, coal, lithium, potash, bromine, chromium, and tantalum.¹⁹ Furthermore, some mining operators are in the exploring stage. This policy is consistent with Ethiopia's overall economic diversification goals, which seek to reduce import, boost domestic production, and enhance export. As a consequence of this, recent projections indicate a significant growth, which will benefit both the domestic and international markets.

The extraction of construction minerals has been a crucial aspect of Ethiopia's mining sector.²⁰ These extraction activities, which are carried out by both domestic and foreign companies, are dispersed throughout the country. In recent years, numerous mining concessions have been awarded for the extraction of construction minerals. Some of the most important minerals are granite, basalt, gypsum, clay, limestone, marble, and silica sand.²¹ Furthermore, several exploration licenses have been issued to various mining operators. The cement industry, a major consumer of construction minerals, has experienced a rapid expansion. The cement industry is among the fastest-growing industries in Ethiopia.²² Twenty-three cement companies generate 12 million tons of cement annually. The Ministry of Industry of the Federal Democratic Republic of Ethiopia (FDRE) has created plans to direct the expansion of its cement sector. It anticipates meeting the nation's needs by supplying 19.97 million tons of cement by the end of the year 2025.²³

The mining sector has contributed to economic development, government revenue, foreign currency earnings, and employment opportunities and meets the demand of industries for raw

¹⁹ Ibid; Ministry of mine, List of mining license at supra note 9; Ethiopian Press agency, Genetu, Mamaru, and Bisrat Kebede. "Ethiopian Coal Deposits and Resource Development Prospects." *Environmental Quality Management* 34, no. 1 (2024): e22289; Addis Fortune, Ministry Grants Coal Mining Concessions, <https://addisfortune.news/ministry-grants-coal-mining-concessions-in-bid-to-cut-import-bills-amid-environmental-concerns/> Addis Fortune, Oromia Regional State Pioneers Decentralized Coal Concessions, <https://addisfortune.news/oromia-regional-state-pioneers-decentralised-coal-concessions/> accessed in June, 2024 Africa energy, Ethiopia: Exports expected early 2024 from first lithium project amid shareholder battle, <https://www.africa-energy.com/news-centre/article/ethiopia-exports-expected-early-2024-first-lithium-project-amid> , accessed , Sep 2023;

²⁰ Dure Mulatu, at supra note 8

²¹ Ministry of mine, List of mining license at supra note 9;

²² Ibid, the first cement factory established in Dire Dawa in 1936 by the Italians. With the increased demand for cement, the government responded by building the Addis Ababa and Massawa cement factories in 1964 and 1965, respectively. In 1984 and 1991, two production lines were installed at Mugher. The last few decades have seen the opening of new cement companies and the upgrading of old cement factories.

²³ Ibid; Arkebe Oqubay, *Made in Africa: Industrial Policy in Ethiopia*. Oxford University Press, 2015.

materials.²⁴ The contribution of the extractive sector to national GDP reached a maximum of six percent in 2014.²⁵ In the last few decades, it has contributed to nearly 1% of the total government revenue.²⁶ The mineral sector has also become one of the leading foreign currency earners among coffee and chat, reaching up to 40%.²⁷ It also employs millions of people in both its formal and informal sectors.²⁸ The mining sector supply essential inputs to various industries and reducing the need for imports.²⁹

Understanding the significance of the mining industry in the Ethiopian economy, the federal government has devised a comprehensive strategy to make it a major driver of economic growth and development.³⁰ The mining sector has been identified as a priority in the Homegrown Economic Reform Agenda.³¹ It envisions the mining sector as a diverse, world-class, competitive, and environmentally sound private sector extractive industry that will contribute to not less than 10 percent of the GDP. Its main strategic direction focuses on attracting foreign direct investment (FDI), increasing the sector's foreign exchange earnings, and focusing on the production of minerals that substitute imports.³² It highlights the importance of environmental compliance, community development, and social investment, recognizing the necessity for sustainable development practices. Yet, despite the industry's long history, the country's enormous natural resource potential, and the attention it has received in various national development plans (as highlighted in the following chapters), the overall contribution of the mining industry to the Ethiopian economy remained relatively low until recently.³³

²⁴ IP, 3 and IP 4; Ministry of Mine, annual report 2023;

²⁵ Moore Stephens, Ethiopian Extractive Industries Transparency Initiative Report, Third EITI report; National (2018); World Bank Group and Ministry of Mines and Petroleum, Strategic Assessment of the Ethiopian Mineral Sector, "FINAL REPORT," 2018; Ministry of Mine at supra note 1;

²⁶ IP, 3 and IP 4; Ibid

²⁷ Ibid; Ministry of Mine at supra note 1;

²⁸ Ibid; Ministry of Mine, annual report 2023

²⁹ Ibid

³⁰ Ibid

³¹ National Planning Commission, A Homegrown Economic Reform Agenda: A Pathway to Prosperity, 2021-2030 (2020): 29-31 Available at: <https://faolex.fao.org/docs/pdf/eth211967.pdf>

³² Ibid. In the Homegrown Economic Reform Agenda, the government intends for mining to comprise 10% of the country's gross domestic product (GDP) by 2030. To achieve this, it aims to support artisanal and small-scale mining, review gold pricing, address the concerns of local communities and incentive miners, address technical and institutional barriers, and develop policies and institutional capacities to create a sustainable

³³ Yohannes Yihdego et al., Mining sector challenges in developing countries, Tigray, Ethiopia, and inspirational success stories from Australia, *Int. J. Mining and Mineral Engineering*, Vol. 9, No. 4, 2018: 321–60. Yohannes et al.

3.3.THE REGULATION OF MINING BEFORE THE INTRODUCTION OF MODERN LEGAL AND INSTITUTIONAL FRAMEWORK IN ETHIOPIA

Ethiopia has a long history of extracting mineral resources for various purposes.³⁴ In its long history, precious metal, gold, construction and industrial minerals have been the most important minerals in terms of their economic and social contribution and impact on the environment.³⁵ However, these mineral resources did not get the same attention, either from the government or academics. As can be seen from the following discussion, gold has been at the center of government regulations.³⁶ On the other hand, industrial and construction minerals have been extracted by different societies in Ethiopia, but their regulation has not been subjected to extensive government regulation. The limited government regulation relates to the local nature of mining of these resources until the end of the 20th century.³⁷ The regulation of these minerals changed with the introduction of modern cement factories and urbanization. Hence, our discussion on the issue is informed by these differences, focuses on the regulation of gold mining, and includes instances where other minerals, have become politically, economically, socially, and environmentally important.

Historians have noted that the extraction of gold from the surface of the earth in Ethiopia is a very old economic activity deeply rooted in the country's history.³⁸ According to their account, the earliest mining operation in Ethiopia was associated with the extraction of gold from the Axumite Kingdom. The Axumite kingdom has been reported to produce large amounts of gold using public

note that the underlying causes of the weaknesses in the mining sector are like those observed in any other sector of the economy, including ineffective implementation strategies, low capacity of institutions, lack of focus, and sustainability because of regime changes.

³⁴ Alemseged Debele, A History of Mining in Wallaga, Western Ethiopia, 1899–1991, Dissertation submitted to the College of Social Sciences of Addis Ababa University, 2020;

See the FDRE Constitution, Articles 40(3) and 89(5); 51/5 and 52/1/c; and 97; 98 and 99

³⁵ *ibid.*; Metassebia Hailu, *supra* note 4

³⁶ *ibid*

³⁷ Dure Mulatu et al., *supra* note 8; DJ Morgan, *supra* note 18, Its localized nature is highly related to the bulk nature of the substance, its abundant supply, and its limited economic importance in the country. Industrial minerals are bulk in nature, which requires a relatively well-developed infrastructure to extract and transport, which was completely absent until recently in Ethiopia. Moreover, industrial minerals, such as limestone, are abundantly found in different parts of the country. There was no economic reason to extract and transport the industrial minerals to different parts of the country. The industrial minerals were not part of the traditional trade of commodity items, which were part of the Ethiopian long-distance trade. Industrial minerals, such as limestone, were not of such economic importance until the industrial revolution. The story is not different in Ethiopia.

³⁸ Metassebia Hailu, *supra* note 4; Richard Pankhurst, An Introduction to the Economic History of Ethiopia from Early Times to 1800, Lalibela House, 1961: 224–231.

and private mining sites.³⁹ In the meantime, it utilized traditional rules and institutions to govern the extraction of mineral resources, focusing on enhancing the sector's economic contribution. It is reported that the kingdom, using its public mining sites, was able to collect a large amount of gold that was used for domestic consumption, trade, and as a means of currency.⁴⁰ Moreover, it uses tax to collect significant gold from the society. It is also noted that minerals such as limestone and gypsum had been extracted by different societies in the Axumite kingdom. Archeological and historical artifacts demonstrate the wide use of these minerals for construction, manufacturing tools, utensils, and wares.⁴¹

Despite the Axum civilization's fall, as historians noted, the mining sector in medieval Ethiopia remained crucial, maintaining a similar legal and institutional framework.⁴² However, it has been reported that the government reduced its direct involvement in gold production. The government focused on using taxes on the sales and production of gold to meet its need for revenue and trade.⁴³ Private traders were the main organ responsible for long-distance trade, shouldering the burden of gold production and reaping the benefits of gold extraction.⁴⁴ Furthermore, this period also witnessed the emergence of resource-related conflicts, with competition for control over gold resources often underlying broader political disputes.⁴⁵

In modern Ethiopia, Emperor Tewodros II, Tekle Giorgis, and Yohannes IV were busy with successive battles with both local and international opponents, which gave them limited opportunities to regulate the mining sector.⁴⁶ These rulers were unable to make the policy decisions that affected the mining sector. Emperor Menelik II's accession to power brought about the most significant change in the regulation of the mining sector. The extraction of mineral resources,

³⁹ *ibid*; Alemseged Debele at *supra* note 34; The public mining operations are owned and operated by the State.

⁴⁰ *Ibid*

⁴¹ *Ibid*; Gidey, B. Transaction, Bank, and Insurance in Ethiopia. Addis Ababa. 1991: 30-33.

⁴² *Ibid*, Ayda Bouanga, Gold, Slaves, and Trading Routes in Southern Blue Nile (Abbay) Societies, Ethiopia, 13th–16th Centuries, *Northeast African Studies*, Vol. 17, No. 2, 2017: 31–60. It had been regarded as an important source of gold. Scholars who visited the “interior” in the 14th century and onwards have proven the presence of gold mining, use, and export.

⁴³ *ibid*

⁴⁴ *ibid* Metassebia Hailu at *supra* note 4

⁴⁵ *ibid*, Owens, Travis J. "Beleaguered Muslim fortresses and Ethiopian imperial expansion from the 13th to the 16th century." PhD diss., Monterey, California. Naval Postgraduate School, 2008. A good example in this regard is the successive conflict between the center and gold-producing area of Damot and Enarya, where the former seeks to impose a tribute to be paid in gold.

⁴⁶ *ibid* Ayda Bouanga, at *supra* note 42

especially gold, was part of Emperor Menelik II's nation-building efforts.⁴⁷ His reign saw organized efforts to modernize and centralize control over mineral resources via territorial consolidation and administrative reform. However, Emperor Menelik II faced two important challenges. He was challenged, on the one hand, by local lords who were keen to keep its independence and control over natural resources. On the other hand, Menelik was against rival colonial powers for the control of natural riches.⁴⁸

Emperor Menelik II addressed the claims of the local government depending on the nature of their resistance.⁴⁹ In cases where the local lord put up resistance, lost their right while in cases where there was no overt opposition, has broader right to resources.⁵⁰ Despite such a difference, the state expansion has allowed the central government to have direct control over mineral resources.

On the other hand, Emperor Menelik II addressed challenges from European colonial powers by entering into a concession for valuable metals.⁵¹ Several foreign entities and individuals from Britain, France, Germany, and Italy, referred to as concession hunters, obtained concessions in the western and southern parts of the country.⁵² Mining concession agreements with foreign corporations were concluded without a clear regulatory framework or organized plan.⁵³ However, concessions hold important contractual provisions, such as the peaceful enjoyment of possession, employment, development rights, tax and duty privileges, security, government equity, and royalty.⁵⁴

⁴⁷ Ministry of Mines and Energy. "YeMadin ena Hayl Minch, 1976

⁴⁸ Ministry of Mine at supra note 1;

⁴⁹ Asebe Regassa, *Frontiers of Extraction and Contestation: Dispossession, Exclusion, and Local Resistance Against MIDROC Laga-Dembi Gold Mine, Southern Ethiopia*, *The Extractive Industries and Society*, 2021:1-11; Alemseged Debele at supra note 34, Metassebia Hailu at supra note 4

⁵⁰ Alemseged Debele at supra note 34

⁵¹ *Ibid.*; Bahru, Zewdie, *Ethiopian History from 1855 to 1991*. Addis Ababa University Press, 2010: 183–184; Bahru Zewdie, *Concessions and Concession-Hunters in Post-Adwa Ethiopia: The Case of Arnold Holz*, *Istituto Italiano per l'Africa e l'Oriente (Isao)* (1990): 365-383; Guluma Gemedu, *Political Domination, and Exploitation of Mineral Resources in Oromia: From Menilek to Meles*, *the journal of Oromo Studies*, volume 5, 1998:133-155, Guluma notes that Menelik's generosity towards foreign concession hunters was unprecedented. He further notes that earlier Ethiopian rulers were rather fearful of foreigners and unwilling to share their knowledge of the country's mineral wealth.

⁵² Alemseged Debele at supra note 34; Metassebia Hailu at supra note 4; G Wondemagegnehu G. Selassie, *Mining and Development: An Overview of the Ethiopian Experience Within the Context of Mining Laws*, *The Ethiopian Bar Review*, vol. 2, no. 2, March 2008 115-143

⁵³ *ibid*

⁵⁴ *Ibid*

Emperor Menelik pursues a centralized model that asserts its economic interests directly through tributes, royalties, gifts, and direct extraction.⁵⁵ Furthermore, managing the environmental impact of mining was not even conceived.⁵⁶ The mining sector was responsible for disturbing the natural habitats.⁵⁷ Moreover, although the imperial state allowed local miners to continue with their traditional mining practices, the expansion of state control and the concession system significantly infringed the mining activities of the local population.⁵⁸ Alemseged rightly observed that the expansion of the Ethiopian state and the concession system increased economic strains and hardships for the local populations, fundamentally altering traditional resource access and utilization patterns.⁵⁹

The above-mentioned historical developments reveal the initial attempts to regulate the mining sector in Ethiopia. The major developments that occurred during this period evolved from traditional governance systems to more centralized state control, driven by economic and political imperatives, while largely overlooking environmental and social ramifications. It established patterns of successive efforts toward centralized control over mineral resources between the center and peripheries that would influence later developments in the sector. Another significant aspect of this period was the tension that existed between the imperial government and the foreign investment, each seeking to maximize its interests. Overall, this period's regulatory approach is similar to that of most countries, with the primary focus of the state being to maximize economic benefits through direct production and taxation. While the state extensively worked to establish mechanisms for revenue generation and control over mineral resources, it often neglected long-term environmental and social considerations. Environmentally, like most of the legal systems at this time, it failed to properly consider the adverse effects of mining operations. Moreover, socially, it failed to consider the adverse effects; instead, it transformed traditional mining communities and established new hierarchies in resource access and control.

55 Asebe Regassa, *Frontiers of Extraction and Contestation: Dispossession, Exclusion, and Local Resistance Against MIDROC Laga-Dembi Gold Mine, Southern Ethiopia*, *The Extractive Industries and Society*, 2021:1-11; Alemseged Debele at supra note 34, Metassebia Hailu at supra note 4

56 *ibid*

57 *Ibid*; Frank Hayter, *In Quest of Sheba's Mines*, Stanley Paul and Co. Limited, ed., 1935: 91–92, 165.

58 Guluma at supra note 50; Yosef Alazar, *Gold mineralization at Lege-dembi and Sakaro in the Megado greenstone belt, southern Ethiopia*. Ph.D. Dissertation: Germany, 1991

59 *Ibid*

3.4. THE INTRODUCTION OF MODERN LEGAL AND INSTITUTIONAL FRAMEWORK AND THE GOVERNANCE OF MINING IN ETHIOPIA

Prior research acknowledges that the period between the reign of Empress Zewditu and the Italian invasion witnessed extensive efforts by the imperial government to strengthen its grip over natural resources by enacting laws and the Department of Mines.⁶⁰ The imperial government enacted a successive legal framework aimed at enhancing ownership and control of mineral resources. The Imperial Decree issued in 1928, which asserted that “all wealth of the sub-soil of Ethiopia is state property.”⁶¹ The Ministry of Interior and Commerce issued a directive on November 29, 1929, which provides that prospecting or exploitation of minerals requires permits from its newly created Department of Mines.⁶² The control of the imperial government over mineral resources was further reinforced by subsequent decrees and legislation. The Imperial Decree of December 5, 1929, raised procedural issues for the authorization of mining by referring to the institutional mandate.⁶³ In the same manner, legal notices issued on May 19, 1931,⁶⁴ May 21, 1931,⁶⁵ and November 7, 1931,⁶⁶ reaffirmed minerals as “state property” and put in place procedures that allow the central government to control the extraction of minerals. Despite such improvements, nothing on the issue had been included in the Constitution of 1931. Moreover, despite the newly created Department of Mines, Emperor Haile Selassie I directly handled most matters himself and granted a lease or a concession in direct consultation with the lessee or the concessionaire.

In this, period, the outlook of the central government over the extraction of mineral resources was not changed. The government has continued with its objective to obtain economic benefits through direct production, royalties, and tributes.⁶⁷ The central government, in collaboration with local administrators, actively participated in mineral production operations. The royalties amount is not

⁶⁰ Alemseged Debele at supra note 34, Metassebia Hailu at supra note 4

⁶¹ Imperial Decree of the Ethiopian Government, April 8, 1928.

⁶² Richard Pankhurst, *The Trade of Northern Ethiopia in the Nineteenth and Early Twentieth Centuries*. *Journal of Ethiopian Studies*, Vol. II, No. 1, 1964: 50–107,

⁶³ Wondemagegnehu G. Sellassie at supra note 51; Imperial Decree to Maintain the Prosperity of the Mineral Resource of the Country and to Control Strictly the Export of Mineral Resource, *Negarit Gazeta*, December 5, 1929;

⁶⁴ A legal notice dated May 19, 1931,

⁶⁵ *Ibid*, legal notice, dated May 21, 1931, expressly prohibits all mining by natives or foreigners except extraction of gold "by peasants. It was promulgated to set aside the authority of the feudal "barons" and make legal only the mining permits and mining concessions granted by the Imperial Government.

⁶⁶ Imperial Decree to Prohibit the Extraction of Any Precious Mineral Resource Without Having the License of Mines Office and a Decree to Control the Smuggling of Precious Mineral Resource, November 7, 1931,

⁶⁷ Alemseged Debele at supra note 34, Metassebia Hailu, at supra note 4

fixed but rather a matter of private agreement between the Emperor of Ethiopia and the concessionary.⁶⁸ Furthermore, the government established a complex tribute system specifically targeting gold-producing regions, particularly in western and southern Ethiopia. Moreover, the imperial government's concern over environmental issues and social aspects did not make any significant difference.⁶⁹ However, the environmental, social, and health impacts of gold mining continued without any change.⁷⁰

The Italian invasion of 1936–1941 was caused by economic factors, among which making the Italian economy self-sufficient by exploiting agricultural and mineral resources was the major one. The Italian government wanted to extract mineral resources to support its objective of building the Italian national economy. Once the invasion was completed, the occupation forces started wide-ranging prospecting and extraction activities and commenced the extraction of mineral resources, including precious metals and construction minerals.⁷¹ However, it operated without any improvement—in some cases, worse—in environmental protection or social development. Accordingly, the Italians were responsible for environmental degradation and damage to biodiversity. Mining was carried out through a harsh approach of labor conscription, displacement of local communities, and expropriation of artisanal miners.⁷² The only positive contribution of the Italian invasion was the discovery of several minerals in different parts of the country.⁷³

Following the defeat of the Italian fascist occupation by Ethiopian patriots, the imperial government once again sought to assert control over valuable natural resources. The Imperial government had established institutions and legal frameworks that could tie its control over the mining sector during the post-liberation period. In 1944, the imperial government nullified concessions granted by the Italian government to individuals and companies.⁷⁴ In addition to this,

⁶⁸ *ibid*

⁶⁹ Chala Dechasa, *Environmental Management System: During Imperial, Derg, and EPRDF Periods in Ethiopia: Review Paper*, *Journal of Environment and Earth Science*, 2014: 45-57.

⁷⁰ Alemseged Debele at *supra* note 34, Metassebia Hailu, at *supra* note 4

⁷¹ DJ Morgan at *supra* note 18

⁷² Alemseged Debele at *supra* note 34, Metassebia Hailu, at *supra* note 4

⁷³ *ibid*,

⁷⁴ *Ibid*, See the Proclamation to Provide for the Revocation of Concessions Granted by the Italian Government, Proclamation No. 49, 1944, It follows that the government was the owner of the major and most lucrative gold and platinum fields in the southern and western parts of the country, such as the Kibre Mangiest-Adola and Akobo goldfields, as well as the Yubdo platinum mine. Moreover, the government's decision to cancel the concession paved the way for a new concession.

Proclamation No. 67/1944,⁷⁵ and Proclamation No. 107/1949⁷⁶ were enacted aimed to enhance the state's control and revenue over the mining sector. In 1950, the government enacted a notice encouraging foreign capital investment in Ethiopia.⁷⁷ The imperial government's concern over environmental issues and social aspects did not make a significant difference, at least until the enactment of the revised 1955 constitution.⁷⁸ The revised 1955 Constitution set forth important principles for the extraction of mineral resources.⁷⁹ The revised constitution of 1955 reaffirmed the long-held view as to the ownership of mineral resources, as it provided that natural resources are owned by the state.⁸⁰ It set forth important principles regarding the control of natural resources.⁸¹ It reflected a modification of the long-held economic frontier outlook on environmental protection.⁸²

However, it took more than 15 years for the imperial government to translate constitutional stipulation into practice and attempt to include laws governing the economic, environmental and social impacts of mining.⁸³ A modern and comprehensive law was enacted to regulate activities in the mining sector.⁸⁴ It outlined royalty, income tax, and rent as key mechanisms for deriving benefits from the resource operation's proceedings.⁸⁵ It provides an important legal framework that aims to restrict or reduce the environmental impact of mining activities, including restrictions

⁷⁵ See the Proclamation for the Control of Transactions in and Concerning Gold and Platinum, Proclamation No. 67/44, and the Imperial Decree on Administrative Regulations, Decree No. 6, 1946. It provided that such precious metals are the property of the Empire of Ethiopia, and their extraction requires a license to be issued by the appropriate authorities.

⁷⁶ See the proclamation to govern income taxes from businesses, Proclamation No. 107/1949, It governs income taxes from businesses, including mining.

⁷⁷ See the decree to provide encouragement of foreign capital investment in Ethiopia, notice No. 10, 1950. The government revised the incentive for investors who engage in mining. Decree to Provide for the Encouragement of Capital Investment in Ethiopia, Decree No. 51 of 1963,

⁷⁸ Chala Dechasa, at supra note 68

⁷⁹ See the Revised Constitution of 1955, Article 130, which reaffirmed state ownership and control of natural resources. It provided an important step in the protection and utilization of natural resources, as it states that natural resources constitute a sacred trust that should be used for the benefit of present and succeeding generations and conserved by Imperial Law.

⁸⁰ *ibid*

⁸¹ See the Revised Constitution 1955 of the empire of Ethiopia, Article 130

⁸² *Ibid* Chala Dechasa, at supra note 68

⁸³ A Proclamation to Promote the Development of Mineral Resources of the Empire of Ethiopia, Proclamation Number 282/1971, and Mining Regulation No. 396 of 1971

⁸⁴ *Ibid*

⁸⁵ Tilahun Weldie, An Overview of the Legal Regime Governing Minerals in Ethiopia, Bahir Dar University Journal of Law, Vol. 3, No. 1, 2012: 24-66

on mining areas, due diligence, optimal extraction, and modern technologies.⁸⁶ Moreover, mining law also introduces important legal frameworks that are essential to addressing the social impact of mining, including compensation to the owners of the land, and safety protection mechanisms.⁸⁷

In the meantime, postwar period, the imperial government was eager to reconstruct the country. In line with this, policies were enacted to achieve economic and social development. Furthermore, after taking lessons from successful Southeast Asian and African countries, the government started to introduce a five-year integrated development plan, which also covers the mining sector.⁸⁸ In these plans, the imperial government paid greater attention to the role of the mining sector in achieving economic development. In addition, the imperial government persevered in its practice of establishing highly centralized organizations that were subject to consistent reorganization.

In this period, the imperial government continued to consolidate its control over mineral resources through the creation of modern legal, policy and institutional framework, that serves as a milestone for the subsequent mining policies of the country. The government's main aim was to obtain the maximum economic benefits through direct production and taxation.⁸⁹ However, despite the limited success witnessed in intensive geological surveys, mineral exploration, and prospecting, the efforts of the imperial regime were largely unsuccessful, as limited exploration and development of minerals took place. For instance, from 1950 to 1974, mineral exports, mostly gold, averaged approximately seven million birrs.⁹⁰ Furthermore, notwithstanding the development in the legal and institutional framework, as noted above, the regulatory efforts failed to address the environmental and social impacts of mining. The environmental impacts of gold mining had continued without any change. Moreover, the social and health impacts of mining have continued impact local communities in the mining areas.

⁸⁶ *ibid*

⁸⁷ *ibid*

⁸⁸ The First Five-Year Plan of the Imperial Government of Ethiopia, 1957–1961; The Second Five-Year Plan of the Imperial Government of Ethiopia, 1962–1967 and the third five-year plan of the imperial government of Ethiopia, 1968–1971,

⁸⁹ The Imperial government of Ethiopia, mining proclamation, Proclamation Number 282/1971, and Mining Regulation No. 396/ 1971, indicated the primary intention of the government to extract mineral resources that can be used for the development of the industry. It modified the royalty and the income tax to be paid by the mining companies. Moreover, it imposes an obligation on the mining companies to ensure the optimal extraction of the resource.

⁹⁰ *ibid*

3.5.THE INTRODUCTION OF SOCIALISM AND GOVERNANCE OF MINING SECTOR IN ETHIOPIA

The Derg regime came to power in 1974 following the overthrow of the Imperial government. The regime despite its socialist orientation, maintain most of the legacies of the imperial government, while it introduces some changes to the governance of mineral resources in Ethiopia. The regime reaffirmed state ownership of mineral resources, declaring that "all mineral wealth of the country belongs to the state."⁹¹ This principle was further enshrined in the 1987 PDRE Constitution. The regime discontinued concession agreements granted by the imperial regime. Under the Derg, the government became the sole entity authorized to extract valuable and rare minerals, while industrial minerals and non-metallic ores were explored and extracted through joint state-private ventures. The private sector's role was limited to construction minerals, such as marble.⁹² It also introduced a taxation system based on the ownership of mining operation (state, private, or joint ventures).⁹³ The 1987 Constitution also marked a shift toward environmental protection, requiring the state to ensure the conservation of natural resources.⁹⁴ Additionally, it imposed an obligation on the state to design programs that benefit all communities. In 1984, following successive Zemecha plans, the Derg announced a ten-year development plan that emphasized the mining industry's role in achieving national economic development.⁹⁵ Despite these changes, the regime made no significant revisions to the basic laws governing mining activities. The Imperial Mining Proclamation and Regulations remained the primary legal instruments regulating the sector.⁹⁶

The Derg reorganized Ministry of Mine and Energy in 1976 and 1982 making it responsible for mineral policy and planning, the administration of mineral legislation, and the supervision of state-owned agencies and corporations. Moreover, several institutions and autonomous organizations

⁹¹ A Proclamation to Provide for Government Control of Mineral Prospecting, Exploration, and Mining Activities, Negarit Gazeta Proclamation Number 39/75

⁹² Alemseged Dembele at supra note 34; Proclamation to Provide for Government Control of Mineral Prospecting, Exploration and Mining Activities, No.39/1975. However, government control of mineral prospecting, exploration, and mining activities was modified by the 1983; Joint Venture Proclamation Negarit Gazeta, Proclamation No 32 of 1989; Investment Proclamation Negarit Gazeta, Proclamation No 17 of 1990.

⁹³ G. Sellassie Wondemagegnehu, at supra note 51

⁹⁴ *ibid.*, In line with such an objective, the regime was preparing a mining safety and environmental protection regulation when it was overthrown in 1991. It started the research and drafting process that aimed to develop a national conservation strategy. The process was carried out through funding and technical assistance from the World Conservation Union. The National Conservation Strategy (CSE) is intended to foster the management of natural resources in the context of development.

⁹⁵ Alemseged Debele at supra note 34

⁹⁶ Proclamation Number 39/ 1975

directly accountable to the Ministry have evolved.⁹⁷ The Derg regime maintained the highly centralized management of mineral resources. This period saw limited development in terms of institutional developments that regulate the mining sector.

During the Derg period, the government collaborated with private companies and international entities, such as the UN mining team, to prospect, explore, and extract mineral resources. These efforts led to the discovery of diverse mineral deposits across the country, including gold, platinum, and tantalum. However, the regime struggled to achieve significant mineral production, with annual outputs consistently falling short of expectations. The mining sector remained economically marginal, contributing less than 1% of Ethiopia's GDP and exports.⁹⁸ This poor performance highlighted the regime's inability to leverage the country's mineral wealth for broader economic development. Furthermore, despite the effort made, many environmental problems that encircled the mining industry in the pre-revolution period continued, as the government prioritized resource extraction over environmental conservation. The regime showed little willingness to address the ecological devastation at extraction sites, focusing instead on maximizing economic gains from mineral resources. Extraction sites often suffered from deforestation, soil erosion, and water pollution, with minimal efforts to rehabilitate affected areas. The performance of the mining sector during the Derg period also revealed a continued failure to deliver tangible benefits to local communities. The economic gains from mineral extraction remained concentrated within the state, with little trickle-down effect to the broader population.⁹⁹

It is clear from the above discussion that the Derg period, despite the introduction of some changes that are in line with the regime's socialist orientations, it represented more continuity than change in Ethiopia's mining sector governance. It saw limited development in terms of legal and institutional developments that regulate the mining sector, with the exception that socialism is used to justify the state control over mineral resources. Moreover, the fundamental challenges of environmental degradation, limited economic impact, and community exclusion persisted throughout this era.

⁹⁷ Dure Mulatu et al., *supra* note 647; DJ Morgan, *supra* note 617.

⁹⁸ The Ten-Year Perspective Plan (TYPP) of Ethiopia, 1984 The sector faced numerous challenges, including a shortage of skilled labor, scarcity of foreign exchange, inadequate financial resources, and a lack of comprehensive geological data.

⁹⁹ Alemseged Debele at *supra* note 34

3.6. THE TRANSITIONAL PERIOD AND GOVERNANCE OF MINERAL RESOURCES IN ETHIOPIA

The ethno-nationalist liberation forces successfully executed a large-scale military operation that culminated in the overthrow of the Derg regime in May 1991. In the aftermath, a transitional government was established through the adoption of a transitional charter.¹⁰⁰ The overthrow of the Derg coincides with important global events: the third wave of democratization, devolution, and sustainable development, which will have a direct bearing on Ethiopia's political and economic trajectory over the next few decades. The transitional government sought to align with these global paradigms by initiating sweeping socioeconomic and political reforms.¹⁰¹ The transitional government attempted to reform the national economy in line with its idea of privatization. It also set to establish a democratic governance system that will lead to peace and stability as its prime objectives.¹⁰² It initiated the process of decentralizing power from the central government to the subnational government. Moreover, it attempted to introduce the idea of sustainable development.

The legal and institutional framework governing the mining sector was one of the key areas targeted for reform. The transitional government introduced modern mining laws, tax proclamations, and regulations to encourage private capital investment in the sector.¹⁰³ It made an effort to design a legislative framework that is competitive enough to draw investment in mining industry, including the ideas of privatization in the mining sector, reducing the tax rate, introducing depreciation of capital investment, loss carrying forward, a re-investment allowance, the operation

¹⁰⁰ The Transitional Period Charter of Ethiopia, 1991; A Proclamation to Provide for the Establishment of Regional Self-Government, Proclamation No. 7 of 1992 Accordingly, the transitional charter recognized the right to self-determination including secession of the different ethno-linguistic group. The transitional self-governments were also established, mainly based on ethno-linguistic boundaries. The proclamation had created 14 "self-governing regions" for the nations, nationalities, and peoples of Ethiopia. Out of the 14 "self-governing regions nine of which were multi ethnic in their composition and only four regions were mono ethnic and the city of Addis Ababa was organized as an independent region. Furthermore, important powers were decentralized to the newly created regions

¹⁰¹ James Krueger et al., "Environmental permitting in Ethiopia: no restraint on "unstoppable growth?" Haramaya Law Review, 2014, 73-102.

¹⁰² Transitional Charter of Ethiopia, 1991

¹⁰³ A Proclamation to Promote the Development of Mineral Resources Proclamation No. 52/1993, Council of Ministers Regulations on Mining Operations, Council of Ministers Regulations No. 182/1994; even though the minor amendment was by Mining Amendment Proclamation, Proclamation No. 22/1996, these laws continued to regulate the mining sector until it was finally repealed by the federal mining proclamation, Proclamation No. 678/2010. The later law only made minor adjustments to its predecessor.

of foreign currency accounts, and exemptions for expatriate employees.¹⁰⁴ It should be noted from the start that the developments that occurred during this period have a significant impact on the governance of mineral resources under the FDRE constitution.

The new mining law retained some elements from previous regimes, such as the reaffirmation of public ownership and control over natural resources. However, it also introduced several innovations to address the economic, social, and environmental challenges associated with mineral resource extraction.¹⁰⁵ The new mining law maintain some of the issues addressed under the previous regimes. The public's ownership and control over natural resources were reaffirmed in the revised mining law. It also reaffirmed the optimal extraction of mineral resources by specifically requiring a person who holds a mining license to carry out mining operations in a prudent, diligent, and efficient manner, following appropriate technology and best practices generally accepted in the mining industry.¹⁰⁶

It also introduces important changes in addressing the economic, social, and environmental issues that arise in the development of mineral resources and the institutions that address them. It mandated that mining operations be conducted in manner that led to sufficient economic returns. The law also recognized the critical role of private investment in the sector, providing safeguards and incentives to attract both local and foreign investors. Moreover, it provides tools that are essential for environmental protection, including environmental impact assessment for large-scale mining operations, environmental conservation, adoption of suitable technologies, areas that are reserved from mining, environmental rehabilitation and environmental monitoring and supervision.¹⁰⁷ It also provides important elements for regulating the social impact of mining. It provides for the local content requirements, preference for the employment of Ethiopian nationals, and domestic goods and services.¹⁰⁸ For the first time in the modern history of Ethiopia, it recognized the role of artisan miners in the Ethiopian mining sector.¹⁰⁹ Additionally, it reaffirms

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Ibid

that mining operations should be conducted in such a manner as to ensure the health and safety of employees, and other persons.¹¹⁰

The transitional mining proclamation also introduced devolution of power in the mining sector, dividing responsibilities for revenue generation and mineral resource management between the federal government and newly established subnational governments.¹¹¹ It delineated regulatory authority based on the scale of extraction: regional governments were granted authority over artisanal and construction mining licenses, while the central government retained control over large-scale mining operations through the Ministry of Mines and Energy.¹¹² It represented a notable change in the governance of mineral resources, bringing about devolved institutional frameworks that greatly impacted the future design and functioning of the Ethiopian federal system.¹¹³

The transitional government amended Mining Income Tax Proclamation which provides an important financial regime to collect economic benefits from the extraction of mineral resources, including royalties, income taxes, fees, and equity participation.¹¹⁴ It introduced division of revenue raising between the newly created regions and the central government as per Proclamation Number 33/1993.¹¹⁵ The profit tax, royalty, and rent tax from large-scale mining operations are the shared revenue sources of both levels of government, and subnational governments have the same power over small-scale mining operations.¹¹⁶ It is responsible for the creation of a decentralized fiscal system that forms the foundation for the distribution of revenue from mineral resource extraction in the subsequent federal system.¹¹⁷

¹¹⁰ *ibid*

¹¹¹ A Proclamation to Provide for the Establishment of National/Regional Self Governments, Proclamation No. 7 of 1992. It reaffirmed the public ownership of mineral resources. It does not assign the ownership of mineral resources to the central or subnational government.

¹¹² Mining Income Tax Proclamation, Proclamation No. 53/1993,

¹¹³ A Proclamation to Promote the Development of Mineral Resources proclamation, Proclamation No. 52/1993, Council of Ministers Regulations on Mining Operations, Council of Ministers Regulations No. 182/1994; even though the minor amendment was by Mining Amendment Proclamation, Proclamation No. 22/1996, these laws continued to regulate the mining sector until it was finally repealed by Proclamation No. 678/2010. The later law only made minor adjustments to its predecessor.

¹¹⁴ *ibid*

¹¹⁵ *ibid*

¹¹⁶ A Proclamation to Define the Sharing of Revenue between the Central Government and the National/Regional Self-Governments, Proclamation No. 33/1992 It should be noted here that the division of control and revenue-raising power continued to affect the evolution of the federal arrangements.

¹¹⁷ *ibid*

However, the administrative and legal frameworks may have changed, but the economic, social and environmental problems associated with the use of mineral resources have not changed significantly.¹¹⁸ The transitional government continued to rely on the resource frontier model, which often led to the creation of resource enclaves with limited broader economic benefits.¹¹⁹ The mining sector's contribution to the national economy remained minimal, accounting for less than 1% of GDP and exports.¹²⁰ The transitional government reaffirmed its commitment to environmental conservation. However, many environmental problems encircled the mining industry in Derg time, continued.¹²¹ The transitional government introduced an important tool to enhance social development, including local content requirements and health and safety regulations.¹²² It also addresses the historic claims of local communities that were prohibited from extracting and selling precious minerals.¹²³ Local communities were allowed to engage in artisan mining, which created employment for millions of people. But still the local community obtained limited economic advantage from the extraction of mineral resource.

It is clear from the above discussion that the transitional period represents a crucial phase in Ethiopia's mining sector development. It witnessed Ethiopia's initial effort to align its legal and institutional framework with global trends, modernization of legal frameworks, introduction of environmental and social safeguards, and devolution of power to regional governments. These changes laid the foundation for the more comprehensive federal framework under the 1995 FDRE Constitution. The legacy of these reforms proved significant, establishing principles and structures that would shape Ethiopia's federal approach to mining sector governance. However, their immediate impact on addressing fundamental challenges was limited. The economic, social, and environmental challenges associated with mineral resource extraction persisted.

¹¹⁸ Guluma at supra note 50; Asebe Regassa, at supra note 54

¹¹⁹ Ibid

¹²⁰ World Bank. Ethiopia Mining Sector Development: Policy and Legislative Options Report. <http://hdl.handle.net/10986/24766> 2016.

¹²¹ Alemseged Debele at supra note 34

¹²² A Proclamation to Promote the Development of Mineral Resources proclamation, Proclamation No. 52/1993

¹²³ Alemseged Debele at supra note 34

3.7.THE INTRODUCTION OF FEDERALISM AND GOVERNANCE OF THE MINING SECTOR IN ETHIOPIA

In the years following the adoption of the transitional charter, the FDRE constitution was enacted. The FDRE constitution introduced several changes, including the federal system. The framers of the Constitution thought that establishing an ethnic federal form of government was a cure for the problems of the country and a viable way out of a nearly disintegrated nation.¹²⁴ The constitution explicitly acknowledges Ethiopia as a land of ethnolinguistic diversity and recognizes ethnic groups as building blocks of the federation.¹²⁵ In line with the idea of ethnic federalism, the constitution created regional governments based mainly on the borders of the ethnolinguistic group of the country. In doing so, it gives ethnic groups the chance to exercise the right to self-rule at the local level and also share power at federal level.

In addition to introducing the federal structure, the FDRE constitution addressed the governance of mineral resources. The constitution reaffirmed state ownership over mineral resources while it divided control and revenue-raising power over mineral resources between the center and regional states. It also provided important principles, guidelines, and rules that influence the governance of mineral resources. One of the rights and guiding principles introduced under the constitution is the idea of sustainable development. Hence, an attempt will be made in subsequent subsection to assess the idea of sustainable development in the Ethiopian legal system and its evolution in the mining sector.

3.7.1. INTRODUCTION OF CONCEPT OF SUSTAINABLE DEVELOPMENT IN THE ETHIOPIAN LEGAL SYSTEM

One of the major rights and guiding principles introduced under the constitution and subsequent laws is the idea of sustainable development.¹²⁶ The introduction of the idea of sustainable

124 Keller Edmond, *Ethnic Federalism and Democratization in Ethiopia*, Edinburgh University Press 2003: 21, 30-43 It should be noted that the discussion about the governance of mineral resources will be covered in subsequent chapters, with the exception of the concept of sustainable development and mining. The later points are explored under the current and next sections, which attempt to introduce the idea of sustainable development in the Ethiopian legal system and its evolution in the mining sector in particular.

125 Assefa Fiseha, *supra* note 58; Alemante G. Selassie, "Ethnic Federalism: Its Promise and Pitfalls for Africa." *The Yale Journal of International Law*, Vol. 28: 51, 2003: 51.

126 See the FDRE Constitution, Article 43 (1), which provides that "the peoples of Ethiopia as a whole, and each nation, nationality, and people in Ethiopia have the right to improved living standards and sustainable development." A similar provision is incorporated in all regional state constitutions. Moreover, it is also incorporated in several subsidiary

development has been influenced by both international and domestic developments.¹²⁷ Since the final days of the Derg, the Ethiopian government has made successive attempts to internalize the global debate on sustainable development.¹²⁸ Internationally, Ethiopia has been influenced by global frameworks that emphasize the need for responsible resource management and environmental stewardship. It was a signatory to several multilateral agreements that have a direct bearing on the sustainable development efforts of the country. It tried to deploy international ideals to fit the unique circumstances of the domestic policy debate.¹²⁹ Moreover, there were domestic efforts to incorporate the idea of sustainable development into legal and institutional frameworks.¹³⁰ The idea has gained traction as a response to the country's unique challenges, including population growth, environmental degradation, and the need for equitable economic development.

The FDRE Constitution is the primary tool used to introduce the concept of sustainable development in the Ethiopian legal system. As noted above, it makes a clear reference to the right to sustainable development.¹³¹ However, the FDRE Constitution nor subsidiary laws have given

legislations, including the Environmental Impact Assessment Proclamation No. 299/2002; the Environmental Pollution Control Proclamation No. 300/2002; the Oromia Regional State Mining Proclamation, Proclamation No. 227/2017; and the Federal Mining Operation Proclamation No. 678/2010.

¹²⁷ James Krueger et al., *supra* notes 100

¹²⁸ *Ibid* After the 1972 Stockholm Conference, the idea of sustainable development caught the attention of the UN member states, UN and other supranational agencies, and international financial agencies. As noted in the previous section, these institutions initiated different sustainable development models supported by different instruments such as conventions, protocols, guidelines, standards, and policies. As one way forward to realizing sustainable development, countries became part of international legal instruments designed to bring about sustainable development. Ethiopia is a party to diverse instruments, including the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the United Nations Framework on Climate Change Control (UNFCCC), the Kyoto Protocol, the Convention on Biological Diversity (CBD), and the Convention to Combat Desertification (CCD). As a member of the African Union, Ethiopia is a party to the African Convention on the Conservation of Nature and Natural Resources, the Bamako Convention. These instruments provide an important element of sustainable development, including the right to sustainable development, environmental rights, and the right to participate. It is part of the law of the state and also serves as a basis for interpreting the constitutional rules.

¹²⁹ *ibid*

¹³⁰ Wondemagegnehu G. Sellassie at *supra* note 51, Gedion Asfaw, et al., *Ethiopia: Protecting Nature in a Developing Decentralized Country*, in *Environmental Governance and Decentralization*, edited by Albert Breton, Giorgio Brosio, Silvana Dalmazzone, and Giovanna Garrone, Edward Elgar Publishing, 2007; 111-139.

¹³¹ It must be noted here that our discussion focused on the FDRE constitution, mainly for three reasons. First, the constitution, which is the supreme law of the land, dictates the constitutional space for subsequent laws, including the subnational constitution. Second, the subnational constitution used similar wording to that of the FDRE constitution. Hence, our discussion will apply to subnational constitutions, *mutatis mutandis*. Third, the nature of sustainable development recognized under the subsidiary laws will be addressed in detail in next part.

an elaborated definition of the concept or its key elements.¹³² The lack of definition has led to a debate about the content of sustainable development and the model of sustainability recognized.¹³³

The content of the notion of sustainable development recognized is subjected to two major debates. On one hand, some argue that the constitutional right to sustainable development solely indicates economic growth.¹³⁴ This group of scholars based their argument on the Amharic version of Article 43(3) of the constitution, which uses the phrase ‘*yemayaquarit idget*’ which can be translated to mean ‘*unstoppable or continuous growth*’, early government policy documents that focus on economic development and the existence of separate rights for environmental protection under Article 44.¹³⁵ On the other hand, others contend that Articles 43, 44, and 89 of the constitution incorporate contemporary understandings of sustainable development that integrate economic, social, and environmental dimensions.¹³⁶ It further argues that the Constitution contains sufficient rights and principles directing modern sustainable development.¹³⁷

The current researcher supports the view that the concept of sustainable development is integrated into Ethiopia's legal and policy framework, as demonstrated by the country's constitution and policy documents. Although the Amharic version of the constitution uses the term "*unstoppable or continuous growth*" instead of "*sustainable development*," it is important to look beyond this specific provision to understand the nature of sustainable development that is recognized.¹³⁸ A thorough examination of the FDRE constitution reveals that sustainable development is recognized as a fundamental guiding principle. The Constitution establishes crucial pillars of sustainable development, including the right to development, environmental rights, right of society to be consulted on activities that affect it, right to sustainable development, and improved living standards and principles for environmental protection and management.¹³⁹

¹³² See the FDRE Constitution, the 1997 Environmental Policy of Ethiopia (EPE), the Environmental Impact Assessment Proclamation No. 299 of 2002, and the federal mining proclamation, Proclamation No. 678/2010.

¹³³ James Krueger et al., supra notes 100

¹³⁴ Tsegai Berhane Interrogating the Economy-First Paradigm in ‘Sustainable Development: Towards Integrating Development with the Ecosystem in Ethiopia, Mizan Law Review, Vol. 11, No. 1, September 2017: 64-87; Krueger, James at supra note 95

¹³⁵ Ibid

¹³⁶ Teferi Bekele et al., Sustainable Development Laws in Ethiopia: Opportunities and Challenges of Their Implementation, Afe Babalola University, J. of Sust. Dev. Law & Policy, Vol. 9: 2: 2018; 24- 48

¹³⁷ Ibid

¹³⁸ The FDRE Constitution article 43

¹³⁹ Ibid

Article 43 of the Constitution of Ethiopia makes it abundantly clear that the people of Ethiopia have the right to sustainable development and to improved living standards. Regardless of the ongoing debate that was mentioned earlier regarding the Amharic and English versions of the Constitution, it is important to point out that this article at least acknowledges the right to economic development. Moreover, the FDRE Constitution encompasses basic environmental rights and policy guidelines that are essential for the realization of sustainable development.¹⁴⁰ It guarantees the right to live in a clean and healthy environment, imposes an obligation on the government to restrain development activities that impact the environment, and imposes a duty on the government to ensure that development projects do not cause harm to the environment.¹⁴¹ The Constitution also includes important social development rights and guiding principles that are crucial for sustainable development. It stipulates that the government, as the owner of natural resources, should ensure that its development activities benefit society and are equitably distributed across communities.¹⁴² Furthermore, it provides the local community that is impacted by policy and development activities with the right to be consulted and the right to compensation for any adverse impacts that may occur as a result of those activities.¹⁴³ On top of that, the Constitution provides a substantial amount of protection for workers and women right.¹⁴⁴ Taking into consideration these provisions, one could make the case that the FDRE Constitution has successfully incorporated concepts of sustainable development throughout its text. The inclusion of these provisions demonstrates the commitment of the Ethiopian legal system to promote sustainable development, and underscores the importance of aligning mining practices with sustainability objectives.

¹⁴⁰ Khushal, Vibhute, *Environmental Policy And Law Of Ethiopia: A Policy Perspective*, *Journal of Ethiopian Law*, (22) 2008: 75–101; Fikire Tinsae, *Justiciability of Socio-Economic Rights in Ethiopia: Exploring Conceptual Foundations and Assessing the FDRE Constitution and Judicial Perspective*. *Beijing Law Review*, 9, 2018: 322-344; Abebe, A. *Human Rights in the Ethiopian Constitution: A Descriptive Overview*. *Mizan Law Review*, 5, 2010: 41-71.; Yeshanew, S. *The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia*. *African Human Rights Law Journal*, 8, 2008: 273-282. The FDRE Constitution, under articles 35, 36, 39, 40, 41, 42, 43, and 44, has recognized socio-economic rights. Moreover, it empowered ratified international human rights treaties to serve as a standard of interpretation for the bill of rights recognized in the Constitution, many of which treat socio-economic rights as justiciable. However, questions have been raised about the justiciable nature of the rights recognized in the Constitution, which is often seen as a progressive approach. However, as Fikire rightly points out, such debates are rhetorical, as these rights are justiciable. On the other hand, the constitution stipulates economic, social, and cultural objectives and principles that the state must adhere to when formulating national policies, which in turn influences the interpretation of the rights enshrined in fundamental rights and freedoms.

¹⁴¹ The FDRE constitution Article 44; 92

¹⁴² Id Article 89

¹⁴³ Id Articles 43/2 and 44/2

¹⁴⁴ Id Articles 35 and 42

Ethiopia demonstrates its commitment to sustainable development through its medium- to long-term plans and policies. An examination of Ethiopian government policy will also reveal that it has come a long way to recognize the ideas of sustainable development. Even before the introduction of the FDRE constitution, Derg and transitional governments attempted to integrate the idea of sustainable development into the Ethiopian political economy.¹⁴⁵ Since the 1990s, the government led by the EPRDF has executed a range of medium- to long-term plans and targeted policies that acknowledge the important pillars of sustainable development to varying degrees.¹⁴⁶ In the beginning, the primary focus of development plans was on the economic and social development of the country.¹⁴⁷ However, federal and subnational governments have made progressive efforts to implement the pillars of sustainable development.¹⁴⁸ The integration of the environmental pillar with the economic, environment, and social development pillars began during the formulation of the Sustainable Development and Poverty Reduction Program (SDPRP).¹⁴⁹ Later initiatives, including the Plan for Accelerated and Sustainable Development to End Poverty (PASDEP), followed such development and set specific indicators and targets.¹⁵⁰ Growth and Transformation Plans (GTP) I and II represent the most ambitious efforts to incorporate sustainable development principles and objectives.¹⁵¹ Furthermore, the Homegrown Economic Reform Agenda identified sustainable development as a key pillar.¹⁵² Thus, even at the time of writing the above-mentioned article, several policy instruments were in place that aimed to encourage sustainable development.

Once the content of the concept of sustainable development recognized under the Ethiopian legal framework is clarified, the next question that arises is the nature of sustainable development model recognized and how it addresses conflicts between economic, social, and environmental elements.

¹⁴⁵ Gedion Asfaw, et al at supra note 129

¹⁴⁶ Agriculture Development Led Industrialization (ADLI), 1992; Poverty Reduction Strategy Paper (PRSP), 2001; Sustainable Development and Poverty Reduction Program (SDPRP), Federal Democratic Republic of Ethiopia (FDRE) Ministry of Finance and Economic Development (MOFED), 2002; Plan for Accelerated and Sustained Development to End Poverty (PASDEP), Ministry of Finance and Economic Development (MoFED) (2006); The Federal Democratic Republic of Ethiopia Growth and Transformation Plan (GTP) (2010/11–2014/15); Growth and Transformation Plan II (GTP II) (2015/16–2019/20); A Homegrown Economic Reform Agenda: A Pathway to Prosperity, 2020

¹⁴⁷ Ibid

¹⁴⁸ Tsegai Berhane, at supra note 132

¹⁴⁹ Sustainable Development and Poverty Reduction Program (SDPRP), at supra note 146

¹⁵⁰ Plan for Accelerated and Sustained Development to End Poverty (PASDEP), at supra note 146

¹⁵¹ Growth and Transformation Plan I (GTP I), at supra note 146; Growth and Transformation Plan II (GTP II), at supra note 146; A Homegrown Economic Reform Agenda: A Pathway to Prosperity, at supra note 146

¹⁵² Ibid

There are two views on the nature of the sustainable development model under the Ethiopian legal system. On the one hand, Teferi et al. argue that the Constitution aims to promote a strong sustainability model.¹⁵³ On the other hand, those such as Tsegai, based on constitutional texts and various policy documents, contend that Ethiopia follows a weak sustainable development approach, with greater emphasis on social and economic development.¹⁵⁴

This latter interpretation aligns with the Constitution and successive economic policy documents. A closer examination of the constitution acknowledges the importance of economic growth while also recognizing the need to safeguard social equity and environmental protection. The successive economic policy documents of the Ethiopian government reveal a preference for prioritizing economic sustainability.¹⁵⁵ Moreover, if one considers the strong sustainable development model and takes the constitutional text literally, it is impossible to have an extractive sector. As noted here, the mining proclamation is a good example in this regard, as it recognizes elements of sustainable development, such as economic and social development and environmental protection, as guiding principles for government action. It attempts to create a balance between competing elements. Therefore, it is reasonable to argue that Ethiopia follows a weak sustainable development model that emphasizes balancing economic development with social and environmental wellbeing. Once the nature of the sustainable development model is established, the next question is which element prevails when there is conflict between the economic, social, and environmental elements. Ideally, it is advisable to avoid such conflicts.¹⁵⁶ It is well-documented that conflicts are inevitable in practice. Responses to these conflicts depend on whether the sustainable development model is weak or strong. In the case of a strong sustainable development model, the principle of sustainability takes precedence over the economic development needs when conflicts arise. However, in a weak sustainable development model, the choice depends on finding a balance between the economic and sustainability objectives. As noted above, Ethiopia has recognized a weak, sustainable development model. Accordingly, in such cases, the response depends on a balance between the pillars of sustainable development.

153 Ibid

154 Tsegai Berhane, at supra note 132

155 Growth and Transformation Plan I (GTP I), at supra note 146; Growth and Transformation Plan II (GTP II) at, at supra note 146; A Homegrown Economic Reform Agenda, at supra note 146

156 Tsegai Berhane, at supra note 132

It is evident from the preceding discussion that the establishment of the Ethiopian federal system was implemented alongside the introduction of the concept of sustainable development in its present-day manifestation. Ethiopia's approach to sustainable development reflects a careful balance between ambitious development goals and environmental stewardship. This strategy is shaped by both globally recognized standards and domestic imperatives, and it allows Ethiopia to achieve a progressive evolution toward more comprehensive sustainability integration. While disagreements over the precise form of Ethiopia's sustainability model continue, the evidence points to a pragmatic, weak sustainability approach that emphasizes development while maintaining critical environmental and social safeguards. This framework offers sufficient flexibility to facilitate the fulfilment of Ethiopia's urgent development requirements while simultaneously guaranteeing the long-term sustainability.

3.7.2. THE INTRODUCTION OF SUSTAINABLE DEVELOPMENT AND THE MINING SECTOR

The constitutional introduction of the idea of sustainable development preceded and followed by a diverse legal and policy framework that intended to mainstream the idea of sustainable development. International agreements, Mining Law, mineral transaction law, and Environment Management legislation, among other pieces of legislation, play a crucial role in regulating controlling the extraction of mineral resources.¹⁵⁷ This framework represents a significant paradigm shift in the governance of mineral resources. It is a noteworthy achievement in the move towards responsible mining practices that balances economic development with environmental protection and social welfare.

The federal government has actively engaged in international agreements, including investment treaties, international human rights laws, and environmental conventions and treaties that has contains provision which incorporate the idea of sustainable mining.¹⁵⁸ Investment treaties often include provisions that promote environmentally responsible mining practices, encourage community engagement, and safeguard human rights. The international human rights laws provide essential guidelines for safeguarding the rights of workers, local communities, and indigenous

¹⁵⁷ See the Oromia Regional State Mining Proclamation, Proclamation Number 227/2017, The federal mining proclamation, Proclamation No. 678/2010, and the Environmental Impact Assessment Proclamation No. 299 of 2002. It should be noted here that a detailed assessment of the legal and institutional practices will be made in subsequent chapters.

¹⁵⁸ *ibid*

populations, ensuring that mining activities do not come at the expense of human dignity, environmental integrity, or social justice. Similarly, environmental conventions and treaties also provides a robust foundation for addressing pressing environmental challenges. The collective reading of the above instruments provides important rights, and principles which requires that mining operations are conducted in a manner that balances economic growth with environmental stewardship and social responsibility.

In the last thirty years, the Ethiopian federal government has made significant progress in creating a legal framework that regulate the extraction of mineral resources. The principal law regulating the mining industry is the Mineral Resources Development Proclamation, in short, the mining proclamation.¹⁵⁹ It provide important rule that tackles different aspects of mineral resources extraction. It seeks to ensure that the extraction of mineral resources is carried out in an orderly and ecologically sustainable manner while simultaneously supporting fair and equitable social and economic growth. As noted herein under, to accomplish these goals, it provides detailed regulations and guidelines. Moreover, the Ethiopian federal government passed the Environmental Impact Assessment Proclamation in 2002.¹⁶⁰ As noted in subsequent chapters, it provides a comprehensive framework for ensuring that development projects contribute to economic growth without compromising environmental integrity or social well-being.

The federal government has implemented several targeted policies and medium-to long-term plans that expressly acknowledge the key components of sustainable development to varying degrees.¹⁶¹ The policy framework, as noted above, acknowledges the value of environmental protection, social and economic development, and governance in the mining sector. These initiatives reflect a

¹⁵⁹ Federal Mining Proclamation, proclamation Number 678/2010, It should be noted here that an attempt is made in the subsequent chapter to examine the extent to which the Ethiopian legal framework integrates the pillars of sustainable mining: economic development, environmental protection, and social development. In terms of economic development, this study examines whether the legal system supports responsible mining methods that maximize economic gains while avoiding adverse effects. Assessment of environmental protection focuses on how much the legal system integrates environmental protection, pollution control measures, land reclamation regulations, and biodiversity conservation. Additionally, social development analysis evaluates the legislative framework that upholds the rights and welfare of impacted communities, employees, and vulnerable groups.

¹⁶⁰ Environmental Impact Assessment proclamation, Proclamation Number 299/2002

¹⁶¹ Sustainable Development and Poverty Reduction Program (SDPRP), at supra note 146; Plan for Accelerated and Sustained Development to End Poverty (PASDEP), at supra note 146; Growth and Transformation Plan I (GTP I), at supra note 141; Growth and Transformation Plan II (GTP II), at supra note 146; A Homegrown Economic Reform Agenda: A Pathway to Prosperity, at supra note 146

growing recognition of the interconnectedness of environmental protection, social and economic development, and governance within the mining sector.

Additionally, the federal system has designed programs that are meant to increase the mining industry's contribution to sustainable development. These programs seek to attract investment, enhance operational standards, and ensure that mining activities align with national development goals. Moreover, the Ministry of Mine created numerous drafts of its mineral policy, including those from 2008 and 2019. However, many of them are yet to be adopted. A number of explanations could be forwarded in response to the federal government's failure to come up with a binding policy framework, including frequent changes in leadership, limited attention to the issue, and constant reshuffling within the ministry.¹⁶² Despite such limitation, the draft mining policy framework acknowledges the value of governance, social and economic growth, and environmental protection in the mining industry.¹⁶³ It places strong emphasis on the necessity of reducing the negative effects of mining operations on the environment, fostering sustainable resource management, and ensuring the welfare of nearby communities. It also recognizes the importance of accountability, transparency, and governance in the industry.

It is clear from the above discussion that, saving detailed discussion for later chapters, in the last three decades the Ethiopia has made a significant attempt to operationalize the idea of sustainable mining in its legal system. It continuously attempted to incorporate trends and also address emerging challenges in the governance of mineral resource. In the meantime, it strives to balance economic growth, environmental protection, and social wellbeing. This, effort, to large degree has been successful, as it led to the recognition of important elements of sustainable mining.

3.8. CONCLUSION

This chapter examines the major developments made in the governance of mineral resource in Ethiopia, from ancient times to the current federal system, emphasizing on the most significant shifts in strategies and policies. This long-term perspective aimed provides a solid basis for analyzing the current challenges and opportunities in Ethiopia's mineral resource governance. In ancient and medieval Ethiopia, mineral extraction was carried out without a detailed legal and institutional framework that was primarily focused on economic gains. A significant shift began

¹⁶² Moore Stephens at supra note 20

¹⁶³ Draft-Mineral-Resources-Development-Policy of Ethiopia 2021

during Emperor Haile Selassie's reign, marked with the introduction of modern mining legal and institutional frameworks which established state control and economic advantages, while environmental and social issues were given only limited consideration. The Derg did not make a significant change to the basic laws and policies governing mining activities. The transitional government introduced a new mining and tax law, which brought about significant changes in mineral resource governance. The newly introduced laws address the economic, social, and environmental aspects of mineral resource development. It also introduces the idea of devolution to the institutions that handle the mining sector. It has attempted to take steps towards the decentralization of mining governance, with some powers devolving to regional states. Nonetheless, the problems pertaining to the economy, society, and environment that emerge from the use of mineral resources do not essentially change. One of the most significant changes brought about by the FDRE Constitution was the establishment of the federal system. It also provided important principles, guidelines, and rules that govern the extraction of mineral resources. One of the major rights and guiding principles recognized under the Constitution and subsequent laws is the idea of sustainable development. The Constitution introduces a soft sustainable development approach that balances economic and social development with environmental well-being. Furthermore, the constitutional introduction of the idea of sustainable development was further reinforced by the development of diverse legal and policy frameworks, including the Mineral Resources Development Proclamation and the Environmental Impact Assessment Proclamation, which sought to mainstream sustainable practices in the mining sector. Thus, the governance of mineral resources in Ethiopia has evolved significantly structurally and conceptually over time. It has transitioned from a traditional legal and institutional framework to a modern one. It also marked a significant shift from a solely economic focus to a more comprehensive approach that sought to balance economic benefits with environmental preservation and social progress. This evolution reflects broader global movements for sustainable development and responsible resource management. This demonstrates how past traditions, political shifts, and changing global standards have all had an impact on Ethiopia's current approach to mineral resource management.

CHAPTER FOUR

THE OWNERSHIP OF MINERAL RESOURCES AND SUSTAINABLE MINING IN THE ETHIOPIAN FEDERATION

4.1.CHAPTER INTRODUCTION

The assignment of the ownership of mineral resources and the administration of mining licenses are one of the contentious issues in the design and operation of federal systems. Moreover, the relationship between the ownership structure and sustainable mining practices in an emerging field of study. This chapter aims to explore Ethiopia's experience in addressing these issues, focusing on three key areas: the assignment of ownership of mineral resource, the administration of mining licenses, and the impact of ownership structure on sustainable mining practices. The first section is an introductory one. It examines the evolution in the regulation of the ownership of mineral resources in Ethiopian legal system. It reveals that the ownership system has undergone significant changes over time, reflecting the country's political and economic evolution. The Second section examine the nature of the ownership system recognized by the FDRE Constitution. It reveals that the FDRE constitution and subsequent mining laws ambiguous treatment of the ownership mineral resource, which have led to significant disputes among local communities, subnational governments, and the federal government. The third section examines the legal framework governing the mining license. It identifies a critical inconsistency with the constitution, international human rights law, and the concept of power decentralization. The fourth section assesses practical challenges in the transferring mining titles within Ethiopia's federal system. It reveals that the federal government has issued numerous large-scale mining licenses, without adequate involvement of subnational actors. Moreover, it revealed that the exclusive approach has fueled tensions and, in some cases, escalated conflicts between the federal government, subnational entities, and affected communities. Furthermore, the chapter examines the federal government's recent attempts to address these challenges. While some efforts have been made to improve consultation and benefit-sharing, these initiatives have been limited in scope and lack the necessary legal and institutional support. The Fifth section assessed the impact of the assignment of ownership of mineral resources on sustainable mining. It finds that the ownership structure has limited impact on sustainable mining practices. The final section presents the conclusion which was made based on the discussions made in previous sections.

4.1.THE OWNERSHIP OF MINERAL RESOURCES PRIOR TO THE INTRODUCTION OF THE FDRE CONSTITUTION

In Ethiopia, the regulation of the ownership of mineral resources has undergone significant changes over time, reflecting the country's political and economic evolution. Historically, the ownership of mineral resources was governed by traditional rules and institutions deeply rooted in local customs and practices, varying across different regions and ethnic groups that date back to times immemorial. The creation of the modern Ethiopian state in the late 19th century brought about a profound change in the regulation of the ownership of mineral resources. It has paved the way for the rules that replace traditional rules in a manner that ensures the central government has control over mineral resources.¹ It allowed the central government to have overarching power over the extraction of mineral resources. The central government was the main organ that granted permits or licenses to prospective foreign and domestic companies, irrespective of the location of mineral resources.² Local governments were mainly used by the center as a source for the supply of gold, mainly through the gold tribute system, gifts, and sales.³ This shift in governance represented a move away from localized, traditional forms of resource control towards a more centralized, state-driven approach.

The centralization of the regulation of the ownership of mineral resources, as noted above, was formalized through a series of legal instruments enacted by the imperial government. The de jure dispossession of local communities and government was made in 1928 with an imperial decree, which vests the ownership of mineral resources in the imperial government, except for building materials.⁴ The central government's ownership of mineral resources was further confirmed by successive legal instruments including constitutions, proclamations, and decrees.⁵ However, most

¹ Markakis John, Ethiopia: The Last Two Frontiers, Eastern Africa Series, 2011.

² Alemseged Debele, A History of Mining in Wallaga, Western Ethiopia, 1899–1991, Dissertation submitted to the College of Social Sciences of Addis Ababa University, 2020; <https://etd.aau.edu.et/collections/6ee88dea-4e2e-45df-93fd-fb4268a5c711> ; Guluma Gameda, Political Domination, and Exploitation of Mineral Resources in Oromia: From Menilek to Meles, the journal of Oromo Studies, volume 5, 1998:133-155

³ Ibid

⁴ See Imperial Decree of 18th April 1928.

⁵ See Wondemagegnehu G. Selassie, Mining and Development: An Overview of the Ethiopian Experience Within the Context of Mining Laws, The Ethiopian Bar Review, vol. 2, no. 2, March 2008 115-143, Decree to Maintain the Prosperity of the Mineral Resource of the Country and to Control Strictly the Export of Mineral Resource, December 5, 1929, Official Notice, March 19, 1931, Official Notice, May 21, 1931, Decree to Prohibit the Extraction of Any Precious Mineral Resource Without Having the License of Mines Office, Decree to Control the Smuggling of Precious

of these laws are fragmented in terms of organization and content. As noted, previous chapter, in 1971, the imperial government enacted the first comprehensive mining law of the country.⁶ The Imperial Mining Code reaffirmed the state's ownership of mineral resources. Moreover, it also provides detailed rules that provide for a highly centralized procedure that regulates the transfer of mining licenses.⁷ This evolution of the legal framework solidified the central government's control over mineral resources and established a more structured approach to mining regulation in Ethiopia.

Over time, as noted above, the imperial government's the regulation of the ownership of mineral resources underwent significant institutional changes. Until the Italian invasion, mining concessions were largely transferred to developers through a direct bargain with the imperial government. In most cases, the emperors negotiated concessions mainly with foreign developers. However, in the post-Italian era, the imperial government established a centralized institution that enforced the government's ownership of mineral resources. It created the Department of Mines at the Ministry of Finance (1941–1953), Imperial Mining Board (1953–1966), and Ministry of Mines (1966–1974).⁸ These institutions had issued several mining licenses to domestic and foreign developers. However, none of these institutions entertained the idea of devolution of power or participation of the local community in the decision-making process. This evolution of the institutional framework solidified the central government's control over mineral resources and established a more structured, and centralized approach to mining regulation in Ethiopia.

The military rule that replaced the imperial regime enacted mining regulations, laws, and orders that regulated the ownership of mineral resources, which were highly influenced by its radical

Mineral Resource, 27.2.1924 E.C.; The 1931 constitution of the imperial government of Ethiopia; Proclamation to Provide for the Revocation of Concessions Granted by the Italian Government, Proclamation No.49/1944; Decree on "Administrative Regulations (Amendment), Decree No.6/1946.; Proclamation for the Control of Transactions in and Concerning Gold and Platinum in Our Empire, Proclamation No. 67/1944; Proclamation to govern income taxes from businesses, Proclamation No. 107/1949; Decree to provide Encouragement of Foreign Capital Investment in Ethiopia, Notice No. 10/1950; The Revised Constitution of the Empire of Ethiopia, 1955; Decree to Provide for the Encouragement of Capital Investment in Ethiopia, Decree No. 51/1963; An Order to Define the Power and Duties of Our Ministers, No. 46/1966; A Proclamation to Promote the Development of Mineral Resources of the Empire of Ethiopia, Proclamation Number 282/ 1971; Mining Regulation No. 396/1971

⁶ Ibid

⁷ Tilahun Weldie, An Overview of the Legal Regime Governing Minerals in Ethiopia, Bahir Dar University Journal of Law, Vol. 3, No. 1, 2012: 24-66

⁸ See Wondemagegnehu G. Selassie at supra note 5.

socialist ideological orientation.⁹ However, the Derg, despite its radical socialist ideological orientation, as noted above, largely continued with the imperial government's policies. It uses its socialist ideology to justify the government's ownership and control of mineral resources. Accordingly, the public ownership of mineral resources was reaffirmed, and the government was made to own all the valuable and rare mineral resources found in the country. It also allows minerals to be extracted by the government, mutually by the government and individuals, and by individuals and private companies.¹⁰ Moreover, Derg did not change the centralized mining license system. Meanwhile, it granted mining licenses to domestic investors and created a joint venture with companies from the socialist camp.¹¹ This period demonstrates how Ethiopia's mineral governance adapted to the new political ideology while maintaining certain continuities with the past, particularly in terms of centralized control.

The ethno-nationalist liberation forces were able to undertake massive military operations that threw the military regime out of power in May 1991.¹² The transitional central government enacted a new mining and mining tax proclamation.¹³ The transitional mining law, as noted above, introduced several changes that focused on addressing the peculiarities of the mining sector.¹⁴ However, despite the introduction of the decentralization of power, its effect on the ownership of mineral resources was rarely felt. It simply reaffirmed the public ownership of mineral resources.¹⁵ It does not assign ownership of mineral resources to central or subnational governments. On the other hand, it provided that the central government has the main power in the administration of the ownership of mineral resources.¹⁶ The role of the newly created subnational government was limited to licensing all artisan miners and construction material mining by domestic investors.¹⁷

⁹ Ibid, However, the military regime had only issued three proclamations that are directly related to mining, none of which had made any significant difference in the government's ownership and control of mineral resources.

¹⁰Ibid; Grantley W. Walrond, Girma Hailu, Policy Ethiopian mining sector changes with the private sector in mind, natural Resource Forum, Volume15, Issue3 August 1991: 239-242; A Proclamation to Provide for Government Control of Mineral Prospecting, Exploration, and Mining Activities, Proclamation Number 39/75.

¹¹ ibid

¹² Christophe Van der Beken, Unity in Diversity: Federalism as a Mechanism to Accommodate Ethnic Diversity: The Case of Ethiopia, Munster, Lit Verlag, 2012.

¹³ The Transitional Period Charter of Ethiopia, 1991; A Proclamation to Provide for the Establishment of Regional Self-Government, Proclamation No. 7/92

¹⁴ Ibid

¹⁵ See Mining Proclamation No.52/1993; Mining Operations Council of Ministers Regulations No. 182/1994.

¹⁶ Ibid article 46

¹⁷ Ibid article 46

The central government was not required to involve the subnational government or local communities in the decision-making process. This period demonstrates a complex interplay between decentralization efforts and the continuity of centralized control over mineral resources, reflecting the challenges of balancing national interests with regional autonomy in resource governance. In line with such an arrangement, the transitional government issued several mining licenses to developers. Transfer of mining titles without the involvement of the newly created subnational government and local communities.¹⁸ The role of subnational governments was limited to preparing land for mining operations. Moreover, it granted mining licenses in areas occupied by diverse peoples to multinational gold mining corporations without consulting and compensating local communities for any damage they sustained.¹⁹

4.2.THE OWNERSHIP OF MINERAL RESOURCES UNDER THE FDRE CONSTITUTION

In the years following the adoption of the transitional charter and the formation of the transitional government, serious efforts were made to enact a constitution.²⁰ The resulting new Constitution opted for a new state-building strategy and introduced an ethnic-based federal system. The ethnic federal system is considered a major stone in addressing the long-standing ‘national question,’ which was initiated by the students’ movement in the 1960s and 1970s.²¹ The creation of the Ethiopian Federation reignited the ownership claims of ethnolinguistic groups. The FDRE constitution tried to address this historic question pertaining to control over natural resources in line with the cardinal principle of federalism, the division of power. It provides that natural resources, including minerals, are owned by the “state and the people.”²² Moreover, it provides that the government must hold, on behalf of the people, natural resources and deploy them for their

¹⁸ Ibid

¹⁹ Gobena Huluka, Environmental Impacts of Gold Mining in Oromia, *Journal of Oromo Studies*, volume 6, 1999:159-173

²⁰ Christophe at supra note 12

²¹ Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Rev. Ed. Utrecht: Wolf Legal Publishers, 2007., the constitution, in explicit terms, acknowledges Ethiopia as a land of ethnolinguistic diversity and recognizes ethnic groups as a building block of the federation. It recognized the right to internal and external self-determination of “nations, nationalities, and peoples” as the “super-norm” on which the Constitution is founded. The constitution tries to empower the different ethnic groups in the country by establishing regional states and local governments based on an ethnolinguistic basis. It tries to decentralize power and resources from the center and accommodate the diverse ethnolinguistic groups that exist in the country.

²² See FDRE constitution Art. 40(3).

common benefit and development.²³ The regional state constitutions also provide similar provisions for the ownership of natural resources.²⁴ However, the Constitution's treatment of natural resource ownership is marked by ambiguity, leading to significant interpretative challenges.

The FDRE Constitution regulates ownership of natural resources by providing land under the same sub-article. Accordingly, it provides that land and natural resources are owned by the '*State and the Peoples of Ethiopia*'.²⁵ It uses two separate entities, "*State and Peoples of Ethiopia*," which are subjected to different interpretations to assign ownership of natural resources. Furthermore, similar provisions regarding the ownership of natural resources are included in the constitution 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 the 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.

The first source of ambiguity entity that has been used assign the ownership of mineral resources is "*state*." However, the English and Amharic versions of the Constitution ascribe different meanings to the term. In the English version, the term "*state*" suggests that ownership lies with the Ethiopia state, which is represented by the federal government. Conversely, the Amharic version uses "*Mengist*", which can be roughly translated as "*government*". It remains unclear, whether it refers to the federal or regional governments. This linguistic ambiguity breeds confusion and competing assertions of control over mineral resources.²⁶ Complicating matters further are federal and state mining laws. The federal mining law provides that mineral resources "are the property of the government".²⁷ It defined the government as "*the federal government... and... includes states*

²³ Ibid article 89/5, Wondemagegnehu G. Selassie at supra note 5

²⁴ See the Amhara National Regional State Constitution, Proclamation Number 59/2001; the Harari Regional State Constitution, 2005; and the Oromia Regional State Revised Constitution, Proclamation Number 46/2004. All the regional states used similar terminology in the assignment of mineral resources to that of the federal constitution. For instance, see the Oromia region constitution article 40 and the Amhara region constitution article 40.

²⁵ See the FDRE Constitution, Art. 40(3). Furthermore, it provided that land is "a common property of the nations, nationalities, and peoples of Ethiopia and shall not be subject to sale or other means of exchange."

²⁶ Husen Tura, "Land rights and land grabbing in Oromia, Ethiopia." Land use policy 70, 2018: 247-255; Fasil Zewdie, Right to Self-Determination and Land Rights in Ethiopia: Analysis of the Adequacy of the Legal Framework to Address Dispossession' Law, Social Justice & Global Development Journal, LGD, 2013:3-26

²⁷ The Federal Mining Proclamation, Proclamation Number 678/2010, Article 2/10, 5/1

*where appropriate.*²⁸ This definition implies that both federal and regional governments can assert ownership of mineral resources. On the other hand, the regional state, for a long time, opted not to make claims regarding the ownership of mineral resources, while it provided that the land was the property of the people in the regional state.²⁹ After the 2018 national protest, some regional states started to state that the mineral resources in the region are the property of the region and the people of the region.³⁰ The above development led to the question of the role of the federal and regional states in the ownership of mineral resources.

The second entity that has been subjected to different interpretations is the phrase “*Peoples of Ethiopia.*” The lack of clarity mainly emanates from the difference between the English and Amharic versions. The English version of the Constitution uses “*Peoples of Ethiopia.*” It is not clear whether this refers to the nation, nationality, or people, as provided under Article 39/5 of the Constitution. The second sentence of the same provision further adds to the confusion, as it only provides that land is a common property of the nations, nationalities, and people of Ethiopia. It is not clear whether it adopted the joint ownership of mineral resources between the federal government and the specific nation, nationality, and people in the country.³¹ On top of this, as noted above, the regional state mining law started to provide that the mineral resources in the region are the property of the people of the region.³² On the other hand, the Amharic version of the same text uses the word “*people*” without any qualification. It seems that it considers the

28 The Amhara National Regional State Constitution, Proclamation Number 59/2001; the Harari Regional State Constitution, 2005; and the Oromia Regional State Revised Constitution, Proclamation Number 46/2004, follow the federal constitution in the assignment of ownership of mineral resources.

29 Ibid. Except for the Harari region, all the regional state constitutions provide that land is the common property of the people of the regional states.

30 A Proclamation to Amend Oromia Region Mineral Development Operation Administration No. 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.” Emphasis is added by the authors. It should be noted here that Most of the regional states failed to make such claim, as it failed to develop an independent mining law, A good example in this regard is Benishangul regional state.

31 See FDRE constitution article 39/5. It should be noted here that the ownership of mineral resources, as noted in the previous chapter, is the widest right over mineral resources. Accordingly, the interpretation that the FDRE constitution assigns ownership of mineral resources to NNP or not has a significant effect. The interpretation as to the recognition of the right will grant the NNP substantive and procedural rights over mineral resources, including the veto power over the extraction of mineral resources and the right to be consulted and informed. On the other hand, the contrary interpretation will minimize the right of the right of NNP over mineral resources to procedural rights. Hence, the proper determination of the issue is crucial.

32 A Proclamation to Amend Oromia Region Mineral Development Operation Administration No. 223/2020; see its preamble.

people of the country as one entity and suggests that the federal government and entire population of the country are joint owners. On the other hand, the regional state constitutions followed the Amharic version of the federal constitution.³³ Moreover, the federal mining law provides that mineral resources “are the property of all the peoples of Ethiopia.”³⁴ These inconsistencies have led to divergent interpretations and competing claims over resource ownership.

The lack of clarity, as noted above, has led to a debate about the assignment of ownership of mineral resources. The Ethiopian Federation has witnessed contradictory claims and conflicts among ethnic groups, each seeking to advance their own interpretations.³⁵ On the other hand, constitutional law on this issue is limited. Moreover, there is limited literature exploring the assignment of ownership of mineral resources, as most scholarly works have concentrated on land ownership. The latter discussion is also highly diversified and can be categorized as supporting the state, federal, or joint ownership of land, while others argue for the rights of indigenous people.³⁶ Hence, an attempt will be made to explore what ‘*State and the Peoples of Ethiopia*’ is and its effect on the rights of the federal government, regional states, and people.

The determination of the nature of the assignment of ownership of mineral resources should start with an exploration of the meaning of the term used by the constitution to assign ownership of mineral resources. The first entity used by the FDRE constitution to assign ownership of mineral resources is the “*state*”. State ownership of mineral resources in Ethiopia has a long history. However, de jure state ownership of mineral resources is associated with an imperial decree that vests ownership of mineral resources in the central government, except for building materials.³⁷

33 Amhara Regional State Revised Constitution, Proclamation Number 59/2001; Oromia Regional State Revised Constitution, Proclamation Number 46/2004; Revised Constitution of the Benishangul Gumuz Regional State’, December 2002; All the regional states used similar terminology in the assignment of ownership of mineral resources.

34 See Federal Mining Proclamation, Proclamation Number 678/2010, Article 2/10, 5/1.

35 see The ONLF Statement on Military Operation Against Illegal Oil Facility in Ogaden, 24 April 2007 (<http://www.onlf.org/pressAug062006.htm>); Reuters, Gunmen kill five miners in Ethiopia, <https://www.reuters.com/article/us-ethiopia-crime-idUSKCN1R01HD> accessed January 2020; the Guardian, Ethnic Somali rebels kill 74 at a Chinese oil field in Ethiopia <https://www.theguardian.com/world/2007/apr/25/ethiopia> ; Reuters, Ethiopia denies rebels chased oil and gas firms away, <https://www.reuters.com/article/ozatp-ethiopia-oil-gas-20100902-idAFJJOE6810PD20100902> ; accessed January 2020,

³⁶ Muradu Abdo, "State policy and law in relation to land alienation in Ethiopia." PhD diss., University of Warwick, 2014; Cambou, Dorothee. "Addressing the rights of Indigenous Peoples in the development of Ethiopia: A difficult compromise or a compelling necessity?" In Human Rights and Development, Brill Nijhoff, 2015: 139-166.; Fasil Zewdie at supra note 26; Husen Tura at supra note 26

³⁷ Imperial Decree of the Ethiopian Government, April 8, 1928

State ownership of mineral resources was reaffirmed during the Dreg and Transitional periods. Moreover, there is no indication of devolution of ownership of natural resources in the constitution-making process. The reading of the minutes of the constitution suggests that the federal government's ownership rights over natural resources were not an issue.³⁸ Despite the existence of significant mineral resource endowments and the claims as to the ownership of mineral resources by different ethnolinguistic groups, even before the creation of the federation, there was no consideration of the issue in the constitutional-making process. The discussion was mainly focused on the issue of land ownership. The discussion on land ownership was mainly focused on private versus public ownership. The drafter of the constitution, which already knew about the predominant role of the central government in the administration of the ownership title over mineral resources under the transitional mining law,³⁹ preferred to provide a general clause as to the assignment of ownership of mineral resources. The fact that the drafters of the constitution failed to argue in favor of the devolution of ownership power from the center should be considered as an indication of its choice to maintain the existing ownership structure. This decision can be seen as a continuation of Ethiopia's historical tradition of centralized resource governance, which prioritizes state control over local autonomy.

The nature of the assignment of ownership of mineral resources should also be seen in light of the theory of the assignment of mineral resources. The literature on the assignment of ownership of mineral resources, as noted above, advocates that the optimal assignment of ownership is inseparable from the technical and administrative capacity of the owner to efficiently manage the resource and maximize the surplus from its extraction. There was no clear debate or bargaining that considered these points and their relevance to Ethiopia. However, if one sees the mineral resource potential and the economic, social, and environmental impacts of the mining sector, it is clear that the federal government is the most competent organ for promoting exploration, assigning exploration rights, and regulating the development of minerals. Subnational governments have limited power to perform certain functions.

The experience of the emerging federation helps us to understand the assignment of ownership to mineral resources. Modern and emerging federations, as noted above, in most cases tend to provide

³⁸ See the Minute of the constitution volume 3 and 4, 1995

³⁹ A proclamation to promote the development of mineral resources, Proclamation Number 52/1993, Article 46

that the federal government is the main organ assigned with the ownership of natural resources.⁴⁰ The Ethiopian Constitution was drafted at a time when such a perception was a trend.⁴¹ Some of these factors are also relevant for understand the Ethiopian cases. The constitutional drafters were aware that Ethiopia has significant mineral resource potential that is unevenly distributed throughout the country.⁴² It was known that the mining sector has contributed to economic development, government revenue, foreign currency earnings, employment opportunities, and met the demand of industries for raw materials.⁴³ Moreover, there were different ethnolinguistic groups that aimed to control the mineral resources, as part of the right to self-determination.⁴⁴ In such cases, the experience of emerging federations suggests that the federal government should be the main organ assigned to the ownership of mineral resources. Thus, it is fair to argue that the FDRE Constitution has used the word "*state*" to refer to the federal government.

The second entity used by the FDRE constitution to assign ownership of mineral resources is the '*Peoples of Ethiopia*', which has been subjected to different interpretations. On the one hand, as noted above, based on the English version of the constitution, the exclusion of the mineral resource from the second line, and the regional state mining law, one could argue for the recognition of the rights of the nation, nationality, and peoples over the ownership of resources. On the other hand, as noted, reading the Amharic version of the constitution, all the regional state constitutions, and the federal mining law leads to the conclusion that the federal government and the entire population of the country are joint owners. The latter approach makes the regional state, as a representative of the people, claim to be a joint owner. The determination as to whether the constitution assigns the ownership of mineral resources to the people of Ethiopia as a whole or to each nation,

40 George Haysom Nicholas and Sean Kane, *Negotiating Natural Resources for Peace: Ownership, Control, and Wealth-sharing*, Geneva: Centre for Humanitarian Dialogue, 2009; Grant Bishop and Anwar Shah, "Fiscal Federalism and Petroleum Resources in Iraq," International Center for Public Policy Working Paper Series, Andrew Young School of Policy Studies, Georgia State University, 2008:1-32; George Anderson, *Natural Resources in Federal and Devolved Countries*, *Forum of Federation* 2020: 1-28; Haysom Nicholas and Sean Kane, *Negotiating Natural Resources for Peace: Ownership, Control, and Wealth-sharing*, Geneva: Centre for Humanitarian Dialogue, 2009: 5- 32;

41 Kodizie Kwesike Chignons Achelous, *Constitutional Approaches to Resource Control in Oil-Producing Federations*, Thesis submitted in conformity with the requirements for the degree of Master of Laws at the Faculty of Law, University of Toronto, 2014

42 Ministry of Mines and Energy of Ethiopia, *Mineral Investment Opportunities in Ethiopia*, Volume Two: Geology and Mining, 1994

43 Ibid

44 Guluma Gameda, *Political Domination, and Exploitation of Mineral Resources in Oromia: From Menilek to Meles*, the journal of Oromo Studies, volume 5, 1998; Alemseged at supra note 2

nationality, and people should be seen in light of the nature of the right of self-determination recognized under the FDRE constitution.

The FDRE constitution provides for the right to self-determination for the nation, nationality, and people in the country. It provides for the traditionally known components of the right to self-determination: political, social, and cultural.⁴⁵ However, there is serious misunderstanding and confusion as to the recognition of one of the elements of the right to self-determination: the economic right to self-determination,⁴⁶ which includes ownership and control over natural resources. It is unclear from Articles 39 and 40 of the FDRE Constitution that it contains the right to economic self-determination. The recognition of the right to the economic right of self-determination and its effect on the ownership of mineral resources have not been primarily addressed in constitutional jurisprudence or in the literature. On the other hand, important discussions were held on the recognition of the right to the economic right of self-determination and its effect on land ownership, which will assist us in the case at hand. It has been subjected to a controversial interpretation that stretches from one that denies the existence of the right to those who argue that the right is recognized under the Constitution.⁴⁷ On the one hand, some argue that the FDRE constitution does not protect economic rights to self-determination. For instance, Fasil argued that the FDRE Constitution failed to incorporate the economic dimension of the right to self-determination, which includes people's rights to ownership and control over natural resources.⁴⁸ On the other hand, some argue that the right to self-determination includes the economic right to self-determination, which gives minorities room to claim ownership of and control over natural resources. Tilahun, by focusing on the rights of indigenous people on land, argues that the Constitution, particularly Article 39, can be construed as providing people with the right to control and maintain access to natural resources.⁴⁹ He argues that the phrase "full measure

45Tilahun Weldie, *The Right to Self-Determination under the Ethiopian Constitution: A Legal Tool for Indigenous Peoples' Protection against Land Alienation?* *Journal of African Law*, 63, University of London, 2019: 359-383; Fasil Zewdie at supra note 26; Husen Tura at supra note 26

46 Ibid., *Minutes of the Constitution, Volumes 3 and 4*, 1995

47 Ibid

48 Ibid. Fasil reaches such a conclusion based on his interpretation of the "people" in the constitutional text. He argues that the Amharic version of the constitution, which has an overriding effect, uses the term "people" instead of "peoples," which is also another indication that the right is vested with the Ethiopian people in general.

49 Ibid

of self-government," which is provided under Article 39(3), and the cultural rights in Article 39/2, can be interpreted as incorporating the economic aspects of self-determination.⁵⁰

It is argued here that the FDRE constitution failed to recognize the economic right of self-determination. The reading of the minutes of the constitution, especially Articles 39 and 40 of the FDRE constitution, shows that constitutional designers were focused on the role of the right to self-determination in addressing the national question.⁵¹ However, the discussion largely focuses on the social, cultural, and political aspects of the right to self-determination. Discussions on incorporating the economic right to self-determination are limited. Ownership of natural resources was not subjected to extensive treatment or lengthy discussions. There has been insufficient discussion on how to use the ownership of natural resources as a tool to accommodate antagonistic socioeconomic and political claims. Constitutional designers, despite the claim as to the ownership of mineral resources, even before the creation of the federation and the division of administrative power over mining titles under the transitional mining law, failed to adequately consider the issue.⁵² The constitutional drafter limited itself to choosing an ownership system for natural resources. Thus, the reading of the minutes of the constitution shows that there is no indication that the constitution intends to recognize the ownership of mineral resources as the right of the people.

The FDRE Constitution provided that provisions under Chapter 3 should be "*interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, international covenants on human rights, and international instruments adopted by Ethiopia.*"⁵³ Accordingly, Ethiopia is a member of major international human rights instruments, such as the ICCPR, ICESCR, and ACHPR, which provide important people's rights over mineral resources. It provides procedural and substantive rights for natural resources.⁵⁴ Although international human rights

50 Ibid. Tilahun Weldie at supra note 45; Tilahun argues that the right to self-government, which is provided under Article 39/3, is used to refer to all aspects of self-determination, including social, economic, and political. He further argues that Article 39/2 of the Constitution provides for the cultural right to self-determination, which should be interpreted to allow people to have access to land and natural resources.

51 Ibid., the FDRE Constitution, Preamble

52 the Minutes of the Constitution, Volumes 3 and 4, 1995

53 The FDRE constitution article 13

54 Lilian Miranda, The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development, *Vanderbilt J. of Trans. Law*, Vol. 45, No. 3, 2012: 785 Farmer, Alice. "Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries." NYUJ Int'l

instruments provide important procedural rights to ensure the participation of local communities in the extraction of mineral resources, they fall short of ownership. It is far from full ownership rights; rather, it mostly involves procedural rights that ensure the participation of people in the development of mineral resources, including the right to prior and informed consent for the development of extractable resources located on indigenous people's land.⁵⁵ It should be seen in a manner that allows the nations, nationalities, and people of the country to have greater say and control over their resources through their institutions. There is no international human rights law that leads to an interpretation that provides for the people's ownership of mineral resources. Therefore, the arguments made regarding land ownership are not directly applicable to mineral resources. Instead, international human rights treaties prioritize 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.⁵⁶

The debate stemming from the disparities between the Amharic and English versions of the Constitution should be analyzed within the framework established by the Constitution itself to resolve such inconsistencies. The FDRE Constitution outlines specific guidelines for addressing this issue, indicating that in instances of contradiction, the Amharic version of the Constitution holds priority.⁵⁷ 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.⁵⁸ This unambiguous declaration leaves no room for doubt regarding ownership of mineral resources. Thus, based on the Amharic version of the constitution, one can reasonably argue that the Constitution assigns the ownership of mineral resources to the “*People of Ethiopia*” as encompassing the entire population, not specific NNP. Overall, based on the preceding discussion, it is reasonable to conclude that the FDRE Constitution vests ownership of mineral resources in both the state and people of Ethiopia.

L. & Pol. 39 (2006): 417 The procedural rights include the right to be informed, consultation, and consent to projects that affect them. The substantive rights include ownership, possession, use, and control, with different scopes.

⁵⁵ Tilahun Weldie, *supra* note 45

⁵⁶ Usman Nasir, *Issues in Mineral Resource Ownership and Control: International Trend and the Nigerian Question*, in *Rule of Law, Governance Dispute Resolution, and Contemporary*; Endalew Lijalem, *Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Legal Developments Arctic Review on Law and Politics*, Vol. 8, 2017 427-452; Farmer, Alice, et al., *supra* note 314;

⁵⁷ FDRE constitution Article 106

⁵⁸ *Ibid* Article 40(3))

After, the rights of the federal government, regional states, and ethnic groups are settled, the next point should be the status of federal and state mining legislation that attempts to regulate the ownership of mineral resources. As noted above, the FDRE constitution, for the first time in Ethiopian history, introduced a joint ownership structure. It is unconstitutional for the federal and subnational governments to claim the ownership of mineral resources to themselves. Moreover, it is not for the regional state or the federal government alone to determine the scope of their power and the nature of their ownership of mineral resources. It is not advisable to follow such an interpretation 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.⁵⁹ Therefore, it is imperative for Ethiopian authorities to ensure that mining legislation aligns with the constitutional provisions that establish shared ownership.

4.3. MINING LICENSES IN THE ETHIOPIAN LEGAL SYSTEM

Once the ownership of mineral resources is established, it is crucial to develop a comprehensive legal framework that effectively operationalizes the general prescription of ownership. As noted above, the state, depending on the division of power, uses legislative and management power to translate policy statements into action.⁶⁰ The state uses its lawmaking power to provide a legal framework that regulates the mining license system and provides a process in which the mining title is transferred from the organ to which the constitution vests the ownership of mineral resources to the mining company that is going to exploit the resources. Moreover, the states, as can be seen in the subsequent section, use their management power to implement procedures to transfer ownership rights over mineral resources to developers.⁶¹

The FDRE constitution assigns ownership of natural resources, including mineral resources, to both the “*State and the Peoples of Ethiopia.*”⁶² This policy statement about the ownership of

⁵⁹ Ibid Articles 9(1) and 50(8))

⁶⁰ It should be noted from the start that legislative and executive power over mineral resources and the constitutionality of the Proclamation are addressed in upcoming chapters.

⁶¹ Haysom Nicholas and Sean Kane at supra note 40; and George Anderson at supra note 40. The government, acting through the Licensing Authority, controls the allocation of mining rights. The government issues different types of licenses, including reconnaissance, exploration, retention, and mining licenses.

⁶² The FDRE Constitution, Article 40/3

mineral resources needs to be supported by detailed regulations that operationalize the rights of different levels of government over ownership of mineral resources. As such, the federal and state governments have to develop a legal framework that translates policy statements on mineral resource ownership into actionable provisions.⁶³ It needs to provide a legal framework that regulates the mining license system and the process where the mining title is transferred from the organ that the constitution vests in the ownership of mineral resources to the company to develop. However, federal and regional mining laws have made apparent divisions in the regulation of mining licenses. Based on the apparent division of licensing and administrative competence made in the federal mining proclamation, it follows two trends in enacting a detailed legal framework that regulates mining licenses.⁶⁴

The first trend covers mining operations, which fall within the federal government's licensing power as per the federal mining law.⁶⁵ In such cases, the federal government enacted a detailed rule that regulated mining licenses that fell under the jurisdiction of the federal license, while regional states chose to refrain. However, some regional states have recently begun to challenge the division made by 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 introduced regulations specific to special small-scale mining operations.⁶⁶ It also contradicts the federal proclamation by expanding the states' authority beyond domestic to include any investor engaged in reconnaissance, exploration, and retention of

63 Federal Mining Proclamation, Proclamation Number 678/2010, A Proclamation to Amend Oromia Region Mineral Development Operation Administration No. 223/2020.

64 Ibid

⁶⁵Ibid. The draft federal mining proclamation, Article 52 The FDRE Constitution, Article 52/2/d The FDRE Constitution provides that the power to enact a law that regulates the utilization and conservation of natural resources is a concurrent power. However, as noted in subsequent chapters, 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. Moreover, the federal mining proclamation has its own division of power. Accordingly, the state grants licenses to artisan mining, reconnaissance, exploration, and retention licenses concerning construction and industrial minerals, and small-scale mining licenses for industrial minerals and large-scale construction material mining by domestic investors. The federal government has the power to issue reconnaissance, exploration, retention, and mining licenses other than those issued by a state licensing authority. Moreover, the draft mining proclamation has shifted the regulation of large-scale construction minerals from the state to the federal government. It should be noted here that the constitutionality of the above issues is addressed in subsequent chapters.

⁶⁶ A Proclamation to Amend Oromia Region Mineral Development Operation Administration No. 223/2020 Articles 24(3), 29, 30, and 49(4)(b),

construction and industrial minerals, as well as small-scale mining licenses for industrial minerals and construction materials.⁶⁷

The second trend pertains to mining operations that fall 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.⁶⁸ This arrangement allows the regional states to tailor-make laws that align federal regulations with their specific conditions and needs. Regional state lawmakers have the authority to establish the secondary legislation necessary for the administration of federal law.⁶⁹ However, this trend presents two fundamental challenges.⁷⁰ First, the detailed nature of federal law leaves limited room for regional states to exercise discretion. Second, regional states have failed to utilize the space afforded to them effectively and adapt to regulations that largely mirror federal legislation. Nevertheless, some regional states have recently attempted to leverage the provisions of 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. 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.⁷¹

As noted above, the federal Mining Proclamation provides the power to issue mining licenses for profitable mineral resources in the country under the power of the federal government.⁷² In such cases, mining law does not require the federal government to involve the subnational government and local communities in the decision-making process. The role of subnational governments in the

⁶⁷ Ibid Articles 27, 28, and 49(4)

⁶⁸ Federal Mining Proclamation, Proclamation Number 678/2010 articles 27, 28, and 49(4),

⁶⁹ Ibid

⁷⁰ IP 5, IP 7 and IP 11.

⁷¹ A Proclamation to Amend Oromia Region Mineral Development Operation Administration No 223/2020 Article 53 it should note here that Benishangul Gumuz regional state failed to introduced its own mining and mineral traction legislations.

⁷² The Federal Mining Regulation, Regulation Number 423/2018, article 54; Federal Mining Proclamation Number 678/2010, As it can be seen in subsequent chapters, the FDRE Constitution confers management power over mineral resources, including mining licenses, to regional governments (articles 51(5) and 52(2)(d)). However, despite this constitutional provision, the Federal Mining Proclamation establishes its own division of executive power. It upheld the limited role of the subnational government in the decision-making process, from land administration to the licensing of artisan miners and construction material mining by the domestic investor. Whereas it grants exclusive authority to the federal government on issues that are not covered by regional mining licenses (Article 52, Federal Mining Proclamation No. 678/2010).

decision-making processes is largely restricted to land administration. 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 federal government's dominance by expanding its authority in this area. Unlike the ownership of mineral resources, subnational mining laws failed to claim the administration of large-scale mining titles.⁷³

It is critical to consider these developments in light of the FDRE Constitution as well as relevant international human rights instruments. As will be seen in subsequent chapters, legislative power over mineral resources is explicitly established as a concurrent power, which means that both the federal and regional governments share responsibility while performing different roles and functions. The Constitution does not assign any 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. Therefore, any attempt by the federal or regional state governments to divide legislative powers over natural resources is unconstitutional.

The FDRE Constitution establishes a concurrent legislative power over mineral resources. Within the framework of concurrent power, it is crucial for both 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 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 the suit. Secondary laws should not serve as the basis for contradicting or altering the contents of primary laws. Therefore, the regional state laws that contradict the principles of concurrency should be reconsidered.

The Constitution explicitly assigns 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.⁷⁴ As can be seen in subsequent

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

74 The FDRE constitution article articles 51(5) and 52(2) (d)

chapters, the almost total exclusion of regional governments and the wide discretionary power of the federal government in the transfers of mining legislation are direct contradictions with the Constitution. In such cases, the Constitution provides clear rules, as it states that any federal or state law that contradicts the Constitution is invalid.⁷⁵ Accordingly, any division of management power in the subsequent legal framework between the federal and subnational governments has no effect.

Additionally, it is important to consider Federal and some State Mining Laws, which excluded local communities in the management of mineral resources in light of the Constitution and international human rights instruments. The FDRE Constitution provides citizens with a say in the development decision that impacts them.⁷⁶ Local communities, as part of national citizens, should have a meaningful say on mining and resource extraction activities within their territories. Therefore, federal and state laws that exclude local communities from the management of mineral resources need to be interpreted alongside constitutional provisions that enable local communities to participate in and influence decisions pertaining to mineral resource extraction on their lands.

Ethiopia is a signatory to major international human rights treaties that recognize people's rights to free, prior, and informed consent for resource development on their lands.⁷⁷ The ICCPR, ICESCR, and ACHPR, as noted above, recognize the right to natural resources and impose an obligation on the state to consult people on development endeavors that affect their lives. Federal and state constitutions recognized international human rights instruments as part of the country's

⁷⁵ Id Article 9, 51 As can be seen from the subsequent section, one can, based on the federal government's power to regulate the macroeconomy, argue that the federal government should have a say in the management of mineral resources, including the issuance of mining licenses. However, such a claim is not supported by the nature of the assignment of management power and experience of federations worldwide. As noted in the previous chapter, the management of mineral resources can be divided into two: primary and secondary power. Primary powers basically cover powers that are directly related to the operational aspects of mining, such as the authority to issue mining licenses, regulate exploration, and oversee extraction processes. On the other hand, secondary power covers other activities that indirectly influence the mining operation, such as regulation of export, macroeconomic stabilization, etc. The assignment of secondary powers, such as macroeconomic regulation, should not be taken as a primary power that allows the federal government to regulate the extraction of mineral resources. Moreover, such arguments are not supported by the practical experiences of federal systems. The experience reveals that federations reveal that the assignment of secondary power would not result in primary powers. Therefore, the federal government's role in macroeconomic regulation should not be interpreted as a justification for extending its authority into the direct management of mineral resources.

⁷⁶ Id Article 12, and 43/2

⁷⁷ Endalew Lijalem at supra note 56

domestic laws.⁷⁸ Consequently, the mining law's exclusion of local communities from the decision-making process violates international instruments.

4.4. ISSUANCE OF MINING LICENSES PRIOR TO 2018 IN ETHIOPIA

The FDRE Constitution vests ownership of mineral resources in the state and people of Ethiopia.⁷⁹ Furthermore, it provides that the government must ensure that the exploitation of mineral resources advances social progress in its capacity as a steward of the nation's wealth.⁸⁰ Moreover, the Federal Mining law provides procedures for the process of transferring mining titles from the state to mineral developers. It addresses two highly interwoven and important steps in the transfer of mining titles. The first step is to regulate the government's decision to extract mineral resources from a particular location. The mining law made a policy decision that, except for areas designated as not subjected to mining operations, any place in the country is open to mining operations.⁸¹ Furthermore, prohibited areas can be made available for mining under certain conditions.⁸² In this regard, regional states and local communities played no role.⁸³

The second step involves the transfer of mining titles to developers. The federal government, based on the division of power under federal mining law, can decide to develop mineral resources, either itself or the regional state, or provide mining rights to third-party developers.⁸⁴ It has been using these two options at different times. MoM decisions depend on the capacity of the state, contribution of the mining sector, and availability of investment.⁸⁵

The first option is to develop mineral resources through state institutions. The central government's involvement in the mining sector has a long history, dating back to imperial times.⁸⁶ As noted above, despite earlier attempts to privatize the sector, central and regional governments have been actively engaged in the reconnaissance, exploration, and mining of precious metals, as

⁷⁸ Id article 13.

⁷⁹ FDRE constitution article 40

⁸⁰ Ibid article 89/ 5

⁸¹ IP 1, IP 2, IP 3 and IP 4

⁸² Federal Mining Proclamation, Proclamation Number 678/2010

⁸³ IP 3, IP 4, IP 5 and IP 9

⁸⁴ Federal Mining Proclamation, Proclamation Number 678/2010

⁸⁵ IP 1, IP 2, IP 3 and IP 4

⁸⁶ Alemseged at supra note 2

well as industrial and construction minerals.⁸⁷ The federal government operated several mining companies over the last three decades. Currently, it reorganized these mining companies under the Ethiopian Mineral Petroleum and Biofuel Corporation (EMPBC) in 2015, with an authorized capital of 5,267,000,000 (fifteen billion, two hundred sixty-seven million) Birr.⁸⁸ The EMPBC is actively engaged in reconnaissance, exploration, and mining of gold, tantalum, lithium, platinum, copper, soda ash, gemstone, kaolin, feldspar, bentonite, dolomite, diatomite, quartz, salt, oil, and gas.⁸⁹ It enabled the federal government to maintain direct control over mineral resources while reaping a greater share of economic benefits. However, direct government involvement in the mining sector could have several potential disadvantages, such as inefficiencies compared to private sector operations and the risk of political interference in resource allocation.⁹⁰ Hence, the federal government involvement in the mining sector need to carefully weighed against these potential pitfalls.

In the past thirty years, regional states have been actively involved in the mining sector. A notable example is the Oromia regional state, which has emerged as a major player in mining operations. The Oromia Mining Share Company (SC), which serves as the Tumsa Endowment's development arm, has been particularly active in mining activities.⁹¹ This includes gold mining, which is a crucial economic driver, tantalum extraction in Kenticha, and coal mining operations.⁹² Furthermore, the Amhara regional state has left its mark through industrial ventures like the Abay

⁸⁷IP 1, IP 2, IP 3 IP 5, IP 6, IP 8 and IP 10 Ashenafi Endale, 'New breed regional conglomerates replicating EFFORT', The Reporter, 12 March 2022., <https://www.thereporterethiopia.com/22566/>, Vaughan, S., and Gebremichael, M., "Rethinking Business and Politics in Ethiopia: The Role of EFFORT, the Endowment Fund for the Rehabilitation of Tigray." Research Report. Africa's power and politics London: Overseas Development Institute, August 2011:589-611. Ethiopian Mineral Corporation (EMC), <https://fidel-labs.github.io/emdc/about-us.html>, accessed June 2021 See Council of Ministers Regulations No. 367/2015, Council of Ministers Regulation No. 413/2017, and Council of Ministers' Regulation No. 462/2020.

⁸⁸ Ibid

⁸⁹ Ibid, Ethiopia investment holding, <https://eih.et/portfolio>, accessed, June, 2024

⁹⁰ Elbra, Ainsley. "Gold mining in sub-Saharan Africa: Towards private sector governance." The Extractive Industries and Society 1, no. 2 (2014): 216-224.

⁹¹ See the mining license list of the ministry of mines for the year 2023/2024; The reporter, Instability deters Oromia mining projects, substitution of coal imports , <https://www.thereporterethiopia.com/22457/> accessed in June 2024; Addis fortune Concessions to Six Firms, <https://addisfortune.news/ministry-grants-mining-concessions-to-six-firms/> accessed in June 2024

⁹² IP 5, IP 6, IP 8

Cement Factory.⁹³ Furthermore, the Endowment Fund for the Rehabilitation of Tigray (EFFORT) has established its own mining subsidiaries, including Messobe Cement and Ezana Gold.⁹⁴ EFFORT's involvement in the mining sector extends beyond mere extraction, encompassing industries that utilize mineral resources and that provide essential support for mining activities. Overall, this multifaceted approach aims to enhance the overall contribution of the mining sector in economic landscape of the country. Moreover, these businesses not only benefit local economies through local employment, supporting industry supply chains, and promoting local development, but also demonstrate the region's commitment to effectively utilizing its mineral resources. However, it is worth noting that most emerging regional states are not significantly involved in this sector.⁹⁵ In fact, as can be noted in the subsequent chapter, the mining sector is witnessing a development of power asymmetry where the relatively developed regional states, such as Oromia, are asserting their rights and also imposing their interests. On the other hand, emerging states such as Benishangul Gumz regional states are unable even to claim their constitutional power, let alone engage in imposing their interests and also participate in the development of mineral resources. Moreover, although this approach presents the above-mentioned advantages in terms of control and potential economic benefits, it also poses challenges that require attention to ensure equitable and efficient resource development across all regions.

The government prefers to use a second option and to transfer mining titles to private developers.⁹⁶ The central government has issued several large-scale mining licenses for domestic and foreign developers. It has issued mining licenses to investors for extracting precious and industrial minerals from various parts of the country. The MoM transferred the right to explore and produce to developers by following open mineral access or a competitive approach to allocate mining titles.⁹⁷ In cases where proven mineral resources are ready for exploitation, the Ministry invites developers to submit proposals for the development of mineral resources.⁹⁸ As noted below, the

⁹³ See the mining license list of the ministry of mines for the year 2023/2024; Addis Fortune, Abay Industrial Ventures into Mining, <https://www.google.com/search?client=firefox-b-d&q=Abay+Cement+Factory+and+Yetmen+Gypsum+%26+Gypsum+Products+Manufacturing>, accessed, June, 2024

⁹⁴ Ibid

⁹⁵ Ibid; IP 1, IP 2, IP 3 IP 10, and IP 12

⁹⁶ Federal Mining Proclamation, Proclamation Number 678/2010, Article 52, It granted six types of licenses: reconnaissance, exploration, retention, artisanal mining, small-scale mining, and large-scale mining.

⁹⁷ Ibid

⁹⁸ IP 1, IP 3 and IP 4

licensing authority evaluates a company's financial and technical capabilities, economic and social contributions, and detrimental effects on the environment and society. Based on this assessment, it chose the best possible company, followed by awarding a contract subject to the approval of the Council of Ministers.

In most cases, the MoM follows an open-access system. Accordingly, mining companies have submitted their applications for the extraction of mineral resources. These applications are treated chronologically and administered on a first-come first-serve basis. Once an application is created, MoM uses its mining cadaster system to assess the rights of other developers regarding mineral resources. Once the availability of the license is ascertained, with the exception of the prospecting stage, the economic, social, and environmental impacts of mining operations and the technical capacity of the company are assessed.⁹⁹ After completing the assessment, it decides to accept the application and submit its proposal to the Minister for approval. The decision to accept an application requires approval from the Council of Ministers.¹⁰⁰

In either case, transferring a mining license necessitates a thorough examination of a number of factors, including the firm's financial capacity, current and potential economic benefits, and social and environmental challenges that society may face. In this regard, the Ministry of Mines (MoM) and Environmental Protection Agency (EPA) play a critical role by conducting a thorough evaluation of the economic, environmental, and social impacts associated with the mining project, as well as the financial and technical capabilities of the companies involved, to select the most suitable candidate.¹⁰¹ The MoM evaluates the economic contribution of the extraction process by examining the development plan of the mining company, which outlines the overall mining operations. This evaluation takes into account factors such as revenue generation, job creation, and a company's ability to strengthen local and national economies. Additionally, the Ministry thoroughly assesses the financial, technical, and experience components of mining companies and ensures that only those companies are awarded licenses with technical expertise and financial resources to conduct mining operations successfully.¹⁰² Considering these variables, the MoM

⁹⁹ Ibid

¹⁰⁰ Federal Mining proclamation, proclamation number 678/2010

¹⁰¹ IP 1 IP 2, IP 3 IP 8 and IP 12

¹⁰² Ibid

aims to choose a company that is equipped to handle the demands and difficulties of a mining project.

The transfer of mining licenses demands a thorough examination that goes beyond economic aspects. It requires a thorough analysis of the mining project, including its social and environmental implications.¹⁰³ As a result, the Environmental Protection Agency (EPA) is responsible for assessing the environmental and social impacts. It ensures that environmental issues are adequately addressed and that appropriate safeguards are in place to mitigate any negative consequences. Furthermore, it proactively detects and addresses social concerns associated with mining activities through SIAs. Based on SIA, developers are required to develop mitigation strategies to reduce the negative impacts of mining operations.

The Ministry of Mines (MoM) grants mining licenses once the work program, technical and financial capacity, and environmental and social impacts of mining operations are approved. Accordingly, over the past 30 years, MoM has issued several large-scale mining licenses.¹⁰⁴ However, the transfer of mining titles has been a matter of concern between the federal government and large-scale mineral developers. Subnational actors such as regional states and local populations in mining areas have not been included in the decision-making process.¹⁰⁵

For most of the last 30 years, especially until 2018, the MoM has been issuing several large-scale mining licenses in an exclusive manner.¹⁰⁶ Subnational actors, including regional states or the local community, are never involved, consultative, or participate in the decision-making process.¹⁰⁷ The federal government uses a wider interpretation of the Constitution and the extensive power given to it under the mining proclamation to assert a monopoly in the transfer of mining rights. For the federal government, the regional state or the local community are neither joint owners nor principal

¹⁰³ Ibid

¹⁰⁴ World Bank Group, Strategic Assessment of the Ethiopian Mineral Sector: Final Report. 2014. <http://hdl.handle.net/10986/20585> ; However, the federal government faced several challenges regarding the administration of mining titles. These include difficulties in handling submitted cases, overlapping license issues between regional states, limitations in regulating mining operations, and failure to resolve conflicts between artisans and large-scale mining operations.

¹⁰⁵ It should be noted here that the relationship between the central and subnational governments in the transfer of mining licenses has already been extensively discussed in previous chapters. Thus, we will not address the issue here.

¹⁰⁶ IP 1 IP 3 IP 5, IP 9 IP 10 and 11

¹⁰⁷ Ibid

actors in the decision-making process.¹⁰⁸ It focuses on the role of natural resources in economic growth and aims to transfer natural resources from what it considered unused places to efficient use by allowing large-scale miners to deploy minerals for the development of the country.¹⁰⁹ As noted in, party politics and the political ideology of the ruling party further facilitated the federal government's dominant role in the transfer of mining titles.¹¹⁰

The transfer of large-scale mining titles was largely an affair between the federal government and the large-scale mineral developers. The MoM transferred large-scale mining sites to developers, without participation or consultation with the subnational government. The involvement of subnational governments in the transfer of mining titles has often been ignored. Regional governments, which are responsible for land administration within their territories, are often simply ordered to transfer land and to restrict local communities from accessing mining sites.¹¹¹ Moreover, mining companies prefer to have their dealings with the federal government, whose decisions until recently were implemented by the lower level government without significant challenges.¹¹² It often ignores the involvement of the subnational government and local community in acquiring mining titles.¹¹³ On some occasions, the mining companies prefer to securitize their relationships with local communities,¹¹⁴ while others attempt to create links with the local government and community through informal means and different levels of donations.¹¹⁵

For a long time, regional governments were not vocal and eager to challenge the status quo and participate in the decision-making process.¹¹⁶ However, as can be seen from the discussion below, this dynamic began to shift after 2018, when regional states started to challenge the absolute power of the center and called on the participation of the subnational government and communities in

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Zemenu Yesigat, Subnational Fiscal Autonomy in a Developmental State: The Case of Ethiopia Beijing Law Review, July 7, 2016: 42.

¹¹¹ IP 5, IP 9 IP 10 and 11; Asebe Regassa and Damena Abebe, Gold Glitters, Grievances Grow: Contestation and Uncertainty Around Midroc and Godu Gold Mines in Guji, Oromia, Rift Valley Institute, Peace Research Facility, 2023

¹¹² Bloomberg, Africa's Richest Man May Quit Ethiopia Over Mining Dispute, <https://www.bloomberg.com/news/articles/2017-06-21/dangote-cement-may-shut-ethiopian-plant-over-mining-disputes> accessed at January 2021.

¹¹³ IP 1, IP 2 IP 4, IP 5 and IP 8

¹¹⁴ Asebe Regassa, at supra note 112; Companies, which are accused of having strong political affiliations with the ruling party, were accused of ignoring the local communities. In cases of local protest, it will rely on the might of the federal government to secure its mining interests.

¹¹⁵ Ibid

¹¹⁶ Ibid

decision-making.¹¹⁷ The regional government's failure to question the legitimacy of the federal government's extensive authority in mining title transfers can be attributed to the Ethiopian People's Revolutionary Democratic Front (EPRDF) that dominated the Ethiopian political landscape. The EPRDF, which controlled both federal and state governments, was built on the principle of democratic centralism—a highly centralized approach to policy and decision-making that discouraged dissent and prioritized uniformity. This structure effectively stifled opposing views and ensured that regional governments complied with decisions made at the federal level without question.¹¹⁸ As a result, regional states, as noted in subsequent chapters, who were aware of the right to the management of mineral resources, including the transfer of mining titles, failed to challenge the decisions made by their superiors at the federal level. Furthermore, the EPRDF's adherence to the developmental state ideology further reinforced this centralized system.¹¹⁹ This ideology emphasized the centralization of power and control over national wealth, viewing the federal government as the primary driver of economic development and the implementer of nationally significant projects.¹²⁰ Accordingly, the actions of the federal government agencies are considered essential for implementing nationally significant development projects, which the regional states were expected to comply with without questioning.

The federal government's failure to establish an inclusive decision-making process has effectively marginalized regional governments, preventing them from voicing their perspectives or challenging federal decisions. A striking example of this dynamic is the renewal of Midroc's large-scale mining license. Despite widespread opposition, the federal government proceeded with the renewal without adequately consulting the regional government or engaging the local community. This exclusionary approach sidelined regional stakeholders, resulting in a lack of representation and a failure to address their concerns. The disregard for local voices exacerbated existing grievances, ultimately sparking protests in the mining area.¹²¹ These protests highlight the

¹¹⁷ IP 1, IP 2 IP 4, IP 6, and IP 11; Ethiopian Observer, Renewed protests in Oromia region around mining project, <https://www.ethiopiaobserver.com/2018/05/02/renewed-protests-in-romia-region-around-mining-project/> accessed in January 2021

¹¹⁸ Zemenu Yesigat at supra note 111; Wedekind J. Prosperity t the periphery? the politics of resource extraction in Ethiopia, post-2018, the Ethiopia Peace Research Facility (PRF), 2024

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ IP 5, IP 6 Asebe Regassa, Development by Dispossession?" In a reappraisal of the Adola Gold Mine in southern Ethiopia, Life & Peace Institute (LPI), Volume 28, 2016

growing tension between centralized federal decision-making and the legitimate interests and concerns of local communities.

The federal government transferred mining titles to ancestral lands without the participation and consent of the local community inhabiting the mining area.¹²² The role of local communities is often limited to environmental impact assessments and land preparation in the process, denying them a substantive say in decisions that profoundly impact their lives and livelihoods.¹²³ However, the extraction of mineral resources, as can be seen in subsequent chapters, has brought significant challenges to the economy, environment, and social well-being of the local community. The extraction of mineral resources has not brought most of the promised glories from private developers or the government.¹²⁴ It led to the exclusion of local communities from having physical access to land and natural resources.¹²⁵ Mining localities are among the most environmentally and socially affected areas in the country.¹²⁶

The failure to engage the local community in the decision-making process, coupled with the adverse effects of mining operations, has eventually resulted in periodic local resistance against mining companies and the government.¹²⁷ Over the years, the local community has conducted several protests aimed at exposing the exclusion of people from the decision-making process and the adverse effects of mining operations.¹²⁸ The federal government was not ready to listen to the demands. For a long time, it lacked the political will to involve the local communities in the decision-making process. It has issued mining licenses even in the presence of clear opposition.¹²⁹

¹²² IP 5, IP 9 IP 10 and 11 Asebe Regassa, at supra note 112;

¹²³ IP 1, IP 2, IP 4, Habtamu Semahagne, "The Power to Administer Land in Ethiopia: Scrutinizing Federal Legislative Interventions" Bahir Dar UJL 6, 2015, Council of Ministers Directive to Administer Agricultural Investment Land, March 2010 It should be noted here that the allocation of more than five thousand hectares was given to the federal government. However, it has a limited role in the mining sector, as activities on agricultural land and mining operations are carried out in a very limited area.

¹²⁴ The detailed analysis of the economic impact of mining operations will be assessed in subsequent chapters.

¹²⁵ IP 5, IP 7, IP 8 IP 9 and IP 12 The local communities in major gold-producing areas are angered by the encroachment of mining licenses on their land. For instance, MIDROC Gold PLC has expanded its operation into areas that were occupied by artisan miners in the Guji area of the Oromia region.

¹²⁶ It should be noted here that the detailed nature of the impact of mining activities on the local population will be assessed in the coming chapters.

¹²⁷ Asebe Regassa, at supra note 112

¹²⁸ IP 5, IP 9 IP 10 and 11

¹²⁹ Asebe Regassa and Damena Abebe, at supra note 122; Abdisa Olkeba. "The Socioeconomic Effects of Large-Scale Gold Mining on Local Community in Ethiopia: Empirical Evidence from Lega Dambi Gold Mining Company." *Journal of Indigenous Knowledge and Development Studies* 1, no. 2 (2020); Jonah Wedekind, at supra note 118

On most occasions, the government uses brute force to address the opposition it faces from local communities. Until recently, it was able to micromanage protests.¹³⁰

It is clear from the above discussion that the pre-2018 period reflected a mining transfer that largely excluded the subnational government and local community from the decision-making process. The exclusionary mining license allocation arrangement represents a multi-faceted violation of both domestic constitutional law and international human rights obligations. As previously noted, the federal constitution mandates joint ownership of mineral resources between the federal government and regional states. This framework has been developed to ensure that both levels of government play a part in the administration of the ownership of mineral resources. Nevertheless, the federal government's assumption of unilateral ownership and exclusion of subnational actors from the decision-making process is unconstitutional. Furthermore, the FDRE Constitution, as noted in subsequent chapters, provides that regional actors are the main organs in the administration of mineral resources, which also includes the transfer of mining. It highlights the importance of regional involvement in mining governance. The failure to involve regional states in the allocation of mining licenses is a blatant disregard for constitutional requirements, thereby undermining the fundamental tenets of federalism. Moreover, as noted above the FDRE constitution provides that any act that violates the constitution rendering the above action to have no effect.¹³¹ Therefore, the exclusive process necessitated urgent reforms to restore regional authority and uphold federalism principles.

As noted above, the FDRE Constitution provides citizens with a say in the development decisions that impact them.¹³² The adoption of a participatory approach is crucial for promoting trust and accountability in governance. Additionally, as noted above, the country is a signatory to several international human rights instruments, including the ICCPR, ICESCR, and ACHPR, which recognize the right of people to their natural resources and impose an obligation on the state to consult with communities on development initiatives that affect them.¹³³ The federal government's approach to transferring mining titles without the participation and consent of local communities violates this commitment. By sidelining local communities, the federal government not only acted

¹³⁰ *ibid*

¹³¹ The FDRE constitution article 9/1

¹³² *Id* Article 12, and 43/2

¹³³ Endalew Lijalem at *supra* note 56

unconstitutionally but also failed to uphold its international commitments to protect the rights of its citizens to participate in the management of their natural resources. The exclusion of local communities from mining license transfers is a violation of the FDRE Constitution and international human rights instruments to which Ethiopia is a party.¹³⁴ Therefore, it was crucial for the federal government to reassess its approach to resource management and to involve local communities in the decision-making process.

4.5. THE ADMINISTRATION OF MINING LICENSES IN POST 2018 ETHIOPIA

The period between 2015 and 2018 was marked by widespread national protests in Ethiopia, which brought the governance of the mining sector to the forefront of the country's political discourse. Among the key issues raised during this time was the administration of mining titles.¹³⁵ Protestors in the major mining regions of the country, such as Oromia, complained about the over-centralization of power in the issuance of mining licenses. In particular, protestors highlighted exclusionary administration of large-scale mining licenses, lack of transparency in revenue, limited economic contribution, and the adverse social and environmental impacts of mining operations.¹³⁶

As the protests intensified, regional governments began to push for strong involvement in the administration of mining licenses.¹³⁷ Regional states, at least a few of them, initiated challenges against the absolute power of the center and advocated for the involvement of the subnational government and local communities in decision-making.¹³⁸ It calls for a more significant and inclusive role in the transfer of mining titles that allows subnational actors to prioritize local interests and community needs.¹³⁹ Furthermore, the protests encouraged subnational governments to take unilateral actions in order to assert the interests of the regional states and local communities in the mining process. It employed various strategies to challenge the federal government's dominance, such as delaying the transmission of information about mining areas, issuing licenses to small-scale developers in the areas of interest to large-scale mining companies, holding

¹³⁴ The FDRE constitution Id article 13.

¹³⁵ *Ibid.* It should be noted here that the issues that arise concerning the revenue generated from mineral resources and the adverse social and environmental effects of the mining sector will be assessed in the next chapter.

¹³⁶ Bloomberg, at *supra* note 113; Ethiopian Observer, at *supra* note 118; Olkeba, Abdisa. "Effects of foreign direct investment on socio-economic conditions of local community: The case of Dangote Cement Factory in Ethiopia." *Ethiopian Journal of Science and Sustainable Development* 5, no. 2 (2018): 115-129.

¹³⁷ IP 5 IP 8 IP 9 and IP 11

¹³⁸ IP 1, IP 2 IP 4, IP 6, and IP 11; Ethiopian Observer, at *supra* note 118

¹³⁹ *Ibid*

discussions with mining operator, and actively engaging in the extraction of mineral resources. This change represents a significant shift in the power dynamics of the mining sector, and has important implications for resource governance.

The regional states began to employ a mechanism to delay the information sent to the federal government regarding the status of mining areas, ultimately delaying the federal licensing process.¹⁴⁰ Regional states that control the flow of information at the local level, especially about the availability of land, started to use their power to influence the timing of mining developments. This strategy allows regional governments to effectively stall federal licensing processes in their jurisdictions. It allows them to ensure that local interests are considered before federal permits are granted. It enabled them to prioritize local economic interests and even halt initiatives deemed detrimental to regional development. For instance, in an interview with regional states, it was noted that the delay tactic has allowed regions to express their grievance about the mining project, though at the cost of frustrating federal timelines. However, it should be noted here that such delays may impede mining operations, discourage investment, and raise tensions with federal agencies, potentially leading to jurisdictional disputes.

Furthermore, the region has begun issuing licenses to small-scale developers in areas allocated to large-scale mining operations, which directly affects the plans of large mining corporations.¹⁴¹ It argued that such act of the regional states is to be responsible for empowering local artisanal miners by creating opportunities for small-scale mining. Furthermore, it is also noted to reduce reliance on large-scale projects, which often generate limited benefit to the regional states. However, this strategy introduces operational complications for mining firms, as it complicates their access to resources. It created competition for large-scale mining firms, compelling them to also interact more directly with regional governments and local stakeholders. Moreover, it can lead to overlapping claims or operational conflicts, requiring greater engagement with regional stakeholders. Furthermore, while this method tries to increase community resilience by

¹⁴⁰ Ibid It should be noted here that most of these strategies are employed by the relatively developed regions, such as Oromia region, which can assert their influence and protect their interests. while the emerging regional states such as Benishangul region play a limited role in asserting their interest.

¹⁴¹ IP 1, IP 3 IP 5, IP 7, IP 9 and IP 10

encouraging small-scale mining activities, it risks fragmenting the mining sector, potentially discouraging large-scale investors who are concerned about regulatory uncertainty.

As previously mentioned, some regional states have already been active in mineral resource extraction.¹⁴² Accordingly, following national protests, they further enhanced their roles. Regional governments view their active involvement in mineral resource extraction as a tool to safeguard regional interests in the mining sector and directly impact economic outcomes.¹⁴³ For example, as previously stated, the Oromia regional state, via Oromia S.C., is heavily involved in the mining industry.¹⁴⁴ This increased regional involvement in mineral extraction has significant implications for the regional economy, as it enable to capture some of the economic rent generated from the extraction of mineral resources. However, this also raises questions about effective oversight and the potential for conflicts of interest, particularly if regional governments prioritize short-term gains over sustainable practices.¹⁴⁵

Additionally, the regional state, which was aggrieved by the exclusionary transfer of mining licenses, has started to require mining companies to hold discussions with it.¹⁴⁶ The regional government saw such direct communication as one way to retroactively express their views on mining operations within their borders. It aims to ensure that mining operations have a positive impact on the local communities in which they operate, and add to their environmental impact.¹⁴⁷ For instance, Oromia regional state requires mining companies to hold direct discussions with regional authorities.¹⁴⁸ It held a consultation with mining companies to persuade them to invest in local development projects, address social and environmental issues, and expand local employment and skill development opportunities. As a result, businesses such as MIDROC Gold have strengthened their programs in order to enhance the quality of educational facilities, youth employment opportunities, and health services in the local community.¹⁴⁹ This marked a

¹⁴² Ibid

¹⁴³ Ibid

¹⁴⁴ Ashenafi Endale, at supra note 88; Vaughan, S., and Gebremichael, M., "at supra note 88 Council of Ministers Regulations No. 367/2015, Council of Ministers Regulation No. 413/2017, and Council of Ministers' Regulation No. 462/2020.

¹⁴⁵ IP 1, and IP 4

¹⁴⁶ IP 5, and IP 6

¹⁴⁷ Ibid

¹⁴⁸ Ibid

¹⁴⁹ Ibid

significant departure from previous practices where companies primarily dealt with the federal government.

Overall, the above actions of the regional states represent a significant move toward decentralizing the mining sector. It is one of the genuine efforts to transition from long-standing, exclusionary, and centralized control of the mining sector to a more decentralized, inclusive, participatory, and locally responsive system of mining governance model. However, these efforts have introduced important changes in power dynamics; they also raised concerns about their effect on the investment attractiveness of the country, as inconsistent regulatory practices could deter foreign investors. Moreover, these changes were not supported by legal and institutional reform and also federal bargaining, which led to a question about their consistency.

In response to growing unrest and changes in regime, the federal government implemented incremental changes in the administration of mining titles in the country. The federal government took different measures that aimed to address some of the grievances raised against it. The major action includes allowing regional states to be consulted during the licensing process, recognizing the share of the regional state, and the suspension of controversial mining licenses.

The federal government increased subnational governments' participation in the administration of mining titles. It has attempted to improve communication with the regional state to obtain detailed information about the mining areas. Accordingly, once an application for a mining license is made, the federal government, after checking its cadaster system, will consult the regional states. It consults with the regional state about whether the area is held by other actors, including farmers, public institutions, and artisan miners.¹⁵⁰ The latter is important for determining possible issues related to priority rights, expropriation, compensation, and other remedies. However, the role of regional states is limited to determining whether the mining area is occupied by different organs, and if so, determining the amount of compensation needed. Once the findings of the regional state are given to the ministry, the latter grants a mining license. Although such development is essential to avoid possible delays and overlaps in the administration of the mining title, it is trivial, and regional states are still seen as subsidiaries of the federal government. Moreover, the federal system

¹⁵⁰ Ibid

failed to introduce substantial changes to legal and institutional frameworks to ensure the effective participation of subnational actors in the decision-making process.

The Ministry of Mine is attempting to revisit some of the controversial mining operations, which are accused of failing to incorporate the regional government and local communities perspective in the mining tile transfer process and causing economic, social, and environmental impacts on the local community, with the view of holding an independent investigation and holding discussions with the regional state local community.¹⁵¹ The main example in this regard is the controversial MIDRCO gold-leg Dembi mining operation, which is a major large-scale gold mine in the country. After much uproar against the renewal of the mining license and the adverse effects of mining, the ministry ordered the suspension of the operation to be followed by investigations of the mine operation and consultation with the community. It attempted to hold discussions with the local community and re-indemnify communities affected by the mine.¹⁵² Moreover, the federal government and Oromia region agreed to have an equity share in the MIDROC Lege dembi mining project.¹⁵³ However, such arrangements are made on a one-time basis without the necessary institutional and legal frameworks.

It is evident that the shift within the ruling party in the post-2018 period resulted in a limited shift in the government's attitude towards the role of subnational actors. However, this shift did not significantly affect the functioning of the federal government, which continues to play a decisive role in the transfer of mining licenses.¹⁵⁴ While there has been a nominal increase in regional state involvement, the changes have been minimal and lack the depth required to create a truly inclusive and locally focused governance framework. The federal government continues to administer the transfer of mining licenses largely in an exclusionary manner that violates the FDRE constitution and also international human rights instruments. For example, in the case of Kumruk gold, the federal government is accused of failing to consult with the regional government before issuing a

¹⁵¹ Reporter, የማዕድን ኩባንያዎች ወደ ሥራ ሊመለሱ ነው, <https://www.ethiopianreporter.com/article/20138> , accessed in January 2021

¹⁵² Ibid Tom Gardner, EXCLUSIVE: Health woes, outrage, and toxins near an Ethiopian gold mine, "We are the walking dead." <https://www.thenewhumanitarian.org/authors/tom-gardner> accessed in January 2021

¹⁵³ Ibid

¹⁵⁴ IP1, IP 3, IP 4, IP,6, and IP 10

license.¹⁵⁵ Furthermore, the license included an area that was used by Artisan miners. As a result, the regional government refused to let the mining company enter the mining area, as it was difficult to displace the artisanal miners from the land earmarked for investment.¹⁵⁶ Furthermore, in the case of the Okotie large-scale gold mine, it obtained mining rights without the participation of local communities.¹⁵⁷ This approach not only violates the principles of participatory governance, but it also sets dangerous precedents for future mining operations in the area. Furthermore, it dismissed local communities' environmental concerns.¹⁵⁸ This attitude raises questions regarding the long-term sustainability of such mining operations and their potential to cause irreversible ecological damage. Moreover, despite the aforementioned efforts, no significant changes have occurred in the legal and institutional frameworks governing mining license transfers. The efforts are quite fragmented and tend to take a case-by-case approach.

It is clear from the preceding and subsequent chapters that the federal government is required to comply with the Constitution as well as international human rights instruments that permit regional states and local communities to have a say in the process of transferring mining titles. In order to ensure compliance with constitutional mandates and international human rights obligations, it is imperative for the federal government to acknowledge the importance of granting regional states and local communities voice in the transfer of mining titles. To this end, it is necessary to conduct a comprehensive review of the legal framework to ensure the participation of subnational actors in mining governance. Moreover, in order to ensure effective participation in the decision-making process, it is crucial to establish institutional mechanisms. Creating an intergovernmental relations arrangement would effectively address these aspects of mining governance. Overall, the federal system needs to proactively empower regional states and local communities in the transfer of mining licenses. This involves making revisions to the existing laws and practices, improving

¹⁵⁵ IP 7, IP 9 and IP 10; The Reporter, Kurmuk Mining's gold ambitions on hold as Benishangul officials air doubts over "legitimacy", <https://www.thereporterethiopia.com/39748/> accessed June, 2024; Addis Fortune, Artisanal invading gold miners derailing Kurmuk operations to be kicked out, <https://www.capitalethiopia.com/2023/01/16/artisanal-invading-gold-miners-derailing-kurmuk-operations-to-be-kicked-out/> accessed June, 2024

¹⁵⁶ Ibid

¹⁵⁷ Asebe Regassa and Damena Abebe, at supra note 122

¹⁵⁸ Ibid; IP 6; Davison, W. 'Saudi Billionaire's Gold Find May Double Ethiopian Production'. Bloomberg, <https://www.bloomberg.com/news/articles/2012-03-15/saudi-billionaire-s-gold-find-may-double-ethiopian-production#xj4y7vzkg>, accessed on may, 2023

communication between different levels of government, and developing a framework that ensures the voices and needs of local communities are given priority in resource management.

4.6. THE OWNERSHIP OF MINERAL RESOURCES AND SUSTAINABLE MINING IN ETHIOPIAN FEDERAL SYSTEM

As noted above, the effect of the assignment of ownership of mineral resources on ensuring sustainable development depends largely on the complex and multifaceted assignment of legislative, management, and revenue powers over mineral resources, as these powers determine the role of the federal or state in regulating the extraction of mineral resources. As noted above, the FDRE constitution, despite the ambiguity, assigns ownership of mineral resources to the “State and in the peoples of Ethiopia.”¹⁵⁹ However, it followed unique trends for the assignment of legislative, management, and revenue power over mineral resources, which has an effect on the impact of ownership of mineral resources on ensuring sustainable mining. Hence, it is essential to see the impact of each power on the relationship between the assignment of ownership of mineral resources and sustainable mining.

As noted above, it is argued that the FDRE Constitution provides joint ownership of mineral resources.¹⁶⁰ The joint ownership is not matched by sufficient legislative power for regional states. Despite the ongoing debate regarding the scope and nature of legislative power, it is argued in subsequent chapter, the FDRE constitution grants the federal government principal legislative authority over mineral resources.¹⁶¹ It allows the federal government to enact laws that dictate the nature of mining extraction. Accordingly, as it can be seen here, the federal government uses its centralizing legislative authority to mainstream the idea of sustainable development through different legal instruments, international conventions and treaties, development plans, and policies. However, while the federal mining law acknowledges the role of regional states, the role of the state legislature is limited to enacting secondary legislation on mining operations that falls under the mandate of regional jurisdictions per federal law. Even in these cases, the role of the regional state, as noted hereunder, is limited, as the regional state failed to utilize the space allocated to men. Thus, the mismatch between the ownership of mineral resources and legislative power,

¹⁵⁹ The FDRE constitution article 40(3)

¹⁶⁰ Ibid

¹⁶¹ Ibid article 51(5).

combined with regional states' underutilization of their limited authority, restricts their ability to translate policy statements about the ownership of mineral resources into action and influences the nature of mineral resource extraction.

The FDRE constitution provided a clear division of management power over mineral resources by allocating all management power to the states. As noted in the subsequent chapter, if we limit our reading to the constitutional text, the assignment of management power, despite the limited legislative power, could have made the regional states the main actors in the management of mineral resources. This role is crucial for translating the policy statement on mineral resource ownership into action and for influencing the nature of mining operations. However, federal mining legislation has significantly restricted the regional states' involvement in key management decisions that impact mining sustainability. It centralizes key management decisions, leaving regional states with limited management responsibilities, primarily overseeing artisanal and small-scale mining operations, and land administration.¹⁶² As a result, the regional state has limited power to influence the management of mineral resources, which is essential for implementing policies on mineral resource ownership and promoting sustainable mining practices. Hence, the role of the regional state, a joint owner, in using management to ensure sustainable mining is limited.

The FDRE Constitution establishes a unique approach for assigning revenue from the extraction of mineral resources between federal and regional states.¹⁶³ If one sees the assignment of revenue-raising power among joint owners of mineral resources, one can assume that both levels of the government can influence the sustainable extraction of mineral resources. However, as noted in the subsequent chapter, an analysis of actual revenue flows reveals that the federal government retains significantly more revenue-raising power, which can influence mining sustainability. The central government has extensive revenue power that can influence the sustainability of mining operations. Currently, the concept of the joint ownership of resources is not accompanied by sufficient revenue power at the subnational level. This imbalance has limited the ability of subnational governments to significantly affect economic growth and environmental and social wellbeing.

¹⁶² Federal Mining proclamation, proclamation number 678/2010

¹⁶³ See the FDRE constitution Articles 96, 97, and 98. The FDRE Constitution delineate the tax powers of the federal government, state governments, and concurrent powers respectively.

The preceding discussion makes it abundantly clear that the experience of Ethiopia demonstrates that mere assignment of joint ownership of mineral resources does not guarantee an effective influence over the nature of the mining practices. Despite the FDRE constitution's ambiguous assignment of joint ownership of mineral resources to the "*state and in the peoples of Ethiopia*," the exclusion of regional states from key legislative, management, and revenue powers has limited the practical impact of the ownership of mineral resource could have on sustainable mining practices. The limited role of the regional states in the key decision-making processes, as noted here in, has restricted the ability of subnational governments to meaningfully influence economic growth, environmental protection, and social well-being in relation to mining activities.

4.7.CONCLUSION

It is widely agreed that there are three broad issues in the constitutional design relating to the governance of mineral resources: ownership, control, and benefit-sharing. By taking the Ethiopian experience as an example, this chapter attempts to address how the ownership of mineral resources and mining licenses is administered in federal systems and its effect on ensuring sustainable management. It commences by examining the historical evolution and regulatory frameworks governing mineral resources in Ethiopia. It reveals that the impact of the political, economic and social development had on the institutional and legal framework that regulates the ownership of mineral resources and issuance of mining licenses. It also assesses the nature of the ownership system recognized under the FDRE constitution. It finds that the ownership of mineral resources is addressed in the FDRE constitution and subsequent mining laws in vague and ambiguous terms, which has generated much controversy in federations between local communities, subnational governments, and the federal government. Despite the ambiguity surrounding the issue, it has been argued that the FDRE constitution provides joint ownership of mineral resources. Furthermore, it explores the legal framework that translates ownership of mineral resources into action. It finds that despite the developments made in international human rights law, and the FDRE constitution, federal mining law provides that the federal government is the main organ that administers mining license, especially in the case of large-scale mining. It upheld the limited role of the subnational government in the decision-making process of land administration. It is argued that federal mining law is incompatible with the constitution, international human rights law, and the idea of the decentralization of power. Moreover, it also assesses the actual administration of mining license in the Ethiopian federation. It finds that since the 1990s, the federal government has allocated

large-scale mining licenses to domestic and international investors. The transfer of mining titles was performed in an exclusive manner. The federal government's monopoly of power led to confrontation, which sometimes resulted in open conflict between the federal government and subnational and local communities. It is argued that the practice that excludes the subnational government and local people is incompatible with the constitution, international human rights law, and the idea of the decentralization of power. It also explores the federal government's attempts to incorporate the inclusion of substate actors following the development of the post-2018 national protests. However, it finds that the federal government's efforts were trivial and not supported by necessary legal and institutional developments. Without robust support mechanisms and genuine engagement with subnational actors, these initiatives risk being mere tokens, rather than effective strategies for inclusive governance. In addition, it assesses the far-reaching implications of assigning ownership of mineral resources to promote sustainable development within the Ethiopian Federation. The Ethiopian experience underscores the inadequacy of solely assigning joint ownership of mineral resources to foster sustainable mining practices, emphasizing the need for additional measures. It argues that meaningful and impactful joint ownership necessitates a balanced distribution of legislative, management, and revenue powers between federal and regional governments to foster effective and sustainable mineral resource management.

CHAPTER FIVE

LEGISLATIVE POWER OVER MINERAL RESOURCES AND SUSTAINABLE MINING IN THE ETHIOPIAN FEDERATION

5.1.CHAPTER: INTRODUCTION

Legislative power is the first dimension of control of natural resources, serving as a vital means for states to exercise its regulatory authority to address environmental and socio-economic challenges that arises in mineral extraction. The assignment and exercise of legislative power over natural resources is a highly contentious issue in federal constitutional design. It necessitates careful negotiations between national and subnational stakeholders, which have competing interests. The introduction of the idea of sustainable mining further complicates the design and the implementation of legislative power over mineral real resources. This chapter investigates the complex landscape of assignment and exercise of the legislative power over mineral resources and its effect in ensuring sustainable mining in the Ethiopian Federation. It accomplishes this by conducting an analysis of the concurrent legislative power, legislative authority over natural resources, the scope of this power, mechanisms for coordination, and its exercise, as well as the impact the mining legal framework has on ensuring sustainable mining practices. Accordingly, the chapter is organized in seven sections. The second section examines one of the controversial issues in the Ethiopian federation, the concept of concurrent power in the Ethiopian context, with the aim of laying the groundwork for subsequent discussion by clarifying how concurrent legislative authority operates in the Ethiopian context. The third section examined and assessed the scope of legislative power over mineral resources, as well as the extent and limitations placed on it. The fourth section investigates the mechanisms used to coordinate legislative efforts related to natural resources and evaluates their effectiveness in ensuring consistent governance and decision-making. The fifth section examines the application of legislative jurisdiction over mineral resources, focusing on assessing the obstacles and opportunities that arise in real-world settings. The sixth section examines the operationalization of the idea of sustainable mining in to the mining legislative framework, which includes mining proclamations and environmental legislation. The last section, is the concluding section, which provides a comprehensive understanding of the legal, institutional, and practical challenges in regulating legislative power over mineral resources and its impact on fostering sustainable mining in Ethiopia’s federal system.

5.2.CONCURRENT LEGISLATIVE POWER UNDER THE FDRE CONSTITUTION: AN OVERVIEW

One of the hallmarks of the FDRE Constitution is the constitutional division of power. 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 enumerated the exclusive legislative powers of federal¹ and regional state governments.² It expressly confers residual power to the states.³ In contrast to numerous other federal systems, the FDRE Constitution does not clearly enumerate the concurrent legislative powers shared by the federal government and regional states. Upon closer examination of the constitution, it is clear that it incorporates concurrent legislative powers for both levels of government.⁴

The first areas in which concurrent legislative authority was established were social and economic policymaking and regulations. The FDRE Constitution establishes a framework for concurrency over policy and legislation, covering a wide range of social and economic matters. Specifically, 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

¹ 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.

² Solomon Negussie, *Fiscal federalism in the Ethiopian ethnic-based federal system* Wolf Legal Publishers, 2006; Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Rev. Ed. Utrecht: Wolf Legal Publishers, 2007; 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.

³ Ibid. FDRE Constitution Article 52 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."

⁴ 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 FDRE Constitution indicates the existence of concurrent power in the taxation power, However, the unofficial amendment to the constitution has changed it into a revenue-sharing arrangement. Moreover, the Constitution also provides for the concurrent power of the courts. However, it is hard to take this power as a concurrent power as the constitution provides for the delegation of the jurisdiction of federal courts to state courts. Despite such limitations, a detailed exploration of the conational text will reveal that the constitution provided limited areas of concurrent power for the federal and state governments.

and historical heritage.⁵ Concurrently, the Constitution empowers states with the authority to formulate and execute their own economic, social, and developmental policies, strategies, and plans at the state level.⁶ 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.⁷ This concurrent framework has a dual purpose in mind. First and foremost, it seeks to ensure that there is a certain level of uniformity in the process of formulating social and economic policies across the country as a whole. Second, it seeks to decentralize policymaking authority, which will enable states to tailor their policies to the specific requirements and circumstances of their respective regions. It is important to note that implementing this concurrent framework poses a number of challenges. Federal laws and policies frequently restrict states' capacity to exercise their decision-making authority.⁸ This limitation arises from various factors, including the relative inexperience of regional states as entities, the dominance of a single party overseeing all levels of government, and the lack of institutional avenues for significant state involvement in decision-making processes.⁹

The second form of concurrent legislative power in the Ethiopian federal system is established through the separation of legislative and administrative functions between the federal and state governments.¹⁰ The FDRE Constitution's Articles 51(5) and 52(2)(d) grant the federal government the power to enact laws pertaining to 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 laws. This arrangement designates the federal government as having legislative power to administer land and other natural resources, while allowing regional states to enact laws that regulate the administrative aspects of natural resource use and management.¹¹ However, as can be seen here, the distinction between these powers remains ambiguous, leading to contradictory interpretations and practices.

5 Ibid., FDRE Constitution, Articles 51(2) and (3), and 52(2) Assefa Fiseha and Zemelak Ayele "Concurrent powers in the Ethiopian federal system" In *Concurrent Powers in Federal Systems*, pp. 241-260. Brill Nijhoff, 2017.

6 Ibid

7 Ibid

8 Ibid

9 Ibid

10 Ibid

11 Ibid

The third area is "generic" concurrency, which includes mainly two kinds of concurrent powers.¹² In the first type, regional states possess the power to enact laws until the House of Federation determines the necessity of federal legislation.¹³ 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.¹⁴ State laws become subordinate to federal legislation as soon as they are passed down. It is important to note that once the federal government regulates civil matters using its powers to sustain economic integration, it comes under the sole purview of federal legislation as long as the law remains in force. It is crucial to remember that as long as federal legislation is in effect, civil matters that the federal government governs using its authority to support economic integration are under the exclusive jurisdiction of that legislation. In the second type of concurrency, regional states exercise legislative power until the federal law is enacted.¹⁵ 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 criminal issues that have not been addressed by federal criminal legislation, thus creating concurrent jurisdiction over unspecified criminal matters.¹⁶ It is crucial to note that federal authorities are not prevented from legislating criminal issues regulated by regional or state law. In such cases, regional law provisions would be superseded once the federal government introduced analogous legislation on the same matter.

12 Ibid "Generic" concurrency, is used to describe a conditional or sequential form of legislative power-sharing in federal system that allows both levels of government to legislate on the same subject matter, but with a key condition: subnational governments can exercise legislative authority only until the federal government decides to enact its own laws.

¹³ Ibid

¹⁴ Ibid

¹⁵ FDRE Constitution Articles 55/5 and 55/6

¹⁶ See Yenenesh Bahiru, *The Power to Legislate Criminal Procedure Code under the Federal Systems: Issues in Ethiopia*, (unpublished LLM thesis, Ethiopian Civil Service University), June 2011: 44–47; and Abdi Gurmessa, *Criminal Jurisdiction of State Courts under the Constitution of the Federal Democratic Republic of Ethiopia*, (unpublished LLM thesis, Addis Ababa University School of Law), March 2014: 93–95. However, there are two lines of argument over who has the power to enact a criminal procedure code in Ethiopia. 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 based 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 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.

5.3. DIVISION OF THE LEGISLATIVE POWER OVER NATURAL RESOURCES

The FDRE Constitution divides legislative power over natural resources between the federal and regional governments. It provides the power to enact a law that regulates the utilization and conservation of natural resources as a second type of concurrency. It assigns legislative competence to mineral resources by separating legislative and administrative powers between the federal and state governments.¹⁷ Accordingly, 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, regional governments are empowered to administer these resources within the federal legal framework.¹⁸ Moreover, the Constitution provides important principles, guidelines, and rules that have direct significance for controlling mineral resources. It specifically provides for the right to development, environmental rights, right of society to be consulted on activities that affect it, principles for environmental protection and management, and good governance.¹⁹ However, the constitutional division of power fails to clearly address two critical issues: the specific power that falls under concurrent power, and the precise authority of either tier of government. Such ambiguity has led to two main questions. First, does the administrative power of the regional state entail law-making? If so, what is the scope of the federal law? Second, does the federal constitution, by using the terms "utilization" and "conservation," assign all primary legislative competencies over mineral resources, or does it leave room for the residual power of regional states? ²⁰ Resolving this issue requires a thorough examination of the nature and scope of legislative authority over natural resources.

5.3.1. THE SCOPE OF THE LEGISLATIVE POWER OVER MINERAL RESOURCES IN ETHIOPIA'S FEDERAL SYSTEM

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.²¹ The federal government is expected to establish

17 FDRE Constitution Articles 51(2 & 3) and 52/2

18 Ibid

19 Ibid, Articles 43, 44, 89 and 92.

20 Ibid

21 Ibid Articles 52/2/d and 51/5

framework laws that establish general principles and guidelines that allow regional states to adapt to their unique circumstances by enacting subsidiary legislation that addresses local needs and implementation requirements. 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.

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 as well as several regulations and directives to regulate the country's mining sector.²² Federal mining proclamations and regulations govern the extraction of mineral resources in the country.²³ Federal mineral transaction laws and regulations regulate most commercial activities that involve mineral resources.²⁴ Most regional states failed to enact independent mining laws, while some regional states enacted mining laws that are largely in line with federal laws. Some regional states fail to enact mining laws. For instance, the Benishangul Gumuz region has failed to introduce a mining law.²⁵ Furthermore, there are some regional states that reserved to introduce only limited to regulations based on the federal mining proclamation. For instance, the southwest Ethiopian regional state introduced regulations based on federal mining law.²⁶ On the other hand, there are regional state that introduced regional mining laws.²⁷ Moreover, regional states have failed to enact laws regulating mineral resource transactions.

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

23 Ibid; proclamation to promote the development of mineral resources, proclamation no. 52/1993; Council of Minister's regulations on mining operations, regulations no. 182/1994; Mining (Amendment) Proclamation No. 22/1996; Initially, it relied on the transitional period mining proclamation and regulations, which were enacted by the then central government. These legal frameworks heavily regulate the extraction of mineral resources, leaving limited room for the regional states to exercise their authority. A major amendment was made in 2010 when the federal government introduced Proclamation No. 678/2010, which provided comprehensive rules for mineral operations.

24 Ethiopian Mineral Resource Transaction Proclamation No. 1144/2019

25 IP 7, IP 10 and IP 11

26 south west Ethiopia regional state regulation, regulation number 7/2023; there are some regional states that fail to enact mining law. for instance, Benishangul gums region failed to introduce mining law. moreover, there are some that introduce regulation based on the federal mining proclamation. for instance, the south west Ethiopia regional state introduce a regulation based on the federal mining law.

27 IP, 7, IP 9 and IP 12 A Proclamation to Amend Oromia Region Mineral Development Operation Administration No. 223/2020 It should be noted here that Only the Some regional state actively engaged in the enactment of state mining laws. On the other hand, the large number of the regional states do not have a regional mining law, in these regard Benishangul region is a good example.

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. Federal mining and mineral resource transaction proclamations have divided the administration of mineral resources between federal and state governments based on the level of mining operations, transactions, and the nature of mineral resources.²⁸

The federal government, based on its division of administrative power, has made an apparent division of legislative competence of either level of government over mineral resources, which can be categorized into two trends. The *first trend* covers mining operations and mineral resources, which fall within the federal government's administrative competence. As noted above, 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.²⁹ Accordingly, it establishes 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.

28 Federal Mining Proclamation, Proclamation No. 678/2010, article 52; Ethiopian Mineral Resource Transaction Proclamation No. 1144/2019, The Mining Proclamation is a basic legal instrument governing the management of resources in Ethiopia. It provides a dual approach to the management of mineral resources. It designated the Ministry of Mine as a "supervising body" at the federal level, while it identified the regional mining bureaus to administer issues at the regional level. According to Article 52, the role of the state is limited to granting licenses to artisan mining, reconnaissance, exploration, and retention licenses concerning construction and industrial minerals, and small-scale mining licenses for industrial minerals and construction material mining by domestic investors. The federal government has the power to issue reconnaissance, exploration, retention, and mining licenses other than those issued by a state licensing authority. Currently, the federal government has the authority to provide licenses for the significant mining of industrial minerals as well as metallic, precious, and semi-precious minerals. The federal government also has the power to issue certificates of discovery for strategic minerals and certificates of professional competence for professionals who wish to engage in consultancy services in the mining sector, conduct testing, and provide permission to export mineral samples. The Federal Mineral Transaction Law further divides the licensing and certification of competencies for each type of mineral transaction. The federal government has the power to issue licenses and certificates of competency for mineral refining and smelting of metallic and associated minerals, as well as mineral exporter certificates of competency. It also has the power to enforce standards in which smithery, lapidary, combining, and refining activities are conducted. Regional states have residual power. Moreover, the regional state has some specific powers, including the power to issue mineral supplier certificates and craft All transaction certificates, including export licenses, should be conducted according to the standards set by the federal government.

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

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.³⁰ Regional states have also failed to enact laws that regulate mineral transactions.

However, as noted here, recent developments have seen some regional states challenge the division of administrative competence by enacting rules that overlap with federal law. For example, the amendment to the federal mining proclamation introduced a special small-scale mining license and assigned the power to issue such a license to the federal government.³¹ Conversely, the Oromia regional state mining law broadens its jurisdiction. The regional law assigns the power to issue licenses for special small-scale mining to the region.³² Furthermore, as noted herein, even though the federal mining proclamation limits the administrative role of regional states in granting licenses for reconnaissance, exploration, and retention of construction and industrial minerals, as small-scale mining licenses for industrial mineral and construction material mining for domestic investors, regional laws broadened the state's power.

The *second trend* relates to the legal framework governing mining operations that falls within the administrative jurisdiction of regional states, as outlined in the Federal Mining Proclamation. In such instances, federal mining law provides the fundamental regulatory framework. This enables regional states to formulate laws which enable them to adopt federal laws and policies, tailored to their unique circumstances. Legislative bodies at the regional level possess the power to create secondary legislation essential for the implementation of federal law.

³⁰ Mineral Resource Transaction Proclamation No.1144/2019, Article 28(4)

³¹ The Federal Mining Proclamation Amendment, Proclamation Number 816/2016, and the federal mining proclamation, Proclamation Number 678/2010. Article 2/44 (as amended by Proclamation 816) provides for the special small-scale mining as a means mining operation of gemstones or placer resources of gold, silver, platinum, or tantalum of which the annual run-of-mine does not exceed the limit stated, which is carried out by individuals or small and micro-enterprises who were the holders of artisanal Mining censes and have sufficient financial capacity to employ modern machinery and equipment in such operations. Moreover, Article 52/2 of Proclamation 678/2010 assigns the power to issue such a license to the federal government.

³² A Proclamation to Amend Oromia Region Mineral Development Operation Administration No. 223/2020, articles 24/3, 29, 30, and 49/4/b, provided that the region issues a mineral production license, including a large-scale mineral production license, a small-scale mineral production license, a special small-scale mineral production license, and the artisanal method of mineral production license. It defines a Special Small Scale Mining License similarly to the federal mining proclamation as a license granted to individuals who possess an Artisanal Mining License and have acquired the ability to utilize machinery in their mining activities. A Special Small Scale Mining License is granted exclusively to individuals who possess an Artisanal Mining License.

However, it faces two fundamental challenges: the detailed nature of federal law and ineffective utilization of the space afforded to them. The federal government established a detailed legal framework, leaving little room for regional governments to exercise legislative authority. As a result, regional governments have been unable to pass legislation that address their specific needs and priorities. This practice goes against the principles of concurrent power and constitutional division of power. Moreover, despite the limited space left by federal mining laws, until recently, regional states have not effectively utilized this limited room for legislative autonomy.³³ Regional governments have failed to utilize the limited opportunities to introduce additional legal frameworks that complement federal laws. Instead, some regional states failed to enact laws, while others enacted mining laws that predominantly adopted mining laws that largely mirror federal legislation.³⁴

Nevertheless, in response to national protests, regional states have attempted to leverage the provisions of federal mining legislation. One notable effort, especially in Oromia, has been the modification of federal law, specifically regarding the duration of mining licenses and their renewal.³⁵ Additionally, 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.³⁶

The Federal Mineral Resource Transaction Proclamation adopted an approach similar to the Federal Mining Proclamation.³⁷ 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.

33 Ibid., Federal Mining Proclamation Number 678/2010

34 IP 3, IP 5 IP 7, and IP 11

35 Federal Mining Proclamation Number 678/2010, 2010, Article 29; A Proclamation to Amend Oromia Region Mineral Development Operation Administration No. 223/2020, Articles 26 and 27 For instance, in the case of large-scale mining operations, the federal mining law stipulates 20 years for a large-scale mining license and 10 years for its renewal. Conversely, the Oromia regional law has reduced the duration to 10 years and 5 years, respectively. Similarly, the federal mining proclamation sets a maximum duration of 10 years for a small-scale mining license and 5 years for its renewal. On the other hand, regional mining has further reduced the duration of small-scale mining to five years.

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

37 The Federal Mineral Resource Transaction Proclamation No.1144/2019; the federal Transaction of Precious Minerals Proclamation no. 651/2009

The above-mentioned actions of federal and regional governments must be analyzed in light of the constitutional division of powers, the country's constitutional law, and the concept of concurrence. As noted above, the FDRE Constitution provided that legislative power over mineral resources is a concurrent power, achieved through the separation of legislative and administrative functions between federal and state governments.³⁸ This framework shows that both federal and regional governments have a shared responsibility for lawmaking, each with their own specific roles and functions. The federal government has the power to enact laws regarding the utilization and conservation of natural resources. By contrast, regional states possess the power to administer natural resources in accordance with federal law, which includes the ability to enact laws that regulate the administrative aspects of natural resource utilization and conservation.³⁹ However, unlike federal and regional mining laws, as well as federal mineral resource transaction laws, the Constitution does not distinguish legislative power based on the division of administrative power outlined in federal legislation, such as the level of mining operations, processing activities, or the nature of mineral resources. The latter are the basis for allocating revenue sources under Article 98 of the Constitution, which is administered independently. Furthermore, as will be demonstrated in the following paragraphs, the constitution of the FDRE assigns the broadest legislative power over mineral resources, which restricts the residual powers of regional states. One of the features of the federation is the constitutionality of power, which is not subjected to unilateral alteration.⁴⁰ The FDRE Constitution is no exception: neither the federal nor regional governments have a constitutional mandate to unilaterally divide legislative authority over natural resources. The federal or regional government's attempt to divide legislative powers in this domain would be unconstitutional as it contradicts the constitutional framework that establishes concurrent power for mineral resources. The FDRE constitution outlines explicit regulations governing such actions, declaring that any governmental act that contravenes the constitution is deemed null and void.⁴¹ Consequently, any effort by either the federal or state government to impose a division of power that contradicts the constitutional framework would undoubtedly breach the constitution, making such efforts of no effect.

38 Ibid

39 Ibid

⁴⁰ R.L. Watts, *Comparing Federal Systems*, Montreal & Kingston, McGill-Queen's University Press, 1999.

⁴¹ See FDRE constitution article 13

Furthermore, the purported division of legislative power over mineral resources necessitates a thorough review of constitutional case law. While constitutional case law has not directly addressed legislative authority over mineral resources, significant precedents have emerged within the House of Federation (HoF) regarding legislative power over land, which is addressed in the same constitutional article as mineral resources.⁴² Significantly, the landmark case of *Biyadlegn Meles et al. v. Amhara Regional State* clarifies the scope of legislative and administrative authority at multiple levels of government.⁴³ It reveals that the Constitution neither supports dividing legislative power over natural resources between federal and regional governments nor endorses the enactment of exhaustive federal law. It upholds the principle of concurrent power, which implies that both federal and regional governments have distinct roles in legislative power. It acknowledges the power of the federal government to enact laws pertaining to the utilization and conservation of land and other natural resources. In the meantime, it recognized the legislative role of regional states in regulating the administrative aspects of natural resource utilization and conservation. It demonstrates that the Constitution was not intended to allocate legislative power over natural resources in a manner that contradicts the idea of concurrent power. Consequently, it underscores the significance of concurrent legislative power and involvement of both federal and regional governments. Thus, the federal government's assertion of exclusive competence in any aspect of mining operations and its enactment of exhaustive laws is not supported by the constitutional law.

As previously mentioned, the FDRE Constitution establishes legislative power over mineral resources as concurrent power. Accordingly, it is crucial for both federal and regional governments to adhere to the principles of concurrency when exercising legislative competence over mineral resources.⁴⁴ A fundamental aspect of concurrent powers is that federal legislation should enable

42 Assefa Fiseha and Zemelak Ayele, at supra note 5 Habtamu Semahagne. "The Power to Administer Land in Ethiopia: Scrutinizing Federal Legislative Interventions" *Bahir Dar UJL* 6, 2015: 195. Ethiopian Federal Democratic Republic House of Federation First Emergency Meeting (Tahisas 24 2006, Ethiopian Calendar); *Biyadlegn Meles & et al. v. Amhara Regional State*, the House of Federation First Emergency Meeting, unpublished, 1989, E.C. Even though legislative power over natural resources and land are treated under the same article, the two issues did not attract the same attention. The constitutionality of the diverse laws that regulate rural and urban land is at the center of constitutional law. However, since both issues are covered in the same sub-article, the arguments that are raised as to the legislative power of either tier of the government to regulate land are pertinent to understanding the possible debate that arises against the legislative power over natural resources.

⁴³ Ibid

⁴⁴ Ibid

regional legislators to enact laws addressing 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. Moreover, the regional state should be active in utilizing the space allocated to them. However, the Federal Mining and Mineral Transaction Proclamation's attempt to assign exclusive legislative power over mining operations and mineral resources undermines the concept of concurrent power.⁴⁵ This attempt contradicts the underlying principles of concurrency and is inconsistent with the constitutional framework. It is essential to ensure that the concurrency principles are respected to maintain a balanced and cooperative approach to mineral resource governance. Therefore, any attempt to establish exclusive legislative power over specific mining operations and mineral resources is contrary to the principles of concurrency and should be reconsidered.

The normative concept of concurrency, as noted here in, is grounded in the principle of federal supremacy, which provides that in case of a contradiction between federal and state law, the former will prevail.⁴⁶ However, the existence of federal supremacy has been a subject of debate in Ethiopia.⁴⁷ Notwithstanding such controversy, it is worth noting that, as noted below, regional states have attempted to modify the content of federal law in relation to the division of power and the definition of mineral resources. When viewed through the lens of the concurrency framework recognized under the FDRE constitution, it is clear that the attempt by regional governments to modify the content of federal law conflicts with the idea of concurrency. Regional state laws, as noted here, should be limited to secondary legislation aimed at addressing local needs, rather than contradicting or altering federal legal frameworks. Such adherence ensures that the balance of power is maintained and that both federal and regional authorities can effectively fulfill their respective roles within the constitutional structure. Thus, the modifications made by the regional state on the federal mining law fundamentally conflict with the concurrency framework outlined in the FDRE Constitution.

⁴⁵ The Federal Mineral Resource Transaction Proclamation No.1144/2019, Article 28(4)

⁴⁶ R.L. Watts at supra note 40

⁴⁷ Assefa Fiseha, at supra note 2

5.3.2. THE ISSUES THAT ARE COVERED UNDER THE LEGISLATIVE POWER OVER MINERAL RESOURCES

The FDRE Constitution specifically assigns legislative power over the "*utilization and conservation*" of natural resources to the federal government.⁴⁸ However, it has failed to define the "*utilization and conservation*" of natural resources. The absence of explicit clarity in the Constitution has led to debates and uncertainties in interpreting the division of power between federal and subnational governments. 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 specifically, it raises questions about whether it encompasses the later stages of the extractive sector, including processing, marketing, and exportation, or if it is limited to the initial extraction of resources. Moreover, as the Constitution assigns residual power to subnational governments, it adds another layer of complexity to the exact scope of legislative power over the "*utilization and conservation*" of natural resources.

The scope of legislative power over mineral resources hinges on defining the terms "*utilization*" and "*conservation*." The process of conservation can be understood in a relatively straightforward manner. It is a term that describes actions that are taken with the intention of preserving natural resources in their natural habitats and avoiding the negative effects that natural resources, if any, may have on their surroundings.⁴⁹

In contrast, the notion of "*utilization*" is more complex, as it involves the actual utilization or use of natural resources. 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 the utilization of mineral resources include activities such as reconnaissance, exploration, mine development, mineral processing, marketing, exports, and other sector-related operations?

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

⁴⁸ The FDRE constitution Arts. 51(5), 55(1) & 52(2/d)

⁴⁹ See Bryan A. Garner, Black's Law Dictionary, 11th edition, 2019.

mineral resources. The first perspective that focuses on the actual practices in the Ethiopian federal system argues that the term covers the whole activities in the extractive sector. 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 proclamations to regulate mining and mineral transactions. These laws extensively regulate the extractive sector.⁵⁰ These laws provide an illustrative definition of the “*utilization*” of mineral resources, encompassing all aspects of the extractive industry. According to the illustrative definition, the utilization of mineral resources covers every aspect of the extractive sector. The reading of the proclamations suggests that the federal government maintains the widest legislative authority over mineral resources. Furthermore, it is noteworthy that regional states have not challenged this assertion as evidenced by their mining laws that reflect similar interpretations.⁵¹ The regional states have not sought to assert any residual power over mineral resources. Although regional states have enacted and revised laws governing mineral resources, their powers are primarily limited to enacting secondary legislation within the framework established by the federal law.⁵²

On the contrary, an opposing viewpoint contends that the federal government's powers should be limited to the utilization and conservation of mineral resources, with residual legislative power reserved for regional states. This viewpoint gained support from interviews conducted with officials from various regional states. These interviews provided valuable insights into the understanding and interpretation of legislative power in relation to mineral resources. According to these interviews, the federal government’s legislative power was limited until the minerals entered the resource market.⁵³ It was argued during these interviews that once the minerals reached the resource market; it fell under residual legislative power of the regional states.

⁵⁰ 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.

⁵¹ Mineral Resource Development Proclamation Number 91/2005; A Proclamation to Amend Oromia Regional State Income Tax Proclamation Number No. 202/2017

⁵² FDRE constitution, article 52(2)d

⁵³ IP 5 IP7 and IP 11

The preceding discussion highlights a lack of clarity in the Constitution, which has resulted in conflicting interpretations among legal scholars and practitioners. It is necessary to thoroughly examine the above ambiguity and settle it accordingly. To do this, the above ambiguity is assessed in light of the experiences of federal systems, constitutional texts, and constitutional case laws. 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, as noted above, classical federations have adopted a decentralized approach, granting subnational governments explicit authority over onshore minerals. While this approach affirms regional autonomy, it can impede coordinated national strategies on crucial matters, such as macroeconomic policy, international trade, and climate change.⁵⁴ In response, the federal government’s legislative power gradually expanded. Conversely, emerging federations often establish centralized federal control, granting exclusive federal competence over mineral legislation. While enabling unified regulation, this limits subnational authority.⁵⁵

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 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.⁵⁶ Given the historical context of the Constitution’s development, it is reasonable to infer that the terms used in the constitution imply expanded federal power. This interpretation is consistent with centralized governance in many countries.

A thorough analysis of constitutional texts provides valuable guidance. Upon examining the constitutional text, it is evident that the Constitution, alongside the phrase ‘*utilization of natural resources*,’ grants considerable authority to the federal government, consequently restricting the

⁵⁴ Kodzie Kwesike Chignons Achelous, *Constitutional Approaches to Resource Control in Oil-Producing Federations*, Thesis submitted in conformity with the requirements for the degree of Master of Laws at the Faculty of Law, University of Toronto, 2014; George Haysom Nicholas and Sean Kane, *Negotiating Natural Resources for Peace: Ownership, Control, and Wealth-sharing*, Geneva: Centre for Humanitarian Dialogue, 2009

⁵⁵ *Ibid* The major exception to the centralized model is the Iraqi and Russian Federation constitutions, which assign legislative power over mineral resources as a concurrent power. Moreover, it should also be noted here that the centralized model facilitates coordinating national issues but fails to reflect the interests of sub-national entities.

⁵⁶ Guluma Gameda, *Political Domination, and Exploitation of Mineral Resources in Oromia: From Menilek to Meles*, the journal of Oromo Studies, volume 5, 1998,

residual power of regional states. The FDRE Constitution grants the federal government authority over macroeconomic policy, international trade, and inter-regional commerce.⁵⁷ These powers have significant implications for the later stages of mineral resource extraction, including trade and export. Even with the exclusion of the 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 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.

The FDRE Constitution employs specific terms to assign legislative power over mineral resources but fails to provide precise definitions for these terms. Nevertheless, valuable insights can be gleaned from constitutional minutes, which shed light on the nature of this assignment.⁵⁸ It is evident from the discussions among constitutional drafters that their intention was not to divide specific powers over natural resources between the federal and regional governments. Instead, the intention was to grant concurrent legislative power over mineral resources to both the federal and regional states. The Constitutional Minutes make it clear that it does not imply an intention to create a division of power over natural resources. Rather, it assigns primary legislative powers over mineral resources, including the later stages of the mining sector, to the federal government while allowing regional states to enact secondary laws regulating these matters without reserving primary legislative power as a residual power to regional states.

Moreover, the issue of legislative power over mineral resources should be examined in light of the limited number of constitutional cases that have been examined in the country. Although constitutional case law, as noted above, has not directly addressed this specific issue, precedents have emerged regarding legislative power over land, offering crucial insights into the present matter.⁵⁹ These precedents establish that the Constitution does not intend to adopt a narrow interpretation of the phrase the utilization of mineral resources. It acknowledges that the federal

57 FDRE Constitution Article 51

58 See the Minute of the Constitution, volume 4, 1995'

59 Assefa Fiseha and Zemelak Ayele, at supra note 5; Habtamu Semahagne at supra note 42; Biyadglegn Meles & et al. v. Amhara Regional State, the House of Federation First Emergency Meeting, unpublished, 1989, E.C.

government, and more especially the House of People's Representatives, has primary legislative authority over mineral resources. This interpretation underscores the importance of the federal government's role in enacting a comprehensive legislative framework that allows sub-national 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 flexibility to address specific regional needs and circumstances through secondary legislation.

It is clear from a thorough examination of the experience in other federal systems, constitutional texts, constitutional minutes, and constitutional case law that the FDRE Constitution assigns broader concurrent legislative power over mineral resources. Therefore, the words "*utilization*" and "*conservation*" are used to encompass all the necessary legislative powers, leaving no residual powers for the regional states.

5.4.MECHANISMS FOR COORDINATING AND SETTLING DISPUTE OVER THE LEGISLATIVE POWER OVER NATURAL RESOURCES

The concurrent legislative power over mineral resources creates a significant area of overlapping jurisdiction between the federal and regional governments.⁶⁰ It is crucial to establish institutions and coordination mechanisms that enhance effective communication and collaboration between federal and subnational governments needed in the exercise of concurrent legislative power. Furthermore, it would be wise to create a governing body to address any potential conflicts that may arise. For the past 30 years, legislative power over mineral resources in Ethiopia has been exercised by both the federal and regional governments. However, the institutional and legal frameworks that oversee the coordination of legislative competence in this domain are still largely unexamined. Furthermore, there has been an insufficient examination of the resolution of constitutional disputes concerning legislative power over mineral resources. Thus, it is crucial to evaluate existing institutional and regulatory frameworks that oversee the legislative power of mineral resources.

⁶⁰Ibid

5.4.1. INTERGOVERNMENTAL RELATIONS

The exercise of concurrent power creates a significant area of overlapping jurisdiction that necessitates cooperation at both levels of government. Federations are expected to build institutions and intergovernmental relations (IGR) forums that will facilitate coordination and cooperation during the legislative process.⁶¹ These forums, whether formal or informal, provide a platform for federal and state legislators to consult and communicate with each other. By engaging in these forums, legislative bodies can avoid conflicting laws.⁶²

The Ethiopian Federation adheres to this principle as well. As noted above, the FDRE Constitution provides a long list of concurrent powers that require active cooperation between both levels of the 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.⁶³

Unfortunately, when federal mining and mineral transaction laws were enacted where the formal IGR system was not institutionalized. This lack of a forum that facilitates cooperation and coordination between federal and regional governments has led to the development of a legal framework that faces the above-mentioned limitations. Recent initiatives have been undertaken to establish a formal legislative Intergovernmental Relations (IGR) forum that encompasses both federal and state legislative bodies.⁶⁴ This forum holds the power to ensure the enactment of harmonized laws in areas of shared jurisdiction. Its primary purpose is to promote regular meetings, consultations, and communication between the federal and state governments in order to eliminate conflicts and inconsistencies. Furthermore, there are ongoing endeavors to create an intergovernmental regulatory body, as outlined in the Draft Federal Mining Policy.⁶⁵

The mining law is currently going through the process of being amended; however, the functionality of these institutions is still largely restricted. As a consequence of this, it is difficult

61 Assefa Fiseha and Zemelak Ayele, at supra note 5

62 Ibid

63 Nigussie Afesha, Functional Domains of IGR Forums, House of Federation, and Ministry of Peace in Ethiopia: The Need for Clarity *Mizan Law Review* 16, no. 2, 2022: 305-338

64 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

65 The FDRE Ministry of Mines, Draft Mining Policy 2021

to evaluate the efficiency of the existing IGR system in terms of directing the legal framework that regulates mineral resources. Nevertheless, it is important to point out that representatives from regional states are voicing their opinions during parliamentary hearings, albeit in a more casual setting.⁶⁶ This allows them to contribute to the discussions surrounding the regulatory framework and provide insights and perspectives. There is an urgent need to create an IGR forum among legislative bodies to promote regular meetings, consultations, and effective communication between the federal and state governments.

5.4.2. FEDERAL SUPREMACY AND UMPIRING BODIES

It is inevitable that there will be differences between the laws of the federal government and those of the states, particularly when it comes to the exercise of concurrent legislative powers. One effective strategy for resolving these conflicts is federal supremacy.⁶⁷ Additionally, umpiring bodies are crucial in addressing constitutional disputes and conflicts between various levels of government.⁶⁸ These institutions are critical to maintaining constitutional balance and ensuring the federal system runs smoothly. Consequently, federal systems are expected to create these institutions that resolve disputes that may occur when exercising concurrent power.

The FDRE Constitution, as previously mentioned, does not specifically tackle the matter of federal supremacy. The constitutional gap has resulted in two conflicting interpretations: one asserting the supremacy of federal legislation and the other upholding the sovereignty of the "nations, nationalities, and peoples," which emphasizes the supremacy of state law.⁶⁹ This ambiguity has significant implications for mineral resource governance. As the above mentioned federal and regional mineral and federal mining transaction proclamations were enacted under this uncertainty. As noted, federal and regional mining laws contradict each other on several occasions, leading to

66 IP 3

⁶⁷ Assefa Fiseha, *supra* note 2; Solomon Nigussie, *supra* note 2, This principle generally states that federal law is given priority over state law in cases of conflict to maintain uniformity in national policy and to avoid the division of federal authority due to conflicting state laws.

⁶⁸ *Ibid* However, the composition and power of umpiring bodies varied greatly across federations. Despite such limitations, the Federation generally followed two trends in the assignment of umpiring bodies.

⁶⁹ Assefa Fiseha and Zemelak Ayele, *at supra* note 5

questions regarding the fate of either law.⁷⁰ The contradictions underscore the pressing necessity for clarity regarding federal supremacy in the governance of mineral resources in Ethiopia.

The FDRE Constitution assigned the power to resolve constitutional disputes to the House of Federation, a political body that is unique among federal systems.⁷¹ However, the assignment of constitutional review power to a political body has been subject to intense criticism.⁷² Moreover, the efficiency of the HoF in constitutional interpretations is questionable.⁷³ Furthermore, the role of the HoF in settling constitutional disputes involving mineral resources is very limited. The failure of the HoF to entertain cases involving mineral resources has nothing to do with the harmony of federal and state government actions with the constitution.

As discussed previously, both federal and regional governments have enacted legal frameworks that directly contradict the constitution in terms of the division of legislative and executive power. Additionally, regional governments have passed laws that contradict federal legislation. In such clear cases of contradiction, it would be expected for either the level of government to challenge the constitutionality of opposing laws or to invoke federal supremacy through umpiring bodies. However, neither the federal nor regional governments nor any interested parties have taken steps to challenge the constitutionality of these laws. Unlike land-related disputes, which have attracted the attention of the HoF, the constitutionality of laws regulating mineral resources remains unlitigated before the HoF. Neither the federal government nor the regional states opted to present any contradictions to the HoF. This trend can be linked to several factors, including the dominance of the Ethiopian People's Revolutionary Democratic Front (EPRDF), the limited economic significance of the mining industry, and public perceptions of

70 The Federal Mining Proclamation Amendment, Proclamation Number 816/2016; A Proclamation to Amend Oromia Region Mineral Development Operation Administration No. 223/2020, Article 24/3, 27, 28, 29, 30, 49/4/; For instance, the Oromia regional state mining law contradicts the division of administrative competence over mineral resources made by the federal mining proclamation. It provides that special small-scale mining falls under the jurisdiction of the regional state. It also provides detailed rules that regulate small-scale mining. Moreover, regional law has extended its power beyond regulating domestic investors who engage in large- and small-scale construction minerals and small-scale industrial minerals to cover any investor. It also provides a detailed legal framework governing its new administrative roles.

71 According to the FDRE constitution, Article 62, the Ethiopian second chamber, the HOF, consists of the different ethnic groups in the country. Each nation, nationality, and people of the country are represented by one member, and for each additional one million people, there will be one additional seat. The FDRE constitution at supra note 14 does not provide any limit as to the maximum number of members of a given ethnic group. Membership is not based on the principle of territoriality.

72 Assefa Fiseha at supra note 2

73 Ibid

the HoF.⁷⁴ The enduring supremacy of the Ethiopian People's Revolutionary Democratic Front (EPRDF) stifled any attempts to contest the constitutional order. The mining industry in Ethiopia, with its relatively modest economic significance, have led to a diminished focus on legal disputes within this sector. The public's perception of HoF and its effectiveness may influence the likelihood of cases being brought before it. As a result, HoF has a minimal impact on overseeing the exercise of concurrent power, particularly when it comes to mineral resources. The lack of engagement leaves significant constitutional problems unaddressed, thereby jeopardizing Ethiopia's successful mineral resource management. Thus, the absence of clear federal supremacy provisions in the FDRE Constitution, coupled with the limited role of the HoF in resolving mineral resource-related disputes, creates a significant challenge for effective mineral resource governance in Ethiopia.

5.4.3. SECOND CHAMBER

The second chamber in federal systems is a crucial tool for integrating subnational interests and perspectives into the legislative process.⁷⁵ It enables regional governments to actively participate in the legislative process and collaborate with federal authorities by voicing their needs and concerns. It ensures that legal safeguards are in place to keep the federal government from potentially exceeding its authority. Furthermore, it permits regions to influence national legislation, ensuring that the legislation embodies the federation's diversity.

The House of Federation (HoF) serves as Ethiopia's second chamber.⁷⁶ However, the House of Federation (HoF) encounters considerable challenges in guaranteeing regional state representation, including lack of state participation and legislative power. A significant challenge confronting the HoF is the absence of direct involvement of regional states in the federal legislative process.⁷⁷ Unlike other federal systems, the HoF represents the country's nation, nationality, and people, not its regional states. This representation model implies that subnational governments do not have a direct voice in shaping federal legislation.⁷⁸ It can be contended that regional states find indirect representation in the HoF, as these states are mainly established

74 IP 4, IP 5 and IP 11

75 R.L. Watts at supra note 40

76 The FDRE constitution article 62

77 Assefa Fiseha at supra note 2

78 Ibid

based on ethnolinguistic divisions. However, as more than half of the regional states in the federation are multi-ethnic, this has led to questions regarding the geographical representation of specific regional interests.⁷⁹ Furthermore, members of the HoF are chosen to represent their ethnic groups rather than their specific regional states, therefore they are expected to prioritize the interests of their ethnic groups over larger regional issues.⁸⁰ As a result, it is difficult to claim that regional states have a voice in legislative proceedings. Furthermore, the HoF has limited legislative authority, and its approval is not required for the enactment of federal legislation.⁸¹ This concentration of law-making power in the lower chamber raises concerns about its capacity to influence the law-making process that impacts the regional states. Here, one may argue that the HoF, through its constitutional interpretation power, can mitigate the problems caused by its lack of legislative power. The existence of a second chamber should not be viewed as a substitute for the active involvement of regional governments in the legislative process. Moreover, as previously mentioned, the role of the HoF in constitutional interpretations is far from satisfactory. Hence, regional states lack the institutional mechanisms to participate in the legislative process at the central level.

Mining and mineral transaction laws were enacted under a second chamber that faces the above limitations. As a result, although as noted above, the lower chamber enacted a law that significantly affected regional states' interest the second chamber failed to effectively address such challenges. The HoF was a passive observer during the formulation of federal legislation, which contradicted the principles of concurrent power and directly affected the interests of regional states.

5.5.THE EXERCISE OF LEGISLATIVE POWER OVER MINERAL RESOURCES

The federal government, as noted above, has enacted a mining and mineral resource transaction law, supported by delegated legislation, regulations, directives and policies, while facing limited intergovernmental relations (IGR) and the absence of a federal paramountcy clause, a law-making

79 Ibid

80 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).

81 Assefa Fiseha at supra note 2

second chamber, and a political umpiring body.⁸² Federal mining law covers important issues that arise in the extraction of mineral resources, including mineral rights, procedures for transferring mining titles, the 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.⁸³ The draft mining policy followed the federal mining proclamation and provided detailed rule that regulate the mining sector. On the other hand, it clear from the exploration of the regional state laws that not every subunit will have a similar relationship with the federal law. Depending on the defacto asymmetry in the exercise of legislative power, regional states behaved differently. Accordingly, very few Regional states have also enacted proclamations and regulations concerning the extraction of mineral resources, while most regional states failed to do so.⁸⁴

The federal mineral transaction law contained detailed rules that govern mineral resource transactions.⁸⁵ It left it within the limited scope of the regional legislator to enact secondary legislation that regulates issues of local concern. However, the regional states, unlike the mining law, failed to adopt regional mineral transaction laws in line with the federal law. Thus, it is the federal mineral resources transaction law that is applied throughout the country.

The federal and regional mining legal frameworks cover similar issues and align with the provisions of the Constitution. However, there have been instances where the constitutionality of both legal frameworks has been questioned, particularly regarding the regulation of ownership and the division of administrative and legislative powers. Furthermore, inconsistencies can be found between federal and state laws, which further complicate the legal landscape.

The constitutionality of the federal and regional mining legal frameworks comes into question primarily in relation to the regulation of mineral resource ownership. The FDRE constitution

82 The Federal Mining Proclamation Amendment, Proclamation Number 816/2016, የማዕድን 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 Number 678/2010; Ethiopian Mineral Resource Transaction Proclamation No.1144/2019

⁸³ Ibid

⁸⁴ Proclamation to Amend Oromia Region Mineral Development Operation Administration Proclamation No. 223/2020.

⁸⁵ Mineral Resource Transaction Proclamation No.1144/2019,

establishes that the ownership of mineral resources lies with the “people and the state.”⁸⁶ Similarly, regional state constitutions also contain identical provisions concerning the ownership of natural resources.⁸⁷ However, as noted above, there is ambiguity within the constitutional texts regarding whether the phrase “state and people” assigns ownership of mineral resources to the federal government, regional states, or even ethnic groups. In an attempt to regulate ownership rights over mineral resources, both the federal and regional legal frameworks have made efforts. 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.”⁸⁸ The definition of “government” in the law includes the federal government and, where applicable, the states. Recently, the regional states started asserting that mineral resources within their respective regions are the property of the people residing in those regions.⁸⁹

The attempt to split legislative authority over mineral resources is the second area, in which the constitutionality of the federal and regional mining legal frameworks is questioned.⁹⁰ As previously mentioned, both federal and regional legal frameworks have attempted to establish a division of power in relation to mineral resources.⁹¹ Empirical data shows that 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 possesses 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 with the concept of concurrent power and enacted framework legislation. This legislation aims to provide a general framework for regional states to exercise their legislative authority in

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

87 The enforcement proclamation of the Revised Constitution of Oromia regional state, proclamation number 46/2001, 8th year, No. 6, 12th of July, 2001; The Revised Amhara National Regional State Constitution Proclamation Number 59/2001; The Constitution of the Harari Regional State, 2004, the Revised constitution of the Benishangul Gumuz regional states, 2002.

88 See the federal mining proclamation number 678/2010, article 5/1.

89 See the Oromia mining proclamation, Proclamation No. 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.”

90 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.

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

line with federal objectives and standards. However, it is important to note that regional states strictly adhere to the division of power stipulated by federal laws, except for the specific cases mentioned above. 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.⁹² The amendment made in 2013 has further strengthened the power of the federal government.⁹³ Moreover, the Mineral Resource Transaction Proclamation has divided administrative power over the later stages of extraction. These legislative measures have granted the federal government extensive control over the mining sector.⁹⁴

However, it is noteworthy that subnational mining laws have historically failed to challenge the absolute power of the central government in this regard. Nevertheless, subnational governments, are starting to advocate for the participation of subnational entities in decision-making processes.⁹⁵ An example of such a challenge is observed in the Oromia regional mining law, which expands the authority of the regional government over special mining activities and regulates small-scale industrial minerals and construction minerals by any investor.⁹⁶ It demonstrates a growing trend of subnational governments seeking to assert their administrative power within the mining sector.

92 Federal Mining Proclamation Number 678/2010, Article 46, 52

93 Ibid; The Federal Mining Proclamation Amendment, Proclamation Number 816/2016, 2012. Under the federal mining proclamation, number 678/2010, artisanal mining of metallic minerals like gold and platinum was under the jurisdiction of the regional states. Proclamation number 816/2018 broadened the power of the federal government and made sub-divisions between special small-scale and non-special, precious and non-precious minerals.

94 Ethiopian 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.

95 IP 5, IP 7 and IP 9

96 Ibid Federal Mining Proclamation Number 678/2010; The Federal Mining Proclamation Amendment, Proclamation Number 816/2016, 2012, article 27, 28 and 49/4; 52

96 Federal Mining Proclamation Number 678/2010, articles 24/3, 29, 30 and 49/4/b; see Oromia Mining Proclamation, Proclamation No. 223/2020,

These regional governments argue for greater autonomy in decision-making processes and a more inclusive approach to resource management.⁹⁷

A notable difference has emerged between federal and regional mining legislation on the definition of mineral resources, and conflicts arise from the division of administrative power. The first difference relates to the definition of various types of natural resources considered mineral resources.⁹⁸ While the federal and state governments have historically defined minerals in similar ways, subsequent amendments by the federal government have resulted in discrepancies. In the case of mineral water, for instance, the federal government omitted it in its definition of mineral resources, whereas regional states recognized it as a mineral resource. Over a decade passed before regional states were able to match their definitions with the amendments made by the federal government.⁹⁹ Another inconsistency is found in the manner in which geothermal energy is discussed. In the beginning, the federal government and the states provided that geothermal energy as a mineral resource. In 2010, the federal government unilaterally removed geothermal energy from the definition of a mineral. Despite the fact that geothermal energy from the definition of a mineral some regional states such as Oromia regional state continues to consider it to be a mineral.¹⁰⁰ The difference in the definition of geothermal energy, as a mineral resources, have resulted in significant fluctuations in the revenue shares allocated to regional states. Moreover, it led to debate about the constitutional basis of the regional states to maintain such legal framework.

Furthermore, as previously stated, there has been a recent divergence in the division of administrative power over mineral resources and subsequent legislative power. The federal mining

⁹⁷ IP 5, IP 7, IP 9 and IP 10

1051 A Proclamation to Amend Oromia Region Mineral Development Operation Administration No. 223/2020, The effect of the federal government's legislative power over the revenue system will be addressed in upcoming works.

⁹⁹ A proclamation to promote the development of mineral resources, proclamation NO. 52/1993, article 2/14; The Oromia Region Mineral Development Proclamation No. 91/2005, article 2/; Federal Mining Proclamation Number 678/2010, article 2; A Proclamation to Amend Oromia Region Mineral Development Operation Administration, proclamation No. 223/2020, article 2/9/a. According to Proclamation No. 52/1993, Article 2/14, water is 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. For instance, it took ten years for Oromia regional states to amend their laws.

¹⁰⁰ A Proclamation to Amend Oromia Region Mineral Development Operation Administration No. 223/2020; Federal Mining Proclamation Number 678/2010; Federal Geothermal Resources Development Proclamation No. 981/2016, geothermal resources development, proclamation number, articles 2/20 and 13/1-4/. According to Proclamation No. 52/1993, geothermal energy is one type of mineral resource. The regional states also provide similar definitions. However, geothermal energy was later removed from the definition of mineral resources. On the other hand, the regional state did not mandate significant change.

proclamation, as noted above, allocated the power to regulate special small-scale mining to the central government. Regional states, on the other hand, have called into question this division of administrative power and have enacted specific regulations regarding the matter. As an example, the Oromia regional state mining proclamation assigned the powers to regulate special small-scale mining to the regional government. Additionally, the proclamation has enacted rules that regulate the issue, which is a challenge to the federal government's division of administrative power.¹⁰¹

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.¹⁰² 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 for any investor.¹⁰³ 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 preceding argumentative acts of federal and regional states in exercising legislative power over mineral resources need to be seen in light of the constitutional division of powers and the concept of concurrent power. One of the fundamental features of federal systems is the constitutional division of power between different levels of government. Once this division is established in the constitution, it is expected to be respected and adhered to by both the federal and regional governments. In the specific case of Ethiopia, 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 avoid duplication and ensure that the roles and responsibilities assigned in the constitution are followed. Moreover, determining the scope of power should not be solely in the hands of either the federal or subnational governments. Unilateral actions by either level of government, particularly in a contentious context where conflicting claims over mineral resources exist, are not advisable. Instead, the actions of both levels of

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

¹⁰² Ibid; Federal Mining Proclamation No. 678/2010; Article 52

¹⁰³ Ibid

government should respect the terms of the constitutional framework. To maintain the constitutional order, any changes or reinterpretations should strictly follow proper constitutional procedures. If there is a need for changes or reinterpretations, they must be carried out in accordance with the established constitutional processes to ensure the preservation of the division of power. The attempts to alter or divide ownership, legislative power, or administrative power over mineral resources in violation of the FDRE constitution are fundamentally 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.

Moreover, 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. The concurrent powers noted above necessitate alignment between federal and subnational legislation, with subnational governments considering federal legislation in their decision-making processes. The federal government is free to enact and amend laws. In either case, the regional states are expected to follow the lead and enact laws that do not contradict the federal government. Despite this expectation, regional governments have enacted laws that are at odds with the federal mining law, particularly in two areas: the definition of mineral resources and the distribution of power.¹⁰⁴ Such acts of the regional government are against the concept of concurrency and the constitutional division of power. As noted above, 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; the regional power is focused on giving effect and meaning to the federal law. It is not up to the regional laws to substantially change the content of the federal law. Thus, regional governments should exercise legislative power in line with the objectives and purpose of concurrent power, and secondary laws should not serve as a basis for challenging the content of primary laws.

104 Federal Mining Proclamation Number 678/2010; The Federal Mining Proclamation Amendment, Proclamation Number 816/2016, 2012, articles 27, 28, and 49/4; 52

104 Federal Mining Proclamation Number 678/2010), articles 24/3, 29, 30, and 49/4/b It is worth noting that, as noted above, the absence of a federal supremacy clause in the FDRE constitution and the lack of an intergovernmental forum, at least at the time, pose challenges in resolving this issue. Moreover, the matter has not been submitted to the constitutional umpiring body for resolution.

5.6. LEGISLATIVE POWER OVER MINERAL RESOURCES AND SUSTAINABLE MINING IN ETHIOPIAN FEDERAL SYSTEM

Since the latter days of the Derg regime, Ethiopia made significant attempt to align with the global trend of sustainable development.¹⁰⁵ Ethiopia's commitment to Sustainable Development over the years reflects its dedication to reform policies and legal instruments across various sectors.¹⁰⁶ One of the countries' commitments is reflected in the FDRE Constitution, which provides a clear reference to the idea of sustainable development.¹⁰⁷ As noted above, Ethiopia recognizes elements of sustainable development, such as economic and social development and environmental protection, as guiding principles for government action.¹⁰⁸

The constitutional introduction of the idea of sustainable development is followed by diverse international investment treaties, international human rights laws, environmental conventions, and treaties that have serious implications for sustainable mining. As noted above, Ethiopia's commitment to international human rights laws, environmental conventions, and treaties is indicative of its commitment to sustainable development in the mining sector as the international instruments have an impact on shaping the mining industry's social and environmental well-being and economic results.

It also enacted a legal and policy framework that aimed to operationalize the idea of sustainable mining. Federal and regional governments have enacted legislation aimed at mainstreaming the idea of sustainable development for the extraction of mineral resources.¹⁰⁹ The Mining Law,

¹⁰⁵ Gedion Asfaw, et al., Ethiopia: Protecting Nature in a Developing Decentralized Country, in *Environmental Governance and Decentralization*, edited by Albert Breton, Giorgio Brosio, Silvana Dalmazzone, and Giovanna Garrone, Edward Elgar Publishing, 2007.

¹⁰⁶ Ibid; Tsegai Berhane Interrogating the Economy-First Paradigm in 'Sustainable Development: Towards Integrating Development with the Ecosystem in Ethiopia, *Mizan Law Review*, Vol. 11, No. 1, September 2017,

¹⁰⁷ See FDRE constitution at supra note 14, article 43;

¹⁰⁸ Ibid., article 43, 89–92; Teferi Bekele et al., Sustainable Development Laws in Ethiopia: Opportunities and Challenges of Their Implementation, *Afe Babalola University, J. of Sust. Dev. Law & Policy*, Vol. 9: 2: 2018; It provides important pillars of sustainable development, including the right to development, environmental rights, the right to be consulted, principles for environmental protection, good governance, social development rights, and several guiding principles.

¹⁰⁹ The federal Transaction of Minerals Proclamation at supra note 26, the federal mining regulation, Regulation number 423/2018; A Proclamation to Amend Oromia Region Mineral Development Operation Administration, Proclamation No. 223/2020. The regional states could play a crucial role in enacting laws tailored to address regional differences in several key mining areas. However, this discussion will not assess the role of regional states in ensuring sustainable mining practices, as this aspect falls outside the scope of the study, which primarily focuses on large-scale gold and industrial mining operations governed by federal mining law, which is the exclusive legislative authority of

mineral transaction law, and Environment Management legislation, among other pieces of legislation, were passed to control the extraction of mineral resources.¹¹⁰ The principal law regulating Ethiopia's mining industry is the Mineral Resources Development Proclamation.¹¹¹ In particular, the federal mining proclamation has clearly stated that its prime objective is to ensure sustainable extraction of mineral resources.¹¹² The title of the proclamation, "a proclamation to promote sustainable development of mineral resources" is an indicative of the sustainable development element and objectives aimed to be introduced by the instruments. It also establishes rules that prioritize ecological sustainability and justifiable social and economic development, thereby contributing to the effective governance of the mineral resource sector. The Ethiopian federal government passed the Environmental Impact Assessment Proclamation (EIA) in 2002.¹¹³ It plays a vital role in promoting sustainable development by establishing a framework for environmental development, management, protection, regulation, and monitoring.¹¹⁴

The federal government has instituted a series of medium- to long-term plans and focused policies that explicitly recognized the important pillars of sustainable development to a different degree.¹¹⁵ Ethiopia is actively engaged in implementing the United Nations Sustainable Development Goals (SDGs). As noted above, the SDGs have been integrated into national development plans, such as

the federal government. As a result, regional states with limited mining laws are significantly excluded from the legal framework, which restricts their ability to regulate these activities effectively. Consequently, our analysis centers predominantly on federal mining legislation, emphasizing its implications for mining operations.

¹¹⁰ See the Oromia Regional State Mining Proclamation, Proclamation Number 227/2017, the federal mining proclamation, Proclamation No. 678/2010, and the Environmental Impact Assessment Proclamation No. 299/2002.

¹¹¹ Federal Mining Proclamation, proclamation Number 678/2010.

¹¹² See the federal mining proclamation, proclamation number 678/2010 preamble and article 4

¹¹³ Environmental Impact Assessment proclamation, Proclamation Number 299/2002

¹¹⁴ Federal Mining Law: The Mining Operations Proclamation No. 678/2010; The Environmental Impact Assessment Proclamation No. 299/2002 Mulatu, Shenkutie, and Yeshimar Yigzaw. "Investigating the Role of Law Enforcement in Preventing Environmental Crimes Related to Industrial Waste in Specific Regions of Ethiopia." *Journal of African Development Studies* 10, no. 2 (2023): 47-62. In addition to the international instruments, the Federal Mining Law and Environmental Proclamation in Ethiopia establish a framework for the responsible management of mineral resources, emphasizing socio-economic benefits and environmental protection. The obligations under these instruments are justiciable, meaning affected parties can seek legal recourse if mining companies fail to comply with environmental and socio-economic standards. However, existing legislation often lacks effective implementation, necessitating stronger institutional support.

¹¹⁵ Sustainable Development and Poverty Reduction Program (SDPRP), Federal Democratic Republic of Ethiopia (FDRE) Ministry of Finance and Economic Development (MOFED), 2002; Plan for Accelerated and Sustained Development to End Poverty (PASDEP), Ministry of Finance and Economic Development (MoFED) (2006); The Federal Democratic Republic of Ethiopia Growth and Transformation Plan (GTP) (2010/11–2014/15); Growth and Transformation Plan II (GTP II) (2015/16–2019/20); A Homegrown Economic Reform Agenda: A Pathway to Prosperity, 2020

Plan for Accelerated and Sustainable Development to End Poverty (PASDEP), the first Growth and Transformation Plan(GTP I), the Second Growth and Transformation Plan (GTP II) and the current 10-year homegrown plan.¹¹⁶ Moreover, although the Ethiopian mining sector did not have a special policy on natural resource sustainability, the draft mining policy also states that sustainable development is the guiding principle.

As noted in the previous chapter, a close examination of the FDRE constitution and subsequent policy mining legal framework reveals that it introduced a weak sustainable development model that aims to balance the economic, social, and environmental pillars of sustainability. However, each sustainability pillar adopted by the Ethiopian legal framework for mining remains largely unexplored. Hence, by focusing on the legal framework, that applies to large-scale mining operations, an attempt will be made to examine the nature of the pillars of sustainable mining recognized under the Ethiopian legal framework: economic sustainability, environmental sustainability, and social sustainability.

5.6.1. THE LEGISLATIVE POWER OVER MINERAL RESOURCES AND ECONOMIC SUSTAINABILITY

As noted above, the extraction of minerals will generate significant economic benefits and challenges. Economic sustainability requires the extraction of mineral resources in a manner that leads to the generation of maximum economic benefits for the current and future generations.¹¹⁷ To this end, the government, in addition to the fiscal regime, uses the legal framework to optimize the economic benefits of the mining sector, addresses the complex macroeconomic issues in the extraction of mineral resources, and regulates the reinvestments of mining procedures.¹¹⁸

The Government uses its regulatory power to enhance the economic contribution of the mining sector by regulating the extraction of mineral resources and enhancing forward and backward

¹¹⁶ United Nations Ethiopia, How the UN is supporting The Sustainable Development Goals in Ethiopia https://ethiopia.un.org/en/sdgs?afd_azwaf_tok accessed august 2024 ; United Nations Ethiopia, Pathways to accompany Ethiopia's strive towards sustainable development, https://ethiopia.un.org/en/274391-pathways-accompany-ethiopia%E2%80%99s-strive-towards-sustainable_ accessed august 2024

¹¹⁷ Tina Hunter, Comparative Perspective on Exhaustible Resource Development in Ethiopia: Lessons from the Norwegian Legal Framework and Experience, in *Ethiopian Yearbook of International Law*, 2017: 49-78.

¹¹⁸ *Ibid.*, Kenneth J. McKenzie, Fiscal Federalism and the Taxation of Nonrenewable Resources, in *Perspectives on Fiscal Federalism* Edited by Richard M. Bird, WBI, Learning Resources Series, 2006. The role of the government's taxing power in ensuring sustainable mining will be addressed in subsequent chapters.

economic linkages, employment, and infrastructure development.¹¹⁹ The Ethiopian legal framework has followed the same trend. It provides a legal framework that regulates the extraction of mineral resources, forward and backward economic linkages, employment and infrastructure development.¹²⁰ It also provides fiscal and non-fiscal tools to collect economic benefits from the extraction of mineral resources concurrently, and for the regional government.¹²¹

The federal mining proclamations, regulations, and draft policies have attempted to regulate mineral resource extractions. They provide a detailed legal framework that enables the government to control the start of extraction, rate of production, efficiency of extraction, and full development of mining fields. It uses a field development plan, notification of production, use of suitable technology, and limits on the renewals of a license, relinquishment requirements, and fees to ensure the efficient extraction of mineral resources. The Federal Mining proclamation,¹²² regulation,¹²³ and draft mining policy¹²⁴ require a person engaged in the exploration and exploitation of mineral resources to submit a field development plan that optimizes field extraction. The government is expected to approve and monitor work programs to ensure that the optimal extraction of mineral resources and mining fields are not left without the extraction of mineral resources. Extraction of mineral resources must be based on economic principles. The federal mining proclamation¹²⁵ and regulation¹²⁶ require notifications of the production rate. The notification of the production rate is essential to ensure that there is no excessive increase or decrease in the production rate. The use of modern technology is essential to ensure that the maximum mineral resources are extracted, with a limited impact on the environment and society.

119 Uyanga Gankhuyag et al., *Managing mining for sustainable development: A sourcebook* Bangkok, 2018; Thomas Akabzaa, *Mining in Ghana: Implications for National Economic Development and Poverty Reduction in Mining in Africa* Regulation and Development Edited by Bonnie Campbell, Pluto Press, 2009; Claudine Sigam et al., *Extractive Industries: Optimizing Value Retention in Host Countries*, UNCTAD, 2012; Roderick G. Eggert, October, *Mining and Economic Sustainability: National Economies and Local Communities*, Mining, Minerals, and Sustainable Development, No. 19, 2001.

¹²⁰ The federal mining proclamation, proclamation number 678/2010

¹²¹ *Ibid.* In the FDRE constitution, Article 98, the government's use of taxation powers to generate optimal economic benefits from the extraction of mineral resources and its reinvestments will be addressed in subsequent chapters.

¹²² The federal mining proclamation, proclamation number 678/2010, Articles 28/1/a, 30/1/a, 33, and 38

¹¹⁶⁶ The federal mining regulation, Regulation number 423/2081, Articles 35 and 36

¹²⁴ Draft mineral resources development policy 2021

¹²⁵ The federal mining proclamation, proclamation number 678/2010 Article 36/1/a, 38/1, 58

¹²⁶ The federal mining regulation, regulation number 423/2018 article 50/2 and 54

The federal mining proclamation,¹²⁷ and regulation,¹²⁸ require the extraction of mineral resources to be carried out by sound engineering and suitable technologies. The federal mining proclamation,¹²⁹ and regulation,¹³⁰ use limits on the renewal of a license, relinquishment requirements, and fees to encourage efficient exploration and exploitation of mineral resources.

However, the efficiency of these tools in enhancing efficiency is questionable.¹³¹ Although Ethiopia has implemented a legal framework to regulate the nature of mineral resource extraction, there is uncertainty regarding its effectiveness in promoting truly efficient mining practices as it is hindered by inadequate economic incentives, ineffective relinquishment policies, possible enforcement difficulties, and a lack of adaptability.

The contribution of the mining sector to the overall economic development deepens the backward and forward linkages of the sector to the rest of the economy. The linkage of the mining industry to the rest of the economy is essential for ensuring structural transformation and industrialization. The federal mining proclamation, regulation, and draft policy attempted to enhance linkages between the mining sector and the rest of the economy. However, federal mining proclamation¹³² and regulation¹³³ provide a relatively limited legal framework that encourages backward linkages, i.e., local procurement of goods and services. Moreover, the federal mining proclamation¹³⁴ and regulation¹³⁵ do not provide an effective legal framework that regulates the forward linkage of the mining industry to the rest of the economy.¹³⁶ Recognizing these shortcomings, the Homegrown economic reform program and draft mining policy have placed significant emphasis on enhancing

¹²⁷ The federal mining proclamation, proclamation number 678/2010 articles 45 and 36

¹²⁸ The federal mining regulation, regulation number 423/2018 article 54

¹²⁹ The federal mining proclamation, proclamation number 678/2010, Article 24, /1,29, 31, and 41

¹³⁰ The federal mining regulation, regulation number 423/2018, article 16-18, 47/3

¹³¹ Ibid., IP 1, IP 3 and IP 4 the cost of renewing the license fee is too small for exploration and exploitation licenses. Moreover, it does not provide a strong relinquishment requirement.

¹³² The federal mining proclamation, proclamation number 678/2010, Article 36/1/l It does not specifically address downstream processing. It states that the licensee has to give preference to Ethiopian goods and services, where they are readily available at a competitive price and are of comparable quality to goods and services outside Ethiopia.

¹³³ The federal mining regulation, regulation number 423/2018, article 54

¹³⁴ The federal mining proclamation, proclamation number 678/2010 Article 54/4/g, 77/1/b

¹³⁵ The federal mining regulation, regulation number 423/2018, article 53

¹³⁶ The federal mining proclamation, proclamation number 678/2010, Article 54/4/g, 77/1/b, provided that the government has the power to compel developers to sell their output to the national government. In line with such requirements, the federal government has been regulating the supply of gold and industrial minerals. The federal government has enacted a regulation that compels small-scale miners to sell their produce to the national bank. On the other hand, the federal government has been regulating cement factors that use most industrial minerals.

the forward and backward development of mineral resources.¹³⁷ This change in perspective indicates a recognition of the necessity for enhancement in this domain.

The mining sector is mostly capital intensive, and its direct employment opportunities are relatively limited. However, it is also known for its unique ability to create significant indirect and induced jobs.¹³⁸ The federal mining proclamation¹³⁹ and regulation¹⁴⁰ obligate the license holder to give preference to the employment of Ethiopians that have the required qualifications. Moreover, mining companies must ensure that employees receive training and education necessary for mining operations.¹⁴¹ It does not provide consultation with the local government or affected communities. Moreover, it does not provide for quantitative obligations that set specific numerical targets or quotas for local employment. Furthermore, large-scale mining in Ethiopia generates limited direct employment due to its capital-intensive nature and the limited number of large scale operation that reaches the exploration stage of the operation. Moreover, the existing operations failed to great significant indirect and induced employment in the sectors. Recognizing these shortcomings, the draft mineral policy lists several actions that the government must undertake to maximize the employment of Ethiopian nationals in the mining sector, including the preferential treatment of its citizens, capacity building, community consultation, and the need to enhance indirect jobs.¹⁴²

The development of an infrastructure that supports mining operations presents a significant opportunity for broader economic development. Consequently, it is common for a legal system to require mining corporations to finance the required infrastructure. Recognizing this potential, the Ethiopian government has incorporated infrastructure-related provisions into its mining legislation

¹³⁷ See the Homegrown Economic Reform at supra note 115, Draft mineral resources development policy 2021, 138 Uyanga Gankhuyag supra note 119. Countries generally use three methods to enhance the employment contribution of the mining sector: preferential treatment of citizens, consultation with the government, and quantitative obligations.

¹³⁹ The federal mining proclamation, proclamation number 678/2010 Article 38/1/h

¹⁴⁰ The federal mining regulation, regulation number 423/2018, Article 39/1 The regulations contain more precise language as they require that the holder of a license “may employ a qualified foreign national if he can provide evidence that shows a qualified Ethiopian national cannot be found to fill a position and has obtained approval thereof from the licensing authority.” It also requires that foreign nationals transfer their knowledge to domestic developers. It also provided that “the foreign national shall be replaced by an Ethiopian national where it is ensured by the licensing authority that the foreign national has been working for enough time to transfer his skills and knowledge to an Ethiopian national.”

¹⁴¹ The federal mining proclamation, proclamation number 678/2010, the Article 4/1, 34/1/c, h72/3

¹⁴² Draft mineral resources development policy 2021. The draft policy recommends actions that aim to enhance the capacity of the local workforce, enhance the employment potential of the local workforce, and assist companies in recruiting local employees.

and policies that are useful for other economic activities. The federal mining proclamation¹⁴³ and regulation¹⁴⁴ regulate the development of infrastructure in Ethiopia, including the obligation of the Licensee to cooperate and financially contribute to the construction of infrastructure, and the right of third-party access to infrastructure. Moreover, draft mining policies have encouraged the development of infrastructure projects.¹⁴⁵ The preceding legislative framework provides a foundation for leveraging mining-related infrastructure to produce larger economic benefits. However, the current framework does not provide specific guidelines for regulating all aspects of infrastructure development. Furthermore, the current system lacks effective channels for coordinating infrastructure development among mining firms, local governments, and other economic sectors, restricting its ability to fully capitalize on potential synergies. It also neglected to provide explicit provisions for long-term infrastructure planning that goes beyond the life of mining ventures. In addition, it does not provide a specific process for including local communities in infrastructure planning to ensure that development is consistent with local needs and goals.

Mineral resources hold considerable economic promise for developing nations; however, they also present intricate macroeconomic challenges that necessitate robust government involvement.¹⁴⁶ As mentioned above, economic sustainability requires, an effective management system is required to convert the abundance of natural resources into long-term and equitable economic growth.¹⁴⁷ To this end , the government need to establish comprehensive legal and institutional frameworks to manage the economic challenges that arise in the extraction of mineral resources.¹⁴⁸ It needs to provide a legal framework that addresses the economic impact of the mining sector, including structural budget rules, setting up natural resource funds, savings, and public financial management.¹⁴⁹ As previously stated, the mining industry in Ethiopia is currently undergoing significant growth. This expansion is being driven by massive investments that are unveiling the country's extensive resource potential. It is predicted that these investments will yield significant economic advantages that will have an impact on the economy. On the other hand, Ethiopia has yet to develop a comprehensive framework capable of effectively managing the economic effects

¹⁴³ See the federal mining proclamation, proclamation number 678/2010 Article 36/1/e

¹⁴⁴ The federal mining regulation, regulation number 423/2018, article 29

¹⁴⁵ Draft mineral resources development policy 2021

¹⁴⁶ Eggert, Roderick G., at supra note 119

¹⁴⁷ Ibid

¹⁴⁸ Lorena Viñuela, et al, at supra note 110

¹⁴⁹ Uyanga Gankhuyag at supra note 119; Robin Broadway and Anwar Shah at supra note 67

of the mining sector.¹⁵⁰ The current laws, such as the Mining and Income Tax Proclamation, address only operational concerns and revenue generation.¹⁵¹ The wider economic impacts that are associated with the operation of mining operations are not taken into consideration by these laws.¹⁵² Thus, for the purpose of bringing this issue under control, it is essential for the federal government to devise a comprehensive framework that is capable of effectively regulating broader economic impacts of the mining sector.¹⁵³

As mentioned, the extraction of mineral resources is seen as a depletion of national wealth. The introduction of the idea of sustainable mining led to a paradigm shift to view the benefit generated from these resources as a form of national wealth that should be preserved and reinvested rather than merely extracted and spent.¹⁵⁴ In order to accomplish this objective, legislative power over mineral resources is used to direct investment of the proceeds from mining into sustainable alternatives.¹⁵⁵ As noted above, many countries have developed legal frameworks that regulate the economic effects of mining operations in order to promote sustainable mining.¹⁵⁶ The FDRE constitution provides basis for regulating the proceeds from the extraction of mineral resources.¹⁵⁷ However, the Ethiopian federal system lacks comprehensive laws and institutions for converting its mineral wealth into long-term benefits.¹⁵⁸ Furthermore, the matter is not covered in the draft mining proclamation. This regulatory gap threatens the transformative potential of mineral resources to drive long-term economic growth and development. The experiences of other resource-rich developing nations highlight the impacts of these limitations.¹⁵⁹ Nigeria's experience with the "oil curse" exemplifies the potential consequences of mismanaging resource abundance. In contrast, Botswana's success in using its diamond resources as a driver of growth and prosperity serves as a prime example of how resource-rich nations can attain sustainable development through

¹⁵⁰ Moore Stephens, Ethiopian Extractive Industries Transparency Initiative Report, Third EITI report; National (2018)

¹⁵¹ The federal mining proclamation, Proclamation No. 678/2010, The federal Income tax proclamation, proclamation number 979/2016

¹⁵² Ibid

¹⁵³ Bauer, Andrew, and Uyanga Gankhuyag. "Natural resource taxation and revenue sharing in Asia," OECD Fiscal Federalism Studies: Local Public Finance and Capacity Building in Asia Issues and Challenges, 2020: 155;

¹⁵⁴ Ibid; Ploeg, Frederick van der. "Natural resources: curse or blessing?" Journal of Economic Literature 49, no. 2 (2011): 366-420

¹⁵⁵ Ibid

¹⁵⁶ Uyanga Gankhuyag at supra note 119

¹⁵⁷ FDRE constitution article 43/1 89/6

¹⁵⁸ IP 3

¹⁵⁹ Bauer, Andrew, and Uyanga Gankhuyag at supra note 152

robust institutions and well-considered policies.¹⁶⁰ These different experiences highlight Ethiopia's urgent need to build effective legal and institutional frameworks for the management of utilization revenue from the extraction of mineral resources, before significant resource revenues materialize.

It is clear from the above discussion that the federal legal framework attempts to regulate administer a mining process to ensure that the extraction of mineral resources is conducted in a manner that generates maximum economic benefits. However, it failed to develop a comprehensive framework capable of effectively managing the economic effects of the mining sector. Moreover, like most developing countries, federal and state governments have focused on meeting the current needs.¹⁶¹ This method may provide short-term benefits while jeopardizing future economic stability and expansion. Furthermore, as previously stated, the legal framework failed to include critical elements necessary for ensuring efficient extraction of mineral resources.

5.6.2. THE LEGISLATIVE POWER OVER MINERAL RESOURCES AND ENVIRONMENTAL SUSTAINABILITY

The extraction of mineral resources, as noted above, results in significant waste production, air emissions, liquid effluent discharge, land degradation, and habitat destruction.¹⁶² The environmental impacts of mining inflict significant and enduring harm on human health and well-being. Environmental sustainability highlights the significance of preserving environmental quality for the long haul, while allowing human activities that do not result in enduring adverse effects on ecosystems.¹⁶³ As noted above, in order to regulate the environmental impact of mining activities, governments make use of legal instruments to provide both traditional and nontraditional means of conducting such regulation.¹⁶⁴ The FDRE Constitution recognized fundamental human rights, such as the right to a clean environment, land, territories, and resources, free prior and informed consent, and protection from involuntary resettlement.¹⁶⁵ Ethiopia is a signatory to a

¹⁶⁰ Ibid

¹⁶¹ See A Homegrown Economic Reform Agenda: A Pathway to Prosperity supra note 115

¹⁶² Andrew Bauer, Paul Shortell, and Lorenzo Delesgues Sharing the Wealth: A Roadmap for Distributing Myanmar's Natural Resource Revenues, Natural Resource Governance Institute, 2016.

¹⁶³ Moomen Abdul-Wadood et al., "The Drive towards Consensual Perspectives for Enhancing Sustainable Mining," Resources 9, no. 12: 2020, 1-16

¹⁶⁴ Uyanga Gankhuyag supra note 119

¹⁶⁵ See the FDRE Constitution, Article 40, as it provides that all persons have the right to a clean and healthy environment. The Constitution further reasserts that the government should work hard to ensure that all Ethiopians

number of important international instruments that guarantee rights to the environment.¹⁶⁶ Federal and regional mining proclamations and regulations have attempted to address the environmental problems that arise during the extraction of mineral resources. It has established traditional forms of environmental regulations, including environmental impact assessment, environmental management, land reclamation, notification of operational risks, monitoring, and auditing, and land reservation, to address the environmental impact of mining operations.

Environmental impact assessment is the primary tool used to address the environmental impact of mining operations. Ethiopia has developed a thorough and comprehensive framework for conducting environmental impact assessments in its mining sector, showcasing a firm dedication to safeguarding the environment. The federal mining proclamation¹⁶⁷ and regulation¹⁶⁸ provided that, except for a reconnaissance license, retention license, or artisanal mining license, any applicant for a license and renewal shall submit an environmental impact assessment and obtain all necessary approvals from the competent authority. However, it failed to provide a detailed legal framework for implementing an environmental impact assessment. Such an issue is not a problem, as the Environmental Impact Assessment Proclamation and its subsequent legislation provide a detailed rule that regulates environmental impact assessments for projects that could impact the environment, including mining operations.¹⁶⁹ Furthermore, the environmental policy addresses the need for environmental impact assessments.¹⁷⁰ Additionally, the draft mineral policy provides an environmental impact assessment and includes “no-go” options where the risk to the environment is considered unacceptable.¹⁷¹

live in a clean and healthy environment. To this end, the design and implementation of development programs and projects are required to be carried out in a way that does not cause any major damage or destroy the natural environment.

¹⁶⁶ Gedion Asfaw at supra note 105

¹⁶⁷ See the federal mining proclamation, proclamation number 678/2010, the preamble of the proclamation, articles 46/1, 62, and 63/1. The preamble to the Proclamation stated that one of the objectives of the Proclamation is to enable the government to protect the environment for the benefit of present and future generations and to ensure that the extraction of mineral resources is carried out in an ecologically and sustainable manner.

¹⁶⁸ The federal mining regulation, regulation number 423/2018 article 39

¹⁶⁹ Ibid. There is a reference to the requirement for a project EIA to be completed before the granting of a mineral license.

¹⁷⁰ Environmental Impact Assessment Proclamation, Proclamation Number 299/2002; Federal Democratic Republic of Ethiopia environmental protection authority, EIA Procedural Guideline Draft (2003); EIA Reporting Guide Ethiopia; The federal democratic republic of Ethiopia, environmental policy, and environmental protection authority, in collaboration with the ministry of economic development and cooperation, Addis Ababa April 2, 1997

¹⁷¹ Draft mineral resources development policy 2021

Another important tool for addressing the adverse impacts of mining operations is the Environmental Management Plan. The federal mining proclamation¹⁷² and regulation¹⁷³ calls for an Environmental Management Plan. However, the federal mining proclamation and regulations failed to develop mine-specific environmental management directives and guidelines.¹⁷⁴ The environmental policy contains general provisions that apply to the environmental management of mineral resources.¹⁷⁵ It calls for the adoption of standards for mining applications. However, it failed to provide a detailed legal framework for regulating its application. The draft mineral policy calls for an environmental management plan.¹⁷⁶ In light of these constraints, it appears that Ethiopia has acknowledged the significance of environmental management plans (EMPs); however, there is a major requirement for more comprehensive and detailed guidance to guarantee the successful implementation of EMPs in the mining industry.

Once the Environmental Management Plan is approved, the licensee needs to present progressive updates and periodic reports. The Federal Mining Proclamation failed to require a license holder to submit progressive updates and periodic reports.¹⁷⁷ The mining regulation provides that a license holder is required to notify issues that have an impact on the environment.¹⁷⁸ However, it failed to provide detailed directives and guidelines that regulate the periodic reports on the environmental impact of mining. The draft mining policy requires mineral resource developers to present progressive updates and periodic reports of the Environmental Management Plan.¹⁷⁹ Although Ethiopia is making progress in acknowledging the significance of continuous environmental reporting in mining, the limitations described above indicate that the existing legislative and regulatory framework is not adequate to guarantee efficient and consistent implementation.

Reports by the license holder must be verified by an appropriate government agency. The federal mining proclamation¹⁸⁰ and regulation¹⁸¹ provides an important legal framework that regulates the monitoring of mining operations. It obliges the government to monitor the performance of mining

¹⁷² The federal mining proclamation, proclamation number 678/2010 Article 20/1/c/

¹⁷³ The federal mining regulation, regulation number 423/2018 article 39

¹⁷⁴ Ibid,

¹⁷⁵ The environmental policy of the Federal Democratic Republic of Ethiopia, 1997

¹⁷⁶ Draft mineral resources development policy 2021

¹⁷⁷ The federal mining proclamation, proclamation number 678/2010

¹⁷⁸ the federal mining regulation, regulation number 423/2018, article 39/2

¹⁷⁹ Draft mineral resources development policy 2021

¹⁸⁰ The federal mining regulation, regulation number 423/2018, article 39/2

¹⁸¹ The federal mining proclamation, proclamation number 678/2010

operations and their impact on the environment. Moreover, it provides the government with the authority to suspend and terminate mining operations when such operations harm the environment.¹⁸² Despite this, it did not result in the development of mine-specific environmental management directives and guidelines for the purpose of monitoring environmental audits during the mining process.¹⁸³ The draft Mineral Policy makes an effort to address this problem by mandating the establishment of efficient monitoring and auditing systems that are responsible for regulating the negative effects that mining operations have.¹⁸⁴ This is a positive development, it is important to establish specific guidelines for implementation and mechanisms for enforcement to ensure the policy's practical effectiveness.

The idea that there should be extensive consultations at various stages of the mining lifecycle is one that is widely supported and recommended. The federal mining and environmental proclamations, as noted herein, provide very little reference to public participation and consultation in the environmental management of the mining sector.¹⁸⁵ As noted above, the Environmental Management Proclamation provides public participation in the environmental impact assessment process.¹⁸⁶ However, it failed to provide effective community consultation, engagement, and protection mechanisms throughout the mining process. Despite its lack of clarity, environmental policy provides public consultations for the appraisal of environmental impact assessments.¹⁸⁷ The draft Environmental Impact Assessment Guideline for Mining and Petroleum Operations requires public views on development projects during the environmental impact assessment stage.¹⁸⁸ On the other hand, the draft Mineral Policy provided public participation, an appeal process, and access to information during the EIA process.¹⁸⁹ Thus, it is obvious from the preceding discussion that Ethiopia's legal systems, while including certain provisions for public

¹⁸² Id article 44/1

¹⁸³ Melisha Charles, Denby McDonnell, Christopher Stoicheff, and Joshua Tafel, A Roadmap for Environmental and Social Impact Assessment in Ethiopia's Mining Sector, Ministry of Mine, 2020

¹⁸⁴ Draft mineral resources development policy 2021

¹⁸⁵ See the federal mining proclamation, Proclamation Number 678/2010, Article 58; Melisha Charles et al at supra note 168

¹⁸⁶ Ibid. The closest thing it provides to public consultation is a negotiation between the land user or owner and the license holder in terms of compensation that may be paid because of loss or damage caused by mining activities.

¹⁸⁷ The environmental policy of the Federal Democratic Republic of Ethiopia, 1997

¹⁸⁸ See the EIA Guidelines for Mining and Petroleum Operations. However, it failed to define what "consultation" means, the information that will be provided to the public, and the nature of consultation, whether it is an ongoing process or only occurs at the EIA approval stage.

¹⁸⁹ Draft mineral resources development policy 2021

involvement, have substantial limits to achieving meaningful public participation and community input throughout the mining lifetime.

The extraction of mineral resources has a significant effect on the natural environment. It is advisable for mining companies to allocate sufficient funds that will enable them to mitigate the adverse effects of operations. In Ethiopia's federal system, the legal framework provides rules that require license holders to set aside cash to cover the expenses of land reclamation and other environmental mitigation measures. The federal mining proclamation¹⁹⁰ and regulation¹⁹¹ provide that license holders should allocate funds to cover the costs of reclamation and the environmental impact of mining operations. The environmental policy highlights the need to reclaim land used for mining operations.¹⁹² Moreover, the draft mining policy contains a detailed policy statement regarding the purpose and utilization of environmental rehabilitation funds.¹⁹³ The mentioned development is a significant legal safeguard, recognizing the importance of mining companies considering and incorporating the environmental impacts of their activities.

The extraction of mineral resources damages the land and natural environment surrounding mining operations. Legal systems commonly provide off-limit areas for mining operations. In Ethiopia, the federal mining proclamation prohibits mining in certain areas to address environmental concerns and to protect ecologically sensitive or culturally significant landscapes from the negative effects of extractive activities. The federal mining proclamation provides important areas that are not subjected to mining operations.¹⁹⁴ It also empowers the federal government to designate areas that have not been designated, recognizing that the initial list may not be exhaustive. However, it granted the government with wide discretion to subject any area to mining operations when it believes that it is in the best interests of the country.¹⁹⁵ This clause has the capacity to override environmental protection considerations, prioritizing immediate economic interests over long-term sustainability. Moreover, the draft mining policy underscores the need for areas that are not

¹⁹⁰ the federal mining proclamation, proclamation number 678/2010 Article 62

¹⁹¹ The federal mining regulation, regulation number 423/2018, Article 39. It provided a detailed rule that regulates the environmental rehabilitation fund, including requiring mining areas to be completely restored and reclaimed for future use, progressive management of the environment, financial guarantees for environmental rehabilitation, controlled decommissioning, closure procedures, procedures for determining possible latent environmental risks after mine closure, and the retention of responsibility by a mine until an exonerating certificate is granted.

¹⁹² The environmental policy of the federal Democratic Republic of Ethiopia, 1997

¹⁹³ Draft mineral resources development policy 2021

¹⁹⁴ The federal mining proclamation, proclamation number 678/2010 article 6

¹⁹⁵ Ibid

subject to mining operations.¹⁹⁶ It proposes a more robust dedication to protecting vulnerable ecosystems and natural resources.

It is clear from the above discussion that the federal legal and policy framework attempts to address the environmental impact of the extractive sector by providing traditional environmental protection mechanisms including environmental impact assessment, environmental management, land reservation, environmental rehabilitation funds, notification of operational risks, monitoring, and auditing. However, it has failed to provide non-traditional forms of regulation, including the use of performance standards and economic instruments. Moreover, traditional instruments have failed to incorporate sufficient community consultation. Furthermore, it failed to provide a detailed legal framework for implementing environmental impact assessments, environmental management plans, and environmental rehabilitation funds.

5.6.3. THE LEGISLATIVE POWER OVER MINERAL RESOURCES AND SOCIAL SUSTAINABILITY

Mining has a direct influence on the communities that are located in close proximity to mining sites.¹⁹⁷ In order to achieve social sustainability, it is necessary to guarantee that mining will result in an equitable distribution of both benefits and burdens. Governments use regulatory and fiscal powers to address the social impact of mineral resource extraction. In Ethiopia, the federal and state mining laws provide an important legal framework that ensures the social sustainability of mining, including impact assessments, community development funds, compensation for land disposition, and health and safety standards.¹⁹⁸

Social impact assessment is essential to identify the possible impact of mining on society. The Federal Mining Proclamation has failed to provide a social impact assessment.¹⁹⁹ As noted above, the federal mining proclamation provided that any and all mining endeavors in Ethiopia are required to go through an Environmental Impact Assessment (EIA) to comply with legislative requirements. This evaluation investigates the effects of the project on the environment, society, economy, and culture. Moreover, the federal mining regulation provided that any applicant for a

¹⁹⁶ Draft mineral resource's development policy 2021

¹⁹⁷ Andrew Bauer, at supra note 149; Fanta Mandefro, "Social accountability in the extractive industries: a review of the Ethiopian experience." *Ethiopian Journal of Business and Economics (The)* 6, no. 1 (2016): 1-32.

¹⁹⁸ *Ibid*

¹⁹⁹ See the federal mining proclamation, proclamation number 678/2010, Article 62

mining license shall submit a social impact assessment.²⁰⁰ The draft mineral policy highlights the need for social impact assessment.²⁰¹ However, it failed to provide a detailed legal framework for implementing a social impact assessment. The mere acknowledgment is inadequate without the necessary legal measures. The lack of a comprehensive legal framework weakens the efficacy of social impact assessments, putting communities at risk of potential adverse effects of mining operations.

The community development fund is an essential component in the process of establishing trust between mining companies and the communities adjacent to their operations. The federal Mining Proclamation mandates that all holders of mining licenses, along with holders of exploration licenses in specific instances, engage in community development activities.²⁰² Furthermore, the Federal mining regulations provide a detailed legal framework that regulates the obligations of license holders toward community development.²⁰³ On top of this, the Ministry of Mining issued a detailed directive that provided the role of the regional state, local, and federal governments.²⁰⁴ The draft mining policy underlines the importance of community development funds, mechanisms, and institutional arrangements for its implementation. However, the above-mentioned legal framework has failed to regulate important decisions in development, including process project selection, procurement, supervision, management, and direct community participation.²⁰⁵

Public participation, consultation, and transparency at each and every stage of the mining process are absolutely necessary in order to ensure the sustainability of mining operations. The FDRE Constitution establishes the foundation for public involvement, dialogue, and openness.²⁰⁶ International human rights instruments highlight essential procedural rights that guarantee the involvement of local communities in the extraction of mineral resources. Additionally, it establishes essential guidelines that promote public involvement, consultation, and

²⁰⁰ federal mining regulation, regulation number 423/2018, article 6, የማዕድን ሥራ ፈንድ ለማቋረጥ የ የሚቀርቡ ውሳኔዎች የሚጣራበትን አግባብ ለመወሰን የ ወጣ የ ማዕድንና ነዳጅ ሚኒስቴር መመሪያ ቁጥር 809/2013

²⁰¹ Draft mineral resources development policy 2021

²⁰² See the federal mining proclamation, proclamation number 678/2010, Article 62/3

²⁰³ Federal mining regulation, regulation number 423/2018, article 40, It provides a detailed legal framework that regulates the administration of community development funds. It specifically provides the contribution to be made by the special small-scale, small-scale, and large-scale mining license holders at different stages of mining. Moreover, it provides that the contribution of the exploration license is determined by an agreement with the licensing agency.

²⁰⁴ The federal ministry of mine and petroleum, Directive to Regulate Mineral Exploration and Mining Community Development Plan and Fund Directive Number 1/2019

²⁰⁵ Melisha Charles et al at supra note 168

²⁰⁶ The FDRE constitution article 12/ 1, 43/2, 92/3

transparency.²⁰⁷ However, no specific law regulates public participation in Ethiopia; rather, it is provided by different laws. The Federal Mining Proclamation provides a limited reference to the requirements for consultation.²⁰⁸ It only provides for limited participation by the local community in the case of environmental and local development funds. The Environmental Management Proclamation provides public participation in the environmental impact assessment process and requires participation in community development planning.²⁰⁹ The environmental policy requires public views on development projects during the environmental impact assessment stage.²¹⁰ Furthermore, the draft mining policy calls for stakeholder participation in environmental impact assessments and open access to information, social issues, and appeal procedures.²¹¹ However, it failed to provide a clear rule that addresses the grievance handling mechanism that can be used by individuals, workers, communities, and/or civil society organizations that are being negatively affected by mining operations.

The extraction of mineral resources requires land, which will be expropriated from the local inhabitants. Mineral developers are required to compensate the local community for the loss of land and other properties attached to it. Moreover, local communities should be entitled to resettlement. Under the FDRE Constitution, land ownership is vested in the state, which transfers possessory rights.²¹² The government exercises its expropriation power to transfer land to private investors, which is deemed to be of public interest.²¹³ It provides that the local community affected by government action is entitled to have the right to compensation based on a negotiation between the mining companies and local communities.²¹⁴ However, unlike regional states, federal mining law failed to recognize the preferential rights of the local community.²¹⁵ Moreover, it failed to recognize the issue of resettlement for those affected by the environmental impact of mining.

²⁰⁷ The right to participate in public affairs is provided in several instruments, including UDHR art. 21; ICCPR art. 25; CEDAW art. 7; ICERD art. 5; CRPD art. 29; and DRTD art. 8(2). Furthermore, the right to access information is provided under UDHR art. 19; ICCPR art. 19.

²⁰⁸ See the federal mining proclamation, proclamation number 678/2010, Article 60.

²⁰⁹ Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, However, it failed to define "consultation" and "participation." Despite such limitations, it provides for public participation at the EIA/ESMP stage of mining license approval.

²¹⁰ The Environmental policy of the FDRE 1997

²¹¹ Draft mineral resources development policy 2021

²¹² The FDRE constitution article 40/3

²¹³ The federal mining proclamation, proclamation number 678/2010, Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation, Proclamation No. 456/200, Article 2.5

²¹⁴ Ibid article 44/2

²¹⁵ Oromia Regional State Mining proclamation amendment proclamation, proclamation number 223/2020

Furthermore, the draft mining policy failed to incorporate the internationally accepted standards and principles of resettlement.

The extraction of mineral resources frequently presents dangerous working conditions, underscoring the necessity of strong regulatory frameworks to safeguard the health and safety of workers. Governments utilize their regulatory authority to tackle the health and safety concerns that emerge during the extraction of mineral resources. The FDRE Constitution provides several articles about workers having the right to a healthy and safe work environment.²¹⁶ The federal mining laws and regulations provide workplace safety.²¹⁷ The federal labor proclamation provides rules that also cover occupational health and safety issues in the mining sector.²¹⁸ Additionally, the Ministry of Labour formulates directives, guidelines, and policies that tackle health and safety concerns, particularly within the mining sector.²¹⁹ The draft policy outlines methods by which the ministry fosters health and safety working conditions across all mines.²²⁰ While these frameworks serve as a vital tool for promoting Occupational Safety and Health (OHS), it do not provide a comprehensive legal framework that specifically addresses the unique intricacies of health and safety in mining. Consequently, continuous efforts are required to guarantee complete implementation and enforcement.

It is clear from the above discussion that Ethiopia has made efforts to address the social sustainability of mining operations by providing impact assessments, compensation for the disruption of livelihoods, public participation in decision-making, and health and safety protection. However, significant gaps remain in the legal and policy framework as it is characterized by fragmentation, limited scope, and inadequate mechanisms in the area of participation of the local community, principles of resettlement, specific directives that regulate labor issues, and social management plans. To attain social sustainability in Ethiopia's mining sector, it is essential to enact thorough reforms that align with global best practices and tackle the unique challenges faced by communities impacted by mining operations.

²¹⁶ The Ethiopian Constitution Article 9.19, 25, 31, 35, 42 (1), (2), 44(1), 89(8), and 90 (1)

²¹⁷ The federal mining proclamation, proclamation number 678/2010; the federal mining regulation number 423/2018

²¹⁸ The Federal Labor Proclamation No.1156/2019, article 89, Labor Proclamation No. 377/2003

²¹⁹ Ministry of Labour and social affairs, Occupational Health and Safety Committee Guideline 2006; Ministry of Labour and social affairs, The Occupational Safety and Health Directive 2008; Ministry of Labour and social affairs, Occupational Health and Safety Policy, 2014

²²⁰ Draft mineral resources development policy 2021

6. CONCLUSION

The legislative power over mineral resources is one of the means which enable the state to exercise its regulatory power to address environmental and socio-economic challenges in mineral extraction. The assignment of legislative power over mineral resources is one of the contentious issues in federal constitutional design. This chapter examined the assignment, exercise, and legal and institutional framework that regulates the legislative power over mineral resources and the adequacy of Ethiopia's legal framework in ensuring sustainable mining.

It starts with exploring the legal and practical issues in the division of legislative power over mineral resources in the Ethiopian Federation. It finds that the FDRE constitution assigns legislative power over mineral resources in an ambiguous manner. It failed to clearly define the nature and scope of the legislative power over mineral resources. The uncertainty over the nature and scope of legislative power over mineral resources has created confusion between the two levels of government.

Moreover, the for-long federation lacks legal and institutional coordination mechanisms that facilitate the exercise of concurrent legislative power during the enactment of the mining laws. It also failed to operationalize the recently created intergovernmental legislative council composed of representatives from federal and regional governments. The confusion about the nature and scope of a division of legislative power over mineral resources, coupled with the lack of institutions and mechanisms that coordinate the lawmaking process, has paved the way for federal and regional laws that contradict the constitution and each other. The federal and regional governments, in contradiction with the constitution, attempted to divide legislative, administrative, and legislative power over natural resources. Moreover, the federal and regional states enacted laws that contradicted each other. On the other hand, the federal umpiring bodies have proven largely ineffective in addressing contradictions between federal and regional laws, leaving conflicts unresolved and perpetuating legal uncertainty. This lack of clarity and coordination not only undermines the ability to consistently enforce laws, but it also exacerbates tensions between levels of government.

Additionally, it analyzed the nature of the sustainable development model recognized and also the sufficiency of the laws in ensuring sustainable mining. It finds that the FDRE Constitution recognizes important elements of sustainable development. Furthermore, it finds that the federal

and regional government attempted to enact legal and policy framework that operationalize the idea of sustainable mining in the mining sector. However, it was found that, despite the efforts that were made, the legal framework still has gaps and inconsistencies that undermine its effectiveness in ensuring sustainable mining practices. Thus, in light of these findings, this chapter comes to the conclusion that there is an immediate and pressing need for a comprehensive reform of the legal framework that governs mineral resources in Ethiopia. The reform should concentrate on tackling the identified gaps, improving regulatory coherence, and creating strong mechanisms for monitoring and enforcement.

CHAPTER SIX

MANAGEMENT OF MINERAL RESOURCES AND SUSTAINABLE MINING UNDER ETHIOPIA'S FEDERAL SYSTEM

6.1.CHAPTER INTRODUCTION

The extraction of mineral resources, as noted above, presents a complex interplay of opportunities and challenges that demand strategic management by the state.¹ The state needs to develop an efficient management structure that addresses the diverse issues that arise in the extraction of mineral resources. The same holds true in federal systems, with the exception that such development is made having the division of power in mind. This chapter sheds light on the broader dynamics of managing mineral resources in Ethiopia's federal system, particularly in contexts marked by competing interests among national and regional governments, as well as ethnic groups. Additionally, it assesses the ability of management institutions to tackle intricate social, environmental, and economic challenges in mineral resource governance. Accordingly, the chapter is structured in sections to provide a systematic exploration of Ethiopia's mineral resource management framework. It commences by briefly analyzing the allocation of executive power under the FDRE constitution. It then examines how the FDRE Constitution divides management authority over mineral resources between federal and subnational governments. Next, the chapter examines the actions and practices of federal and state governments that affect the division of the management of mineral resources with the view of identifying the de facto powers of the federal and regional governments. Following the establishment of the de jure and de facto powers of the federal and regional governments, the study will then investigate the apparent exercise of management power by these governments. Finally, it evaluates the efficiency of the management framework in ensuring that sustainable mining practices in Ethiopia. It critically assesses the institutional capacity to address the intertwined social, environmental, and economic challenges inherent in mineral resource governance. In the end, the chapter forwarded a conclusion that summarized the legal, institutional, and practical gaps that face the management of mineral resources in the Ethiopian Federation.

¹ As previously stated, the state's management power over mineral resources includes a wide range of activities that can be classified as primary or secondary. It should be noted here that our discussion is focused on the primary management powers, which include transferring mineral titles, administering exploration and exploitation, and managing post-closure activities. Moreover, since the transfer of mining title is addressed in the previous chapters, it is excluded from our discussion.

6.2. THE DIVISION OF EXECUTIVE POWER UNDER THE FDRE CONSTITUTION: A BRIEF OVERVIEW

One of the essential future of federations lies in the constitutional allocation of power between federal and regional governments. However, there exist differences among federation as to the division of the executive power. The division of executive power in a federation, with the risk of being reductionist, can be made through either duality or an executive approach. In the duality system, both government sections were primarily responsible for implementing their respective legislation, thus, in principle, the allocation of executive authority is considered co-extensive with the distribution of legislative responsibility. It is based on the assumption that, if both levels of the governments are to remain autonomous, then each must act directly towards the people in the process of enforcing its laws. However, it has to be noted here that, in the most dual federation which used to follow this though accepted the limitations of the strict application of the ideal of dual federalism provides for some modifications.

In the case of executive federalism, the federal government heavily relies on state machinery for the implementation of federal laws.² In executive federations, the legislative power may not coincide with administrative responsibility. The two powers are constitutionally assigned to different levels of governments. In most cases, the power of the federal government is reserved to enacting legislation which will be actively implemented by the state governments. However, it has to be noted here that, the federal practice indicates that the difference between the two systems is not as sharp as is suggested in theory.³

The FDRE Constitution division of executive power is a good example in this regard. A reading of the constitution suggests that, in principle, there are two government structures adjusted in parallel, and that executive power is coextensive with legislative power. Specifically, the Constitution grants legislative, executive, and judicial powers to both the federal and state

² Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Rev. Ed. Utrecht: Wolf Legal Publishers, 2007, R.L. WATTS, *Comparing Federal Systems*, Montreal & Kingston, McGill-Queen's University Press, 1999. However, it must be noted here that most dual federations, like that of the USA, by understanding the limitations of the strict application of the ideal of dual federalism, provide for state participation in a limited manner and instances

³ Ibid

governments.⁴ Furthermore, the Federal Council of Ministers is empowered to ensure the implementation of the laws and decisions adopted by the HoPR.⁵

However, this practice is quite different because the federal government relies heavily on the state to enforce its laws. While the FDRE Constitution envisions a system where federal and state governments operate independently within their respective spheres, the reality is one of interdependence, particularly in the enforcement of federal legislation. Most federal laws in states are enforced through formal or informal contacts between their respective offices or party channels.⁶ The federal government uses formal tools like official administrative coordination and legal mandates, alongside informal tools such as party channels and personal networks, to enforce its laws, effectively integrating state governments into its executive framework despite a constitutional design that suggests greater separation. Hence, even though the FDRE constitution provides for parallel arrangements and the executive power of the federal government is coextensive with its legislative power, constitutional practice suggests that there exists an integrated federal arrangement whereby the execution of federal laws is highly dependent upon the state apparatus.⁷

6.3. MANAGEMENT OF MINERAL RESOURCE UNDER THE FDRE CONSTITUTION

The FDRE Constitution divided management power over mineral resources between central government and regional states. It provides that the federal government has the power to enact laws that control the "utilization and conservation" of natural resources, while regional governments are in charge of managing such resources in conformity with federal regulations.⁸ Regional state constitutions provide provisions that are similar to those in the federal constitution for the management of mineral resources.⁹ The division of executives over mineral resources

⁴ See the FDRE constitution article 50/2

⁵ Assefa Fiseha at supra note 2

⁶ Ibid

⁷ Ibid

⁸ See FDRE Constitution article 51/5, 52/2/d. it should be noted here that despite the FDRE Constitution, assignment of the management power over mineral resources, the federal mining proclamation and mineral resources transition law divides management between federal and state jurisdictions, creating a defacto management of mineral resources. The "defacto management" of mineral resources in this work is used to describe such division.

⁹ The Revised Amhara National Regional State Constitution, proclamation number 59/2001; The Constitution of the Harari Regional State, 2004; The Oromia Regional State Revised Constitution, proclamation number 46/2004; Benishangul Gumuz Regional State Revised Constitution, proclamation number 2002

seems to be one of the few cases in which the FDRE Constitution provides a clear legal framework. Textual readings of the Constitution suggest that regional states are the main actors in mineral resource management.

However, despite this seemingly clear division of power, the management of mineral resources has become a contentious area, marked by a power struggle between federal and state governments. Federal and state mining laws and federal mineral transaction laws provide a detailed legal framework that centralizes significant authority in the hands of the federal government. As noted above, federal mining law states that the federal government is the main organ that administers the extraction of mineral resources. Regional laws, rather than challenging this centralization, have largely aligned with federal frameworks, further entrenching the federal government's dominance. Federal mineral transaction laws also divide management power over mineral resources in favour of the federal government.

The Mining Proclamation is a basic legal instrument governing the management of resources in Ethiopia. It provides a dual approach to the management of mineral resources. It designated the Ministry of Mine as a “supervising body” at the federal level, while it identified the regional mining bureaus to administer issues at the regional level. According to Article 52, the role of the state is limited to granting licenses to artisan mining, reconnaissance, exploration, and retention licenses concerning construction and industrial minerals, and small-scale mining licenses for industrial minerals and large scale construction material mining by domestic investors.¹⁰ The federal government has the power to issue reconnaissance, exploration, retention, and mining licenses other than those issued by a state licensing authority.¹¹ The Federal Mining Law has undergone several revisions to strengthen the federal government's role in Ethiopia's administration of mineral resources.¹² Currently, except for artisanal mining licenses, the federal government has the authority to provide licenses for the significant mining of industrial minerals, as well as metallic, precious, and semi-precious minerals. The federal government also has the power to issue certificates of discovery for strategic minerals and certificates of professional

10 Federal Mining Proclamation, Proclamation Number 678/2010, Article 52(2), A Proclamation to Amend Oromia Region Mineral Development Operation Administration, Proclamation No. 223/2020

11 Ibid

12 See federal mining amendment proclamation, proclamation Number 816/2018.

competence for professionals who wish to engage in consultancy services in the mining sector, conduct testing, and provide permission to export mineral samples.¹³

As noted, the Federal Mineral Transaction Law further reinforces this centralization, as it divides the licensing and certification of competencies for each type of mineral transaction.¹⁴ However, the division of power between the federal and state governments is completely different from that of mineral resources management. The latter is based on scaled mineral mining activities, while the former is based on other commercial transaction criteria. The federal government has the power to issue licenses and certificates of competency for mineral refining and smelting of metallic and associated minerals, as well as mineral exporter certificates of competency. It also has the power to enforce standards in which smithery, lapidary, combining, and refining activities are conducted. Regional states have residual power. Moreover, the regional state has some specific powers, including the power to issue mineral supplier and crafting certificates. All transaction certificates, including export licenses, should be conducted according to the standards set by the federal government.

Federal mining and mineral transaction laws have allowed the federal government to dominate mineral resource management. It provides highly centralized management and planning for the mining sector and largely excludes regional states from the decision-making process. It allowed the federal government to regulate the mining sector without the consent and effective participation of the regional state and local people. The federal government is not required to engage a regional state or local community in the decision-making process. It upheld the limited role of the subnational government in the decision-making process, land administration, licensing of artisan miners, and mining of construction materials by domestic investors.¹⁵ The role of local communities is limited to environmental impact assessment, community development, and compensation. Moreover, the draft mining law further strengthened the federal government's power as it introduced new areas of power to the federal government.¹⁶ It gives the federal government sweeping power over the administration of mineral resources. The role of the regional

13 Ibid, Federal Mining proclamation, proclamation number 678/2010

14 A Proclamation to Regulate Transaction of Minerals Proclamation No. 1144/ 2019

15 The Draft Mineral Resources Development Policy, 2020

16 Ibid

state is limited to preparing land for investors, local security, and compensation for the expropriated land for mining.

The Federal Government determines the level of decentralization of management power based on its understanding. Over the years, the federal government has adopted an aggressive approach, asserting its dominance in the management of mineral resources. This is largely based on the interpretation that natural resources are national assets that should be under the authority of federal institutions.¹⁷ It places great emphasis on the role of natural resources in economic growth and aims to transfer natural resources from what it considers unused places for more efficient use by allowing large-scale miners to deploy minerals for the development of the country. The federal government believes that it is managing mineral resources for the "common benefit" of the people.¹⁸ It maintains that the interests of the local state or community are unaffected.¹⁹

For a long time, the regional state governments have opted not to claim management power over mineral resources.²⁰ Unlike mineral resource ownership, the subnational government, as noted here in under, has failed to claim constitutional power over mineral resource management.²¹ The state constitutions did not directly provide state management power over mineral resources but provided that the regional state had the power to administer the land.²² Moreover, the few regional mining proclamations are consistent with federal mining laws.²³

As noted, following the national protest, a notable difference has started emerged between federal and few regional mining legislations on the division of management power.²⁴ The federal mining proclamation 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.

¹⁷ IP1, IP 3 and IP 4

¹⁸ Ibid, FDRE constitution article 89

¹⁹ Ibid

²⁰ IP 5, IP 7 IP 9 IP 10 and IP 11

²¹ Ibid; Oromia Region Mineral Development Operation Administration amendment proclamation, proclamation number, 223/2020

²² The Revised Amhara National Regional State Constitution, proclamation number 59/2001; The Constitution of the Harari Regional State, 2004; The Oromia Regional State Revised Constitution, proclamation number 46/2004; Benishangul Gumuz Regional State Revised Constitution, proclamation number 2002

²³ Oromia Region Mineral Development Operation Administration amendment proclamation, proclamation number, 223/2020

²⁴ It should be noted here that Oromia regional state is the leading state in terms of organizing a legal framework that governs the mining sector as it enacted successive mining laws. However, the issue is not entertained in the Benishangul Gumuz region, where the regional states chose to use the federal mining law.

More specifically, 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.²⁵ 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. 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.²⁶ Thus, it is essential to evaluate the above development: the federal government, regional states, and local governments' roles in the management of mineral resources in light of international human rights instruments and the federal constitution.

The FDRE Constitution, as noted above, introduced a division of management power over mineral resources. It assigns power to the regional state to manage mineral resources.²⁷ It does not provide any division or criteria, including the scale and nature of mining operations, such as small-scale, large-scale, special small-scale, precious, and non-precious mineral divisions, to divide management power over mineral resources. The constitutional division of large- and small-scale divisions is with respect to the issue of tax determination and not with respect to mineral administration.²⁸ Contrary to this clear constitutional norm, federal mining and mineral resource transaction proclamations attempt to divide management power over mineral resources based on the nature of the resource, level of operation, and business activities.²⁹ It has introduced highly centralized management power over mineral resources that has largely excluded regional states from most decision-making processes. Moreover, regional states have enacted laws in line with federal laws.³⁰ The almost complete exclusion of regional governments and the wide discretionary power of the federal government in the administration of mineral resources are in direct contradiction to the Constitution. In such cases, the Constitution provides clear rules, as it explicitly states that any federal or state law that contradicts the Constitution is invalid.

²⁵ Federal Mining Proclamation Number 678/2010) article 52/2; Oromia mineral resource development amendment proclamation, Proclamation Number 223/2022 article 47

²⁶ Ibid

²⁷ See FDRE Constitution art 52

²⁸ See FDRE Constitution, article 98

²⁹ Federal Mining proclamation, proclamation number 678/2010

³⁰ Oromia Region Mineral Development Operation Administration amendment proclamation, proclamation number, 223/2020

Accordingly, any division of management power in the subsequent legal framework between federal and subnational governments has no effect.³¹

The almost complete exclusion of local communities in the administration of mineral resources under the Federal and State Mining Laws and Federal Mineral Traction Laws should be viewed in light of the Constitution and international human rights instruments that allow people and local communities to influence the decision-making process. As noted above, the FDRE Constitution provides important rights that enable the local community to have a say and influence the decision-making process.³² The FDRE Constitution guarantees essential rights that empower local communities to voice their opinions and impact decision-making processes on matters affecting their interests.³³ Therefore, the federal and state laws that excluded the local communities from the management of mineral resource needs be interpreted alongside constitutional provisions that explicitly enable local communities to participate in and influence decisions pertaining to mineral resource extraction on their lands.

As noted above, Ethiopia is a party to major international human rights instruments that recognize people's right to free, prior, and informed consent for resource development on their lands.³⁴ International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the African Charter on Human and Peoples Rights (ACHPR) provide procedural and substantive natural resources rights to marginalized groups, including indigenous people.³⁵ The ICCPR, ICESCR, made control over natural resources an integral part of the right to self-determination.³⁶ The ACHPR also recognizes the right to natural resources under Article 21, as it states, "All peoples shall freely dispose of their wealth and natural resources."³⁷ Moreover, it imposes an obligation on the state to consult people on development endeavors that affect their lives. Furthermore, the

³¹ Ibid, article 9

³² Ibid, article 12, 43/2, 44/2

³³ Ibid, article 43/2

³⁴ See United Nations Treaty Collection, Ethiopia's Ratification Status <https://treaties.un.org>, accessed in January, 2023; African Human Rights Instruments, <https://au.int>, accessed at January, 2023.

³⁵ Farmer, Alice. "Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries." *NYUJ Int'l L. & Pol.* 39 (2006): 417; Gilbert, Jérémie. "The right to freely dispose of natural resources: Utopia or forgotten right?" *Netherlands Quarterly of Human Rights* 31, no. 3 (2013): 314-341; Miranda, Lillian Aponte. "The role of international law in intrastate natural resource allocation: sovereignty, human rights, and peoples-based development." *Vand. J. Transnat'l L.* 45 (2012): 785.

³⁶ International Covenant on Civil and Political Rights, 1976 article 1 and; International Covenant on Economic, Social and Cultural Rights, 1976) article 1 and 25

³⁷ African Charter on Human and Peoples Rights; Banjul Charter, 1986

federal and regional state constitutions incorporate regional and international human rights instruments that Ethiopia has ratified into its domestic laws.³⁸ It mandates the interpretation of Chapter Three of the Constitution in line with the ratified international human rights treaties.³⁹ The federal and state laws that excluded local communities from management and decision-making on mining operations that affect them are a bridge to the country's international commitment. It is imperative that federal and state laws be interpreted alongside international human rights laws to explicitly enable local communities to participate in and influence decisions pertaining to mineral resource extraction on their lands. It is crucial for local communities to actively participate in the management and decision-making regarding mining operations that affect them. Thus, mining laws should be interpreted and implemented in a manner that respects and promotes the participatory rights guaranteed to communities under domestic and international laws.

6.4. THE MANAGEMENT OF LARGE-SCALE MINING WITH IN ETHIOPIA'S FEDERAL SYSTEM PRIOR TO 2018

The mining sector covers broad economic activities characterized by unique features as well as social, environmental, and economic challenges that require the control and regulation of the state.⁴⁰ The state, as the steward of national wealth, uses its management power to ensure that the extraction of mineral resources leads to economic and social development, with a limited impact on environmental and social well-being. In particular, it regulates critical areas in the extractive sector, including the transfer of mineral rights, exploration, development, exploitation regulations, and the closure and post-closure stages.⁴¹

Once the government has transferred the mining license to developers, the subsequent phase involves management of the exploration, development, and exploitation stages. As previously mentioned, in contrast to the FDRE Constitution, the federal mining proclamation divides management between federal and state jurisdictions. Accordingly, federal agencies manage mining

³⁸ FDRE Constitution Article 13/2

³⁹ Ibid Arts. 9(4), 13(2)

⁴⁰ Ibid

⁴¹ IP 1, IP 2, IP 3, and IP 4; It's important to remember that the transfer of mining titles is addressed in detail in Chapter 4. Moreover, Ethiopia has yet to witness large-scale mining operations reaching the post-development stage. Due to that, the management of the transfer of mining titles and the post-development stages are not discussed here. Hence, our discussion is largely limited to the role of these institutions in management exploration, development, and exploitation processes.

operations that fall under the federal government jurisdiction. A number of federal departments are directly or indirectly involved in the management of mineral resource exploration, development, and utilization. The primary institution responsible for overseeing this stage is the Ministry of Mines (MoM). At the regional level, similar institutions are established to manage mineral resources within their jurisdictions as per federal mining proclamation. This structure aims to ensure comprehensive management across different levels of government, while addressing the unique needs and challenges of each region.

At the federal level, management agencies assess the compliance of mining companies with established mining legislation and standard contracts that set normative frameworks for mining sector operations during the exploration, development, and exploitation stages of extractive activities.⁴² These frameworks encompass fiscal terms, operational commitments, environmental responsibilities, health and safety obligations and social commitments. Regulatory oversight allows the government to manage the economic, social, and environmental impact of mining operations.

The extraction of minerals, as discussed here, has far-reaching economic implications, particularly during the exploitation stage.⁴³ The economic contribution of the mining sector, as noted herein, depends on the management of several areas such as the nature of resource extraction, forward and backward economic linkages, and infrastructure development. The MoM is the primary institution responsible for ensuring that mineral resource extraction is performed in an economically advantageous manner. To that end, as noted here, it regulates critical aspects that are essential for resource extraction, such as the exploration development, start of extraction, production rates, and the efficient extraction of minerals.⁴⁴ The MoM also plays a critical role in regulating the impact of the mining sector on a nation's economy, extending beyond its direct contribution. It promotes a backward economic linkage between the mining sector and the national economy by monitoring compliance with employment regulations, encouraging the use of domestic goods and services, and emphasizing the active participation of local communities.⁴⁵ Furthermore, it plays a critical

⁴²Ibid; see the standard mining exploration, and exploitation contract.

⁴³ Olawuyi, Damilola S. *Extractives industry law in Africa*. Springer International Publishing, 2018; Sigam, Claudine, and Leonardo Garcia. "Extractive industries: Optimizing value retention in host countries." (2012). As noted above, the exploration and development of mineral resources have very limited direct economic consequences.

⁴⁴ IP 1, IP 2, IP 3, and IP 4; Federal Mining Proclamation, Proclamation Number 678/2010

⁴⁵ Ibid

role in regulating forward linkages between the mining industry and downstream sectors in the supply chain.⁴⁶ The MoM plays a crucial role in overseeing infrastructure development by mining companies and the administration of the developed infrastructure.⁴⁷

Ethiopia has enacted legislation that incorporates traditional environmental regulations to ensure environmentally sustainable mining activities. These measures included environmental impact assessments, environmental management plans, environmental monitoring, enforcement, and land reclamation. As previously noted, the Environmental Protection Agency (EPA) plays a crucial role in approving environmental impact assessments and environmental management plans.⁴⁸ The Ministry of Mines (MoM) uses these approvals as the foundation for issuing mining licenses. Once the environmental impact assessment is completed, the MoM is responsible for enforcing and overseeing the environmental requirements throughout mining activities.⁴⁹ It closely monitors mining operations and takes appropriate actions to ensure that mining companies follow environmental standards and meet their environmental protection requirements.⁵⁰ Moreover, the MoM monitors rehabilitation activities, conducts audits for compliance, and takes corrective actions for violations.⁵¹

Mineral resource extraction has a significant impact on surrounding ecological systems, local populations, and workers. As mentioned in earlier parts, Ethiopia has taken significant steps to promote socially responsible mining methods. It has enacted laws and policies that prioritize the consideration and mitigation of the social impact of mining activities. As previously noted, the Environmental Protection Agency (EPA) plays a crucial role in approving social impact assessments and social management plans.⁵² Once the Mining operation begins, the MoM monitors and enforces the social impact of mining and administers the contributions made by mining companies to society.⁵³ It monitors mining activities, assesses their social impacts, and

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid; Environmental Impact Assessment Proclamation No. 299/2002, the Federal Mining Regulation, Regulation Number 423/2018. As noted above, the federal mining proclamation and regulation provided that except for a reconnaissance license, retention license, or artisanal mining license, any applicant for a license and renewal shall submit an environmental impact assessment and obtain all necessary approvals from the competent authority.

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid IP 7 and IP 9

⁵² Ibid; and the Federal Mining Regulation, Regulation Number 423/2018

⁵³ Federal Mining Proclamation, Proclamation Number 678/2010

verifies the implementation of mitigation measures.⁵⁴ Moreover, the commitment of license holders to community development is governed by MoM in collaboration with regional players.⁵⁵ The MoM collects company responsibilities for community development and strives to ensure service continuity in the nearby communities. The Ministry of Labour and Social Affairs was responsible for promoting health and safety issues in the mining sector.⁵⁶

For the majority of the last 30 years, as noted above, federal management organs, mainly the Ministry of Mines (MoM), have maintained control over the management of exploration, development, and exploitation of mineral resources, which are assigned to the federal government as per federal mining law.⁵⁷ It is responsible for monitoring and enforcing the economic, environmental, and social rules. It operates in a highly centralized manner with little to no real input from regional states or local communities. It failed to effectively partner with stakeholders, regional states, and communities, and considered their views.⁵⁸ The MoM has long ignored the involvement of regional and local actors in mineral resource management.

The management of exploration, development, and exploitation of mineral resources excludes regional governments from participating in federally controlled mineral resource management.⁵⁹ Regional states play a limited role in the management of mineral resources as their participation is often ad hoc and limited. Its involvement depends on the federal government's willingness. Most of the time, its involvement only extends to accepting and implementing decisions made by the federal government. Its perspectives are not sufficiently considered in the decision-making process, leading to the development of a sense that they have lost their sense of ownership of these resources. As noted above, regional government action is largely influenced by party politics and adherence to developmental state ideology. However, at the height of the national protests, some regional states actively started to challenge the status quo, including expropriate parts of the mining

⁵⁴ IP 1, IP 2, IP 5 IP 7 IP 9 and IP 10

⁵⁵ The Federal Mining Proclamation, Proclamation Number 678/2010, Article 62/3, and the Federal Mining Regulation, Regulation Number 423/2018, Article 40, It establishes a detailed legal framework for the administration of community development funds. It outlines the contributions that special small-scale, small-scale, and large-scale mining license holders will make at various stages of mining. Furthermore, it states that the contribution of the exploration license is determined by a contract with the licensing agency.

⁵⁶ IP 1, IP 2, IP 5 IP 7 IP 9 and IP 10

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

areas of the large-scale miners, and allocate them to the youth.⁶⁰ For instance, the Oromia regional state removed some of the Dangote cement quarry areas and granted mining licenses to the youth, a move that sparked tensions.⁶¹ The investor considers such an assertion a violation of its mining title and threatens to suspend its mining operation and suspend its plans that aim to double production capacity.⁶²

The community's participation in the management of mineral resource exploration, development, and exploitation is often limited. Local communities directly affected by mining operations were excluded from management of the mining sector. By excluding communities, it neglects specific local needs and concerns. This exclusionary approach fails to account for stakeholders' views.⁶³ This centralized approach hinders systematic, meaningful, regional, and local participation.⁶⁴

Moreover, the mining sector, as can be seen here, has failed to deliver the promised economic benefits, protect the environment, and bring about social development, sparking highly publicized confrontations between mining companies and local communities. Since the transitional period, the MoM has overseen and supervised essential economic facets of resource extraction. Additionally, federal agencies like the National Bank and the Ministry of Trade and Industry collaborate with the MoM to enhance economic advantages. Overall, the mining sector has significantly contributed to government revenue, foreign currency earnings, and employment opportunities while fulfilling the raw material demands of various industries.⁶⁵ However, in spite of ongoing attempts by the federal government, the impact of large-scale mining operations continues to be restricted. It did not achieve the expected economic advantages, including efficient

⁶⁰ Ibid

⁶¹ Ibid

⁶² Bloomberg, Africa's Richest Man May Quit Ethiopia Over Mining Dispute, <https://www.bloomberg.com/news/articles/2017-06-21/dangote-cement-may-shut-ethiopian-plant-over-mining-disputes>, accessed at January 2021.

⁶³ IP 5 IP 6 IP 7 IP 8, and IP 12

⁶⁴ Ibid; Asebe Regassa, Development by Dispossession?" In a reappraisal of the Adola Gold Mine in southern Ethiopia, Life & Peace Institute (LPI), Volume 28, 2016

⁶⁵ IP, 3 and IP 4; Moore Stephens, Ethiopian Extractive Industries Transparency Initiative Report, Third EEITI report; National (2018); World Bank Group and Ministry of Mines and Petroleum, Strategic Assessment of the Ethiopian Mineral Sector, "FINAL REPORT," 2018; Ministry of Mines. Ethiopian Extractive Industries Transparency Initiative (EEITI) Report January 2021

Addis Ababa

resource extraction, economic linkages, and infrastructure development.⁶⁶ The lack of economic opportunities is especially evident at the local level.⁶⁷ The enclave nature of most mining operations and lack of direct and indirect economic benefits has long created perceptions of inequitable extraction.⁶⁸ Local communities believed that the substantial impact costs were not offset by comparable economic gains.

The Ministry of Mines (MoM), as noted above, is responsible for monitoring and enforcing environmental standards throughout mining activities and monitoring rehabilitation mining sites. Accordingly, it monitored and enforced environmental rules.⁶⁹ Moreover, this ensures that mining companies engage in environmental rehabilitation efforts to protect the environment.⁷⁰ However, as can be seen here, the environmental impact of mining operations has not been adequately addressed. Major mining operations such as cement factories, Kenticha tantalum, and Midroc gold projects were accused of causing serious environmental damage.⁷¹ The environmental impact of mining has been a major concern in Ethiopia for decades, sparking highly publicized confrontations between mining companies and local communities.⁷²

⁶⁶ Ibid; Asebe Regassa, at supra note 64; Asebe Regassa, "Frontiers of extraction and contestation: Dispossession, exclusion and local resistance against MIDROC Laga-Dambi gold mine, southern Ethiopia." *The extractive industries and society* 11 (2022): 100980.

⁶⁷ Ibid; IP 5 IP 7 IP 9 and IP 10

⁶⁸ Ibid

⁶⁹ IP 1, IP 2, IP 5 IP 7 IP 9 and IP 10

⁷⁰ Ibid

⁷¹ IP 5, IP 6, and IP 9 Human Rights Watch, Ethiopia: Companies Long Ignored Gold Mine Pollution, <https://www.hrw.org/news/2023/04/26/ethiopia-companies-long-ignored-gold-mine-pollution>, accessed on September 20, 2023; Birhanu Bekel, Assessing the effects of gold mining on the environment: A case study of Shekiso district, Guji zone, Ethiopia, *Heliyon* 8 (2022), Haile, Weldegebrial, and Bheemalingeswara Konka. "Optimum Open Pit Design for Kenticha Tantalite Mine, Southern Ethiopia." *Momona Ethiopian Journal of Science* 13, no. 1 (2021): 147-163. Firdissa, Benti, Sileshi Degefa, Eyobel Mulugeta, and Dingane Sithole. "Ethiopian Cement Plants: Examining Emissions and Their Impact on Community Well-being." (2024). Mining operations in Ethiopia had notable environmental impacts. It is important to note that the specific environmental impacts and the extent of their effects can vary depending on the mining practices employed, the management approaches, and the specific geographical context. The Lega Dembi Gold Mine has been in operation since the late 1990s and has had significant environmental impacts. The mine has been associated with deforestation, habitat destruction, and the contamination of nearby water sources with chemicals used in gold extraction. The Kenticha Tantalum Mine raised concerns about deforestation, soil erosion, and the potential contamination of water sources with chemicals used in the mining process. Dangote and Messobe cement have been involved in the extraction of limestone and other related minerals. Their operations have been associated with habitat destruction, soil erosion, and the alteration of landscapes.

⁷² Ibid

The MoM monitors and enforces the social impact of mining operations and regulates the contributions made by mining companies to society.⁷³ It closely monitors mining activities, assesses their social impacts, and verifies the implementation of mitigation measures.⁷⁴ Moreover, it regulates the corporate commitment of license holders to community development.⁷⁵ However, the mining sector has failed to promote social development, and has been accused of exacerbating serious societal problems.⁷⁶ The MoM has failed to closely monitor mining activities, assess their social impacts, and verify the implementation of mitigation measures, resulting in community-firm conflicts.⁷⁷ Furthermore, it attempted to enforce the corporate social responsibility of license holders but failed to meet community expectations.⁷⁸ Moreover, it failed to effectively ensure the safety and health of the community and employees.⁷⁹ Local communities have long held the view that mining operations are detrimental to the society.⁸⁰

The lack of participation, coupled with the failure to deliver promised economic benefits, protect the environment, and bring about social development, has led to grievances in the mining sector. It has led to frustration among mining-affected groups. This has fueled an increasing number of complaints from mineral-rich regions and communities. It also sparked violent clashes and anti-mining rallies. Particularly in the Oromia region, protests were held against cement factories, Kenticha tantalum, and Midroc gold.⁸¹

⁷³ IP 1, IP 2, IP 5 IP 7 IP 9 and IP 10

⁷⁴ Ibid Ethiopian Extractive Industries Transparency Initiative Report, contribution of mining companies to community development and environmental protection, 2018;

⁷⁵ Ibid

⁷⁶ IP 5 IP 7 IP 8 IP 9 IP 10 and IP 11

⁷⁷ Ibid

⁷⁸ Ibid, Ethiopian Extractive Industries Transparency Initiative Report, at supra note 74; Fanta Mandefro, "Social accountability in the extractive industries: a review of the Ethiopian experience." Ethiopian Journal of Business and Economics (The) 6, no. 1 (2016): 1-32.

⁷⁹ Ibid , The New Humanitarian, EXCLUSIVE: Health woes, outrage, and toxins near Ethiopia gold mine, <https://www.thenewhumanitarian.org/investigation/2020/05/27/Ethiopia-Oromia-Shakiso-gold-mine-health-problems> , accessed June 2022; Melisha Charles, Denby McDonnell, Christopher Stoicheff, and Joshua Tafel, A Roadmap for Environmental and Social Impact Assessment in Ethiopia's Mining Sector, Ministry of Mine, 2020

⁸⁰ Ibid: IP5, IP 6, IP 7 IP8, IP 10 and IP 11

⁸¹ Ibid, VOA Horn of Africa, Ethiopia Agrees to Suspend MIDROC Gold Mining After Protests, <https://www.voanews.com/africa/ethiopia-agrees-suspend-midroc-gold-mining-after-protests> , accessed January 2021; All Africa News.com, Dangote's factory attacked by protesters in Ethiopia's restive region <https://www.africanews.com/2016/10/04/dangote-s-factory-attacked-by-protesters-in-ethiopia-s-restive-region/> accessed on February 2020;

The federal government historically suppressed dissent against mining using security forces and the party apparatus.⁸² On a few occasions, it held discussions with local communities aimed at addressing some of the issues raised. Following this discussion, particularly in the case of MIDROC, the company made an attempt to address some of the complaints raised against mining companies, particularly in terms of infrastructure development.⁸³ The major legal development in this period was an attempt to introduce the Community Development Fund (CDF). Historically, the mining industry has voluntarily contributed community development funds.⁸⁴ Following widespread rallies, the government demanded that mining companies fund community development efforts in mining-affected areas.⁸⁵ The Community Development Fund (CDF) is managed by the MoM together with local and regional governments. The MoM is responsible for collecting CDF, while regional governments and local communities are mostly responsible for putting in work.

It is clear from the above discussion that for most of the last 30 years, the management of Ethiopia's mining sector has been largely centralized, ignoring the interests of regional states and local communities. There have not been any significant actions aimed at decentralizing power management in accordance with the constitutional division of power. Thus, it is essential to briefly assess the constitutionality of such acts in light of the FDRE Constitution and international human rights instruments.

As noted above, the FDRE Constitution provides a clear division of power in the management of mineral resources. It does not provide any divisions or criteria for allocating management power to mineral resources. It clearly stipulates those regional states are the main actors responsible for it. As noted further, in contradiction to this, the federal mining law has made the federal government responsible for the management of large-scale mining operations. The federal government's above-mentioned acts further strengthened the federal mining law and excluded the regional state from mineral resource management. The almost complete exclusion of regional governments and the broad discretionary power of the federal government in mineral resource

⁸² IP 5, IP 6 IP 7 IP 8 and IP 10; Asebe Regassa at supra note 64; Asebe Regassa and Damena Abebe, *Gold Glitters, Grievances Grow: Contestation and Uncertainty Around Midroc and Godu Gold Mines in Guji, Oromia, Rift Valley* Institute, Peace Research Facility, 2023

⁸³ Ibid

⁸⁴ Ethiopian Extractive Industries Transparency Initiative Report, at supra note 74

⁸⁵ the Federal Mining Regulation, Regulation Number 423/2018, Article 40

management are directly contrary to the constitution. In such a case, the FDRE constitution clearly states that any law, customary practice, or decision by a state organ or public official contradicting the constitution has no effect.⁸⁶ Thus, the above-mentioned activities of the federal government should be considered unconstitutional and having no effect.

The role of the federal government and subnational actors, especially local communities, in the management of the mining sector, as noted above, must also be evaluated in light of its international human rights commitments to which Ethiopia is a party. As noted above, both the FDRE Constitution and international institutions place an obligation on the state to ensure the participation of local communities in the extraction of mineral resources.⁸⁷ However, as noted above, federal mining law retracted the role of local communities in the management of mineral resources. Moreover, the practice in the federal system, as noted above, further strengthens the centralized decision-making process. The almost complete exclusion of local communities in the administration of mineral resources violates the Constitution and international human rights instruments that allow people and local communities to influence the decision-making process.⁸⁸ Thus, it is imperative that the federal and state governments undertake a thorough overhaul of their mining sector governance, aligning it with constitutional principles, international best practices, and the legitimate interests of all stakeholders. Only through such fundamental reforms can the country hope to harness its mineral wealth for the benefit of all its citizens while ensuring environmental sustainability and social equity.

6.5. THE MANAGEMENT OF LARGE-SCALE MINING WITH IN ETHIOPIA'S FEDERAL SYSTEM IN POST 2018

As noted above, protests erupted around the major mining areas of the country, bringing the detrimental economic, environmental, and social effects of mining into sharp focus and national

⁸⁶ Ibid article 9/1

⁸⁷ Ibid, article 12, 43/2, 44/2

⁸⁸ Ibid. Endalew Lijalem, "Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples." *Arctic Review on Law and Politics* 8, 2017: 222-245; Gilbert, Jérémie. "The right to freely dispose of natural resources: utopia or forgotten right?" *Netherlands Quarterly of Human Rights* 31, no. 3, 2013: 314-341; Miranda, Lillian Aponte. "The role of international law in intrastate natural resource allocation: sovereignty, human rights, and people-based development." *Vand. J. Transnat'l L.* 45, 2012: 785; International Covenant on Civil and Political Rights, 1976, article 1

prominence.⁸⁹ These protests underscored the urgent need for reforms to address long-standing grievances and ensure a more equitable and sustainable management framework. In an unprecedented manner, subnational governments have begun calling for the active role of subnational actors in the management of mineral resources. It demanded meaningful subnational stakeholder participation in management power of mineral resources in their respective regions.⁹⁰ It also encourages local communities to play an active role in mineral resource management.⁹¹ This change represents a significant shift in the power dynamics of the mining sector, and has important implications for resource governance.

The federal government has implemented several significant measures to tackle concerns related to the management of mineral resources. These encompass the implementation of the Community Development Fund (CFD), actions regarding mining operators, retroactive compensation, revisions to the equity share, and the introduction of an intergovernmental relations forum. The purpose of these measures is to tackle enduring challenges and create a fairer, more sustainable, and responsible framework for mineral extraction and the allocation of benefits. However, as can be seen hereunder, while these efforts represent important steps forward, they have been inconsistent and insufficient to fully align with constitutional principles and international best practices.

As has been mentioned previously, the Community Development Fund (CFD) was established by the federal government in the year 2018. The MoM is actively implementing a Community Development Fund (CFD). The CDF is gathered and then allocated to regional governments for use by local communities.⁹² This financial assistance aims to tackle the socio-economic effects of mining operations, promoting enhancements in local infrastructure, education, healthcare, and other vital services.⁹³ It represents a significant step forward in ensuring that a portion of the

⁸⁹ IP 1, IP 3 IP 4, IP 5, IP 6; IP 9 and IP 11; As noted above, the regional states employed various strategies to challenge the federal government's dominance, such as delaying the transmission of information about mining areas, issuing licenses to small-scale developers in the areas of interest to large-scale mining companies, holding discussions with mining operator, and actively engaging in the extraction of mineral resources.

⁹⁰ *ibid*; the Capital, As tantalum mine privatized, push is made for value added production, <https://www.capitalethiopia.com/2018/01/29/tantalum-mine-privatized-push-made-value-added-production/> June, 2024

⁹¹ *Ibid*

⁹² The federal ministry of mine and petroleum, Directive to Regulate Mineral Exploration and Mining Community Development Plan and Fund Directive Number 1/2019

⁹³ *Ibid*

revenues derived from mineral resource extraction is reinvested in mining-affected communities. By doing so, it seeks to improve the quality of life for local residents and foster better relationships between mining operators and communities.⁹⁴ One example is the Ado Shakiso Woreda administration, which is located in the vicinity of the Legdembí gold mine. The local administration has been able to initiate a variety of community development projects as a result of receiving significant funding from mining operations.⁹⁵ These projects have contributed to local development and helped ease tensions between mining companies and communities. Overall, its impact CDF has been limited by inconsistent implementation and a lack of transparency in fund allocation. Moreover, it does not address the broader structural issues of exclusion and marginalization in decision-making processes. Despite ongoing challenges, the positive effects seen to date indicate that the CDF could significantly change the dynamics between extractive industries and local communities.

After considerable public outcry regarding the mine's adverse effects, the MoM took decisive action against mining operations accused of environmental violations and adverse community impacts. These measures include suspending and revoking some of the mining licences of the operations of mines alleged to cause significant economic, social, and environmental harm to local communities.⁹⁶ The Ministry of Mines (MoM) has suspended mining operations accused of environmental violations and adverse community impacts. A prime example of this new regulatory stance is the MIDROC Gold Lega Dembi site in Ethiopia's largest gold mines. Following widespread protests over its negative impacts and lack of operational transparency, the Ministry of Mines (MoM) ordered mine operations to be suspended.⁹⁷ The ministry suspended the mining project for nearly three years while it carried out investigations into the operation of mining projects. As noted herein, after consultation with the local community, the MoM and Oromia regional state agreed with the developer to reopen the mine once the adverse environmental effects of mining were assessed, and compensation to the communities was paid, as well as the equity share in the company being shared between the center and the state.⁹⁸ Despite these measures,

⁹⁴ IP 1, IP 3 IP 4, IP 5, IP 6, IP 9 and IP 11. It should be noted that the performance of the CDF is made in subsequent chapters.

⁹⁵ Ibid

⁹⁶ IP1, IP 2 and IP 4; VOA Horn of Africa, at supra note 81

⁹⁷ Reporter, የጣዕድን ኩባንያዎች ወደ ሥራ ሊመለሱ ነው; <https://www.ethiopianreporter.com/article/20138>, accessed in January 2021

⁹⁸ Ibid

serious health and environmental issues persist in the areas affected by mining. Reports indicate that local communities near mining sites continue to suffer from severe health problems leading to desperation and neglect.⁹⁹ Moreover, there was no substantial change in the overall management of the mine, and the economic benefits accorded to the local community. Furthermore, more than hundred individuals were arrested in 2021 and 2022, in opposition to the reopening of the MIDROC Lege-Dembi.¹⁰⁰

The federal government attempted to ease grievances raised against mining companies by transferring mining licenses to new local developers. In the case of the Kenticha Tantalum Operation, the federal government terminated the mining license of the state-owned enterprises, Ethiopian Minerals, Petroleum, and Biofuel Corporation. The latter were later accused of causing adverse environmental impacts and of excluding local communities from the benefits generated from the mining operation.¹⁰¹ Once the mining license was terminated, it was transferred to Oromia Mining Share Company.¹⁰² The federal government's efforts aimed to address the dilemma raised by the regional government and localities regarding the lack of opportunities from mining operations in the regional states.¹⁰³ It is seen as a strategy to silence local opposition and questions regarding long-term sustainability and equitable benefit distribution. However, challenges persist. Oromia S.C. is challenged to operate mining operations, costing significant economic opportunities.¹⁰⁴ Moreover, local communities near mining sites complain of limited substantial change in the overall management of mines.¹⁰⁵ Thus, the ongoing grievances suggest that merely shifting ownership does not guarantee that local communities will receive fair benefits,

⁹⁹ Asebe Regassa and Damena Abebe, at supra note 82; Tom Gardner, EXCLUSIVE: Health woes, outrage, and toxins near an Ethiopian gold mine, "We are the walking dead." <https://www.thenewhumanitarian.org/authors/tom-gardner> accessed in January 2021

¹⁰⁰ Ibid

¹⁰¹ IP 4, IP 5, IP 6; the Reporter, Kenticha tantalum mine looted, <https://www.thereporterethiopia.com/6140/> <https://www.google.com/search?client=opera&q=Kenticha+Tantalum+Operation+and+oromia+share+company&sourceid=opera&ie=UTF-8&oe=UTF-8> accessed, January, 2021, the Reporter, Corporation loses USD 2.3 million due to mine closure, <https://www.thereporterethiopia.com/4919/> accessed, January, 2021, Addis Fortune, Tantalum Joint Investment, <https://addisfortune.news/tantalum-joint-investment-attracts-only-one-offer/>, accessed on June , 2021; Mancheri, Nabeel et al "Resilience in the tantalum supply chain". Resources, Conservation and Recycling. 2018, 129: 56–69; Carvalho, Fernando Pet al "Radionuclides and Radiation Exposure in Tantalite Mining, Ethiopia". Environmental Contamination and Toxicology. 81 (4): 648–659.

¹⁰² IP 4, IP 5, IP 6

¹⁰³ Ibid

¹⁰⁴ IP 5, IP 6, IP 9

¹⁰⁵ Ibid

highlighting the need for a more comprehensive approach to community engagement and grievance resolution in the mining sector.

The federal government applied a similar method, as it transfers the mining rights from a state-owned company to a local developer. Following the national protest, terminated the Yayu coal mining project, where METEC, a state-owned military-industrial conglomerate, was extracting coal and exporting the raw materials.¹⁰⁶ The regional state accused METEC of using coal for no intended purpose and failed to pay land rent for 13,900 ha it occupied.¹⁰⁷ Moreover, several complaints have been raised regarding the adverse effects of mining operations.¹⁰⁸ However, owing to a severe lack of foreign currency reserves, the government issued large-scale coal mining licenses to eight companies nationwide, including Oromia Mining S.C., which received mining rights in Yayu district.¹⁰⁹ Furthermore, the Oromia regional state handed over some of the mining areas to organized youth in the area.¹¹⁰ Despite the environmental concerns that the above-mentioned operators have engaged with the mining operation, this reignites the concern about the environmental impact of the operation.

The Ethiopian federal government, in an attempt to address local grievances and protests, made a significant decision to transfer the Okotie Mining Project, held by MIDROC, to local developers. Subsequent the protest against Midroc Gold, the government agreed to transfer the license to explore it to the local business group GODU General Trading S.C. with the aim of empowering local businesses.¹¹¹ The transfer of the mining project to local developers was part of a multi-faceted strategy by the Ethiopian government, including addressing local grievances, empowering local businesses, and political manoeuvring.¹¹² The government aimed to suppress local

¹⁰⁶ IP 4, IP 5, IP 6

¹⁰⁷ Ibid, the Reporter, Oromia hands over coal mine to organized youth, <https://www.thereporterethiopia.com/5532/#>, accessed in June 2024

¹⁰⁸ ibid, Mongabay - Conservation News, Coal mining threatens Ethiopia's ancient coffee forest <https://news.mongabay.com/2022/06/coal-mining-threatens-ethiopias-ancient-coffee-forest/> accessed in June 2024; the Reporter, Instability deters Oromia mining projects, substitution of coal imports, <https://www.thereporterethiopia.com/22457/>, accessed in June 2024

¹⁰⁹ ibid

¹¹⁰ Ibid, the Reporter, Oromia hands over coal mine to organized youth, <https://www.thereporterethiopia.com/5532/#>, accessed in June 2024

¹¹¹ Asebe Regassa and Damena Abebe, at supra note 82; Davison, W. 'Saudi Billionaire's Gold Find May Double Ethiopian Production'. Bloomberg, <https://www.bloomberg.com/news/articles/2012-03-15/saudi-billionaire-s-gold-find-may-double-ethiopian-production#xj4y7vzkg>, accessed on may, 2023

¹¹² Ibid;

opposition to the reopening of the MIDROC Lege-Dembi. It also aims to demonstrate its commitment to local economic development by transferring the license to a local entity. Moreover, it seeks to gain their support and silence opposition by allowing local elites easy access to mining concessions. However, as noted here in under, such an act has a significant impact on the investment attractiveness of the country. Moreover, the transfer of mining licenses does not significantly change the exploration process. GODU General Trading S. C. obtained mining rights and engaged in mining projects without the necessary authorization from environmental regulatory bodies.¹¹³ Furthermore, it largely dismissed the environmental impact concerns of the local communities.¹¹⁴ Moreover, actions were taken against those expressing concerns about failure to mitigate impacts.¹¹⁵ Consequently, while the Ethiopian government has transferred mining operations to regional entities with the aim of responding to the concerns of communities impacted by mining activities, as noted above, the long-term effects on the mining sector remain uncertain. The federal government has recently put in place measures to tackle the enduring grievances of communities impacted by mining operations, as well as to provide retroactive compensation for the damage caused by previous mining activities. This change in policy signifies an important advancement in aligning the goals of industrial growth with the needs of local communities. It seeks to tackle the concerns of communities about the environmental effects of mining activities. A landmark case of MIDROC Gold Lega Dembi exemplifies this approach. As noted above, in response to the public uproar, the MoM, the Oromia region, and the communities agreed with the developer to reopen the mine on the basis of compensation to the local community.¹¹⁶ The significance of this case extends beyond the immediate resolution of the MIDROC Gold dispute. It represents a paradigm shift in Ethiopia's approach to managing mining-related conflicts and community relations. By acknowledging past oversights and taking concrete steps to address them, the government established new precedents for corporate accountability and community engagement in the mining sector. However, communities still believed that the amount of compensation paid to them was insufficient and some parts of the community did not receive

¹¹³ Ibid

¹¹⁴ Ibid;

¹¹⁵ Ibid

¹¹⁶ Ibid IP1, IP 3 and IP 4, Human rights watch, Ethiopia: Companies Long Ignored Gold Mine Pollution, <https://www.hrw.org/news/2023/04/26/ethiopia-companies-long-ignored-gold-mine-pollution>, January, 2024; Jima, Abdisa Olkeba. "Maintaining mutual benefits between investor and local community: Mechanisms to reopen Lega Dambi Gold Mining, Ethiopia." Pan African Journal of Governance and Development (PJGD) 2, no. 1 (2021): 55-81.

payments.¹¹⁷ Moreover, it is not supported by revisions to the legal framework, which could have a broader impact on the sector.

For years, regional states in Ethiopia have voiced concerns about the lack of economic benefits from mining operations within their territories. In recent years, the federal government has attempted to address regional governments' economic concerns. For instance, in the case of the MIDROC Lege Dembi mining project, the federal government and Oromia regional states agreed to share its equity stake in the mining project through informal negotiations.¹¹⁸ Moreover, Midroc also agreed to allow Oromia to obtain an addition equity share.¹¹⁹ The equity participation model represents a significant shift in Ethiopia's approach to mineral resource management. It seeks to address historical imbalances in which local regions are often excluded from the economic benefits derived from their natural resources. However, these arrangements are currently made on a case-by-case basis, without the necessary institutional and legal frameworks in place, which has led to questions regarding its consistency. Moreover, as noted in the subsequent chapter, equity shares are not assigned to either level of government since both levels of government have no legitimate right to share. Furthermore, even if we allow them to share the allocation, revenue allocation should be considered both vertically and horizontally, and it should not be limited to the informal negotiations between the federal and one regional government.

For a long time, the Constitution and mining law did not adequately address intergovernmental relations. Intergovernmental relations, as in most sectors, were largely informal. Recently, efforts have been made to formalize intergovernmental relations. The federal government enacted the Intergovernmental Relations (IGR) Proclamation aimed to establish the National Inter-sectoral Executive Forum, which would facilitate coordination between the federal and regional sectoral executive organs. One of the areas covered by this proclamation is the relationship between the MoM and Regional Bureaus. Nevertheless, despite these efforts, the proposed National Intersectoral Executive Forum is yet to become operational.¹²⁰ Instead, the federal system continued to rely on informal IGR systems. Unfortunately, coordination still relies primarily on

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Proclamation to Determine the System of Inter-Governmental Relations in the Federal Democratic Republic of Ethiopia's Determination Proclamation No. 1231/2021

party channels and ad-hoc arrangements.¹²¹ Annual meetings between federal and regional state representatives serve as informal IGR systems, facilitating coordination between regional, local, and federal governments in mineral management. In addition, the party channel continues to serve as the basis of an informal IGR system.

It is clear from the above discussion that the management of large-scale mining within Ethiopia's federal system has undergone significant changes post-2018, with the aim of addressing the interests of regional states and local communities. The federal government has taken steps to address longstanding grievances in the management of Ethiopia's mining sector, which has undergone changes in recent years, with the aim of addressing the interests of regional states and local communities. These include implementing the Community Development Fund (CDF), enforcing regulatory measures, initiating equity share negotiations and introducing Intergovernmental Relations (IGR) Proclamation. However, it is imperative that the federal government failed to undertake a thorough overhaul of their mining sector governance, aligning it with the Constitution and international human rights instruments that made the regional state and local communities' key actors in the management of mineral resources. While there have been some steps towards decentralization and increased regional participation, the changes have not been substantial enough to significantly alter the power dynamics in natural resource management. There has not been any significant action that aims to decentralize the management of power in line with the constitutional division of power. The federal government continued to actively monitor and oversee the mining sector in a highly centralized manner, excluding regional governments and local communities from decision-making.¹²² Regional states often play a limited role in these processes, and their participation is often relegated to ad hoc advisory roles.¹²³ Furthermore, local communities continue to play an insignificant role in overall management of the mining sector.¹²⁴ On top of this, the recent changes introduced by the federal government suffer from inconsistent implementation and a lack of legal and institutional support.¹²⁵ The federal government has not fully operationalized its decision to establish an intergovernmental

¹²¹ IP1, IP 3 and IP 4

¹²² IP5, IP 6 IP 7 IP 9 IP 10 and IP 11

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ Ibid

forum.¹²⁶ Moreover, federal government decision to introduce equity sharing and retroactive compensation, is not supported by legal and institutional frameworks. The ad hoc nature of these changes gives rise to questions about their effectiveness and consistent application across all mining projects and regions.

6.6. MANAGEMENT OF LARGE-SCALE MINING OPERATIONS AND SUSTAINABLE MINING IN ETHIOPIA'S FEDERAL SYTEM

As mentioned before, Ethiopia's mining sector plays an important role to its economic development, providing significant potential for economic growth, exports, employment, and revenue generation. However, it poses significant challenges in terms of environmental sustainability and social responsibility. As noted above, recognizing these dual features, Ethiopia has made concerted attempts to incorporate sustainable mining principles into its domestic legal framework.¹²⁷ Furthermore, it established a number of organizations to oversee the implementation of the legislative framework. The Federal Ministry of Mines (MoM) is the primary institution that is responsible for overseeing the extractive sector of the country.¹²⁸ Complementing the MoM's efforts are various regulatory bodies, such as the Environment Protection Agency (EPA), each tasked with specific roles within the mining sector. Under this section an attempt will be made to assess the effort of these agencies to ensure sustainable mining practice in Ethiopia's federal system.

6.6.1. THE MANGMENT OF MINERAL RESOURCE AND ECONOMIC SUITABILITY

As previously stated, the mining legal framework recognizes the importance of increasing economic contribution of mining operations. It provides critical tools to maximize the mining industry's economic benefits. Accordingly, as noted above, since the transitional period, the MoM has made efforts to address and enhance the economic contribution of the mining sector. Furthermore, federal agencies, such as the National Bank and the Ministry of Trade and Industry, collaborate with the MoM to maximize economic benefits. These agencies, to varying degrees, regulate that the extraction of resources is conducted in a manner that produces optimal economic

¹²⁶ IP 3 IP 4 IP 5 IP 10 and 11

¹²⁷ Federal Mining Proclamation, Proclamation Number 678/2010

¹²⁸ Ibid

benefits by regulating resource extraction, fostering economic linkages, and promoting infrastructure development.¹²⁹

As noted above, the federal government agencies control the extraction of mineral resources by regulating the initiation of extraction, the efficiency of extraction, and the full development of mining fields. To this end, it uses mining licenses, monitoring and supervision, license renewals, and fees to maximize economic gains from the mining industry and improve the extraction process.

The existence of a consistent, well-planned licensing process, as noted in the previous chapter, is essential for efficient extraction of mineral resources. As a result, the federal mining law mandates that commercial mining projects obtain state-issued licenses, which is critical to ensuring that mining projects align with governmental goals for the economy, society, and environment. Transferring a mining license requires a comprehensive examination of factors including the company's financial and technical capabilities, possible economic advantages, and expected social and environmental issues.¹³⁰

The MoM is responsible for reviewing mining plans and awarding licenses only to companies that have the necessary expertise, financial resources, and technological capabilities for successful operations.¹³¹ During the course of this evaluation, the MoM took into consideration the financial capacity of the companies, their technical expertise, their operational experience, the types of equipment, the extraction and processing methods, and the impact mitigation strategies.¹³² Furthermore, it evaluates a project's economic contribution by reviewing the mining company's field development plan that outlines its overall operations. This evaluation takes into account a company's ability to generate revenue, create jobs, and strengthen local and national economies.

Over the last 30 years, the MoM has issued several large-scale mining permits based on these assessments.¹³³ However, as previously stated, the Ethiopian mining licensing system faces

¹²⁹ Ibid, It is important to highlight that, as previously mentioned, Ethiopia has not yet established a comprehensive framework that can adequately tackle the economic effects of the mining sector. Furthermore, it is deficient in robust laws and institutions necessary for transforming its mineral wealth into enduring advantages. The omission of these points renders the discussion on the role of management power in achieving these objectives unnecessary; thus, they are not included in our discussion here.

¹³⁰ IP1, IP 2, IP 3, and IP 4. It should be noted here that the environmental and social aspects of mining licenses are discussed in subsequent sections.

¹³¹ Ibid.

¹³² Ibid

¹³³ Ibid, MoM mining license list, 2024

challenges and limitations, such as capacity constraints, inadequate vetting processes, a lack of transparency, overlapping licenses, conflicts between artisanal and large-scale mining operations, and limited community engagement.¹³⁴ Interviews with industry stakeholders revealed that the MoM frequently lacks the necessary personnel and expertise to thoroughly evaluate complex mining proposals, limiting the ministry's ability to conduct rigorous assessments.¹³⁵ Furthermore, the licensing process has faced criticism for inappropriate vetting, with political pressure impacting the evaluation process, leading to licenses being issued to companies that do not entirely satisfy the necessary criteria.¹³⁶ Moreover, although Ethiopia is committed to the Extractive Industries Transparency Initiative (EITI), the licensing process frequently suffers from a lack of transparency, with restricted public access to information regarding applications, evaluations, and decisions.¹³⁷ Additionally, the MoM has established a cadaster system to tackle the problem of overlapping licenses. Nonetheless, inadequate coordination between the federal government and regional states occasionally leads to the issuance of overlapping licenses, resulting in conflicts among various mining operators.¹³⁸ The management of mining licenses has experienced disputes between large-scale mining operations and artisanal miners, frequently resulting in social unrest and economic inefficiencies.¹³⁹ Likewise, as previously mentioned, limited community engagement in the administration of the mining license process results in a disconnection between mining operations and community needs and concerns. Thus, these limitations significantly undermine the effectiveness of the licensing system in achieving its intended goal of promoting sustainable and responsible mining practices.

The efficient extraction of mineral resources is one of the crucial goals for the Ministry of Mines (MoM). To do this, the MoM relies on mining operator reports, as well as monitoring and supervision. The mining companies are required to submit periodic reports that outline the

¹³⁴ Ibid., Yohannes Yihdego et al., Mining sector challenges in developing countries, Tigray, Ethiopia, and inspirational success stories from Australia, *Int. J. Mining and Mineral Engineering*, Vol. 9, No. 4, 2018: 321–60; Moore Stephens, supra note 64.

¹³⁵ IP1, IP 2, IP 3 and IP 4

¹³⁶ Asebe Regassa and Damena Abebe, at supra note 82

¹³⁷ Federal mining amendment proclamation, proclamation number 816/2013, IP1, IP 2

¹³⁸ IP7, IP10 and IP 11; The Reporter, Kurmuk Mining's gold ambitions on hold as Benishangul officials air doubts over "legitimacy", <https://www.thereporterethiopia.com/39748/> accessed June, 2024; Addis Fortune, Artisanal invading gold miners derailing Kurmuk operations to be kicked out, <https://www.capitalethiopia.com/2023/01/16/artisanal-invading-gold-miners-derailing-kurmuk-operations-to-be-kicked-out/> accessed June, 2024

¹³⁹ IP1, IP 2 IP 3 IP, IP 5, IP 7 and IP 12

performance of mining companies in line with the field development programs.¹⁴⁰ Moreover, the MoM monitors compliance with work programs to optimize resource extraction and ensure the full development of mining areas.¹⁴¹ It actively monitors and supervises the implementation of these plans to ensure that all mining operations, from exploration to extraction, are conducted efficiently.¹⁴² In the meantime, non-compliance results in penalties or, in severe cases, license revocation.¹⁴³ The MoM seeks to maximize economic gains from Ethiopia's mineral riches while ensuring that mining activities adhere to sustainability standards by enforcing performance reviews and sanctions for non-compliance. However, a review of Ethiopia's experience indicates that the MoM effort is challenged to bring the intended result of guaranteeing effective resource extraction.¹⁴⁴ The MoM has failed to perform rigorous monitoring and supervision. Interviews noted that the monitoring and supervision of the MoM are largely periodic and not exhaustive in nature. Consequently, most mining operators are left for self-regulation.¹⁴⁵ Moreover, the regulatory authority lacks capacity to effectively monitor and regulate mining operations.¹⁴⁶ Its limited capacity is demonstrated by its difficulty to manage the practice of "warehousing," in which mining companies maintain projects without progressing with production.¹⁴⁷ It lacks clear understanding of the underlying reasons for this issue and how to address it.¹⁴⁸ The Mining corporations' experience and competence frequently exceeds that of the government, allowing them to manipulate and abuse project agreements. Thus, the monitoring and supervision of the MoM has a limited impact in ensuring the efficient extraction of mineral resources.

The MoM uses license renewal and fees process to promote efficient extraction of minerals. As noted above the federal mining proclamation imposes limitations on the renewal of mining licenses. One of the objectives of such limitation is to foster efficient and effective mineral

¹⁴⁰ It is important to note that the government could have used its regulatory power to oversee the post-development status of mining operations and shape the nature of resource extraction. However, as of now, no large-scale mining project in Ethiopia has reached the post-development stage. Therefore, we will not include this aspect in our discussion.

¹⁴¹ The Federal Mining Proclamation, Proclamation Number 678/2010 Article 36/1/a, 38/1, and 58 of the Federal Mining Regulation, Regulation Number 423/2018 Article 50/2.

¹⁴² IP 1 and IP 4

¹⁴³ Ibid

¹⁴⁴ IP 1, IP 6, IP 7, IP 8 IP 9 IP 11 and IP 12

¹⁴⁵ Ibid

¹⁴⁶ IP1 and IP 3

¹⁴⁷ IP1, IP 3, IP5, IP 6 IP 7 and IP 9

¹⁴⁸ Ibid

extraction. The MoM is responsible to oversee the process of renewing mining licenses, motivating mining companies to optimize their extraction activities within a designated timeframe.¹⁴⁹ Additionally, the MoM requires the relinquishment of unused portions of the mining area, ensuring that valuable resources are not left unutilized.¹⁵⁰ Additionally, the federal mining proclamation establishes fees for mining companies that do not adhere to their contractual and legal responsibilities. The MoM uses fees as an additional incentive to guarantee that mining licenses are used effectively. In theory, these measures are expected to promote responsible and efficient extraction of mineral resources. However, the effectiveness of these regulatory systems in increasing mineral extraction efficiency is debated.¹⁵¹ Interviewees saw these methods as ineffectual, noting that many mining corporations were able to renew their licenses without being thoroughly scrutinized.¹⁵² It notes that the MoM did not effectively use the license renewal process to thoroughly analyze mining companies' performance and adherence to sustainability standards.¹⁵³ Moreover, the relinquishment requirements has limited impact in ensuring efficient extraction of minerals as the MoM failed to adequately enforce it.¹⁵⁴ Furthermore, the minimal fees for exploration and exploitation permits fail to adequately encourage companies to commit to efficient extraction of mineral resources.¹⁵⁵ Thus, the government failed to utilize license renewal, relinquishment requirements, and fees to ensure efficient extraction of mineral resources. As previously noted, the mining sector's backward and forward linkage with the broader economy are crucial to ensure the sustainability of mining activities.¹⁵⁶ It plays a crucial role in maximizing the economic benefits of mineral resource extraction while also fostering overall economic development. In line with such objectives the federal mining proclamation and development plans seek to strengthen the economic links between the mining sector and the larger economy.¹⁵⁷ In order to cultivate these connections, the Ministry of Mines, in addition to the other ministries

¹⁴⁹ Federal Mining Proclamation, Proclamation Number 678/2010

¹⁵⁰ Ibid. Articles 24, 1, 29, 31, and 41 of the federal mining regulations, Regulation Number 423/2081, Articles 16–18, and 47/3

¹⁵¹ Ibid,

¹⁵² IP1 and IP 4

¹⁵³ Ibid

¹⁵⁴ Ibid

¹⁵⁵ Ibid

¹⁵⁶ Federal Mining Proclamation, Proclamation Number 678/2010, Art. 36/1/I of the Federal Mining Regulation, Regulation Number 423/2081, Article 54

¹⁵⁷ MoM annual performance report, 2021

mentioned, attempt to nurturing these connections. Their initiatives concentrated on two main aspects: sourcing goods and services from local providers and generating job opportunities for citizens.¹⁵⁸ These programs aim to boost local economic activity, encourage domestic companies, and ensure that the advantages of mining operations extend beyond the exploitation of resources. Nonetheless, the MoM has experienced substantial obstacles in strengthening backward economic linkages. A major issue is the inability to develop a functional value chain that connects the mining sector to local businesses, limiting the ability of local enterprises to sell goods and services to mining operations and diminishing the sector's overall economic impact.¹⁵⁹ Furthermore, it failed to ensure that the large-scale mining sector provided adequate job opportunities, particularly for areas directly affected by mining operations.¹⁶⁰ Several factors contribute to this issue, including insufficient training programs, gaps in the enforcement of employment duties, and a lack of community participation in recruitment and hiring processes.¹⁶¹ Thus, despite efforts to encourage backward economic linkage in the mining sector, its success has been largely limited.

As previously stated, forward linkages between the mining sector and other industries in the economy are critical for maximizing economic benefits from mining activities. The Ethiopian government, recognizing the significance of forward economic links, developed strategies that aimed to promote forward linkages between the mining sector and other industries as outlined in its successive programs.¹⁶² As previously stated, the MoM, as well as numerous government agencies such as the National Bank and the Ministry of Trade and Industry, are actively working to promote linkages between the mining and other industries.¹⁶³ Even with these initiatives, the integration between the mining sector and other industries is still restricted, limiting the potential for mineral utilization and overall economic contributions. Interviewees noted that while the mining sector is vital for gold exports and supports the construction and industrial sectors, its

¹⁵⁸ Federal Mining Proclamation, Proclamation Number 678/2010, Article 38/1/h

¹⁵⁹ IP 4 IP5, IP 6, IP 7 and IP8

¹⁶⁰ Ibid

¹⁶¹ Ibid

¹⁶² Poverty Reduction Strategy Paper (PRSP), 2001; Sustainable Development and Poverty Reduction Program (SDPRP), Federal Democratic Republic of Ethiopia (FDRE) Ministry of Finance and Economic Development (MOFED), 2002; Plan for Accelerated and Sustained Development to End Poverty (PASDEP), Ministry of Finance and Economic Development (MoFED) (2006); The Federal Democratic Republic of Ethiopia Growth and Transformation Plan (GTP) (2010/11–2014/15); Growth and Transformation Plan II (GTP II) (2015/16–2019/20); A Homegrown Economic Reform Agenda: A Pathway to Prosperity, 2020

¹⁶³ IP 1, IP 3, IP4

overall effect on the economy appears to be somewhat limited.¹⁶⁴ The mining sector's contribution is fraught by a number of challenges, including insufficient value addition, poor infrastructure, skill gaps, restricted technology transfer, and regulatory issues.¹⁶⁵ The MoM failed to address these concerns as it faced severe policy implementation gaps, low incentives to promote economic linkage, agency coordination issues, and insufficient monitoring and evaluation systems.¹⁶⁶ This has resulted in missed opportunities to strengthen ties between the mining industry and the broader economy. Consequently, despite ongoing attempts, the MoM has failed to ensure that the mining sector produces multiplier effects or increases its ripple impact throughout the economy.

The development of infrastructure in and around the mining area is critical, as it not only supports primary mining operations but also generates spillover benefits that boost overall economic activity. As noted, in Ethiopia, the development of infrastructure is governed by the federal mining law framework. It provides that mining companies must finance the necessary infrastructure in and around the mining area and let third parties access mining infrastructure.¹⁶⁷ On the other hand, the enforcement of legal frameworks that require businesses to finance infrastructure continues to be inadequate, which results in limited spillover effects.¹⁶⁸ Interviewees observed that there are insufficient mechanisms established to guarantee that license holders meet their obligations regarding cooperative infrastructure development.¹⁶⁹ Therefore, insufficient oversight diminishes the potential infrastructure development benefits that could have been realized by the local communities.

The preceding discussion clearly shows that the MoM, in collaboration with federal agencies and, to a lesser extent, regional states, has attempted to administer the mining process in a way that maximizes economic benefits while minimizing social and environmental harm. Despite these measures, the mining sector's contribution to Ethiopia's economic development remains low in comparison to its vast potential.

¹⁶⁴ IP 1, IP3, IP 4, IP 5, IP 7 IP 8, IP 11 and IP 12

¹⁶⁵ Ibid

¹⁶⁶ Ibid

¹⁶⁷ See the federal mining proclamation, proclamation number 678/2010, Article 36/1/e; federal mining regulation, regulation number 423/2018, Article 29

¹⁶⁸ Ibid

¹⁶⁹ IP 1, IP 3, IP 6 IP 8 IP 10 and IP12

6.6.2. THE MANGMENT OF MINERAL RESOURCES AND ENVIRONMENTAL SUSTAINABILITY

The federal Mining and environmental protection laws emphasize the importance of reducing the negative environmental impacts of mining operations, while also providing crucial tools for monitoring and managing their environmental effects. The Environmental Protection Agency (EPA) and the Ministry of Mines (MoM) have taken a proactive approach for addressing environmental concerns that arises in the extraction of mineral resources. To this end, it uses a variety of traditional environmental regulatory mechanisms to improve the sustainability of mining operations, such as mining activity restrictions, impact assessments, environmental monitoring and oversight, and the establishment of an environmental rehabilitation fund.

As was mentioned earlier, according to federal mining law, a policy decision was made to designate certain areas as being off-limits for mining operations.¹⁷⁰ Furthermore, it empowers the Ministry of Mines (MoM) to designate previously unassigned areas. The draft mining policy emphasizes the importance of keeping certain areas free of mining in order to protect vital natural environments for future generations.¹⁷¹ It is critical to remember that the government wields enormous power in choosing whether mining activities are permitted in specific regions, particularly when these decisions are deemed favorable to the national interest. In the past thirty years, the economic impact of the mining sector has significantly shaped government decisions regarding the designation of off-limits areas for mining, often sidelining social and environmental concerns.¹⁷²

As mentioned in earlier chapters, the Ministry of Mines (MoM) mandates that all applicants for a license or renewal, with the exception of reconnaissance, retention, or artisanal mining licenses, must provide an environmental impact assessment (EIA) and an environmental management plan (EMP) from the Environmental Protection Agency (EPA). This criterion is an important tool for actively evaluating the environmental impacts of mining operations.¹⁷³ However, the EPA's

¹⁷⁰ Federal Mining Proclamation, Proclamation Number 678/2010

¹⁷¹ Draft mineral resources development policy, 2019

¹⁷² IP 2, IP 6, IP 8 and IP 12

¹⁷³ See the federal mining proclamation, proclamation number 678/2010, the preamble of the proclamation, articles 46/1, 62, 63/1. the federal mining regulation, regulation number.418/2018, article 39. The preamble to the Proclamation stated that one of the objectives of the Proclamation is to enable the government to protect the environment for the benefit of present and future generations and to ensure that the extraction of mineral resources is carried out in an ecologically and sustainable manner.

credibility and independence as an environmental regulating authority have been a source of contention.¹⁷⁴ Furthermore, there is a huge gap in meaningful community interaction.¹⁷⁵ Interviewees indicated that insufficient public involvement is a significant concern in environmental assessment and management planning processes.¹⁷⁶ Additionally, it was observed that communities frequently obtain technical information in a format that is hard to understand, hindering their ability to grasp the potential environmental impacts of mining activities and effectively communicate their concerns.¹⁷⁷ Local residents have expressed discontent due to a lack of involvement possibilities and limited access to information.¹⁷⁸ The considerable mismatch between the intended objectives of the EIA and EMP processes and their implementation reduces these tools' efficacy in protecting the environment and promoting sustainable mining practices.

Once environmental impact studies and environmental management plans are approved and mining activities begin, the MoM is responsible for ensuring compliance with environmental rules. It plays an important function in ensuring compliance with environmental standards.¹⁷⁹ To this end the Mining companies are required to submit compliance reports that provide a comprehensive picture of the environmental effects of their operations in accordance with the approved environmental impact assessment and management plan.¹⁸⁰ These extensive reports include every aspect of the mining operation from its early stages to subsequent follow-up actions. Reports by license holders must be verified by the MoM. The MoM monitors the mining firms' reports to ensure its accuracy.¹⁸¹ It aims to identify any inconsistencies or gaps in compliance reports and in the actual performance of the operation. It also conducts an evaluation to ensure compliance with environmental standards.¹⁸² In situations where monitoring revealed discoveries, the MoM took necessary action against mining corporations that violated the environmental rules.¹⁸³ It employs a combination of corrective measures, including the suspension or termination of mining permits. This procedure serves as a critical step in ensuring that mining companies follow environmental

¹⁷⁴ Yohannes Yihdego, at supra note 135; Melisha Charles et al at supra note 79

¹⁷⁵ IP 5, IP 7 IP 8 IP 10 and IP 12

¹⁷⁶ Ibid

¹⁷⁷ Ibid; Melisha Charles et al at supra note 79

¹⁷⁸ Ibid

¹⁷⁹ The federal mining regulation, Regulation number 423/2081, Article 39/2

¹⁸⁰ IP 2, IP 4, IP 6 IP 8 IP 10 and IP12; Melisha Charles et al at supra note 79

¹⁸¹ Ibid

¹⁸² Ibid

¹⁸³ Ibid

standards and meet their environmental protection and reclamation obligations. However, the MoM, which is responsible for promoting mining development, is also responsible for ESIAAs in the mining sector, creating conflicts of interest.¹⁸⁴ Moreover, empirical data shows that MoM faces limitations in monitoring and supervising the environmental impact of mining operations, including a lack of adequate personnel and institutional capacity.¹⁸⁵ The MoM's limited staffing is a significant challenge. There is a notable shortage of personnel for a comprehensive nationwide oversight. Interviews with industry experts revealed a pressing need for more inspectors, auditors, administrators, and technical experts to review compliance reports, conduct site visits, enforce regulations, and perform other essential duties.¹⁸⁶ Furthermore, as previously stated, MoM has failed to continuously strengthen its institutional capacity to regulate the environmental impact of mining operations. It struggles to procure equipment for effective environmental management.¹⁸⁷ The failure of the MoM to create participatory monitoring structures intensifies its capacity constraints.¹⁸⁸ It lacks ongoing forums where residents, professionals, businesses, and other organizations can express their views. These constraints have limited its ability to monitor and enforce environmental laws throughout the country. It is more difficult for the MoM to actively monitor and enforce environmental laws across the country. As a result, mines are primarily responsible for self-monitoring, with little government oversight.¹⁸⁹

As previously stated, environmental rehabilitation and reclamation are critical components of sustainable mining practices that seek to mitigate the negative effects of mining operations and restore ecosystems. Ethiopia's mining legal framework provides a solid foundation for effective environmental reclamation and restoration initiatives. Specifically, it mandates the complete rehabilitation and reclamation of mining areas and outline the decommissioning procedures and environmental rehabilitation funds.¹⁹⁰ The MoM is responsible for overseeing these rehabilitation operations, including monitoring and enforcing infractions.¹⁹¹ It works to mitigate the negative

¹⁸⁴ Ibid; Melisha Charles et al at supra note 79

¹⁸⁵ Ibid; IP 2, IP 5, IP 7 IP 8 and IP 12

¹⁸⁶ IP2, IP 3 and IP 4

¹⁸⁷ Ibid

¹⁸⁸ Ibid

¹⁸⁹ IP 2, IP 5 IP 8 IP 10 and IP 12

¹⁹⁰ Federal Mining proclamation at supra note 47, Article 62

¹⁹¹ IP 2, IP 5 IP 8 IP 10 and IP 12; Ethiopian Extractive Industries Transparency Initiative Report, at supra note 74; Melisha Charles, et al, at supra note 79

consequences of mining and encourage the restoration of affected areas. Ethiopia's framework for mining rehabilitation is indeed progressive; however, the actual implementation shows notable deficiencies. The implementation of environmental rehabilitation continues to be inadequate. The MoM did not achieve consistent compliance, resulting in insufficient rehabilitation during the mining process.¹⁹² It has not taken coordinated action to enforce the provisions of rehabilitation strategies designed to mitigate the negative effects of mining activities.¹⁹³ Furthermore, the utilization of environmental rehabilitation funds has aroused discussion. While license holders are expected to set aside cash for reclamation and environmental mitigation, mining corporations are ultimately responsible for enforcing this obligation.¹⁹⁴ The amount of environmental rehabilitation funding is largely dependent on mining companies' decisions. It failed to establish mechanisms for financial assurance to ensure that mining companies have the financial resources to mitigate any environmental impacts that may occur. Moreover, although some mining companies engage in various environmental protection activities, their total contribution to environmental protection is relatively low.¹⁹⁵ The challenges outlined have resulted in notable differences between the goals of Ethiopia's environmental rehabilitation policies and their actual execution in safeguarding and revitalizing ecosystems impacted by mining operations.

Over all, Ethiopia has put in place legal frameworks and institutional mechanisms to promote environmental sustainability in the mining sector. Moreover, the above-mentioned management efforts were made to address the environmental impact of mineral resource extraction. However, the regulation of the environmental impact of mining suffers from the abovementioned limitations. Consequently, the mining sector has caused extensive harm to the environment, including pollution of land, air, and water, as well as negative effects on plant, animal, and human well-being. Extraction of mineral resources has resulted in significant environmental damage across the country. Mining waste, which includes hazardous elements such as cyanide and mercury from the extraction of minerals such as gold, tantalum, and other industrial minerals, causes significant damage to land, air, water, flora, and fauna.¹⁹⁶ Because of this, as noted above, the population has suffered greatly from poor health and loss of livelihoods in various regions. It is essential to address

¹⁹² Ibid

¹⁹³ Ibid

¹⁹⁴ Ibid

¹⁹⁵ Ibid

¹⁹⁶ Asebe Regassa and Damena Abebe, at supra note 82

these challenges to ensure that Ethiopia's mining sector contributes to sustainable development, while protecting the environment and health of local communities.

6.6.3. THE MANGMENT OF MINERAL RESOURCE AND SOCIAL SUSTAINABILITY

The extraction of mineral resources has significant impact on both the local community and the employees involved in the process. The government is expected to come up with legal and institutional framework for minimizing the negative effects of mining activities on nearby communities and workers.¹⁹⁷ Ethiopia has put in place a regulatory framework designed to promote socially responsible mining operations. One of the primary objectives of this framework is to guarantee that mining activities contribute to social development while mitigating adverse effects.¹⁹⁸ To this end, the Federal mining laws provide the basis for ensuring mining's social sustainability, including impact assessment compensation for the disposition of land, monitoring and supervising social impacts, and community development plans.¹⁹⁹

As noted above, the federal mining legal framework recognizes the importance of social impact assessment in the mining sector.²⁰⁰ The EPA evaluates the extent to which mining operations contribute to the local social development. This entails assessing the company's contribution to local employment and developing economic prospects for neighboring areas.²⁰¹ Through these monitoring initiatives, it identifies areas in which mining operations can improve its social impact. Nevertheless, there are glaring flaws in the implementation of such policies. One of the main problems was that the local community was not adequately involved in the evaluation process.²⁰² This lack of engagement undermines the legitimacy and effectiveness of social impact assessments. Furthermore, social impact assessments often lack detailed studies and mitigation

¹⁹⁷ Governments use regulatory and fiscal power to address the social impact of mineral resource extraction. It uses its regulatory power to provide legal requirements and guidelines, including areas that are not subjected to mining, impact assessments, setting standards, providing oversight mechanisms, benefit-sharing, compensation for disruption of livelihoods, social management plans, auditing and reporting tools, public participation in decision-making, and access to information. Furthermore, it uses fiscal instruments that aim to share the benefits of mineral resource extraction. The later point will be addressed in subsequent chapters.

¹⁹⁸ Home grown economic growth program at supra note 164

¹⁹⁹ See the Federal Mining Proclamation, Proclamation Number 678/2010

²⁰⁰ Ibid, Article 62. See the federal mining regulation, Regulation number 423/2081, article 6, የማዕድን ሥራ ፈንድ ለማቋረጥ የሚቀርቡ ውሳኔዎች የሚጣራበትን አግባብ ለመወሰን የ ወጣ የ ማዕድንና ነዳጅ ሚኒስቴር መመሪያ ቁጥር 809/2013 Under the federal mining regulation mineral resource developers must submit a social impact assessment and a social development plan to the Environmental Protection Agency, except for reconnaissance and retention activities.

²⁰¹ IP1, IP 3, IP 4 IP 8 and IP 12

²⁰² IP 8 and IP 12 Melisha Charles, et al, at supra note 79

strategies making it more difficult to identify and resolve social impact of mining operations effectively.²⁰³

Mining activities usually necessitate significant area of land, which can interfere with other land uses. To address this issue, governments are expected to establish clear norms and procedures for land use. In Ethiopia, the FDRE constitution, as well as mining and land legislation, recognize the expropriation of land, including for mining purposes.²⁰⁴ Moreover, it recognizes the rights of local communities affected by such actions to receive compensation for expropriated land. As noted above, in the last thirty years, in collaboration with regional mining bureaus and land administration authorities, the MoM has been involved in expropriating land from local inhabitants and transferring it to mining companies. Regional governments play a critical role in land expropriation processes. However, the expropriation process presents several challenges. First, the local community has limited participation in expropriation decision-making.²⁰⁵ Second, local communities whose land is expropriated for mining operations frequently receive insufficient compensation for the loss of economic opportunity.²⁰⁶ Third, unlike some regional states, federal mining law fails to acknowledge the preferential rights of the local community.²⁰⁷ Ultimately, these limitations have fostered a feeling of exclusion among local communities. Moreover, in certain instances, these communities have voiced their concerns through actions like property damage and the halting of mining activities.²⁰⁸

The Ministry of Mines (MoM) is responsible for monitoring and assessing the societal effects of mining operations.²⁰⁹ It examines periodic reports submitted by license holders, assesses the performance of mining operations, and takes appropriate action against those that have a detrimental social impact. The MoM begins its monitoring with an assessment of the license holder's periodic report and urgent notifications of the performance of mining operations and their

²⁰³ Ibid

²⁰⁴ The FDRE constitution article 44/2

²⁰⁵ IP5, IP 6, IP 7 IP 9 and IP 12; Melisha Charles, et al, at supra note 79

²⁰⁶ Ibid

²⁰⁷ the federal mining proclamation, proclamation number 678/2010; Oromia mining proclamation amendment at supra note 28

²⁰⁸ Ibid

²⁰⁹ The FDRE constitution Article 42 (2); the federal mining proclamation, proclamation number 678/2010; the federal mining regulation, regulation number 423/2018, article 38, article 40.

social impact.²¹⁰ It monitors and supervises the impact of mining on the local community, worker health and safety, working conditions, and human rights.²¹¹ However, the MoM faces significant obstacles in carrying out its duties. One of the most pressing issues is the lack of institutional capability. As previously stated, the ministry suffers from insufficient budget and staffing, which limits its ability to conduct comprehensive social compliance monitoring in a rapidly expanding sector. Interviews indicated that these limitations restrict regulatory powers, including inspection, monitoring, and the imposition of appropriate sanctions. As a result, breaches frequently go unpunished, creating an environment of impunity.²¹²

The legal framework described above provides mining license holders, and exploration licenses holder when relevant, the obligation to participate in community development initiatives.²¹³ The commitment of license holders to community development is monitored through collaboration among federal, regional, and local governments. The MoM oversees the collection of CDFS, whereas regional governments and local communities primarily handle the implementation efforts.²¹⁴ The introduction of the CDF, as noted above, has notably enhanced the distribution of benefits from mineral resource extraction, ultimately improving the quality of life for local residents.²¹⁵ Nevertheless, the execution of the CDF faces significant obstacles that hinder its effectiveness, including limited funding, a deficiency in transparency regarding fund distribution, and insufficient involvement from local communities.²¹⁶ A significant concern is the lack of adequate funding. The contributions from mining operators vary greatly, and some funds do not sufficiently meet the needs of the communities impacted by their activities. The disparity, along with the community's elevated expectations, results in complaints.²¹⁷ Furthermore, there is a

²¹⁰ IP2, IP 6, IP 8 IP and IP 12

²¹¹ IP2, IP 3 and IP 4

²¹² Ibid

²¹³ See the federal mining proclamation, proclamation number 678/2010, Article 62/3 The federal ministry of mine and petroleum, Directive to Regulate Mineral Exploration and Mining Community Development Plan and Fund Directive Number 1/2019. The federal mining regulation, regulation number 423/2018, article 40, It provides a detailed legal framework that regulates the administration of community development funds. It specifically provides the contribution to be made by the special small-scale, small-scale, and large-scale mining license holders at different stages of mining. Moreover, it provides that the contribution of the exploration license is determined by an agreement with the licensing agency.

²¹⁴ Ibid Moreover, as noted above, it failed to regulate important decisions in development, including process project selection, procurement, supervision, management, and community participation.

²¹⁵ IP2, IP 6, IP 8 IP and IP 12

²¹⁶ IP 5, IP 6; IP 9 and IP 11

²¹⁷ Ibid

notable lack of clarity regarding the allocation of funds.²¹⁸ Communities often encounter difficulties in accessing clear information about how funds are allocated for the project. Moreover, although the mining directive permits community participation, the limited involvement of local communities in decision-making, planning, implementation, and project approval phases diminishes their sense of ownership and creates a disconnect between authentic community needs and the projects funded by the CDF.²¹⁹

It is clear from the above discussion that Ethiopia has made strides in creating an oversight system designed to encourage responsible mining practices. The MoM works alongside other federal agencies and regional states to tackle the social effects of mining activities through various means, including social impact studies, management procedures, community development funds, and health and safety regulations. However, the abovementioned, challenges remain that need to be tackled to ensure a successful implementation.

7. CONCLUSION

This chapter has explored the intricacies of managing large-scale mining operation within Ethiopia's federal framework and its effects on sustainable mining practices. It uncovers various legal, institutional, and practical challenges and shortcomings that greatly affect the country's sustainable management of mineral resources.

The FDRE Constitution clearly assigned management power over mineral resources to the regional states. Furthermore, the international human rights instruments that call for the meaningful participation of affected communities in resource management. The succeeding federal and regional mining legislation, on the other hand, has centralized decision-making authority and primarily excludes regional states from the decision-making procedures. This exclusion contravenes the constitutional allocation of management power regarding mineral resources. Furthermore, the subsequent federal mining laws have excluded local communities from decision-making processes, limiting their ability to express concern and protect their interests. It is noted that this centralization is unconstitutional and goes against the interpretation of law, as it contradicts the FDRE Constitution, international human rights instruments that recognize the

²¹⁸ Ibid

²¹⁹ Ibid

management of the regional state, and the procedural rights of local communities to participate in decision-making processes that directly impact them.

Furthermore, over time, the federal government, primarily through the Ministry of Mines (MoM), established and maintained extensive jurisdiction over the management of minerals. This centralized approach has resulted in the exclusion of regional states and local communities from key decision-making processes. It has resulted in a mismatch between national mining management and local realities. Furthermore, the MoM encountered difficulties in adequately monitoring the economic, environmental, and social effects of mining activities. The highly centralized management of mineral resources practices not only violates the constitutional norm but also contributes to persistent conflicts and ongoing misunderstandings among federal authorities, regional governments, and local communities, ultimately undermining the effectiveness of resource management.

In addition, the federal government has attempted to address the major concerns regarding the management of mineral resource by including subnational actors in decision-making, developing intergovernmental relation forum, and sharing the proceeds from the extraction of mineral resources. However, these changes were noted followed by comprehensive legal and institutional framework reform need to ensure consistency and long-term effectiveness. Many of these reforms are ad hoc, raising concerns about their long-term viability and fair implementation across areas and programs. Thus, despite some recent progress, the management of mineral resources is carried out in a manner that is exclusionary and also ineffective to address the challenges that arise in the extraction of mineral resources.

Although Ethiopia's mining sector legal framework, as noted above, attempted incorporates principles of sustainable development, there are major gaps between policy and practice in the country's mining sector. The management agencies have not sufficiently tackled issues related to economic, environmental, and social sustainability. Even though there have been efforts made to maximize the economic benefits that mining can provide, the sector's contribution to the economy is still relatively low in comparison to its potential. A further point to consider is that though traditional environmental protection mechanisms are in place, the implementation of these mechanisms faces significant difficulties. In addition, despite the presence of legal frameworks designed to ensure social sustainability, their implementation lags far behind.

CHAPTER SEVEN:

THE FISCAL BENEFIT FROM THE EXTRACTION OF MINERAL RESOURCES AND SUSTAINABLE MINING IN ETHIOPIA'S FEDERAL SYSTEM

7.1. CHAPTER INTRODUCTION

The extraction of mineral resources, as noted herein above, generates economic and social opportunities; however, it also presents considerable economic, social, and environmental challenges.¹ As mentioned before, governments, in addition to regulatory power, use fiscal power, particularly revenue raising power, to maximize economic gains, rectify social inequalities and limit the environmental repercussions of mining activities.² In federal systems, there is additional task that need to be addressed. The constitutional designers manage these powers while adhering to one of federalism's core ideas, the division of power. This chapter examines examine such journey by taking the Ethiopian federal system as a case study. It explores Ethiopia's federal system approach to regulating fiscal power over mineral resources, especially revenue raising power, and its impact on sustainable mining practices. It starts with an analysis of Ethiopia's federal system's fiscal regime that regulates the economic benefit derived from the mining sector. In particular, it provides insights into the complex challenges of designing and implementing effective fiscal frameworks for regulating the mining sector. This is achieved by examining the legal and institutional framework that governs the distribution of revenue-generating authority, taxing power, and revenue-sharing mechanisms. Furthermore, it assesses the tax regime in ensuring sustainable mining practices. In particular, it assesses the role of the tax regime in ensuring economic sustainability by focusing on its impact on resource extraction efficiency, revenue collection effectiveness, responsible revenue management, and strategic allocation of mining proceeds to achieve sustainable development goals. Moreover, it explores the role of the tax regime in ensuring environmental and social sustainability in the mining sector. It concludes by emphasizing the necessity for thorough reform that harmonizes the nation's legal and institutional frameworks with recognized principles and best practices for managing mineral resource revenue in federations, alongside sustainable mining practices.

¹ Uyanga Gankhuyag et al., *Managing mining for sustainable development: A sourcebook* Bangkok, 2018;

² Ibid

7.2.THE REGULATION OF THE REVENUE POWER OVER MINERAL RESOURCES IN ETHIOPIA'S FEDERAL SYSTEM

The fiscal power over mineral resources is regarded as an important issue in federal constitutional design.³ The FDRE Constitution, subsequent amendments, and the decision of both Houses establish a decentralized fiscal framework that regulates the economic rents that are generated by the mining industry.⁴ It regulates the revenue from the extraction of mineral resources by providing its own taxing powers, revenue sharing, and intergovernmental transfers.

The FDRE constitution adopts a unique approach of delineating specific tax sources for the federal and regional governments.⁵ The same holds true to the assignment of the revenue from the mining sector. Accordingly, it assigns specific tax sources based on the level of mining, the taxpayers involved, and specific revenue sources considered.⁶ It relied on various principles such as ownership principle, type of business form, principle of origin, domiciliation principle, inter-State and international trade, and administrative feasibility. It utilizes a combination of exclusive federal taxes and exclusive regional taxes to allocate mining proceeds.⁷ Furthermore, the constitution incorporates distinct procedures for regulating undesignated revenue sources. These procedures outline specific guidelines and processes for managing revenue from unspecified sources.⁸

The FDRE constitution, as amended, and the decisions of the two Federal Houses, as noted herein, provide a long list of shared revenue sources that are relevant to the mining sector.⁹ These revenue streams included income taxes, certain aspects of excise taxes and value-added tax (VAT), royalties, and joint venture dividends. The federal government is responsible for levying and

³ Qiao, B., & Shah, A. Revenue sharing from natural resources: principles and practices In *Fiscal Systems Reform Perspectives on Managing Natural Resources, Environment, and Climate Change*, Springer, 2023; McLure, Charles E. "The assignment of oil tax revenue." *Fiscal Policy Formulation and Implementation in Oil-Producing Countries*, Washington, DC: International Monetary Fund (2003): 204-15; Bird, R.M. *Subnational Taxation in Developing Countries: A Review of the Literature* World Bank Policy Research Working Paper No. 5450 (2010)

⁴ Senbeta Sisay, et al, "Ethiopia." In *The Forum of Federations Handbook of Fiscal Federalism*, Springer International Publishing, 2023 pp. 125–158.; Tadesse, L. *Income Tax Assignment Under the Ethiopian Constitution: Issues to Worry About* Mizan Law Review, 4(1) (2010)

⁵ The FDRE Constitution Articles 96, 97, and 98. there are two notable exceptions that warrant attention. First the federal government is solely responsible for the administration of customs duties. Second, the sole responsibility for land-use fees lies with the regional states.

⁶ Senbeta et al at supra note 4; Tadesse Lencho at supra note 4

⁷ Ibid

⁸ The FDRE constitution Article 99

⁹ Id Articles 96, 97, and 98

collecting taxes classified as shared revenue sources. These taxes are then distributed to the corresponding regional states.

Furthermore, the FDRE constitution recognizes that vertical and horizontal imbalances may exist within the federal system. To tackle inequalities and guarantee that every citizen has equal access to public services, the Constitution incorporates provisions for intergovernmental transfer, which may manifest as unconditional, conditional, or mixed forms. It is important to note that the provisions governing intergovernmental transfers fundamentally encompass Ethiopia's entire fiscal framework, rather than being limited to the mining sector. Moreover, its application in the mining sector is largely limited. Hence, it is excluded from our discussion.

7.2.1. ALLOCATION OF REVENUE FROM MINERAL RESOURCES IN THE ETHIOPIAN FEDERATION

The FDRE Constitution and subsequent amendments provide for a framework that delineates the division of revenue-raising powers in the mining sector. The constitution delineates revenue-raising powers based on specific mining revenues. Specifically, the constitution delineates exclusive federal taxes and exclusive regional taxes for the mining sector based on the mining level, taxpayers involved, and specific revenue sources. This approach draws inspiration from Ethiopia's schedular income tax system and historical arrangements in Proclamation 33/1992.¹⁰

The exclusive federal power includes customs duties, taxes, and charges on imports and exports; sales tax (VAT), excise taxes on enterprises owned by the federal government; fees, stamp duties, and charges.¹¹ The exclusive state power encompasses personal income tax from employees of private and state enterprises; excise taxes on individual traders and enterprises owned by the state government; royalties and income tax; land rent on small-scale mining activities; fees; stamp duties; and charges.¹² Exclusive federal and regional taxes give both levels of government legislative and administrative authority over their respective revenue sources, in accordance with fiscal federalism principles. The federal and state governments have the authority to establish tax bases, set tax rates, and oversee revenue collection within their jurisdiction.

¹⁰ Ibid, Solomon Nigussie, *Fiscal Federalism in the Ethiopian Ethnic-Based Federal System* (2006)

¹¹ FDRE Constitution, Art. 96

¹² Ibid Art. 97

Furthermore, when one examines the FDRE constitution more closely, it becomes clear that there are several internationally recognized revenue sources in the mining sector that are undesignated to either level of government, including community development funds, environmental rehabilitation funds, contract-based payments, and government equity participation. The FDRE constitution provides unique procedures for regulating undesignated revenue sources, which are to be determined through established processes. Accordingly, the federal system in the last 30 years has attempted to assign some of these revenue sources into exclusive state, federal, or shared revenue sources. However, there are significant revenue sources that are administered without a clear constitutional decision.

Table 1: ASSIGNMENT OF REVENUE SOURCES FROM MINERAL RESOURCES IN ETHIOPIA

TAX SOURCE	LEGISLATION	COLLECTION	REVENUE
1. Customs duties, taxes, and charges on imports and exports	Federal	Federal	Federal
2. Sales (VAT) and excise taxes on enterprises owned by the federal government	Federal	Federal	Federal
3. Personal income tax from employees of private and state enterprises	State	State	State
4. Sales tax (VAT) on individual traders and enterprises owned by the state government	Federal	State	State
5. Excise taxes on individual traders and enterprises owned by the state government	State	State	State
6. Royalties, income tax, and land rent on small-scale mining activities	State	State	State
7. Fees, stamp duties, and charges	Federal/State	Federal/State	Federal/State
8. Personal income from employees, sales tax (VAT), and excise from enterprises jointly owned by the federal and regional governments	Federal	Federal	Shared
9. Profit on companies, dividends due to shareholders, excise taxes, and sales tax (VAT), on companies	Federal	Federal	Shared
10. Income tax and Royalties from large scale mining operations on Large-scale mining	Federal	Federal	Shared

Source: FDRE constitution and the decision of the HOF

7.3.1. THE EXCLUSIVE FEDERAL GOVERNMENT REVENUE RASING POWER FROM MINERAL RESOURCES IN ETHIOPIA

The experience of federal systems and literature suggest that in most federal systems substantial revenues from the mineral sectors are centralized.¹³ The same holds true in Ethiopia, where the federal government receives the lion share of the revenue from the extraction of mineral resources. Its significant authority in revenue generation can be justified in light of its role in overseeing trade, maintaining macroeconomic stability, fostering strategic sector growth, and ensuring consistent fiscal policy implementation throughout Ethiopia. The FDRE Constitution grants the federal government exclusive authority over important tax and non-tax instruments that apply to the mining industry.¹⁴ It has the authority to levy and collect customs duties and taxes on imports and exports, levy income tax, excise taxes, and value-added taxes (VAT) on federally owned businesses, and impose fees and charges related to licenses and services provided by federal agencies.¹⁵

The literature on fiscal federalism emphasizes the significance of federal powers over customs duties and international trade taxes.¹⁶ In line with this, the federal government in Ethiopia has the sole authority to levy and collect customs duties, import and export taxes, and related fees.¹⁷ Centralizing these powers serves multiple purposes, such as regulating international trade, overseeing interregional commerce, generating substantial revenue, and enhancing administrative efficiency. Centralizing duties and international trade taxes enables the federal government to effectively regulate foreign trade. It plays a crucial role for assuring compliance with international trade agreements and standards, streamlining trade operations, and safeguarding domestic sectors from unfair competition.¹⁸ Furthermore, centralized customs duties and import/export taxes are crucial for regulating inter-regional commerce, ensuring that the movement of goods across borders adheres to national standards and regulations. Furthermore, projections indicate that the mining sector will generate significant revenues. Therefore, by centralizing customs duties and import/export taxes, the federal government can optimize revenue collection from the mining

¹³ Andrew Bauer, Paul Shortell, and Lorenzo Delesgues *Sharing the Wealth: A Roadmap for Distributing Myanmar's Natural Resource Revenues*, Natural Resource Governance Institute, 2016; 1- 57

¹⁴ Solomon Nigussie, at supra note 10

¹⁵ Ibid article 96

¹⁶ Baoyun Qiao, et al, supra note 3; Bird, R.M. at supra note 3;

¹⁷ FDRE Constitution, Art. 96(1).

¹⁸ Id Article 51

industry, a crucial step in funding public services and infrastructure development. Centralizing these fiscal powers increases administrative efficiency. A single system for customs duties and taxes decreases the difficulty of administering different tax jurisdictions while also reducing the possibility of tax evasion or anomalies in collection. This streamlined strategy allows for better resource allocation and more effective tax enforcement, resulting in higher compliance and income. Therefore, Ethiopia's strategy is in line with fiscal federalism principles and common practices.¹⁹

The value-added tax, or VAT, is a consumption tax levied on the amount of value added at each stage of sale of mineral products and services in the mining industry.²⁰ Given the complexity and significant revenue generated by the VAT, it is often allocated to the federal government.²¹ The FDRE constitution assigns sales, later turned in to VAT, as can be seen herein, based on the ownership of the business entity. Accordingly, the federal government has exclusive power to levy and collect sales tax (VAT) on enterprises owned by the federal government, including those operating within the mining sector.²² In a similar manner, state governments hold the same authority over businesses that are owned by the states, whereas businesses that are jointly owned by the federal government and state governments is a shared revenue sources.²³ This differed from common fiscal federalism's practice of centralizing indirect taxes. The Ethiopian framers' rationale was not necessarily based on economic efficiency grounds; rather, it was founded on the idea that distributed sovereignty should be based on ownership of productive assets. The federal government enacted the VAT proclamation that levies a standard 15% VAT that also covers mining activities.²⁴ As noted herein, the VAT proclamation covers areas that fall under exclusive federal and state revenue sources, as well as shared sources. Thus, the constitutional allocation of VAT authority reflects a unique approach based on ownership rather than the accustomed centralization.

¹⁹ Customs Amendment Proclamation, proclamation No 1160/2019

²⁰ Wollela Abehodie, and Richard Krever. "Value-Added Taxation and Fiscal Federalism in Ethiopia." *World Tax Journal*, vol. 12, no. 2, 2020: 253-294;

²¹ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3

²² The FDRE Constitution Articles 96/3, 97/7, and 98/1, Minutes, House of Federation and House of People's Representatives joint session held on Miazia 3, 1994 EC. As noted hereunder, sale tax was later developed into VAT; hence, the federal government has exclusive tax power over mining enterprises owned by the federal government.

²³ Ibid

²⁴ Excise Tax Proclamation, Proclamation No. 1186/2020; Value Added Tax Proclamation, Proclamation No. 1157/2019

The literature on fiscal federalism and the assignment of excise taxes highlights the trade-offs between efficiency, equity, and autonomy in federal systems.²⁵ The assignment of excise tax within federal systems presents an intricate challenge, and theoretical discussions pertaining to tax assignment provide minimal direction for real-world policy choices.²⁶ The federal design of each nation dictates how excise taxes are allocated to specific levels of government.²⁷ Nevertheless, the FDRE constitution, as amended, addressed excise tax and VAT in a comparable manner. It assigns excise taxes based on the ownership of the business entity. Accordingly, the federal government has exclusive power to levy and collect excise taxes on enterprises owned by the federal government.²⁸ The federal excise tax proclamation mainly covers those areas that are exclusively federal and share revenue, while the regional states enact their own laws over state revenue sources.²⁹ Thus, the assignment of excise taxes in Ethiopia's federal system reflects a unique approach that emphasizes ownership over centralization rather than the more common practice of centralizing indirect taxes.

A significant amount of attention has been paid in the literature on decentralization to the assignment of fees, stamp duties, and charges. This source indicates that these sources of revenue can be effectively evaluated at the level or within the government entity where the corresponding services are delivered and records are kept.³⁰ In Ethiopia, the federal government has the authority to impose fees and stamp duties related to the services it provides, including those within the mining sector. This is in line with the trend that has been observed in other countries.³¹ The Mining Operations Proclamation and mining directives provide a detailed description of the license fees that mining companies are obligated to pay to the MoM.³² In addition, the federal mineral resource transaction proclamation provides for the establishment of additional license fees in order to regulate particular activities that are associated with the mining industry.³³ Furthermore, the federal government makes use of its authority to impose stamp duties by passing a separate piece

²⁵ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3

²⁶ Ibid

²⁷ Lloyd, Peter. "Excise Tax Harmonization in Australia at Federation." *Aus. Eco. His. Review* 57, no. 1, 2017: 45–64.

²⁸ The FDRE Constitution article 96/3, 97/7, and 98/1; Minutes, House of Federation and House of Peoples' Representatives joint session held on Miazia 3, 1994 EC (2002).

²⁹ Ibid

³⁰ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3

³¹ FDRE constitution article 96/7

³² The federal mining proclamation, Proclamation No. 678/2010

³³ the federal Transaction of Minerals Proclamation, Proclamation No. 1144/2019

of legislation concerning the matter.³⁴ Thus, Ethiopia's approach of the assignment of fees and stamp duties aligns with trends observed in other countries where similar systems are in place.

It is strongly recommended that personal income taxes be decentralized to subnational governments.³⁵ This method is believed to augment local accountability, boost service provision, and more effectively link tax revenues with local needs. In spite of these preconceived notions, the FDRE Constitution allocates personal income taxes according to the nature of the employer. Accordingly, the federal government is empowered to levy personal income taxes on mining enterprises owned by the federal government level, rather than at the regional level where the economic activity occurs.³⁶ Thus, contrary to the literature, the Ethiopian federal system followed an unquiet approach to assigning personal income taxes, including those applied to the mining sector.

7.3.2. STATE GOVERNMENT FISCAL POWER OVER MINERAL RESOURCES IN ETHIOPIA

The FDRE constitution assigns the state governments the fiscal power, including those involving the mining sector. It assigns the power to levy and collect personal income tax from both state and private sector employees, sales (VAT) tax on individual traders, taxes on state-owned enterprises, income tax, royalties, and land rent on small-scale mining activities, and charges and fees on licenses and services issued by the state government to the regional states.³⁷ It has the authority to establish tax bases, set tax rates, and oversee revenue collection within its jurisdiction. This decentralization of revenue-raising power exemplifies the effort toward fiscal decentralization. Allocating mining revenue-raising power to state governments has several advantages. It allows regional governments to receive a portion of the profits from the mining industry. Moreover, it encourages regional states to oversee mining activities. Moreover, it led to the development of a sense of ownership. Furthermore, it enables regional governments, which are closer to the community, to create and implement policies that meet community needs, tailoring regional development. However, the mining sector's decentralized tax system can be problematic. As noted

³⁴ Stamp Duty (Amendment) Proclamation, Proclamation No. 612/2008

³⁵ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3

³⁶ FDRE Constitution Articles 96/3

³⁷ FDRE Constitution Articles 97(4), (7), and (9)

here, it can lead to vertical and horizontal tax competition. Moreover, regional governments' capacity and resources to manage mining activities present another challenge.

The decentralizing personal income taxes to subnational governments, which are in a better position to administer them, has much broader support.³⁸ As noted above, the FDRE Constitution divided personal income taxes based on the nature of the employer. In light of this, the authority to impose personal income taxes on private mining enterprises and state-owned firms operating within regional boundaries is delegated to the respective state administrations. On the other hand, the authority to impose personal income taxes on joint enterprises is a shared Power.³⁹ This ensures that the taxes paid by mining employees go directly towards the development of the communities that benefit from the mining industry. This arrangement is consistent with the principles of fiscal federalism, promoting a system where incentives are structured to enhance regional spillovers from extractive activities.⁴⁰

The allocation of VAT, as previously mentioned, to the central government has historically been a standard procedure.⁴¹ As noted further, the FDRE constitution and its amendment introduce a unique approach by distributing this power based on the ownership of the business. Accordingly, sales tax (VAT) on state-owned enterprises and individual traders, fall under the jurisdiction of the state. However, as noted here, the role of the regional state is limited. Accordingly, the federal VAT proclamation covers areas falling under the exclusive revenue sources of the states, while the states are entitled to collect the revenue.⁴²

The assignment of excise tax, as noted above, has been subject to different interpretations in federal systems.⁴³ The FDRE constitution and its amendment, as noted above, introduce a unique approach by distributing this power based on the ownership of the business. It grants regional governments the authority to impose excise taxes exclusively on state-owned enterprises and individual traders.⁴⁴ The regional state issued an excise proclamation that applies on state-owned enterprises and individual traders. Thus, the assignment of excise tax over state-owned enterprises and individual

³⁸ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3

³⁹ FDRE Constitution Articles 97

⁴⁰ Oromia Regional Government Income Tax Proclamation No. 203/2019;

⁴¹ Baoyun Qiao, et al supra note 3; Bird, R.M. at supra note 3

⁴² FDRE Constitution Article 97

⁴³ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3;

⁴⁴ FDRE Constitution Article 97

traders is expected to enable local authorities to tailor tax policies to their specific economic contexts, enhancing revenue generation and promoting local business development.

It is a common practice in federal systems to decentralize mining royalties while centralizing income taxes.⁴⁵ This approach has several advantages and is endorsed by international experience.⁴⁶

The FDRE constitution introduced its own approach to assigning income tax and royalties from mining. Accordingly, the regional states have the authority to impose royalties and income taxes specifically on small-scale mining operations, while the power over large-scale operations is shared revenue.⁴⁷ As noted here, the empowerment of the federal government to collect royalties from large-scale mining activities goes against the principles of fiscal decentralization, which aim to promote local control over mineral resources. Nevertheless, the assignment of income tax from small-scale mining operations to regional governments is justified, as these operations are typically concentrated in particular regions and their economic impact is largely localized. On the other hand, sharing of the income tax from large-scale mining operations maintains national-level control over the income generated from such activities. As noted herein, this approach aligns with the literature's recommendations and ensures consistency in tax policy and administration across regions.

The literature on fiscal federalism places a strong emphasis on the significance of effectively delegating levies and fees to the government entity that is accountable for the delivery of services and the maintenance of records. This allocation of authority has been shown to increase revenue generation efficiency and service delivery.⁴⁸ Furthermore, decentralization is regarded as a critical component in the context of land use payments associated with mining activities.⁴⁹ In line with this understanding, the FDRE constitution explicitly grants regional governments the power to determine and collect fees and charges, particularly for small-scale mining and land use payments related to mining operations.⁵⁰ A number of state mining laws have been enacted by the regional states, which regulate the taxes and fees that are collected by the government.⁵¹ Furthermore, the regional states have enacted land laws that determine the payments for land use that are associated

⁴⁵ McLure, Charles E., *supra* note 3; Bird, R.M. *at supra* note 3

⁴⁶ Ahmad, Ehtisham, and Giorgio Brosio, eds. *Handbook of multilevel finance*. Edward Elgar Publishing, 2015.

⁴⁷ FDRE Constitution, Article 97

⁴⁸ Baoyun Qiao, et al, *supra* note 3; McLure, Charles E., *supra* note 3; Bird, R.M. *at supra* note 3

⁴⁹ *Ibid*

⁵⁰ FDRE Constitution, Article 98

⁵¹ Oromia Mining Law Proclamation, Proclamation No. 223/2020

with mining activities.⁵² The revenue that is generated from these particular levies, fees, and land use payments plays a vital role in enhancing revenue generation and service delivery in the context of mining activities. Therefore, the allocation of fees and charges, especially concerning small-scale mining and land use payments, to the regional states aligns with the fundamental principles observed in federal systems.

7.3.3. UDESIGNATED POWER OVER REVENUE FROM MINERAL RESOURCE IN ETHIOPIA

The FDRE constitution, as noted above, provides for a division of revenue sources from the mining sector based on the nature of the resource, taxpayer, and source of income.⁵³ However, in the mining sector, there are internationally recognized sources of revenue that fall under the undesignated power of taxation.⁵⁴ These revenue sources include excise taxes over individuals, traders, and private enterprises, as well as value-added tax (VAT) designations, capital gains taxes (CGT) , contract-based payments and government equity participation. Moreover, there are also sources such as community development funds and environmental rehabilitation funds. The FDRE constitution does provide a mechanism to administer the undesignated power of taxation. It provides that the two federal houses must convene a joint session and decide, through a two-thirds majority vote, on the assignment of taxation powers that are not explicitly outlined in the Constitution.⁵⁵

The FDRE constitution allows for a deliberative process to address potential gaps in the allocation of taxation powers.⁵⁶ Over the course of the past quarter of a century, the federal system has

⁵² Oromia Rural Land Use and Administration Proclamation, Proclamation No. 130/2007

⁵³ FDRE constitution article 96, 97, and 98

⁵⁴ Tadesse Lencho at supra note 4, For example, taxes such as capital gains tax and value-added tax (VAT) could be argued as undesignated taxes, despite being mentioned in existing tax laws.

⁵⁵ FDRE constitution article 99

⁵⁶ Ibid., Articles 94–95 The transitional mining proclamation, Proclamation No. 33/92, Article 4; Ahmad, E., & Brosio, G., supra note 46; Martinez-Vazquez, J. The impact of fiscal decentralization: issues in theory and challenges in practice Asian Development Bank Economics Working Paper Series, No. 254, 2011: 1-11. It is worth noting that there are no clear criteria to guide this decision-making process. However, Article 95 of the Constitution provides some high-level guidance to address the issue, stating that revenue should be shared between the federal government and the states in a way that takes into account the federal arrangement. Additionally, Proclamation No. 33/1992, which was issued prior to the constitution, assists in the distribution of tax powers in a more comprehensive manner. It highlights criteria such as ownership of the revenue source, national or regional characteristics, convenience of tax collection, population, wealth distribution, regional development levels, and promoting an integrated national economy. Therefore, when it comes to the assignment of undesignated revenue sources, the two Federal Houses ought to be guided by the constitutional principle.

distributed some undesignated sources of revenue to either the federal or state governments, or it has shared them between the two authorities, depending on the shifting requirements and conditions.⁵⁷ It has also made significant progress in assigning undesignated revenue sources that are relevant to the mining sector. Most notably, it has assigned excise taxes over individuals, traders, and private enterprises, as well as value-added tax (VAT) designations.

As noted above, the literature on fiscal federalism recommends ideal way for assigning excise taxes while actual allocation process, happen to be quite complicated.⁵⁸ Under the FDRE the excise tax on individuals engaged in trading activities as well as on private enterprises, including those involved in mining, is an undesignated revenue source.⁵⁹ Consequently, the two federal houses have decided to divide the power over excise taxes based on the nature of the tax payer.⁶⁰ It made the decision to distribute excise taxes on private businesses, including those involved in mining, as a form of shared revenue between the federal government and the regions.⁶¹

As noted above it is widely held that VAT should be assigned to the federal government because of its extensive scope and complex administrative requirements.⁶² The FDRE Constitution, as noted above, arguably did not explicitly address VAT initially.⁶³ This led to confusion regarding VAT's assignment, administration and revenue allocation.⁶⁴ Two perspectives exist regarding the constitutional status of the issue. One view considers VAT as an undesignated tax requiring joint federal-state assignment under Article 98.⁶⁵ The second perspective contends that VAT effectively replaced the constitutionally assigned sales taxes, which were categorized into federal, state, and

⁵⁷ Tadesse Lencho, supra note 4, For instance, state stamp duties and income taxes on royalties from patent rights of individuals have been rightly assigned to states, recognizing their jurisdiction over these revenue sources. The joint session has assigned state stamp duties, and income taxes on royalties from patent rights of individuals have been assigned to states, while income taxes on enterprise patent royalties are joint revenues. Moreover, the federal government has been granted exclusive rights to income taxes on bank deposit interest revenues, aligning with its role in regulating the banking sector and ensuring effective revenue collection.

⁵⁸ Baoyun Qiao, et al supra note 3; Bird, R.M. at supra note 3

⁵⁹ Ibid the FDRE constitution, as noted above takes a novel approach to the distribution of excise, as it divides the authority to levy taxes according to the specific characteristics of the taxpayers.

⁶⁰ Tadesse Lencho at supra note 4

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

⁶⁴ Wollela Abehodie and Richard Krever, supra note 20

⁶⁵ Tadesse Lencho at supra note 4

concurrent streams.⁶⁶ In practice, the second approach prevailed, as VAT covers previous assignment of sales tax.⁶⁷ Subsequently, it was established that the federal government have the power to collect VAT on the former sales tax, to be dispersed based on the assignment of revenue sources. However, as the number of VAT registrants increased, Ethiopian states gained delegated power to administer VAT for new registrants starting September 2005, allowing them to retain revenue and improve supervision, though the federal government's authority to delegate this power remains a topic for further exploration.⁶⁸

The importance of clearly assigning revenue-raising authority and providing a procedure for the assignment of future revenue sources in ensuring accountability and efficiency, is duly noted in literature on fiscal federalism.⁶⁹ In Ethiopia, despite the above mentioned, progress in allocating undesigned revenue sources, significant revenue streams related to mining are still constitutionally unassigned.⁷⁰ However, the federal government has enacted laws and signed agreements to address some of these unassigned revenue sources.⁷¹ Furthermore, as stated herein, some regions have begun to follow the same pattern. The absence of clear assignment of these revenue sources increases the risks of inconsistent implementation, duplication, and intergovernmental disputes, pitfalls that fiscal federalism analyses frequently emphasize.⁷²

The literature on fiscal federalism recommended that capital gains taxes (CGT) should be assigned to the central government.⁷³ The FDRE Constitution does not expressly assign CGT. Furthermore, the joint house has not yet made a decision regarding which level of government is accountable for levying and collecting CGT.⁷⁴ However, The federal and regional governments have

⁶⁶ Minutes of the House of Federation and House of People's Representatives joint session held on Miazia 2, 1989EC (1997) The sales tax was divided into three categories: federal, concurrent, and state. The federal government was granted taxing authority over sales tax payable by federal government-owned enterprises under the Constitution, whereas state governments were assigned sales tax payable by enterprises they owned. State governments were also given exclusive authority to levy and collect sales taxes owed by individual traders. The federal and state governments were given concurrent authority to levy and collect sales taxes owed by private businesses.

⁶⁷ Minutes of the House of Federation and House of People's Representatives joint session held on Miazia 3, 1994

⁶⁸ Gizachew Chane Sileshi. "VAT and the FDRE Constitution: Is VAT Really an Undesigned Tax." Bahir Dar UJL 5 (2014): 354.

⁶⁹ Baoyun Qiao, et al supra note 3; Bird, R.M. at supra note 3

⁷⁰ Ibid

⁷¹ The Federal Mining Proclamations No. 678/2010

⁷² Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3

⁷³ Ibid; Bird, R.M. at supra note 3

⁷⁴ Silesh, Gizachew Chanie. "VAT and the FDRE Constitution: Is VAT Really an Undesigned Tax?" Bahir Dar University Journal of Law 5, no. 2 (2015): 364-389; Serkalem Eshetie Adinew, Constitutional and Administrative Issues in Relation

incorporated CGT provisions into their income tax laws. The first separate proclamation and directive concerning the CGT was issued by the transitional government of Ethiopia in the year 1994. Since then, the federal government and regional governments are collecting CGT without an explicit legal basis or a decision from the joint house.⁷⁵ The scope of federal and regional CGT is uncertain. Despite such limitations, the federal and the regional government has established an apparent division of power.⁷⁶ The introduction of CGT by both the federal and regional governments constitute unconstitutional overreach and undermines the principles of fiscal federalism.

State equity participation gives governments a say in how mining operations are managed. Moreover, it also allows the state to share in the generated revenues from the extraction of mineral resources. The literature on fiscal federalism suggests that state equity participation should be assigned to the central government.⁷⁷ The centralization of state equity share is advised in light of its contribution for effective governance.⁷⁸ However, the FDRE Constitution does not explicitly assign the state equity participation in mining operations. Despite such limitations, the Federal Mining Proclamation mandates that the "government" should hold 5–10% equity in both large and small-scale mining operations, with 5% of shares being free and 5% being purchasable.⁷⁹ The term "government" is used in this proclamation in confusing manner to refer to both the federal government and regional governments, where appropriate.⁸⁰ However, this usage raises questions about whether the federal government's equity participation applies to all mining activities in the country or only those that are federally licensed. It also raises questions about whether regional

to Capital Gains Taxes in Ethiopia: The Case of Bahir Dar City Administration Thesis, submitted to the School of Law, Bahir Dar University,

⁷⁵ Ibid; Tadesse Lencho at supra note 4; The federal Income tax proclamation, proclamation number 979/2016

⁷⁶ Ibid As a result, the federal government levies CGT on the transfer of shares in companies and buildings owned by business organizations, excluding micro and small enterprises. The regional government is enforcing the CGT on the transfer of buildings owned by sole proprietors and residential buildings that have not been used for residential purposes for at least two years before being sold. In addition, regional states are in charge of managing all taxes levied on micro and small businesses in their respective areas.

⁷⁷ James Otto M., Fiscal Decentralization and Mining Taxation, the World Bank Group Mining Department, March 2001: 1-15; State equity participation gives governments a say in how mining operations are managed. Moreover, it also allows the state to share in the revenues generated from the extraction of mineral resources.

⁷⁸ Ibid

⁷⁹ The federal mining proclamation, Proclamation No. 678/2010, Article 2/10

⁸⁰ Ibid

states can claim equity shares under the federal proclamation.⁸¹ On the other hand, the regional states provided a definition of state equity participation that was more restrictive. This definition states that the government is able to acquire equity shares from mining operations that are granted licenses by the regional state.⁸² Empirical evidence demonstrates that the federal government has assumed equity shares in large-scale mining operations.⁸³ Moreover, some regional states have started to contest and have sought to secure an equity stake. For example, as noted above, in the Midroc Lega Dembi case, the Oromia regional state claimed state equity participation.⁸⁴ In an informal negotiation the federal governments, an agreed to share its equity share with the Oromia regional state.⁸⁵ However, it is important to note that such matters should be addressed following the constitutional provisions rather than being handled on an ad hoc basis.⁸⁶ The informal agreement between the federal and regional governments to share state equity participation has important implications. To begin, revenue assignments should be considered both vertically and horizontally, taking into account regional distribution. Furthermore, such ad hoc arrangements introduce uncertainty and may result in inconsistent treatment of similar issues in the future. A short-term solution of this nature will not address the underlying uncertainty surrounding the issue, preventing the establishment of a clear and transparent regulatory framework. Instead of making informal arrangements, the federal system must follow the proper constitutional procedures to address uncertainties and promote a more structured and constitutionally compliant approach to resource governance.

The mining industry frequently uses ex-ante payments to generate revenue, including bid bonuses and other contractual payments.⁸⁷ According to the literature on fiscal federalism recommends assigning such revenue sources to the national government, which has a relative capacity to negotiate and administer them, is preferable.⁸⁸ Despite the fact that contract-based payments existed in Ethiopia at the time the constitution was written, the drafters neglected to include them.

⁸¹ Reporter, የጣሪያን ኩባንያዎች ወደ ሥራ ሊመለሱ ነው, <https://www.ethiopianreporter.com/article/20138> , accessed in January 2021

⁸² Oromia Mining Law Proclamation, Proclamation No. 223/2020, Articles 2(1) and 64

⁸³ IP 2, IP 4 The federal mining proclamation, Proclamation No. 678/2010, Article 70; for instance, the federal government has equity share in the MIDROC Gold Mines PLC and Abijata –Shalla Soda Ash Sc.

⁸⁴ Reporter at supra note 81

⁸⁵ Ibid

⁸⁶ IP 1, IP 4

⁸⁷ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3

⁸⁸ Ahmad, E., & Brosio, G., supra note 46

On the other hand, federal and regional mining laws contain provisions that allow licensing authorities to collect bonuses and contractual payments from mining agreements within their jurisdictions.⁸⁹ Furthermore, federal and regional states have received contract payments from mining operations operating under their respective licenses. The federal and regional governments' current actions are flagrant violations of the constitution. The unilateral action of either level of government that is not properly assigned by the constitution demonstrates a disturbing disregard for the constitutional division of power, which is the fundamental norm of the federal system.

In recent years, it is common to obligated companies contribute to community development funds that that can meet the development needs of mining-affected areas.⁹⁰ However, the FDRE Constitution failed to explicitly assign community development funds. Nonetheless, in the past, the federal government attempted to regulate payments for community development without a clear legal basis.⁹¹ The Amendment to the Mining Proclamation introduces community development fund contributions during the exploration and mining stages.⁹² Furthermore, Mining Regulation No. 423/2018 establishes specific contribution rates based on the type of mineral and project stage.⁹³ Furthermore, some regional states, such as the Sidama region, have taken steps to address this issue by requiring extractive companies to adhere to corporate social responsibility standards.⁹⁴ Although these legislative efforts constitute progress, there are concerns about the constitutionality of the federal legislation and regional acts. It is critical to note that community development funds fall outside of the traditional concept of taxation. It not outlined in the FDRE Constitution, as a fiscal power either level of government. However, one can regard them as an incidental power of the federal or regional governments' regulatory authority.⁹⁵ As a result, one can reasonably argue that the federal and regional governments have the constitutional authority to establish community development funds.

⁸⁹ IP 1, IP 3, and IP 5 Federal mining proclamation, number 678/2010; Oromia mining law proclamation, Proclamation No. 223/2020

⁹⁰ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3; Bird, R.M. at supra note 3

⁹¹ IP 3

⁹² The Federal Mining proclamation 678/2010; federal mining proclamation amendment proclamation number, 816/2013

⁹³ The federal mining regulation, Regulation No. 423/2018, Article 4

⁹⁴ A Proclamation to Pronounce the Coming into Effect of the Constitution of the Sidama National Regional State, Proclamation No. 1/2020

⁹⁵ The FDRE Constitution Articles 51/2, 52.2.c and 55/10

As was mentioned earlier, mining activities have significant impacts on the environment. As a result, there is a need for fiscal policies that encourage corporations to engage in practices that are sustainable. Environmental taxes and rehabilitation funds, among other things, are important tools for preventing and mitigating the environmental impacts of mining operations.⁹⁶ Scholars argue that environmental taxes and rehabilitation funds should be levied by the federal government to address environmental concerns. This is because the federal government has the capacity and international commitment to address environmental issues. These subnational governments are better equipped to manage such funds because they are more familiar with the affected areas and understand the needs of the local community.⁹⁷ However, the FDRE constitution fails to explicitly assign the authority to levy and collect environmental taxes and rehabilitation funds. On the other hand, the federal Mining Proclamation requires mining companies to set aside environmental funds for the purpose of rehabilitation.⁹⁸ The federal government has been collecting revenues from mining companies that are labeled as "environmental rehabilitation funds." One has to consider the constitutional basis of the federal Mining Proclamation for introducing "environmental rehabilitation funds." It is obvious that the FDRE constitution failed to clearly assign the issue. However, one can regard it as an incidental power of the federal government's regulatory authority and overall environment in the country.

7.3.4. THE DYNAMICS OF FEDERAL AND STATE REVENUE-RAISING FROM MINERAL RESOURCES

The division of revenue powers has the potential to create both vertical and horizontal tax competition, resulting in inefficiencies and externalities.⁹⁹ As a result, it suggests that tax harmonization be implemented at both the vertical and horizontal levels in order to reduce the risks involved.¹⁰⁰ The FDRE constitution gives separate tax authority to the federal and regional governments, as well as some shared authority.¹⁰¹ It allows each level of government to levy taxes

⁹⁶ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3; Bird, R.M. at supra note 3

⁹⁷ Ibid

⁹⁸ The Federal Mining proclamation 678/2010

⁹⁹ Baoyun Qiao et al., supra note 12; McLure, Charles E., supra note 3; Bird, R.M. at supra note 3. Vertical tax competition occurs when both the federal and state governments independently tax the same base, whereas horizontal competition occurs when states governments levy taxes without regard for the reactions of other entities at the same level. Such competition can lead to inefficiencies in the system.

¹⁰⁰ Ibid

¹⁰¹ The FDRE Constitution Articles. 96, 97, and 98

and collect duties within their respective jurisdictions. It is possible that the division of revenue powers will result in both vertical and horizontal tax competition.

However, vertical tax competition appears to play a minor role in Ethiopia's federal system, owing to the Constitution designating specific tax sources, the amendment of concurrent taxation power to shared revenue, significant fiscal transfers from the federal government to the states, and federal financial administration proclamations that establish a structure for unified and standardized tax policies and operations.¹⁰² To begin, the Constitution designates specific tax sources rather than broad tax bases, reducing overlap between federal and regional tax jurisdictions. The level of specificity reduces competition for the same taxpayers or economic activities. Second, the FDRE constitution was amended to shift concurrent taxation power to shared revenue, reducing uncertainty. Third, significant fiscal transfers from the federal government to the states in the form of grants and subsidies reduce the states' incentive to aggressively raise their own tax revenues. Furthermore, the federal financial administration proclamation contributes to the coordination and standardization of taxation practices within Ethiopia's federal system.¹⁰³ It establishes a structure for unified and standardized tax policies and operations, reducing the uncertainties linked to completely autonomous tax systems at both state and federal levels. Moreover, empirical evidence shows that there is limited vertical tax competition in reality.

On the other hand, the issue of horizontal tax competition is slightly different. The FDRE constitution grants regional states exclusive revenue powers.¹⁰⁴ Accordingly, the regional states are empowered to determine their tax bases, set tax rates, and administer taxes within their jurisdiction. This decentralization of power creates a potential for horizontal tax competition among the states.¹⁰⁵ However, in practice, the scope for such regional tax competition remains limited. Regional states have chosen not to compete on a tax level, especially in the case of mining. Rather, regional states tend to mimic federal tax policies, further reducing the differentiation of effective tax rates.¹⁰⁶ Due to that, tax bases, rates, deductions, and exemptions are largely standardized across the states.¹⁰⁷ The major exception in this regard is land lease rates, where

¹⁰² Ibid

¹⁰³ FDRE Financial Administration Proclamation, Proclamation No. 648/2009, Article 64

¹⁰⁴ FDRE constitution article 97

¹⁰⁵ Baoyun Qiao, et al, *supra* note 3; McLure, Charles E., *supra* note 3

¹⁰⁶ Ibid

¹⁰⁷ Ghebrehiwet Tesfai Baraki, "The practice of fiscal federalism in Ethiopia: A critical assessment 1991–2012: An institutional approach." PhD diss., 2015.

regional states have introduced varying fees.¹⁰⁸ This lack of tax competition, particularly in mining, is caused by the dominance of a single party in both tiers of government, as well as limited subnational capacity and willingness to differ.¹⁰⁹ For the past three decades, the EPRDF, now known as the Prosperity Party, has dominated both federal and regional power structures. This party has long advocated for political centralization, and there is little disagreement about it. Lower-level party members have no reservations about accepting higher-level party decisions. To add insult to injury, regional governments frequently face capacity constraints, such as a lack of skilled personnel and financial resources, which limit their ability to develop and implement their own unique tax systems. Even within states that have a relatively high capacity, regional governments demonstrate a limited political willingness to pursue the implementation of autonomous tax systems. As a result, the danger of horizontal tax competition has been mitigated due to functional considerations.¹¹⁰

7.4. SHARED REVENUE SOURCES FROM MINING IN ETHIOPIA

The FDRE constitution, as amended, and the decisions of the two Federal Houses has introduced Shared revenue sources as one of the mechanisms used to distribute revenues generated from mineral resource extraction. It provided that personal income tax, excise duties, and value-added tax (VAT) from enterprises co-owned by the federal and regional governments, and dividends allocated to shareholders, income tax, and royalties generated from large-scale mining operations are considered shared revenues. Furthermore, as previously stated, the decisions reached by the two houses of the Federal Houses has made excise and sales tax (VAT) on private enterprises a shared revenue source. Thus, the Ethiopian federal system has provided for a long list of shared revenue sources that are relevant to the mining sector where the federal government is responsible for levying and collecting to be shared with the regional states.

¹⁰⁸ Ibid

¹⁰⁹ p 3

¹¹⁰ It is worth noting that, as regional fiscal capabilities improve, horizontal tax competition may become more viable. It is possible that state governments will take steps to reduce each other's tax revenue. To avoid such constraints, it is critical to create a legal and institutional framework that maintains a harmonious balance of autonomy and coordination within the federal system. This can be accomplished by establishing systems for intergovernmental collaboration and coordination in the development of tax policies. Frequent consultations, collaborative decision-making procedures, and harmonization of tax bases, deductions, and rates are all viable options.

As previously stated, the literature on fiscal federalism suggests that the optimal option to assign value-added tax (VAT) is to the center.¹¹¹ On the other hand, the FDRE constitution, as amended and decided by the two chambers, offers an unusual approach to assigning sales tax (VAT), depending mostly on the enterprise's ownership structure. Accordingly, value-added tax (VAT) from enterprises co-owned by the federal and regional governments and a private enterprise is a shared competence.¹¹² However, the FDRE constitution and subsequent amendments make no mention of the specific share that the federal and state governments must receive from a mining enterprise in order for it to be considered a joint venture. This lack of specificity complicates the practical application of this tax framework. A good example in this regard is the federal government's 2% acquisition of state equity participation in Midroc Gold and its decision to share it with Oromia region. The question of whether such an inquiry automatically qualifies it as a joint venture remains unanswered. Hence, the Ethiopian system needs to develop a mechanism informed by the literature of fiscal federalism and the experience of federal systems.

The assignment of excise tax as noted above, is not straightforward.¹¹³ The FDRE constitution, as amended, and the two Houses of the federal government, as previously stated, establish their ownership approach for assigning excise tax, mainly based on the ownership of enterprises. It provided that excise taxes levied on enterprises jointly owned by the federal and regional governments and private mining enterprises are considered shared revenue.¹¹⁴ It should be noted here that it does not provide rules that regulate the nature of the ownership structure; hence, the discussion held above on this point is relevant here.

It is advisable to decentralize personal income taxes to subnational governments, which are in a better position to administer them.¹¹⁵ However, the FDRE constitution, as amended, assigns personal income taxes based on the nature of the employer. Accordingly, it assigns the revenue from personal income tax, from enterprises co-owned by the federal and regional governments as

¹¹¹ Swistak, Artur, and Nate Vernon. "Value Added Tax in the Extractive Industries." IMF (2023).; Brosio, G. Oil revenue and fiscal federalism In J. M. Davis, R. Ossowski, and A. Fedelino (Eds.), *Fiscal Policy Formulation and Implementation in Oil-Producing Countries* (2003), 243: 273

¹¹² FDRE Constitution, Art. 98.

¹¹³ Boadway, R., and Shah, A. *Fiscal federalism: principles and practice of multiorder governance*, Cambridge University Press (2009); Senbeta et al., *supra* note 13; Senbeta et al., *supra* note 13.

¹¹⁴ FDRE Constitution, Art. 98.

¹¹⁵ Baoyun Qiao, et al *supra* note 3; McLure, Charles E., *supra* note 3

a shared revenue.¹¹⁶ Such an arrangement failed to aligns with Fiscal federalism principles.¹¹⁷ It is for this reason that, as noted below, the revised revenue sharing formula has assigned such revenue to subnational governments. But still, the above-mentioned issues and discussion in the regulation of the nature of the ownership structure held potential relevance in the future, as the revised sharing formula could potentially be amended.

The literature on fiscal federalism acknowledges the difficulties in the assignment of dividends due to the complicated nature of the revenue. Accordingly, Federations have adopted a variety of approaches to this matter, which are based on the particular circumstances, institutional arrangements, and policy objectives of their respective nations.¹¹⁸ The FDRE constitution, as amended, specifies that dividends to shareholders, including those from mining companies, constitute revenue shared by the federal and regional governments.¹¹⁹ The Constitution appears to acknowledge the numerous difficulties that are associated with the taxation of dividends. It appears that it has made a compromise that acknowledges both the alignment of policies and the equitable distribution of revenue. This provision seeks to strike a balance between nationwide policy harmonization under federal administration and the recognition of an equitable share of revenue from businesses, including those in the mining industry. The goal of this approach is to ensure that regional interests are considered by sharing dividend tax revenue, while federal oversight encourages uniform implementation across the country.

The global mining industry relies heavily on various fiscal instruments, with income taxes and royalties being among the most widely used. These instruments are critical to capturing resource rents and compensating governments for the depletion of mineral assets.¹²⁰ The literature on fiscal federalism provides clear guidance on the allocation of these fiscal instruments between federal and subnational governments. It argues that subnational governments should have primary authority over royalty administration and revenue allocation.¹²¹ This is because royalties are closely tied to the location of resource extraction, and subnational governments are best positioned

¹¹⁶ FDRE Constitution Articles 97

¹¹⁷ Oromia Regional Government Income Tax Proclamation No. 203/2019;

¹¹⁸ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3

¹¹⁹ FDRE Constitution, Article 98

¹²⁰ James Otto M., at supra note 77

¹²¹ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3. The existing literatures on natural resources acknowledged the importance of royalties in compensating resource-rich regional governments for the depletion of their mineral endowments and addressing the spillover effects of the extractive sector.

to address the localized impacts of mining activities. On the other hand, the literature on fiscal federalism suggests that the distribution of income taxes from mining companies ought to be under the control of the federal governments.¹²² This ensures efficiency, consistency, and uniformity in tax administration across the country.

The FDRE constitution, as amended, designates income taxes and royalties from large-scale mining as shared revenues between the federal and subnational governments.¹²³ The assignment of income taxes is consistent with the recommendations made by the literature on fiscal federalism because it is essential for efficiency, ensuring consistency and uniformity across the country. On the other hand, the designation of royalties as shared revenue contradicts the recommendations which advocates for the predominate role of subnational government. Granting subnational governments greater control over royalties would enable them to more effectively collect revenues and address the negative spillover effects of mining activities, such as environmental degradation and social disruption. It would also allow them to allocate these funds in accordance with local development priorities, fostering greater accountability and responsiveness to the needs of mining-affected communities. By contrast, the current shared-revenue model dilutes the ability of subnational governments to fully leverage royalties for local development and compensation purposes.

The allocation of royalties and income tax from mining operations is riddled with ambiguities and challenges. The FDRE constitution, as amended, allocates income tax and royalty over mining based on the scale of mining operations and the classification of the resource as a mineral. However, the Constitution does not provide clear definitions of terms like "mining" and "large-scale mining operations."¹²⁴ Furthermore, there is no existing constitutional case law that can serve as a guide for developing a solution to this problem.

The First criteria for the division of allocation of royalties and income tax from mining is characterization of natural resource as a mineral. Since the transitional period, the federal mining proclamation is used determines what constitutes mining as a basis for calculating royalty and

¹²² Ibid It has been acknowledged that the corporate income tax plays a significant role in propelling national growth, efficiency, and equity.

¹²³ The FDRE Constitution, Article 98/3

¹²⁴ Ibid Articles 97(8) and 98(3)

income tax. The mining law defined mining based on its corresponding definition of mineral resources. On the other hand, it provided a controversial definition of mineral resources that failed to consider certain resources as mines and changed constantly. It provides a definition of mineral that overlooks several natural resources.¹²⁵ Moreover, it also excludes some natural resources from its definition, such as mineral water and geothermal energy.¹²⁶ Hence, the change in the definition of a mineral resource or the failure to consider a mineral resource will disqualify an economic activity based on a natural resource from mining operations, which automatically excludes it from the coverage of royalty imposed under the mining proclamation. Moreover, a unilateral change in the definition of mining in the federal mining proclamation also affects the income tax proclamation, which uses the definition of mining and large-scale operations determined by the federal mining proclamation. Thus, the unilateral approach has resulted in significant revenue losses for regional states.

The second criteria for the division of the allocation of royalties and income tax from mining is the scale of the mining operation. Initially, the scale of mining operations was designated by the Ministry of Mines.¹²⁷ Moreover, since 2010, the federal government has unilaterally, through the mining proclamation, determined the level of mining operations based on factors like capital investment and production volumes.¹²⁸ The federal government, through its power to unilaterally define "mining" and "large-scale mining operations," determines the scope of taxation. Moreover, the definitions of "mining" and "large-scale mining operations" that were established by the federal government are relied on by the regional states, which are the only ones that have the authority to collect royalties and income taxes from small-scale mining operations. Regional governments are frequently chosen to adopt mirror legislation that provides similar definitions of mineral resources and scale of mining operations to those used by the federal government. It failed to develop a unique legal framework that aligned with their specific regional contexts.¹²⁹

¹²⁵ The federal mining proclamation, proclamation number 678/2010.

¹²⁶ The transitional government of Ethiopia mining proclamation, Proclamation number 52/1993; the federal mining proclamation, Proclamation number 678/2010; The federal mining proclamation amendment, proclamation number 816/2013. Mineral water and geothermal energy were initially classified as mineral resources subject to regulations and taxation. However, the federal government later excluded them from the definition.

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Oromia Regional Government Income Tax Proclamation No. 223/2020

7.4.1. EXERCISE OF SHARED REVENUE RAISING POWER OVER MINERAL RESOURCES IN ETHIOPIA'S FEDERAL SYSTEM

Legislative power over shared revenue sources should not be equated with exclusive revenue raising power. On the contrary, it must be exercised in a manner that respects its distinct traits while also taking into account the concerns and interests of both federal and regional governments. It is expected that there will be significant consultation and consideration of either tier of government perspectives and interests in its exercise.¹³⁰ The establishment of an effective consultation process and mechanisms for incorporating the interest of all parties is critical for developing balanced and equitable laws, reducing revenue losses, and encouraging cooperative governance between federal and regional governments.

The FDRE constitution, as amended, and decisions made by the two federal houses have established a list of shared revenue sources that include a variety of industries, including mining. The federal government is responsible for levying and collecting taxes on these shares, while the regional states are entitled to a share of the revenue. In contrast, the constitution and subsequent legal frameworks did not establish clear mechanisms for meaningful regional participation in the development of tax laws. It does not go into detail about how regional governments develop and enact tax legislation for these shared revenue sources. As a result, the process of developing and enacting tax legislation relating to shared revenue sources occurs in an environment that lacks clearly defined mechanisms for meaningful regional participation and engagement.

Due to a lack of clearly defined mechanisms for regional participation, the federal government has dominated the legislative process. As a result, regional states' ability to tailor their tax policies to the unique circumstances and priorities of their respective regions is limited.¹³¹ The absence of clearly defined mechanisms for regional involvement in the legislative process limits regional authorities' ability to provide valuable input and shape mining tax policies based on local economic conditions, needs, priorities, and ground realities. This is notwithstanding some informal engagement with regional authorities during major tax policy a reform involving shared revenue.¹³²

¹³⁰ Baoyun Qiao, et al supra note 3; McLure, Charles E., supra note 3

¹³¹ IP 5; IP 6 and IP10

¹³² Ibid

The lack of consultation and meaningful participation of regional entities in decision-making processes has put a strain on the relationship between the federal and regional governments. This frustration is exemplified by the regional officials, who have criticized the federal government's consistent failure to consult regional authorities during significant reforms to shared revenue sources.¹³³ Regional officials argue that this lack of consultation undermines the interests of the region. For instance, the constant changes in the definition of mineral resources, particularly mineral water and geothermal energy, have resulted in significant fluctuations in the revenue shares allocated to regional states.¹³⁴

It is clear from the above discussion that the shared revenue source from the mining sector is a critical policy area with substantial consequences for revenue creation, resource management, and economic development. It must be exercised in a manner that respects its unique characteristics and provide significant consultation and careful consideration of the perspectives and interests of both tiers of government. However, the federal government's sole control over mining tax policy undermines the basic tents of shared revenue source. To address this, the federal government should set up specific mechanisms and procedures, particularly in the mining industry, to encourage greater regional participation in the process of developing tax regulations for shared revenue sources. Such developments are essential for ensuring that the viewpoints of regional groups perspectives are considered during the decision-making process.

7.4.2. MECHANISM FOR SHARING REVENUE FROM MINERAL RESOURCE IN ETHIOPIAS' FEDERAL SYSTEM

Once shared revenue is established, it is crucial to establish a revenue-sharing mechanism that guarantees that it is distributed efficiently and fairly.¹³⁵ This is especially true for revenue sharing in the mining sector. The presence of effective and equitable revenue-sharing systems is crucial for managing competing claims over the economic rent.¹³⁶ The FDRE constitution, as amended, and the decisions of the two federal houses, as noted above, have established shared revenue

¹³³ Ibid

¹³⁴ Ibid

¹³⁵ Boadway, R., & Shah, A. at supra note 113; Ahmad, E., & Brosio, G., supra note 46; Shah, A. Fiscal decentralization in developing and transition economies: progress, problems, and the promise World Bank Policy Research Working Paper 3282 (2004),

¹³⁶ Ibid

The FDRE constitution and its amendments provide for a long list of shared revenues that are relevant to the mining sector.¹⁴¹ It also establishes the House of Federation (HoF) to determine the proportions of the federal and regional governments.¹⁴² However, the constitution made no explicit provision for allocating percentages or establishing revenue distribution criteria both vertically and horizontally. The existence of this gap allows for the determination of revenue distributions to be made in a manner that is both ad hoc and opaque.

Over the years, the House of Federation (HoF) has developed two revenue-sharing formulas. According to the first formula, all revenues derived from shared revenue sources are to be divided between the center and regional states.¹⁴³ The share of the regional state is to be determined based on a derivation basis, also known as the origin principle. It is essential to recognize that the House of Federation (HoF) encountered difficulties in creating and executing a revenue-sharing formula.¹⁴⁴ Delays have occurred in the process, with the federal government taking over six years to implement the initial revenue-sharing formula. Furthermore, there has been a lack of regular evaluation and revisions to guarantee that these formulas remain relevant and responsive to changing economic conditions and developmental demands. Indeed, the introduction of the revised revenue-sharing formula took nearly two decades to develop.¹⁴⁵

The revised revenue sharing formula bring a number of significant changes. To begin, it allocates all of the shared revenue from the employment income tax to the state, as opposed to the previous 50:50 split.¹⁴⁶ This modification recognizes regional states' active involvement in service delivery, administrative convenience, and specialized revenue needs.¹⁴⁷ Second, it moved the federal government's portion of indirect tax revenue, including as value-added tax and excise, from 70:30

¹⁴¹ FDRE Constitution Art 98

¹⁴² Ibid art 62(7)

¹⁴³ Ibid; See the minutes of the decision of the HoF on its 2nd ordinary meeting on March 13, 2003, HoF Archive According to the formula, direct taxes from companies were divided 50:50 between the center and the states. Indirect taxes were divided 70:30 between the center and the states. In the case of income taxes from large-scale mining operations, the revenue-sharing formula calls for a 50:50 split between the center and states. Royalties are divided 60:40 between the center and the states.

¹⁴⁴ Ibid Senbeta et al at supra note 4 The House of Federation approved the first revenue sharing formula in 1997, and in March 2003, it was decided to put it into effect in the fiscal year 2003–04.

¹⁴⁵ የኢ.ፌ.ዴ.ሪ. ሪፖርት ላይ የፌዴራል ስነ ምግባር ቤት በ5ኛ የፓርላማ ዘመን፤ 4ኛ ዓመት የሰራ ጊዜ፤ ሰኔ 1 ቀን 2011 ዓ.ም ባካሄደው ሁለተኛ መደበኛ ስብሰባ የጋራ ገቢዎች አስተዳደር እና የማከፋፈያ ቀመር ላይ ያስተላለፈው ውሳኔ.

¹⁴⁶ Ibid

¹⁴⁷ HoF Study document about the revised revenue share formula June 2019

to a more balanced distribution.¹⁴⁸ Third, it revised the share of the revenue from royalty payments from forty to sixty in favor of the regional state where the mine is located. The regional state now receives fifty percent of the royalties, with the local government within the same area receiving ten percent.¹⁴⁹ The remaining fifty percent is distributed equally among the other regional states and the federal government. This distribution recognizes the impact that mining activities have on the communities that are located nearby and seeks to provide assistance for the development of areas that have been impacted by mining. Furthermore, it responds to the local community's requests for a portion of the generated revenues, ensuring a fair and balanced distribution of the benefits.¹⁵⁰ Conversely, it upheld the division of dividends and income taxes from large-scale mining operations at 50:50, guaranteeing a steady method for revenue sharing in these areas.

TABLE 2: REVENUE SHARING FORMULA

TAX SOURCES	TYPES OF TAX	SHARE OF FEDERAL GOVERNMENT	SHARE OF REGIONAL GOVERNMENT	SHARE OF LOCAL GOVERNMENT
1. Enterprises jointly owned by the federal and regional governments.	a. Personal income from employees		100%	
	b. Sales tax (VAT), and excise	50%	50	
2. Private-share companies	a. Sales tax (VAT), and excise taxes	50%	50%	
	b. Taxes from dividends due to shareholders	50%	50%	
3. Large-scale mining	a. Profit tax on large-scale mining operations	50%	50%	
	b. Royalties on large-scale mining operations	40%	50%	10%

Source: House of Federation¹⁵¹

The introduction of the Division of Joint Revenues Proclamation represents an important advancement in guaranteeing that the revenue-sharing system operates fairly and efficiently.¹⁵² It establishes a detailed legal framework to govern the revenue-sharing process, from the

¹⁴⁸ የኢ.ፌ.ዴ.ሪ. ሪፖብሊክ ስነ ምግባር ስራ ስር ስር በ5ኛ የፓርላማ ዘመን፤ 4ኛ ዓመት የሰራ ጊዜ፤ ሰነድ 1 ቀን 2011 ዓ.ም ባካሄደው ሁለተኛ መደበኛ ስብሰባ የጋራ ገቢዎች አስተዳደር እና የማከፋፈያ ቀመር ላይ ያስተላለፈው ውሳኔ.

¹⁴⁹ Ibid

¹⁵⁰ Ibid

¹⁵¹ Ibid

¹⁵² System for the determination of the Division of the Federal Subsidy and Joint Revenues Proclamation No. 1250/2021 This proclamation seeks to close a gap in previous practices by establishing a transparent, accountable, responsive, and equitable revenue-sharing process that addresses the specific needs and capacities of the federal system and regional states. To that end, it establishes a legal and institutional framework to govern the revenue-sharing arrangement.

development of the revenue-sharing formula to the administration of revenue-sharing mechanisms. Furthermore, it recognizes the importance of assessing and adapting the revenue-sharing system on a regular basis to ensure that all stakeholders' interests are adequately considered and balanced throughout the process.¹⁵³ It is essential to recognize that the House of Federation (HoF) has not yet established a formula according to the current proclamation. Consequently, predicting the impact of the Division of Joint Revenues Proclamation on revenue sharing regulation is challenging at this moment.¹⁵⁴

The revenue-sharing arrangement in the Ethiopian federal system, as noted above, is currently administered based on the second formula. This formula, as noted above, aims to distribute revenue from shared sources along the vertical line between the central government, regional states, and occasionally local communities, along with horizontal division.¹⁵⁵ The revised formula, as noted above, is an important step toward developing an equitable revenue-sharing system. However, there are important concerns that have been raised regarding the current sharing formula, including the continuous increase in revenue share of the regional states, the constitutional basis for allocating 10% of the revenue to local governments, the mechanism to transfer shared revenue to local communities and allocation of a significant portion of revenue to non-producing states.

The second revenue-sharing formula has evidently improved the allocation of shared revenue sources to the regional states. This development is largely positive, as the federal system is known for its centralization of revenue and decentralization of expenditures. However, it is critical to carefully evaluate the ramifications of such development for the mining sector, which is a unique revenue source with specific characteristics. It is important to bear in mind that allocating an increasing share of revenue from large-scale mining operations to regional states carries inherent risks. Such risks were noted by the House of Federation (HoF) in the development of the formula. The HoF has acknowledged this risk and has provided that once a significant revenue source is expected to emerge, the formula will be revised accordingly. Despite the fact that this decision made by the House of Federation is pragmatic, it requires careful consideration of the difficulties

¹⁵³ Ibid, article 14 ,18

¹⁵⁴ As the implementation progresses, it will be crucial to closely monitor the outcomes and adjustments made to ensure that the revenue-sharing process aligns with the objectives of the revenue sharing.

¹⁵⁵ የኢ.ፌ.ዴ.ሪ. ሪፖርት ላይ የፌዴራል ስምዖን ቤት በ5ኛ የፓርላማ ዘመን፣ 4ኛ ዓመት የሰራ ጊዜ፣ ሰኔ 1 ቀን 2011 ዓ.ም ባካሄደው ሁለተኛ መደበኛ ስብሰባ የጋራ ገቢዎች አስተዳደር እና የማከፋፈያ ቀመር ላይ ያስተላለፈው ውሳኔ.

that are associated with distributing a larger portion of revenue to member states. It is imperative that the HoF need to conduct ongoing assessments of the evolving mining industry. When the circumstances that led to its decision change, it should be ready to revamp the revenue-sharing system in a way that takes into account the specific challenges that the mining industry faces.

In the revised formula, an innovative approach is taken, which is to distribute ten percent of the revenue collected from royalties collected from large-scale mining to communities that are located nearby. Since the formula was first developed, however, federal and state officials have been at odds with one another regarding the constitutional basis for the allocation of ten percent of royalties from large-scale mining to local communities.¹⁵⁶ From the start with the formulation of the formula, the officials of the federal government argue that the allocation of a portion of royalty revenue to local governments in mining areas is a positive step toward recognizing the impact that mining operations have on the communities that are located nearby, as well as addressing their traditional ownership claim and their desire for a fair share of the revenue.¹⁵⁷ On the other hand, regional state officials argue that the House of Federation does not have a constitutional mandate to distribute revenue to local communities or communities in the region. It argues that the responsibility of regulating local governments is the responsibility of regional states.¹⁵⁸ The preceding discussion makes it abundantly clear that the incorporation of local governments into revenue-sharing measures constitutes a step forward in terms of mitigating the effects of mining and satisfying the requirements of the local community. However, it is of the utmost importance to acknowledge that such acts do not have a clear constitutional basis. The federal government and the state governments are the only parties to the revenue-sharing arrangement, as is made abundantly clear by the FDRE constitution.¹⁵⁹ As a result, the HoF's decision to distribute 10% of the revenue from large-scale mining royalties to the communities at large violates the constitution.

The other important issue to worry about when sharing revenue with local communities is uncertainty regarding the mechanism for transferring shared revenue to local communities. The formula failed to provide an explicit guideline that governs how the revenue from large-scale

¹⁵⁶ HoF Study document about the revised revenue share formula for June 2019

¹⁵⁷ IP 3

¹⁵⁸ IP 5; IP 6

¹⁵⁹ FDRE Constitution, Article 62, if the federal government decides to divide revenue with local governments, it should follow the procedures outlined in the constitution, such as special grants.

mining operations should be distributed to the local governments, leading to confusion and uncertainty. In the absence of such guidelines, the responsibility of transferring a portion of mining revenues to the communities that are located in the surrounding area has been placed on the states.¹⁶⁰ The regional states administer the revenue sharing following an ad-hoc approach that lacks transparency. It failed to clearly and separately assign the share of revenue meant for local governments. Because of this, it is difficult to guarantee that the affected communities receive their share of the revenue produced.¹⁶¹ The lack of a legal and institutional framework, combined with limitations in program implementation, has resulted in a perception of disproportionate benefit sharing at the local level.¹⁶²

The updated revenue sharing formula, as mentioned earlier, incorporates horizontal revenue sharing through a blend of formula-based equalization and derivation methods. The main objective is to foster fair development opportunities and tackle horizontal disparities between states. Nonetheless, there have been concerns regarding the distribution of a substantial share of revenue to non-producing states. The formula using the general grant formula based on the equalization principle assigns a significant share of the revenue to non-producing states.¹⁶³ As a result of the criteria included in the general grant formulas, states that produce nothing have received the vast majority of revenue.¹⁶⁴ This resulted in a significant increase in the proportion of the total allocated to regional states that produced nothing. This has also had a significant impact on the revenue share of producing regions, which are frequently those in greatest need of resources for development and infrastructure. The unbalanced distribution of revenue, in which non-producing regions receive a larger share than producing regions, has raised significant concerns about the formula's fairness. The current situation has the potential to exacerbate regional tensions and fuel conflict over resource distribution.

Ethiopia's federal system recognizes a diverse set of shared revenue sources. Furthermore, it stated that the HoF is responsible for developing a formula for distributing revenue from shared sources. However, for a long time, the federal system lacked a comprehensive legal and institutional

¹⁶⁰ IP 5; IP 6; IP 7 and IP 11

¹⁶¹ Ibid

¹⁶² Ibid

¹⁶³ IP 3 የኢ.ፌ.ዴ.ሪ. ሪፖርት ላይ የፌዴሬሽን ምክር ቤት በ5ኛ የፓርላማ ዘመን፤ 4ኛ ዓመት የሰራ ጊዜ፤ ሰኔ 1 ቀን 2011 ዓ.ም ባካሄደው ሁለተኛ መደበኛ ስብሰባ የጋራ ገቢዎች አስተዳደር እና የማከፋፈያ ቀመር ላይ ያስተላለፈው ውሳኔ.

¹⁶⁴ Mom, the Aggregate share of concurrent revenue from Menial Operation (2022)

framework for revenue sharing, process which caused significant problems. There was no specific legislation governing the development of the revenue sharing formula, amendments, disclosure of revenue information, monitoring, or oversight mechanisms. The federal system, as noted above, has historically relied on the two revenue-sharing formulas set forth by the House of Federation (HoF) to oversee the revenue sharing process. However, these formulas have significant drawbacks, including a lack of transparency on formula development processes, amendment procedures, methods for regional input in decision-making, revenue disclosure requirements, and oversight structures.¹⁶⁵ The proclamation for the Division of the Federal Subsidy and Joint Revenues is a substantial development.¹⁶⁶ It establishes a rules-based procedure that governs the revenue-sharing process by providing detailed rules that govern the important stage in the revenue sharing process, including the development and modification of the formula, disclosing collected shared revenue, and establishing oversight mechanisms.¹⁶⁷

The Ethiopian federal system had struggled to create an independent and organized institutional framework for managing shared revenue streams, along with effectively monitoring and supervising the revenue-sharing process. Under the revenue sharing formula, revenue is collected and transferred by the Ministries of Revenue (MoR) and Mines, which lacked the specialized mandate and institutional structure required to effectively manage and oversee the revenue sharing process.¹⁶⁸ Moreover, it did not establish an independent institution to monitor and verify the performance of federal agencies in allocating shared revenue sources accurately and equitably. The proclamation attempted to establish an institutional framework by reorganizing and introducing some of the current agencies involved in revenue-sharing agreements. These agencies include the House of Federation (HoF) Secretariat, the House of Federation (HoF), and organizations that collect and manage revenue sharing. These institutions were designated as the primary institutions in charge of administering the revenue sharing process.¹⁶⁹ It aimed to address

¹⁶⁵ HoF Study document about the revised revenue share formula for June 2019

¹⁶⁶ Ibid.

¹⁶⁷ Ibid

¹⁶⁸ IP 5; IP 6; IP 13 Crucially, these agencies made decisions without consulting regional states. It also lacks of effective communication channels that hampered the exchange of revenue collection information, and timely and accurate transfer of revenue, lowering the revenue-sharing system's efficiency, accountability, and fairness.

¹⁶⁹ Ibid, Article 19

previous shortcomings by establishing a dedicated and specialized revenue-sharing structure that encouraged cooperation and coordination among key stakeholders.

The Proclamation for Division of the Federal Subsidy and Joint Revenues attempted to establish an institutional framework for the revenue-sharing process. Nonetheless, the proclamation has several significant limitations. First, even though it assigned the task of developing a formula for the revenue-sharing process and proposed necessary amendments to the HoF Secretariat and also provided detailed rules to develop the revenue-sharing formula, it failed to ensure meaningful participation of regional stakeholders in the formula development process.¹⁷⁰ This exclusion limits the effectiveness and acceptance of the revenue-sharing framework. Second, it failed to establish a single, independent agency that would be responsible for collecting and transferring revenue from shared sources. The revenue-sharing arrangement remains heavily reliant on previous institutional arrangements and fragmented institutions.¹⁷¹ This fragmentation complicates efforts to gain a clear and accurate understanding of the mining industry's finances. Third, while the proclamation requires federal agencies involved in revenue sharing to provide detailed information about shared revenue to the HoF, it does not ensure that these reports are delivered to regional states in a way that promotes transparency and accountability.¹⁷² Fourth, the proclamation reaffirms the preeminent role that the House of Federation (HoF) plays in the approval of the formula and the monitoring of the revenue-sharing mechanism and also recognizes the important role of the House of Federation Secretariate in the development, approval, and amendment of the revenue-sharing formula.¹⁷³ Nonetheless, it has not succeeded in establishing an independent body to supervise the transfer of shared revenue. The limitations significantly affect the effectiveness of the revenue-sharing framework.

¹⁷⁰ Ibid

¹⁷¹ The Ministry of Mines (MoM) and the Ministry of Revenue (MoR) continue to bear primary responsibility for managing revenue sources from shared revenue sources. The MoM collects royalties from mining operations, which are then distributed to the federal and regional governments, as well as local communities, using predetermined formulas. Simultaneously, the MoR collects income taxes and VAT from the mining industry for federal use, with a portion shared by the federal and state governments.

¹⁷² Ibid

¹⁷³ Ibid

7.5. THE ADMINISTRATION OF SHARED REVENUE GENERATED FROM MINERAL RESOURCES IN ETHIOPIA'S FEDERAL SYSTEM

The literature on fiscal federalism highlights the importance of establishing transparent and accountable revenue-sharing arrangements.¹⁷⁴ Such systems are key for achieving several key objectives, including ensuring equitable distribution of benefits, promoting regional development, strengthening national unity, and preventing resource-related disputes. As previously indicated, the FDRE constitution, as amended, and the decisions of the two Federal Houses have introduced shared revenue sources as one of the mechanisms used to distribute revenues generated from mineral resource extraction. However, despite the constitutional foundation, the administration of shared revenue from mineral resource extraction faced numerous challenges.

The Ethiopian revenue-sharing arrangement has been operational for the last twenty years.¹⁷⁵ However, the Ethiopian federal system, as noted above, for long struggled with implementing a comprehensive legal framework that provides clearer guidelines and mechanisms for revenue sharing. As a result, for an extended period, revenue sharing took place in the absence of a coherent legal framework. In the absence of comprehensive legal framework, the House of Federation (HoF) relied on the revenue sharing formulas to divide the shares between regional governments and the federal government. This approach, while providing a short-term solution, lacked a robust independent legislative framework. Recently, the Ethiopian federal system has made significant progress in establishing a legal framework for the management of shared revenue sources.¹⁷⁶ It introduces the Proclamation to Provide a System for the Determination of the Division of Federal Subsidies and Joint Revenues. Such development signifies a constructive advancement in creating a more organized framework. It seeks to establish a more transparent foundation for revenue sharing and distribution methods. However, despite the progress, this proclamation, as noted above, still suffers from limitations, particularly in terms of specificity and comprehensiveness regarding mineral resource revenue sharing.

The revenue-sharing arrangement in the Ethiopian federal system has long depended on fragmented previous institutional arrangements. Two key institutions, the Ministry of Mines

¹⁷⁴ Andrew Bauer, et al at supra note 13

¹⁷⁵ Senbeta at supra note 13

¹⁷⁶ System for the determination of the Division of the Federal Subsidy and Joint Revenues Proclamation No. 1250/2021

(MoM) and the Ministry of Revenue (MoR), are at the core of the revenue sharing from the extraction of mineral resources, responsible for collecting and sharing the revenue.¹⁷⁷ Furthermore, the introduction of the Proclamation to Provide a System for the Determination of the Division of Federal Subsidies and Joint Revenues did not lead to a single and independent institution that administers the revenue sharing process.¹⁷⁸ Instead, it continues to rely significantly on the current fragmented institutional structure. Furthermore, the federal system failed to establish an oversight body to monitor the revenue-sharing process. The lack of oversight bodies raises a significant concern, as it undermines efforts to ensure transparency and accountability in resource revenue management.

The Ministry of Mines (MoM) is the primary institution responsible for administering revenue sharing from the extraction of mineral resources. Specifically, the MoM is in charge of collecting and administering royalties from large-scale mining activities, which account for a sizable portion of the revenue to be shared. The MoM collects royalties from mining operations and distributes them to the federal and regional governments, as well as local communities, according to predetermined formulas.¹⁷⁹ However, for an extended period, the Ministry of Mines (MoM) has administered royalties without sufficient engagement or consultation with the regional government and independent oversight institution.¹⁸⁰ For an extended period, the administration of shared revenue is carried out by the MoM without sufficient engagement or consultation with regional governments or independent institutions tasked with verifying the accuracy of revenue distribution. This unilateral manner, as noted above, continued despite the introduction of proclamation, which failed to address the issue in a way that promotes a transparency and accountability.¹⁸¹ Accordingly, the Ministry of Mines (MoM) has been managing royalties from large scale mining operation without the involvement of the regional states and independent entities responsible for verifying the accuracy of the distributed revenue.¹⁸² This flaw in the administrative framework has far-reaching consequences for the precision of the revenue-sharing

¹⁷⁷ IP 3, IP 13 and IP 14

¹⁷⁸ System for the determination of the Division of the Federal Subsidy and Joint Revenues Proclamation No. 1250/2021

¹⁷⁹ IP 3 and IP 14; MoM, report about the revenue collected from mining operation, 2024

¹⁸⁰ Ibid

¹⁸¹ Ibid System for the determination of the Division of the Federal Subsidy and Joint Revenues Proclamation No. 1250/2021

¹⁸² IP 14

process. It created a dangerous environment in which inconsistencies might grow without oversight. For instance, in the last five years, the lack of an independent oversight body is clearly reflected in the discrepancies between the allocations reported by federal agencies and the actual amounts received by regional states.¹⁸³ This circumstance erodes trust in the system and reinforces the idea of uneven or biased distributions. It fosters a sense of exclusion and unfairness, which can result in irritation and resentment. As these perceptions proliferate, tensions between federal and regional authorities may escalate, hindering collaboration and efficient governance.

The MOR is the second institution responsible for managing the revenue sharing derived from the extraction of mineral resources. The MoR is responsible for a broader range of shared revenue sources.¹⁸⁴ The MoR distributes the collected revenue, using predetermined formulas, between the federal and regional governments on a tax-by-tax basis. While the Ministry of Revenue (MoR) is responsible for administering a broad range of shared revenue sources, a critical examination reveals significant shortcomings and limitations, adequate involvement or consultation with the regional government and independent oversight body. The Ministry of Revenue (MoR) oversees a number of shared revenue streams derived from mineral resource extraction, independently, lacking adequate involvement or consultation with the regional government.¹⁸⁵ This unilateral approach presents several obstacles that undermine the efficacy of revenue-sharing process, including information asymmetry, reduced accountability, and strained Federal-Regional relations.¹⁸⁶ Furthermore, as noted earlier, the MoR managed the revenue sharing without an explicit oversight mechanism. The lack of a dedicated oversight mechanism that would ensure the precision and completeness of revenue distribution foster uncertainty in revenue distribution.¹⁸⁷ As a result, regional states encounter difficulties in determining if they are receiving an adequate share of the revenue designated for them.¹⁸⁸ This uncertainty could erode the trust of regional states in the revenue-sharing process. The result of the above limitation is observed in the MoR failure to incorporate income taxes from large-scale mining operations in its revenue-sharing

¹⁸³ IP 5 and IP 6

¹⁸⁴ IP 13 It includes personal income tax, excise duties, value-added tax (VAT) from enterprises co-owned by federal and regional governments, and various taxes on private enterprises, including dividends allocated to shareholders, income tax, excise and sales tax (VAT) on private enterprises, and capital gains dividend tax.

¹⁸⁵ IP 13

¹⁸⁶ IP5, IP 6, IP 9 and IP 11

¹⁸⁷ IP 13; *Ibid*

¹⁸⁸ *Ibid*

arrangement.¹⁸⁹ The MoR's failure to incorporate income tax from large-scale mining operations into the revenue-sharing process resulted in a loss of revenue that should have been transferred to regional states. An illustrative instance of this issue is evident in the case of Midroc Gold, which contributed more than 1 billion birrs in income tax in 2022 alone.¹⁹⁰ Despite making large contributions to federal coffers, none of the income tax revenue was distributed to the regional state where Midroc Gold operates. This disparity is not an isolated event. According to MoR data, despite constitutional provisions for revenue sharing, the federal government has not shared any income tax revenues from large-scale mining activities with regional states over the last three decades.¹⁹¹ The federal government's decision not to disperse this significant cash to regional states has put them at a distinct disadvantage, limiting their ability to fund local services and development efforts.

7.6. THE FISCAL REGIME FOR COLLECTING ECONOMIC BENEFITS FROM MINERAL RESOURCES IN ETHIOPIA'S FEDERAL SYSTEM.

The extraction of mineral resources generates significant economic rent, prompting the government to use its fiscal power, to capture a portion of these gains for the public good.¹⁹² As noted above, the academic literature extensively investigates the design of optimal resource tax regimes, effective tax rates, bases, and structures.¹⁹³ Governments, depending on their specific situations, employ a diverse range of tax regimes to collect the economic advantages derived from mineral resources.¹⁹⁴ In the case of Ethiopia, in line with the division of revenue-raising power,

¹⁸⁹ IP 13

¹⁹⁰ MoR, report on the revenue paid by large-scale mining operators from 2018 to 2023

¹⁹¹ Ibid

¹⁹² Shah, Anwar. "Non-renewable resource revenue funds: critical issues in design and management." In *Taxing Choices for Managing Natural Resources, the Environment, and Global Climate Change: Fiscal Systems Reform Perspectives*, Springer, 2023: 153-170; James M. Otto, *Mining Taxation in Developing Countries* UNCTAD, July 2000; Nazneen H. Barma & Kai Kaiser & Tuan Minh Le & Lorena Viñuela. "Rents to Riches? The Political Economy of Natural Resource-led Development," World Bank Publications, The World Bank, number 2381, June. 2012.

¹⁹³ Ibid Calder, Jack. "Resource tax administration: Functions, procedures and institutions." In *The Taxation of Petroleum and Minerals*, Routledge, 2010:356-393; Pietro Guj, Boubacar Bocoum, James Limerick, Murray Meaton, and Bryan Maybee *How to Improve Mining Tax Administration and Collection Frameworks A Sourcebook* April 2013; Calder, Jack. "Resource tax administration: the implications of alternative policy choices." In *The Taxation of Petroleum and Minerals*, Routledge, 2010:335-355.

¹⁹⁴ Ibid.; Otto, James, Craig Andrews, Fred Cawood, Michael Doggett, Pietro Guj, Frank Stermole, John Stermole, and John Tilton. "Mining royalties." A global study of their impact on investors, government, and civil society. Washington, DC, World Bank (2006). Robin Boadway and Michael Keen, *Theoretical Perspectives on Resource Tax Design*, in *The Taxation of Petroleum and Minerals Principles: Problems and Practice* Edited by Philip Daniel, Michael Keen, and Charles McPherson, Routledge Publishing, 2010: 29-90.

as noted above, the federal and regional governments utilize fiscal powers for collecting fiscal benefits from the mining sector.¹⁹⁵ Ethiopia has made significant efforts to align its mining fiscal framework with global best practices, while also customizing it to its unique circumstances.¹⁹⁶ It also attempted to identify suitable tax categories and establishing tax thresholds and bases specifically tailored to address the sector's unique challenges and opportunities.¹⁹⁷ It uses a wide range of taxation tools to collect economic rent from mineral development, including royalties, income taxes, customs duties, taxes and charges, VAT, capital gains, dividends, signature bonuses (depending on the contract), license fees, government equity participation, and land use fees.¹⁹⁸

The primary tool for extracting economic rent from mineral extraction is royalties.¹⁹⁹ In Ethiopia, the federal government and regional states (some of them) have made significant strides toward developing a royalty system for mineral resources.²⁰⁰ Under the Mining Proclamation, the federal government introduced a value-based assessment royalty payment, with rates ranging from 2% to 7%, depending on the type of resource.²⁰¹ This strategy is in line with international standards.²⁰² However, the current system faces several critical limitations, including methodological challenges, constitutional violations, and federal-regional government controversy. The federal Mining Proclamation has introduced a value-based assessment method for royalties. But the one-size-fits-all value-based assessment method proves challenging in the case of calculating and

¹⁹⁵ World Bank, Policy and Legislative Options Report Ethiopia Mining Sector Development, 2016; Ethiopia's mining sector strategic assessment final report, World Bank, 2013; World Bank Group and Ministry of Mines and Petroleum, Strategic Assessment of the Ethiopian Mineral Sector, "FINAL REPORT," 2018' Ethiopia's mining tax regime is considered relatively attractive by international standards. For instance, the World Bank's 2016 Policy and Legislative Options Report on Ethiopia's Mining Sector Development noted that the country's fiscal terms were generally competitive and in line with those of other African countries. Moreover, Ethiopia's 2018 Strategic Assessment of the Mineral Sector, conducted in collaboration with the World Bank Group, found that the country's overall tax burden on mining companies (including royalties, income tax, and other levies) ranged from 47% to 51% of profits, which is comparable to many other mining jurisdictions. This assessment suggests that Ethiopia has struck a reasonable balance between attracting investment and securing fair returns.

¹⁹⁶ Ibid

¹⁹⁷ Ibid

¹⁹⁸ See the federal Mining Operations Proclamation No. 678/2010, Mining Operations Council of Ministers Regulations number 234/2018, the federal income tax proclamation number 979/2016, Oromia regional state income tax proclamation number 202/2017, and Oromia mining proclamation number 227/2017. It is important to highlight that Ethiopia's federal system has predominantly not succeeded in establishing specialized tax legislation for mining operations, with the significant exceptions being corporate income tax and royalties. The absence of specialized legislation may result in difficulties regarding tax administration and compliance.

¹⁹⁹ Ibid

²⁰⁰ Ibid

²⁰¹ Mining Operations Proclamation No. 678/2010, articles 63 and 2

²⁰² World Bank at supra note 195

auditing royalties for bulk mineral resources. Empirical research suggests that volume-based assessment would be more administratively efficient and easier to audit, particularly for bulk minerals.²⁰³ Furthermore, the federal mining proclamation failed to provide a clear legal framework that regulated the transfer of pricing involved royalty payments. This gap is particularly problematic for minerals that need to be processed and may lack a clear market value and are often sold in non-arm's length transactions. For instance, cement factories face challenges in establishing the correct value for royalty calculations due to the complex nature of their transactions.²⁰⁴ In addition, the federal mining proclamation outlines the type of royalty assessment, the valuation point, and the methods used to estimate the value of minerals for artisanal and small-scale mining.²⁰⁵ The proclamation only leaves the regional states with the power to determine the royalty rate for artisanal and small-scale mining operations. Additionally, some regional states' mining operation proclamations seem to differ on the issue as it provides that the way of assessment. Moreover, it leaves the rate of royalty to be determined by delegated legislation.²⁰⁶ It is unconstitutional for the federal mining proclamation to attempt to regulate the issue, as it is the constitutional power of the regional states. It is also unconstitutional for regional states to delegate taxing power, as taxation is a constitutional power.

The income tax system is the second-most important tool for extracting economic rents from mineral extraction.²⁰⁷ In Ethiopia, the power to levy and collect income taxes from large-scale mining operations is shared, whereas small-scale mining is exclusive to regional states.²⁰⁸ The federal government introduces the Income Tax Proclamation, which outline that mining contractors that engage in large-scale mining development are subjected to a business income tax of 25%.²⁰⁹ It also provides for incentives that aim to encourage businesses that engage in the mining sector. Regional laws follow the federal government approach.²¹⁰ This approach is in line

²⁰³ Boadway, R., and Keen, M. at supra note 194, the literature on royalty also suggests that the royalty of bulk minerals is better suited by volume-based assessment that is easy to administer and audit. The value-based royalty assessment method is in the case of bulk minerals expected to impose a burden on both the taxpayer and also the tax administrators.

²⁰⁴ IP 13

²⁰⁵ See Mining Operations Proclamation No.678/2010, article 63/2

²⁰⁶ See Oromia mining proclamation 91/97 article 36/2, Oromia Regional State Income Tax Proclamation No. 223/2020

²⁰⁷ World Bank Group, at supra note 195

²⁰⁸ FDRE constitution article 98

²⁰⁹ See the Federal income tax proclamation, proclamation number 979/2016,

²¹⁰ Oromia Regional State Income Tax Proclamation No. 202/2017, Oromia Regional State Income Tax Proclamation No. 223/2020; Oromia mineral resource development proclamation number 9/2005

with international and African standards. However, in addition to the above-mentioned challenges relating to the definition of mineral resource and the scale of mining operations, the income tax failed to address some of the common challenges that are witnessed in the mining sector, such as ringfencing and corporate overheads.²¹¹ The income tax can be levied on various entities, including project-specific operations, license-specific entities, or multinational corporations.²¹² In Ethiopia, the federal income tax proclamation imposes income tax based on the business income of the mine developers; as a result, the idea of ring-fencing has relevance. This intricacy creates a unique problem for tax authorities tasked with isolating project-specific income and costs, making it difficult to appropriately assess and impose taxes.²¹³ Furthermore, the federal legal frameworks do not directly address the issue of corporate overhead.²¹⁴ This lack of clarity may result in challenges for tax authorities and could undermine the intended economic benefits from mineral extraction.

The VAT is the other important tool for extracting economic rents from mineral extraction. In accordance with the division of power, the federal government enacted the VAT proclamation that covers areas that fall under exclusive federal and state revenue sources, as well as shared sources.²¹⁵ It establishes a uniform 15% VAT on mining activities, which is consistent with the global average VAT rate and positions Ethiopia competitively in the international mining scene. Additionally, it provides significant incentives for mining operations, such as the zero-rating for mineral exports, a deferral mechanism for VAT on imported capital goods, and the allowance for input VAT credits, all aimed at enhancing investment and competitiveness in the sector. Overall, the application of VAT in Ethiopia's mining sector reflects a thoughtful strategy that aims to meet revenue objectives while ensuring the competitiveness of the sector.

Customs duties are the other important tool for extracting economic rents from mineral extraction. As noted above, the FDRE Constitution grants the federal government exclusive authority to levy and collect customs duties, taxes, and charges on imports and exports.²¹⁶ The federal government

²¹¹ Ibid Mining Operations Proclamation No.678/2010,

²¹² Calder, J. at supra note 193

²¹³ Ibid

²¹⁴ See the Federal income tax proclamation, proclamation number 979/2016,

²¹⁵ Value Added Tax Proclamation, Proclamation No. 1157/2019

²¹⁶ FDRE constitution article 96

has implemented a Customs Proclamation that outlines detailed guidelines for customs duties, exemptions, and procedures applicable to goods and equipment imported for mining activities.²¹⁷ The Mining Operations Proclamation provides that export of mineral resources produced under mining licenses be free from customs duties and taxes and exemptions from customs and duties regarding any consumables, equipment, machinery, and vehicles that any holder of an exploration license, small or large-scale mining license, may import to Ethiopia for the purpose of mining operations, in accordance with the approved work program.²¹⁸ These extensive incentives are designed to attract investment in the mining sector.

Excise taxes are another important tool for capturing economic rents from extractive activities. The FDRE constitution, as amended, and decisions of the two federal houses divide authority over excise taxes based on the nature of the taxpayer.²¹⁹ It introduces a dual excise tax structure. Accordingly, the federal government enacted the federal excise proclamation to establish tax on selected goods and services that are considered demand inelastic.²²⁰ This strategy is consistent with international practices that use excise taxes to control consumption and raise money from non-essential goods. Moreover, the regional governments issued an excise proclamation that applies to state-owned enterprises and individual traders.²²¹ The excise tax rates vary depending on the type of goods and services. However, its application in the mining sector is limited. In most cases, mining companies are exempt from paying excise taxes, which significantly reduces the overall tax burden on these entities.

In any business transaction, the owner is expected to earn capital gain when it transfers its asset. The story is similar in mine development, as the developer has the chance to acquire substantial capital gains. However, the taxation of capital gains in mining operations has been subject to different arguments calling for the unique nature of mine development to be taken into consideration in tax policy.²²² As noted above, under the FDRE Constitution, capital gains tax is classified as an undesignated taxation power.²²³ Over the last 25 years, federal and state

²¹⁷ Customs Proclamation Amendment No. 1160/2019

²¹⁸ Mining Operations Proclamation No.678/2010, Art. 73

²¹⁹ Tadesse Lencho at supra note 4

²²⁰ The Excise Tax Proclamation No. 1186/2020; Excise Tax (Amendment) Proclamation No. 1287/2023.

²²¹ FDRE Constitution Article 97

²²² Pietro Guj et al at supra note 193

²²³ See Tadesse supra note 4

governments have provided capital gains tax as part of their income tax legislation.²²⁴ Notably, capital gains derived from mine development are subject to standard capital gain taxation. The federal income tax proclamation provided that the capital gain tax of shares and bonds was 30%, while 15 % is for immovable property.²²⁵ The regional states also followed the federal government's approach to the issue.²²⁶ Unfortunately, there are no special exemptions or reduced rates specifically tailored to mining operations. This uniform application of the capital gains tax raises concerns about fairness and competitiveness in the mining sector.

It is common to introduce dividend taxes on dividends distributed by companies to shareholders as one way of extracting economic rents from mineral extraction. As previously stated, the FDRE Constitution defines power taxes on dividends given to shareholders as shared revenue, in accordance with global conventions. As a result, the federal government has defined dividend tax rates for all sectors, including mining.²²⁷ The dividend tax is designed to capture a portion of distributed profits and contribute to both federal and regional coffers. With a standard 10% dividend tax rate, Ethiopia's approach aligns with international practices while maintaining a competitive position among African mining jurisdictions.

One of the tools to collect revenue from the extraction of mineral resource fees, duties, and other payments. In Ethiopia, mine developers are subject to various fees, including land user fees, stamp duties, and transaction fees.²²⁸ As previously stated, the FDRE constitution divided the power to collect fees between the federal and state governments based on the nature of the service provider, while reserving the power to collect land rental to regional states.²²⁹ The Mining Operations Proclamation and Mining Directive specify the license fees that mining companies must pay to the Ministry of Mines (MoM). These fees include reconnaissance, exploration, and mining licenses, as specified in the proclamation.²³⁰ The federal mineral resource transaction proclamation also introduced extra license fees.²³¹ Regional states in Ethiopia have enacted mining and tax laws that

²²⁴ Federal Income Tax Proclamation No. 979/2016 article 59 /2

²²⁵ Ibid

²²⁶ See Oromia regional state income tax proclamation, proclamation number 202/2017; Oromia Regional State Income Tax Proclamation No. 223/2020

²²⁷ Federal Income Tax Proclamation No. 979/2016

²²⁸ James M. Otto at supra note 194; Kenneth J. McKenzie, Fiscal Federalism and the Taxation of Nonrenewable Resources, in Perspectives on Fiscal Federalism Edited by Richard M. Bird, WBI, Learning Resources Series, 2006.

²²⁹ FDRE constitution

²³⁰ The Mining Operations Proclamation and mining directive 423/2018

²³¹ the federal mineral resource transaction proclamation, number 1144/2018

provide a framework for determining and collecting fees and charges for licenses issued and services rendered within their jurisdictions.²³² Historically, federal and regional governments have introduced nominal revenue rates for these fees. However, recent attempts have been made to improve the fee structure, particularly in regions like Oromia. These efforts aim to increase revenue generation while balancing the need to attract investments.²³³ Ethiopia's mineral resource fee collection system demonstrates a nuanced approach within the African context, balancing regulatory sophistication with investment attractiveness through its unique federal-regional governance model.

The practice among mining nations reveals that the state is allowed to have an equity interest in the development of a mine as one way to impact both investment decisions and capturing the rent from mining operations.²³⁴ State equity participation has a significant impact on investment decisions and the government's ability to collect rents from mine development. As noted above, the FDRE constitution is silent as to state equity participation. Furthermore, both the federal and state mining proclamations provide for equity participation in the mining sector in a vague manner. The Ethiopian approach to state equity participation is lower than the experience across African countries. The lack of clear constitutional guidance, as well as the vague nature of existing legislation, creates uncertainty for both government entities and potential investors. Furthermore, in spite of the regulations outlined in federal and state mining proclamations, as noted here in, the practical administration and execution of equity sharing within Ethiopia's mining sector have been constrained.²³⁵

In many countries, as was mentioned earlier, payments to community development funds are becoming an increasingly common practice. Although the FDRE constitution does not explicitly address the issue, Mining Regulation No. 423/2018 clearly outlines a requirement for community development payments. The regulation emphasizes mining license holders' responsibility to allocate funds appropriately for Community Development.²³⁶ This regulatory solution fills a

²³² Oromia Regional State Income Tax Proclamation No. 223/2020, A notable example is the Oromia regional state mining proclamation, which outlines the specific fees and charges applicable to mining operations within their authority.

²³³ IP 3, IP 6

²³⁴ Ibid

²³⁵ Ibid

²³⁶ The federal Mining Regulation No. 423/2018

constitutional gap while also aligning Ethiopia with international mining best practices. It represents an emerging, promising strategy within the African mining governance landscape, demonstrating potential for significant social and economic impact. The introduction of a standardized community development fund is a significant advancement in Ethiopia's mining sector. It creates a clear, fair, and potentially impactful mechanism for ensuring that local communities benefit directly from mining activities. When correctly implemented, this method has the potential to improve sustainable and fair mining operations in Ethiopia, promoting improved connections between mining corporations, local communities, and the government.

Contract-based payments, particularly bonuses, are essential tools for governments to collect income from mineral extraction. The ex-ante payments serve a variety of purposes, including generating immediate money prior to the start of production, demonstrating the company's commitment to the project, and perhaps reducing the project's initial public costs.²³⁷ The FDRE constitution does not explicitly confer power for administering mining bonuses to either the federal or regional governments. As noted above, this lack of clear assignment of power has led to uncertainties regarding the level of government that has the authority to administer bonuses in large-scale mining operations. In light of these limitations, as observed in many African countries, the federal government and regional states introduced contract-based payments, including signature bonuses. As a matter of urgent importance, it is necessary to address the matter in accordance with the Constitution. As a result, the federal system ought to make an effort to assign contract-based payment in a manner that guarantees the equitable distribution of resources and cultivates a stable investment climate within Ethiopia's mining sector.

7.7. FISCAL REGIME OVER MINERAL RESOURCE AND SUSTAINABLE MINING IN ETHIOPIAN FEDERAL SYTEM

As previously stated, the exploitation of minerals brings significant economic potential and constraints.²³⁸ Achieving the right balance between these costs and benefits is critical to achieve sustainable mining practices.²³⁹ To this end, Governments employ regulatory and fiscal powers.²⁴⁰

²³⁷ Pietro Guj et al at supra note 193

²³⁸ Uyanga Gankhuyag supra note 1

²³⁹ Ibid

²⁴⁰ Ibid; Tina Hunter, Comparative Perspective on Exhaustible Resource Development in Ethiopia: Lessons from the Norwegian Legal Framework and Experience, in *Ethiopian Yearbook of International Law*, 2017: 49-78., The

Fiscal power, particularly tax regimes, plays an important role in ensuring that the mining sector generates optimal economic benefits by influencing resource extraction and the collection of economic benefits.²⁴¹ It also plays a critical role in influencing the environmental and social outcomes of mining operations. The same is true in Ethiopia, which faced both the opportunities and the challenges that are presented by the mineral endowments. The Ethiopian federal system utilizes its tax power over mineral resources to optimize economic benefits from the extraction of mineral resources. Specifically, the federal and regional governments endeavored to utilize their revenue-raising power in particular to influence the efficient extraction of mineral resources, collect fiscal benefits from the mining sector, and regulate environmental and social outcomes of mining operations.²⁴² This section examines how the federal government of Ethiopia utilizes its taxing power to promote sustainable mining practices.

7.7.1. THE ROLE OF TAX REGIME IN PROMOTING EFFICIENT EXTRACTION OF MINERAL RESOURCES

As mentioned above, economic sustainability requires efficient extraction of mineral resources that lead to maximum economic benefit for the current and future generations. The government, along with its regulatory power, uses its fiscal power to promote the efficient extraction of mineral resources. Revenue-raising powers act as significant instruments for governments to influence the actions of mining companies and promote responsible extraction of resources. It has a significant impact on promoting responsible mineral extraction practices; it can be used to influence resource exploitation, stimulate economic linkages, and facilitate the mining sector's impact on infrastructure development.²⁴³ Recognizing mining's potential to drive overall economic development, the Ethiopian government has taken steps to strategically leverage its tax regime to ensure efficient mineral resource extraction. To this end, it attempted to regulate mineral resource

government uses its legislative and management powers over mineral resources to regulate the economic, social, and environmental aspects of the mining sector, as discussed in the previous section. Hence, our discussion mainly focuses on the government's use of fiscal power to regulate the mining sector.

²⁴¹ Ibid., Shah, Anwar, at supra note 192; Henstridge, Mark, and Alan Roe. "The Macroeconomic Management of Natural Resources." *Extractive Industries: The Management of Resources as a Driver of Sustainable Development*, 2018: 161; Van der Ploeg, Frederick, and Anthony J. Venables. "Short-versus Long-Term Considerations." *Extractive Industries: The Management of Resources as a Driver of Sustainable Development*, 2018: 179.

²⁴² Ibid

²⁴³ McMahon, Gary, and Susana Moreira. "The contribution of the mining sector to socioeconomic and human development," 2014: 1-45; Daniel, Philip, Michael Keen, Artur Świstak, and Victor Thuronyi, eds. *International taxation and the extractive industries*. Taylor & Francis, 2016.

extraction, economic integration of the mining industry, and infrastructure development, all with the goal of promoting efficient mineral extraction.

As noted, governments leverage their taxing power not only to generate revenue but also to promote the efficient extraction of mineral resources.²⁴⁴ In Ethiopia, the federal government recognizes the importance of efficient and responsible mineral resource extraction.²⁴⁵ It enacted several proclamation including the income tax, mining, and customs proclamations that contain important tools that are used to regulate the nature of the extraction of mineral resource.²⁴⁶ It incentivizes efficient mineral resource production by attracting new investments, increasing spending on machinery and operations, and promoting exports.²⁴⁷ However, these instruments did not include particular mechanisms for supporting efficient mineral resource extraction, such as progressive taxation, technological adoption incentives, and performance-based eco-taxes. The government failed to implement tailored tax systems in which tax rates differed according to production levels. The rigid tax structure has the potential to provide mining companies with an incentive to either overproduce or underproduce, which would lead to inefficiencies in the extraction of resources.²⁴⁸ Furthermore, technological advancements have the potential to significantly increase productivity in mining operations overall. Incentives for technology adoption can motivate mining companies to partner with research institutions, invest in advanced technologies, and create innovative solutions to current geological and operational challenges.²⁴⁹ Conversely, Ethiopia's legal framework did not include any incentives aimed at promoting technology adoption. Furthermore, although the federal mining proclamation allocates funds for environmental rehabilitation, there are presently no performance-based eco-taxes established to promote environmentally responsible mining practices and sustainable mining methods. It did not

²⁴⁴ Ibid

²⁴⁵ The federal Mining Operations Proclamation No. 678/2010.

²⁴⁶ Ibid

²⁴⁷ Ibid., IP 1, IP 3 and IP 4; investment proclamation, Proclamation No. 1180/2020; VAT amendment proclamation, Proclamation No. 1157/2019

²⁴⁸ Ibid; investment proclamation, Proclamation No. 1180/2020; VAT amendment proclamation, Proclamation No. 1157/2019 the rigid system may encourage companies to Overproduction, to maximize short-term profits, potentially at the expense of long-term resource sustainability. On the other hand, it can also promote as companies deliberately slow production to avoid higher tax brackets, leading to suboptimal resource utilization. These outcomes can result in significant inefficiencies in resource extraction.

²⁴⁹ James Otto at supra note 77; Schodde, R. The role of technology in long-term demand for minerals and metals. *Mineral Economics*, 30(2), 2017: 127–138; Upstill, G., & Hall, P. Innovation in the minerals industry: Australia in a global context. *Resources Policy*, 31(3), 2006:137–145.

contain performance-based eco-taxes, which can provide financial incentives for mining companies to use environmentally friendly technologies and practices.

Governments can use tax regime to promote economic connections between the mining industry and the national economy in general, thereby increasing its contribution.²⁵⁰ In terms of forward linkages, governments can encourage the development of downstream industries by offering tax breaks and incentives.²⁵¹ Furthermore, governments can encourage backward connections by providing tax advantages and exemptions to mining companies that require them to buy goods and services from local suppliers.²⁵² Nevertheless, Ethiopia has not yet completely harnessed the potential of tax regime to enhance economic connections within the mining sector.²⁵³ The existing legal framework and fiscal incentives have not succeeded in fully capitalizing on the economic multipliers and value-added potential of the mining sector.²⁵⁴ It did not offer incentives that would motivate mining companies to engage in value-added activities within the country. It also did not offer tax breaks and exemptions to mining companies to motivate them to procure goods and services from local suppliers, which would have stimulated domestic industry growth and generated job opportunities in the country.²⁵⁵

Furthermore, governments can leverage their revenue raising power to promote and support the development of essential infrastructure necessary for the growth and competitiveness of the mining industry.²⁵⁶ Accordingly, it is common to see countries that uses Tax breaks, exemptions, and preferential treatment can be used to stimulate investments in transportation networks, energy facilities, and communication systems that benefit both mining operations and the local community. In the same vein, the federal mining law covers various issues, including the infrastructure development undertaken by mining companies across the country.²⁵⁷ However, it failed to establish a comprehensive legal framework that promoted the mining industry's

²⁵⁰ Ibid

²⁵¹ Uyanga Gankhuyag supra note 1

²⁵² Addison, Tony, and Alan Roe. *Extractive industries: the management of resources as a driver of sustainable development*. Oxford University Press, 2018: 768; Conrad, Robert F., "Mineral taxation in Zambia." *Zambia: Building Prosperity from Mineral Wealth*, 2014:82-109.

²⁵³ IP 4 and IP 6;

²⁵⁴ Federal mining proclamation number 678/2010

²⁵⁵ Ibid

²⁵⁶ Uyanga Gankhuyag at supra note 1

²⁵⁷The FDRE Mining proclamation number 678/2010

contributions to infrastructure development. It failed to successfully encourage targeted infrastructure investments, which could have been accomplished through private-public partnerships and strategic tax breaks.²⁵⁸

The preceding discussion makes abundantly clear that the Ethiopian government is committed to increasing the efficiency of mineral extraction as a means of promoting economic growth and development.²⁵⁹ The government has made initiatives to encourage efficient mineral resource production, strengthen economic ties between the sector and the economy, and increase the sector's contribution to infrastructure development. All of these initiatives seek to ensure that the mining industry contributes to economic sustainability.²⁶⁰ However, in spite of the initiatives just outlined, the legal system still includes a number of serious inadequacies. Furthermore, as mentioned earlier, the mining sector's impact on the Ethiopian economy remains quite limited when compared to its overall potential.²⁶¹

7.7.2. THE ROLE OF TAX REGIME IN THE COLLECTION OF THE ECONOMIC BEFIT FROM THE EXTRACTION OF MINERAL RESOURCES AND SUSTAINABLE MINING

As mentioned, the extraction of mineral resources has the potential to generate substantial economic contribution.²⁶² As previously stated, the mining sector's economic contribution is determined, among other things, by the state's ability to collect economic benefits from the extraction of mineral resources. In order to fully reap the economic benefits of the extractives industry, governments must provide an effective legal and institutional framework that ensures the country receives an equitable proportion of the profits derived from mineral resource extraction. In order to fully reap the economic benefits of the extractives industry, governments must provide an effective legal and institutional framework that ensures the country receives an equitable

²⁵⁸ IP 4 and IP 6;

²⁵⁹ Growth and Transformation Plan II (GTP II) (2015/16–2019/20); A Homegrown Economic Reform Agenda: A Pathway to Prosperity, 2020

²⁶⁰ Ibid,

²⁶¹ Ibid. It should be noted that, in addition to the preceding discussion about the nature of the legal and institutional framework, more research is required to determine the precise impact of each gap on the efficient extraction of mineral resources. More research is needed to identify and understand the practical barriers that prevent Ethiopia from fully realizing its mineral potential.

²⁶² McMahon, Gary, and Susana Moreira, at supra note 243

proportion of the profits derived from mineral resource extraction.²⁶³ Ethiopia is not an exception as both the federal and regional governments recognize the importance of the mining industry and have taken significant steps to create conducive environment for the collection of economic benefits from the extraction mineral resources. As a result, the federal government has established a legal and institutional framework for effectively capturing economic rent from mineral development.²⁶⁴ As noted above, it has made commendable efforts to establish a strong legal framework that serves as foundation for capturing mineral resource benefits. It attempts to continuously improving the fiscal regime to respond to the evolving needs of the mining sector.²⁶⁵ Furthermore, as previously stated, the federal government has established the Ministries of Mines (MoM), Revenue (MoR) to collect economic benefits from mineral extraction.

Nevertheless, in spite of the steps taken by the government, the revenue and economic benefits that derive from the exploitation of minerals in Ethiopia continue to fall short of their potential. Recent data indicate that the mining industry contributes less than one percent to the overall revenue of the central government.²⁶⁶ Various elements play a role in this underperformance, such as an underdeveloped mining sector, the prevalence of informal mining, and capacity constraints within institutions.²⁶⁷

The limited performance of the mining sector is the main reason for the poor revenue generation that the sector faced. Ethiopia as noted above has significant mineral potential. However, the mining sector remains largely underdeveloped, limiting the economic benefits that could result from mineral extraction and determining the amount of revenue collected by the state.²⁶⁸ Furthermore, the sector is dominated by the artisan and small-scale mining operators, that invades the control of the states.²⁶⁹ A substantial portion of Ethiopia's mining activity occurs in the

²⁶³ Ibid; Kitchen, Melville McMillan, and Anwar Shah. "Intergovernmental Fiscal Transfers: Principles." *Local Public Finance and Economics: An International Perspective*, 2019: 405–439.

²⁶⁴ The Federal mining proclamation no. 678/2010.

²⁶⁵ Moore Stephens, Ethiopian Extractive Industries Transparency Initiative Report, Third EEITI report; National (2018),

²⁶⁶ The Ministry of mine annual report 2023; Ministry of mines, <http://www.mom.gov.et/index.php/investing-in-ethiopia/natural-resources/> accessed June 2024. Nevertheless, additional research is necessary in order to determine whether or not the regime constitutes an ideal tax system that has the potential to maximize revenue collection while simultaneously encouraging investment and sustainable development. Moreover, it is necessary to conduct additional research in order to determine the precise role that each factor plays in determining the exact collection of economic benefits that result from the extraction of mineral resources.

²⁶⁷ IP 3 and IP 4

²⁶⁸ Ibid

²⁶⁹ Ibid

informal sector, which is difficult to tax and regulate. Estimates suggest that up to 50% of gold production in Ethiopia comes from artisanal and small-scale mining, much of which operates outside the formal tax system, which limited the potential revenue to be generated.²⁷⁰ Furthermore, the available evidence suggests that the current institutional framework encounters capacity limitations, especially in auditing, monitoring, and enforcement, which impede the efficient collection of economic benefits from mineral resource extraction.²⁷¹ This resulted in a significant underreporting of mining revenues, which in turn deprives the government of a fair share of the economic benefits associated with the mineral resources of the country.

7.3.3. THE ROLE OF TAX REGIME IN PROMOTING ENVIRONMENTAL SUSTAINABILITY

The extraction of mineral resources leads to considerable environmental impact that causes substantial and lasting damage to human health and well-being. Environmental sustainability emphasizes the importance of maintaining environmental quality over time, while permitting human activities that do not lead to lasting negative impacts on ecosystems.²⁷² As noted above, the federal systems, in addition to the legislative power, have increasingly recognized the critical role of fiscal mechanisms in environmental regulation. It strategically uses taxing mechanisms to shape and regulate the environmental impact of the mining sector through offering targeted tax exemptions or incentives to companies that surpass environmental standards, providing fiscal rewards for implementing advanced environmental management technologies, and financial mechanisms supporting comprehensive environmental reclamation efforts.²⁷³

In Ethiopia, the Federal Mining and Income Tax Proclamation, as noted above, offers divers tax exemptions or incentives to promote mining operations.²⁷⁴ However, the current regulatory framework reveals significant limitations in promoting environmentally sustainable mining

²⁷⁰ Ibid

²⁷¹ IP 4; IP 5; IP 6, IP9, and IP 10 Yohannes Yihdego et al., Mining sector challenges in developing countries, Tigray, Ethiopia, and inspirational success stories from Australia, *Int. J. Mining and Mineral Engineering*, Vol. 9, No. 4, 2018: 321–60. ETHIOPIAN EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI) ANNUAL PROGRESS REPORT 2018.

²⁷¹ World Bank. Policy and Legislative Options Report Ethiopia Mining Sector Development, 2016; Ethiopian extractive industries transparency initiative (EITI) annual progress report 2018

²⁷² Moomen Abdul-Wadood et al., "The Drive towards Consensual Perspectives for Enhancing Sustainable Mining," *Resources* 9, no. 12: 2020, 1-16

²⁷³ *ibid*; Mohanty, Nilmadhab, and Aarushi Goyal. "Sustainable Development: emerging issues in India's mineral sector." *Research Study*, 2012;

²⁷⁴ The federal mining proclamation, number 678/2010; Customs Proclamation Amendment No. 1160/2019; Federal Income Tax Proc.979/2016, Art 41(1&2)

practices. The primary mechanism for environmental protection is the environmental rehabilitation fund.²⁷⁵ As noted above, the federal mining proclamation and regulation provide that license holders should allocate funds to cover the costs of reclamation and the environmental impact of mining operations. Accordingly, the federal Income Tax Proclamation, takes these expenditures as a deductible.²⁷⁶ Overall, the federal legal and policy framework attempts to introduce non-traditional environmental protection mechanisms by recognizing a deduction for contribution to environmental rehabilitation funds. However, it has failed to provide non-traditional forms of regulation.²⁷⁷

7.3.4. THE ROLE OF TAX REGIME IN PROMOTING SOCIAL SUSTAINABILITY

Mining operations have a significant socioeconomic influence on the host country and the communities surrounding extraction sites.²⁷⁸ Governments are increasingly using sophisticated regulatory and fiscal tools to manage the complicated social impact of the extraction of mineral resources. It strategically uses taxing power to shape and regulate the mining sector's social impacts through exemptions and incentives.²⁷⁹ This includes offering tax exemptions to companies that engage in corporate social responsibility (CSR), employ local communities, contribute to community development funds, or share benefits derived from mineral resource extraction.²⁸⁰

In Ethiopia, efforts to integrate social sustainability into mining operations through a tax regime have been minimal. The primary exceptions in this context are the community development fund and the newly established revenue-sharing agreement with local governments. As noted above, mining companies have historically engaged in corporate social responsibility. The federal mining laws provide a legal base for community development funds.²⁸¹ The Federal Mining Proclamation mandates that all holders of mining licenses, as well as holders of exploration licenses in specific

²⁷⁵ the federal mining proclamation, proclamation number 678/2010 Article 62; The federal mining regulation, regulation number 423/2018, Article 39

²⁷⁶ Federal Income Tax Proc.979/2016, Art 41(1&2)

²⁷⁷ Moomen, Abdul-Wadood, supra note 272; Mohanty, Nilmadhab, and Aarushi Goyal, at supra note 273

²⁷⁸ Andrew Bauer, at supra note 13;

²⁷⁹ Ibid

²⁸⁰ Ibid

²⁸¹ Fanta Mandefro, "Social accountability in the extractive industries: a review of the Ethiopian experience." *Ethiopian Journal of Business and Economics (The)* 6, no. 1 (2016): 1-32; the federal mining proclamation, proclamation number 678/2010, Article 62/3 Federal mining regulation, regulation number 423/2018, article 40 The federal ministry of mine and petroleum, Directive to Regulate Mineral Exploration and Mining Community Development Plan and Fund Directive Number 1/2019

cases, participate in community development activities. Furthermore, the federal mining regulations establish a detailed legal framework that outlines the obligations of license holders regarding community development. The federal Income Tax Proclamation allows for community development contributions to be tax-deductible.²⁸² Moreover, as noted above, one of the issues introduced by the revised revenue sharing formula is a 10% share of the royalty from large-scale mining operations.²⁸³ Accordingly, as noted above, local governments that are affected by mining operations are receiving community development funds, which are used to address the adverse effect of large-scale mining operations on the local communities. It is clear from the above discussion that Ethiopia has made efforts to address the social sustainability of mining operations by providing community development activities. However, significant gaps remain in the legal and policy framework to provide adequate mechanisms to shape and regulate the mining sector's social impacts through exemptions and incentives.

7.4. CONCLUSION

This chapter examines how Ethiopia's federal system tackles the economic benefits resulting from the extractive industry, a crucial aspect of federal constitutional design, and its impact on promoting sustainable mining practices. It reveals a complex connection between progress and the ongoing challenges associated with the governance of the economic benefits of the extractive industry. Furthermore, it revealed that the federal system has faced major legal, institutional, and practical challenges in managing the economic benefits from the extractive sector and promoting sustainable mining practices.

One of the most important considerations to consider while developing a federal constitution is the allocation of economic gains from the extraction of mineral resources. The FDRE Constitution addresses the issue by providing taxation power and revenue-sharing processes. The FDRE constitution divided the revenue-raising power from the extraction of mineral resources between the federal and state governments. Nonetheless, the allocation of fiscal power regarding mineral resources revealed considerable challenges. The FDRE constitution did not clearly and concisely assign some of the main revenue sources from the extraction of mineral resources for either level

²⁸² federal income tax proclamation 978/2018, article 36/4/b; 36/6/b; 36/19

²⁸³ House of Federation of Ethiopia. "የኢ.ፌ.ዴ. ሪፌዴሬሽን ምክር ቤት 1 ቀን 2011 ዓ.ም የጋራ ገቢዎች አስተዳደር እና የማከፋፈያ ቀመር ላይ ያስተላለፈው ውሳኔ 03 page

of government or both. The federal government has taken advantage of this ambiguity by enacting laws or issuing executive orders to seize control of revenue streams that are not earmarked for either level of government, often affecting regional interests. The concentration of power has resulted in a significant imbalance in the federal structure, jeopardizing the concepts of fiscal federalism and regional autonomy that the constitution is intended to protect.

Furthermore, the FDRE Constitution and its subsequent amendments recognize the idea of shared revenue sources, which are relevant to the mining industry. However, its examination reveals it is a critical area that needs substantial improvement. For a long time, the federal government failed to establish a legal and institutional framework to govern revenue-sharing procedures. The absence of a thorough framework has led to inconsistent practices and a deficiency in transparency as to the administration of share mining revenues. In recent years, the main emphasis has been on establishing a legal and institutional framework for revenue sharing. However, the recently implemented legal framework has not adequately addressed critical issues such as the fragmented revenue-sharing processes, the insufficient participation of regional states in decision-making, the lack of transparency in the mining revenue process, and the failure to establish a regulatory body that monitors the revenue-sharing process. This flaw in the administrative framework has significant implications on the accuracy and fairness of the revenue-sharing system.

The federal and regional governments have made significant efforts to design and implement fiscal regimes for the mining sector, which are critical for governing the economic benefits derived from mineral resources. Nonetheless, constant adjustment is required to ensure that it effectively reflects fair value for the nation while maintaining global competitiveness. This balance is critical for attracting international investment while ensuring that the country's natural resources produce real advantages for its people

Ethiopia has sought to maximize the sector's economic potential of its mining sector. As noted above, it has made progress in utilizing regulatory power for recognizing and integrating the ideas of sustainable mining into its policies and practices. Moreover, it attempted to operationalize the idea of sustainable mining by leveraging its fiscal power. Nonetheless, considerable gaps exist in the legal and institutional frameworks, which critically limits the sector's ability to contribute to long-term economic development. These gaps are witnessed on critical domains such as efficient

extraction of mineral resources, effective collection of economic benefits, management of the economic impacts of the mining sector, and the strategic use of revenues from the extraction of mineral resources in a manner that ensure for sustainable development. Notwithstanding the attempt to ensure efficient mineral extraction, the current framework lacks important elements such as progressive taxation mechanisms, technological adoption incentives, and performance-based eco-taxes that could drive more sustainable extraction practices. It failed to generate sufficient economic benefits owing to underdeveloped formal mining operations, widespread informal mining activities, and limited institutional capacity for revenue collection and auditing. Furthermore, despite an attempt to use tax reform to ensure environmental and social sustainability, it failed to incorporate essential tools necessary. Additionally, Ethiopia's ability to efficiently employ its mineral resources for long-term development is limited by the absence of a comprehensive sustainable mining strategy that considers economic, environmental, and social considerations. Therefore, to ensure sustainable mining practices, Ethiopia should focus on updating its legal and institutional frameworks, in accordance with international best practices, prior to the expected influx of substantial resource revenues.

CHAPTER EIGHT: SYNTHESIS OF KEY FINDINGS, AND CONCLUSIONS

8.1 CHAPTER INTRODUCTION

As noted, time and again in this work, the objective of this study is to investigate the governance mineral resource and its impact on sustainable mining practices in Ethiopia's federal system. At the heart of this investigation lie critical questions: How does the Ethiopian federal system address the critical issues in the governance of mineral resources: ownership rights, legislative power, management framework, and the distribution of economic benefits? Furthermore, it explores the role of governance frameworks in promoting sustainable mining practices within the country's federal structure. To achieve this objective, the study is conducted in a comprehensive manner, employing a multi-faceted approach. This chapter aimed to present the final contribution of the study, as it presents the major finding of the study and subsequent conclusions. Accordingly, the chapter is organized in four sections to provide a clear and structured overview. The second section outlines the essential findings of the study regarding mineral resource governance and sustainable mining in the context of Ethiopia's federal system. This section highlights the important and complex legal, institutional, and practical challenges faced in the governance of mineral resources that impede sustainable mining practices. The third section offers an extensive conclusion regarding the governance of mineral resources and implementation of sustainable mining practices in Ethiopia. This conclusion encapsulates the complex constitutional ambiguities, legal conflicts, institutional shortcomings, and practical limitations related to the governance of mineral resources, along with the legal, institutional, and practical factors that collectively influence a nation's capacity to utilize its mineral wealth for sustainable development. The fourth section outlines potential future research directions that could improve our understanding of the governance of mineral resource in federal systems and promotion of sustainable mining practices. Overall, the purpose of this chapter is to give policymakers, scholars, and stakeholders with a thorough understanding of the current state of the governance of mineral resources in Ethiopian federal system and its impact ensuring sustainable mining practices. It highlights the major constitutional, legal, practical and institutional issues in the governance mineral resources while proposing prospective solutions tailored to Ethiopia's federal context.

8.2 KEY FINDINGS OF THE STUDY

Federalism, as a governance system, establishes a structure in which central and regional governments share power, promoting a balanced approach that takes into account both national and local objectives.²⁸⁴ Federal systems are designed to address diverse issues, with the governance of mineral resources emerging as one of the most complex and debated.²⁸⁵ The governance of mineral resources has received a lot of attention since the introduction of modern federal systems. In particular, the Ownership, legislative power, management systems, and benefit-sharing, have all been areas of divergence between central government and subnational institutions.²⁸⁶ Researchers have thoroughly investigated the complexities associated with the governance of mineral resources in federal systems, demonstrating how these complexities lead to inefficiencies, conflicts, and governance challenges, as well as highlighting the various rules, principles, and trends aimed at resolving these issues.²⁸⁷

Irrespective of the nature of the governance framework, numerous challenges and trends have emerged throughout history that profoundly influenced the governance of mineral resources. The notion of sustainable mining stands out as having one of the most notable impacts on the governance of mineral resources. The story is also similar in federal systems, where the global move toward sustainable mining has emerged as one of the crucial issues in the governance of mineral resources.²⁸⁸ Accordingly, federations in line with the cardinal rule in federal systems, i.e., the division of power, have utilized their established power over mineral resources to promote sustainable mining practices.²⁸⁹

²⁸⁴ R.L. Watts, *Comparing Federal Systems*, Montreal & Kingston, McGill-Queen's University Press, 1999.

²⁸⁵ George Anderson, *Natural Resources in Federal and Devolved Countries*, *Forum of Federation* 2020: 1-28; Haysom Nicholas and Sean Kane, *Negotiating Natural Resources for Peace: Ownership, Control, and Wealth-sharing*, Geneva: Centre for Humanitarian Dialogue, 2009: 5-32; Grant Bishop and Anwar Shah, "Fiscal Federalism and Petroleum Resources in Iraq," *International Center for Public Policy Working Paper Series*, Andrew Young School of Policy Studies, Georgia State University, 2008:1-32.

²⁸⁶ George R. M. Anderson, *Ownership, Management, and Revenue Sharing of Petroleum Resources in Federal and Devolved Regimes*, in Huurdeman, Alexander, and Anastasiya Rozhkova, eds. *Balancing Petroleum Policy: Toward Value, Sustainability, and Security* Washington, DC: World Bank, 2019: 199-235; Andrew Bauer, Paul Shortell, and Lorenzo Delesgues *Sharing the Wealth: A Roadmap for Distributing Myanmar's Natural Resource Revenues*, Natural Resource Governance Institute, 2016; 1- 57

²⁸⁷ *ibid*

²⁸⁸ Haysom Nicholas and Sean Kane, at *supra* note 2

²⁸⁹ *Ibid*; Novoa V, Laura, *Sustainable Development and Its Relationship with Mining and Law*, Rocky Mountain Mineral Law Foundation ed. 1997:10-42; Pring George, *Sustainable Development: Historic Perspectives and Challenges for the 21st Century*, in United Nations Development Programme 1999.

Ethiopia's diverse geological landscape is rich with a wide variety of mineral resources. Over the years, the mining industry has contributed to economic development by generating revenue for the government, earning foreign currency, creating jobs, and supplying industrial raw material demands. Furthermore, it has severe environmental and social impact. Moreover, the economic, social, and environmental impacts of the mining sector are anticipated to increase as federal and regional governments prioritize the industry in their long-term development plans.²⁹⁰ However, despite the significance of the sector, research that explore the governance of mineral resources and its impact in sustainable mining practices in Ethiopia's federal system remains limited, leaving a significant gap in the literature. This study aims to close the current gap by investigating the Ethiopian federal system's approach to the governance of mineral resources in its design and operations, as well as how this affects sustainable mining practices.

The study reveals numerous legal, practical, and institutional concerns that have significant implications in the governance of mineral resource and promotion of sustainable mining practices, including constitutional uncertainty; legal disputes regarding the assignment of the ownership of mineral resources and the administration of mining titles; debates over the nature and scope of the legislative power; gap legal and institutional framework that regulates exercise of legislative authority concerning minerals; the enactment of laws that conflict with the constitution and human right instruments; centralized management of mineral resources that deviate from the constitution and human right instruments; ambiguous assignment of the economic benefit from the extraction of mineral resources leading to unconstitutional revenue collection; an ineffective benefit-sharing process; and limitation in legal and institutional framework that aimed to ensure sustainable mining practices.²⁹¹

²⁹⁰ National Planning Commission, A Homegrown Economic Reform Agenda: A Pathway to Prosperity, 2021-2030 (2020): 29-31 Available at: <https://faolex.fao.org/docs/pdf/eth211967.pdf>; Ministry of Mines and Petroleum, Guide Investor, 2020;_ Ethiopian Press agency, Some 170 Companies Engaged in Ethiopia's Mining Sector, accessed on September, 2022, https://www.ena.et/web/eng/w/eng_3643507; Ministry of Mines and Petroleum, Guide Investor, 2020

²⁹¹It should be noted here that, as explained in previous chapters, there are many cases, especially in federations with diverse populations, where constitutional ambiguity as to the main issues in the governance of mineral resources has been deliberately used to address irreconcilable political positions between different groups. A good example in this regard can be the Iraqi constitution and CPA. Such an approach has both advantages and disadvantages. The advantage can largely emanate from the ability to differ controversial issues for future suitable political dispensation. However, such advantages can be turned into major disadvantages in countries that lack democratic culture and federal societies. When we come to the Ethiopian federal system, first such ambiguities are not intentionally designed.

The assignment of ownership and administration of mining licenses is a central concern in the federal constitutional design.²⁹² This also applies to Ethiopia's federal system, as this study reveals significant legal uncertainty, institutional challenges, and practical constraints in the assignment of ownership of mineral resources and the administration of mining licenses. The FDRE Constitution assigns ownership of mineral resources but does so in ambiguous terms. It is unclear from a reading of the constitutional texts whether the phrase “state and peoples’ are used to assign ownership of mineral resources to the federal government, regional states, or ethnic groups. This ambiguity has led to disagreements among local communities, regional states, and the federal government. It has been argued that the FDRE Constitution provides joint ownership of mineral resources between the federal government and the entire population.

Furthermore, it finds that constitutional ambiguity, combined with uncertainty in defining legislative power over natural resources and the lack of legal and institutional frameworks that guide the legislative process, has resulted in federal and regional laws that regulates the ownership of mineral resources in a manner that contradict the constitution. It has been argued that it is unconstitutional for either the federal or subnational governments to independently claim sole ownership over mineral resources. Moreover, it finds that, for the past 30 years, the federal and regional laws have introduced a centralized mining license system, especially in the case of large-scale mining operations, overlooking the interests and concerns of regional states and local communities. The Subnational governments play a limited role in mining license processes, primarily restricted to land administration, artisanal mining licensing, and licensing of construction materials mining by domestic investors. Similarly, local communities' involvement is restricted, mostly to environmental impact studies, community development fund administration, and land compensation. It is argued that mining laws and practices that exclude subnational actors from the mining license system are incompatible with the Constitution, international human rights law, and the notion of the decentralization of power.

Furthermore, the exploration of the federal system reveals that the federation lacks the democratic culture and the federal society that is essential to utilize such advantages. Due to that, in the last thirty years, instead of being a source of future federal bargaining areas, these ambiguities are the sources of tension and conflict.

²⁹² Haysom Nicholas and Sean Kane, at supra note 2; Usman Nasir, Issues in Mineral Resource Ownership and Control: International Trend and the Nigerian Question, in *Rule of Law, Governance Dispute Resolution, and Contemporary Legal Issues in Nigeria*, edited by Gre C. Nwakoby and Uruch Ben Odoh, 2016: 457; Okonkwo, Theodore. "Ownership and Control of Natural Resources under the Nigerian Constitution 1999 and its implications for environmental Law and Practice." *Journal of Sustainable Development in Africa* 3, no. 2 (2017): 1-27.

In addition, it revealed that the current system's legal uncertainties, practical contradictions, and institutional deficiencies have created a pervasive sense of exclusion and marginalization among subnational governments and local communities that surround the mining operation. Although the federal government has taken recent steps to incorporate the input of substate actors into the mining license administration, these efforts have been insufficient to change the course and lack the necessary legal and institutional development to ensure genuine participation. It has been argued that broad legal and institutional reforms ensure the effective participation of subnational governments and communities in the decision-making processes, such changes should be reflected in the draft mining proclamation, which is currently pending before the House of Representatives.

As noted above, there is limited research that investigate the impact of mineral resource ownership on sustainable mining practices. Despite these limits, experiences gathered from federal systems show that the impact of ownership of mineral resource on sustainable mining practice is strongly influenced by the assignment of control and revenue powers over mineral resources. Ethiopia's federal system provides an intriguing case study for investigating the impact of the assignment of ownership mineral resource on sustainable mining practices. The study finds that, even with the current joint ownership framework and de jure state management power over mineral resources, the federal government's extensive power over legislative power, de facto centralized management, and highly centralized revenue generation have severely limited the regional states' ability to influence the nature of mining operations. It restricts regional states from actively participating in the governance of mineral resources, reducing their ability to play a vital role in advancing sustainable practices. Consequently, Ethiopia's experience demonstrates that the mere assignment of joint ownership does not guarantee that joint owners have a major impact in ensuring sustainable mining practices.

Legislative power is the first dimension of control of natural resources. It is one of the means that enables the state to exercise its regulatory power to address environmental and socio-economic challenges in mineral extraction. The assignment and exercise of legislative power over natural resources is a highly contentious issue in federal constitutional design that requires careful analysis and negotiations between national and subnational stakeholders.²⁹³ The story in Ethiopia's federal

²⁹³ Haysom Nicholas and Sean Kane, at supra note 2; Kodizie Kwesike Chignons Achelous, *Constitutional Approaches to Resource Control in Oil-Producing Federations*, Thesis submitted in conformity with the requirements for the degree of Master of Laws at the Faculty of Law, University of Toronto, 2011.

system is similar, but with certain distinguishing features and challenges. This study identifies significant obstacles in the assignment and exercise of legislative power over mineral resources, such as constitutional uncertainty, legal conflict, and a lack of a legal and institutional framework that harmonizes the law-making process. Moreover, it lacks several critical elements of sustainable mining, which have significant implications for mineral resource governance in the country.

The FDRE Constitution divides legislative power over mineral 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. Nonetheless, it reveals that it did not clearly outline the nature and scope of legislative power concerning mineral resources, leading to ambiguity and disagreement between federal and regional governments. It noted that the constitution assigns the federal government broad legislative power over mineral resources, spanning all stages of the extraction process. Moreover, it was highlighted that the FDRE constitution establishes concurrent legislative power, which requires federal law to supply primary legislation while allowing regional states to implement secondary legislation that addresses local concerns.

Furthermore, it finds that the Ethiopian Federation lacks robust legal and institutional mechanisms to coordinate concurrent legislative powers over mineral resources. It also failed to utilize existing and recently created limited institutions in charge of resolving such conflicts and ambiguities, such as the HoF and the intergovernmental legislative council. It is argued that the critical importance of implementing institutions and coordination mechanisms facilitates effective communication and collaboration between the federal and subnational governments. In addition, it is essential to tackle constitutional ambiguities and settle legal disputes regarding the legislative power over mineral resources within Ethiopia's federal framework.

Moreover, it finds that the absence of strong legal and institutional frameworks that guide the law-making process, coupled with constitutional ambiguities concerning the assignment of legislative power, has resulted in the emergence of federal and regional laws that conflict with constitutional principles and are also inconsistent with each other. This includes the ownership of minerals and the division of legislative and management powers over mineral resources. It is contended that the actions of federal and regional governments are unconstitutional. Any alterations or reinterpretations must follow appropriate constitutional processes. Furthermore, it is contended

that regional states attempt to amend the content of the federal mining law against the idea of concurrency and the constitutional division of power.

Additionally, it revealed that the federal government has made notable progress in establishing a legal framework that is essential for sustainable mining practices. However, there are significant shortcomings in incorporating essential components that are necessary for ensuring sustainable mining practices. The legal framework fails to sufficiently incorporate essential elements of economic sustainability, including the promotion of efficient extraction of mineral resources, forward and backward economic linkages, and infrastructure development. In addition to this, it outlines fundamental limitations that exist in the process of guaranteeing environmental sustainability. It reveals that it did not take into account non-traditional environmental factors such as performance standards and economic instruments, while the existing traditional instruments lack the necessary requirements for comprehensive environmental regulation. Furthermore, it failed to address the critical elements required for social sustainability in the mining sector, such as meaningful community engagement, clear resettlement principles, social management plans, auditing and reporting tools, and profit-sharing programs. In light of these findings, it is argued for comprehensive reform of Ethiopia's legal framework governing mineral resources and mining practices.

Management power represents the second dimension of control over mineral resources, crucially influencing complex social, environmental, and economic opportunities along with the challenges associated with their extraction.²⁹⁴ The FDRE Constitution acknowledges regional states as the primary actors in the management of mineral resources. However, it revealed that recentralization tendencies have emerged in the management of mineral resources in the federal system. Since the transitional period, mining laws have provided centralized management power over mineral resources, which deviates from the constitutional text. It allowed the federal government to regulate the mining sector without the consent and effective participation of the regional state and local people in the decision-making process. It upheld the limited role of the subnational government in the decision-making process, land administration, local security, compensation for expropriated land for mining, licensing of artisan miners, and mining of construction materials by

²⁹⁴ Anderson George at supra note 2; George R. M. Anderson at supra note 3; Haysom Nicholas and Sean Kane, at supra note 2; Okpanachi, Eyene, *Federalism and Natural Resource Management: A Comparative Study of Intergovernmental Conflict over Oil and Gas in Canada and Nigeria*, 2018: 44-47

domestic investors. Moreover, it excludes local communities from the mining-related decision-making processes. The involvement of local communities is confined to environmental impact assessments, community development initiatives, and issues concerning land compensation. It is contended that the exclusion of regional states and local populations violates the constitution and international human rights standards that promote meaningful participation of subnational actors in the management of mineral resources.

Furthermore, it finds that the federal government established and maintained a highly centralized management system that excluded regional states and communities from crucial decision-making processes. Meanwhile, the mining industry has failed to deliver the expected economic benefits, such as efficient resource extraction, economic integration, and infrastructure development. The sidelining of regional governments and local communities, along with the negative economic, environmental, and social effects of mining activities, has led to considerable grievances, conflicts, and resistance to mining initiatives. This discontent is compounded by the federal government's historical tendency to suppress dissent through security forces and party apparatus, further alienating those affected by mining activities. While the federal government has made recent attempts to include input from regional states and local communities, these initiatives have not succeeded due to their absence of binding legal authority and robust institutional frameworks. It is argued that regional states' and local communities' claims regarding the management of mineral resources cannot be resolved through ad hoc reforms alone.

Moreover, it finds that despite advancements in the management of large-scale mining in Ethiopia over the last three decades, considerable challenges persist in achieving sustainable mining practices. Economically, it has struggled to manage mineral resource extraction in a sustainable manner, which has fostered long-term economic diversification and development. Several factors have collectively hindered the mining sector's potential to drive broader economic growth and development in Ethiopia, including ineffective regulation of resource extraction, limited backward and forward economic linkages, and inadequate infrastructure development. Furthermore, although traditional environmental protection mechanisms are in place, their implementation encounters significant challenges. The mining industry contributes to environmental disasters such as water pollution, deforestation, and land degradation. Moreover, although there are frameworks designed to enhance social sustainability, notable gaps persist in their execution. The implementation of these policies encounters considerable challenges in the domains of social

impact assessment, land expropriation, monitoring and supervision, and Community Development Funds (CDF). It is noted that the government need to address the institutional and practical gaps that affect the implementation of sustainable mining practices.

The economic rent derived from the extraction of mineral resources represents a significant concern in the design of federal constitutions.²⁹⁵ The research explored Ethiopia's journey in leveraging economic advantages from mineral resource extraction while fostering the economic sustainability of the mining industry. It was discovered that the administration of economic benefits derived from mineral extraction in Ethiopia's federal system faced legal, practical, and institutional obstacles.

The FDRE Constitution distributes economic benefits from the extraction of mineral resources by dividing taxing power and revenue sharing. The FDRE Constitution divides revenue from the extraction of mineral resources. However, it revealed that it failed to explicitly assign the most lucrative revenue streams, derived from mineral extraction, to federal or regional governments. Moreover, despite having a clearly established legal and institutional framework addressing undesignated revenue sources, the federal government opted to act unilaterally by enacting legislation and issuing executive orders to seize control of these revenue streams. The actions of the federal government are argued to be a clear violation of the constitution, threatening the principles of federalism and cooperative governance. It noted that the federal system urgently needs to revise its approach in a manner that adheres to constitutional principles.

Furthermore, it finds that the federal system acknowledges the concept of shared revenue sources. However, it fails to provide a mechanism for incorporating regional perspectives into the exercise of legislative decisions over these shared sources. The federal government asserted dominance and taxed mining activities without regard for the specific needs and concerns of regional governments. The central government's unilateral actions have led to laws that frequently contradict the interests of regional states, fostering tension and the possibility of conflict within the federal system. It is argued that the federal government should not use shared revenue streams as its exclusive revenue but should recognize the shared nature of the revenue and take more inclusive and collaborative legislative procedures that actively incorporate regional perspectives.

²⁹⁵ Ibid

Moreover, it reveals that the Ethiopian federal system has been struggling for a long time to build a robust legal framework that oversees the revenue-sharing process linked to the mining industry. For an extended period, the federal system and revenue sharing occurred without a coherent legal framework. While the two revenue-sharing formulas introduced after 2003 attempted to fill this legal vacuum, they only provided broad revenue-sharing arrangements without the details needed for effective implementation. As a result of the lack of a well-defined legal framework that regulates the revenue-sharing process, various practices have emerged, generating uncertainty among stakeholders. Furthermore, recent efforts to develop rule-based revenue-sharing systems have resulted in severe design and operational obstacles, resulting in a stop in progress.

In addition, it finds that Ethiopia's federal system has historically faced challenges in establishing a strong, independent, and organized institutional framework for managing shared revenue streams from mineral resources. Furthermore, it did not establish an independent agency to oversee and efficiently coordinate the revenue-sharing process. The identified deficiencies have led to several negative outcomes, including discrepancies between the revenue reported for sharing with regional states and the figures acknowledged by those states, and the exclusion of income taxes from large-scale mining operations in the revenue-sharing arrangement. Recently, efforts have been made to establish an institutional framework for revenue-sharing arrangements. However, this did not lead to a single and independent institution that ensured regional involvement in the revenue-sharing process.²⁹⁶ Instead, the arrangements continue to depend heavily on the existing fragmented institutional frameworks. It has been argued that recent efforts need to be strengthened. The federal system urgently needs to create a robust and independent framework that improves transparency, enhances regional participation, and ensures that the benefits of mineral resources are shared equally.

As previously stated, fiscal regimes for mineral resources have a considerable impact on the economic benefits that a country can derive from its natural wealth.²⁹⁷ In Ethiopia's federal system,

²⁹⁶ System for the determination of the Division of the Federal Subsidy and Joint Revenues Proclamation No. 1250/2021

²⁹⁷ Shah, Anwar. "Non-renewable resource revenue funds: critical issues in design and management." In *Taxing Choices for Managing Natural Resources, the Environment, and Global Climate Change: Fiscal Systems Reform Perspectives*, Springer, 2023: 153-170; Henstridge, Mark, and Alan Roe. "The Macroeconomic Management of Natural Resources." *Extractive Industries: The Management of Resources as a Driver of Sustainable Development*, 2018: 161.

the federal and regional governments have sought to establish tax regimes that address the distinct challenges and opportunities presented by the mining sector. These efforts aim to design an optimal tax framework that is transparent and stable to investors while also ensuring effective revenue generation. Accordingly, it employs a diverse array of taxation tools to collect economic rents from mineral development. It attempts to select the most effective tax rate, base, and structure. Due to the scope of this work, the detailed assessment of this issue is not made here; hence, as noted later on, further research is recommended.

Fiscal regimes for mineral resources have a considerable impact on the sustainability of the mining sector. In Ethiopia's federal system, the federal and regional governments, at least to some degree, have sought to use fiscal power alongside regulatory power to promote essential components of sustainable mining practice. It uses its fiscal power to promote the economic sustainability of the mining sector, which includes promoting efficient mineral extraction and effective revenue collection. However, its application is fraught with several challenges. Despite the federal government's attempt to regulate mineral extraction, it has fallen short in promoting efficient extraction of mineral resources. Furthermore, it demonstrates insufficient revenue collection that hinders the realization of economic advantages from mineral extraction. On the other hand, it failed to provide for institutional and legal frameworks that are essential for ensuring economic sustainability. It does not have a thorough framework for addressing the wider economic effects of mining, including fluctuations in resource revenues. It also poses a challenge in transforming mineral wealth into enduring advantages, as there is an absence of a thorough legal and institutional framework for the strategic reinvestment of mining profits. Furthermore, as noted above, it did not leverage its fiscal power to implement unconventional environmental protection strategies, which are crucial for preventing environmental degradation. Moreover, it did not effectively leverage its fiscal authority to enhance the socioeconomic advantages. Therefore, it underscored that the federal government must actively utilize the current legal and institutional framework while also integrating the necessary elements to maximize the sector's economic potential, all while protecting against environmental degradation, economic distortions, and social disruptions.

Van der Ploeg, Frederick, and Anthony J. Venables. "Short-versus Long-Term Considerations." *Extractive Industries: The Management of Resources as a Driver of Sustainable Development*, 2018: 179.

8.3 OVERARCHING CONCLUSION

As previously stated, this dissertation investigates the governance of mineral resources and its impact on sustainable mining practice in Ethiopia's federal system. It examines the ways how Ethiopia's federal system addresses critical issues in the governance of mineral resources, such ownership, control, and revenue/benefit sharing. It also examines the impact of governance on sustainable mining. It exposes not just the symptoms of ineffective resource governance but also the underlying structural challenges, including constitutional ambiguities, legal conflicts, institutional deficiencies, and practical constraints that have hampered effective mineral resource management and sustainable mining. Overall, this research offers more than a critique; it provides a comprehensive roadmap for transformative governance.

The ownership of mineral resources is one of the controversial issues in the federal constitutional design. The same holds true in Ethiopia, as it is one of the most contested governance issues. The assignment of the ownership of mineral resources and administration of mining licenses is faced with notable uncertainties in constitutional clauses, inconsistencies in legal frameworks, and the absence of an essential legal and institutional framework. The constitution has provided the ownership of mineral resources in an ambiguous manner. Because of the uncertainties surrounding legislative power over mineral resources, the federal government has been able to claim ownership and oversee the mining license process, frequently at the expense of regional, state, and municipal rights and interests. Furthermore, the centralization of the mining licensing process has led to competing claims, conflicts, and power struggles between the federal government and subnational actors. While the federal government has recently attempted to involve substate actors in the administration of mining licenses, these efforts have proven insufficient and have fallen short of the necessary legal and institutional advancements for genuine participation.

The legislative power over mineral resources is the first dimension of control over mineral resources. The governance of legislative powers concerning mineral resources in the Ethiopian federal system reveals various challenges, such as constitutional uncertainties, conflicting laws passed by both federal and regional authorities, and the absence of specific coordination mechanisms that impede the effective exercise of legislative power. Although the FDRE Constitution recognizes concurrent legislative powers, the scope and nature of this division are not well defined. There has long been a lack of comprehensive legal and institutional frameworks

governing the exercise of concurrent legislative power, particularly over mineral resources. The system has failed to adequately address and resolve legislative disagreements. The constitutional ambiguity and absence of a robust legal and institutional framework to harmonize mineral resource-related legislation have intensified tensions and conflicts among multiple levels of government, with each attempting to exert unilateral legislative control. Due to that the federal system encountered several conflicts between federal and regional laws. However, despite obvious conflicts, the federal system has failed to adequately address and resolve legislative disagreements.

The management of mineral resources is the second dimension of the control power over mineral resources, which is a critical component of the governance of mineral resources. The examination of the management of mineral resources in the Ethiopian federation reveals that it is encountered with considerable challenges, such as constitutional violations, centralized institutions arrangement, ineffective intergovernmental coordination mechanism, insufficient stakeholder engagement and inefficient management of mineral resources. Although the FDRE Constitution designates regional states as the primary government organs responsible for managing mineral resources, both federal and regional governments have enacted mining laws and regulations that contradict the constitutionally established division of power, making the federal government the main organ responsible for managing significant part of the mining sector. Furthermore, the federal government has developed highly centralized institutions to manage and regulate the mining industry. Moreover, it failed to create an intergovernmental coordination and cooperation framework, which is essential to coordinating government action. Additionally, the management practices are highly centralized and exclusionary. The above limitations have resulted in fragmented and uncoordinated management efforts that have failed to translate policies into measurable outcomes.

The regulation of economic benefits from the extraction of mineral resources is another critical issue in federal constitutional design. The regulation of economic benefits derived from mining in Ethiopia is hampered by constitutional ambiguities and violations, legal gaps, institutional constraints, and practical limitations. The constitutional design failed to assign revenue sources in a clear and comprehensive manner, allowing the federal government to collect significant undesignated revenue. Furthermore, the federal government has pursued an exclusivity policy regarding shared revenue sources, which has an impact on the interests of regional states. Moreover, despite recent efforts to the contrary, Ethiopia's federal system lacks a comprehensive

legal and institutional framework for effectively managing the revenue-sharing process. Despite such limitations, Ethiopia has made a commendable effort in formulating the fiscal regime that aimed to collect the economic benefit from the extraction of mineral resources.

The concept of sustainable development plays a crucial role in shaping the legal and institutional frameworks that regulate the global mining industry. The Ethiopian federal system serves as a notable illustration of this trend. The FDRE Constitution recognizes the concept of sustainable development. Furthermore, the federal and regional governments have made efforts to incorporate the notion of sustainable mining into their legal and institutional frameworks. Despite this, Ethiopia's extractive sector is riddled with gaps, inconsistencies, and a lack of clear implementation guidelines. The federal mining proclamation does not adequately address the fundamental components of sustainable mining. Furthermore, implementation of the legal framework is hampered by several institutional limitations. Overall, the mining industry despite the efforts made, falls short of the most fundamental international standards for economic, environmental, and social sustainability.

8.4 AREAS FOR FURTHER RESEARCH:

The study' makes it abundantly clear that more scientific research is needed in to better understand difficulties involved in the governance of mineral resources that are not addressed in this study. In particular It highlights a variety of areas related to the governance of mineral resources and the implementation of sustainable mining practices within Ethiopian federal systems that needs to be examined. Conducting research in these areas can help to develop comprehensive and context-sensitive solutions that address the multiple challenges that arise in the governance of mineral resources. Thus, among the diverse issues that are raised during the research, the following main areas are identified as needing to be addressed quickly in future research projects.

1. THE NEED FOR A COMPARATIVE ANALYSIS OF NATURAL RESOURCE GOVERNANCE IN FEDERAL SYSTEMS

As previously mentioned, there is a scarcity of comparative literature regarding the governance of mineral resources within the federal system, highlighting the necessity for thorough research. The conduct of a comparative review of the governance frameworks for natural resource management can provide significant insights into the governance of mineral resources. Further research can assist the federal system, including Ethiopia's, in developing context-sensitive recommendations

that enhance governance frameworks, improve stakeholder participation, ensure more equitable resource distribution, and strengthen institutions by employing systematic comparative institutional analysis and cross-jurisdictional policy transfer assessment that focuses on ownership, legislative powers, management authority, and revenue-sharing mechanisms

2. ENHANCING THE OPTIMAL TAXATION FRAMEWORKS FOR ETHIOPIA'S MINING SECTOR

The design of the optimal tax regime plays a pivotal role in both revenue generation from mineral resource extraction. Moreover, the design of the optimal tax regime plays a crucial regulatory role, essential for successfully influencing the extraction of mineral resources. Due to the scope of the work, the current study does not assess the design of the Ethiopian tax regime as it applies to the mining sector. It is for this reason that additional research is required to investigate the optimal tax systems for Ethiopia's mining industry. Such additional research will help to analyze the comprehensiveness and efficacy of the current tax systems that govern the mining industry. Furthermore, it offers incisive perspectives on how the tax system may influence economic growth, mineral resource extraction, environmental sustainability, and social progress.

3. EXPLORATION OF THE IMPLEMENTATION OF THE FISCAL REGIME GOVERNING THE ECONOMIC BENEFIT FROM MINERAL RESOURCES

The FDRE constitution, as previously mentioned, allocates the power to generate revenue from mineral resources between the federal government and the regional states. As a result, both levels of government have enacted laws designed to generate revenue from the extraction of mineral resources. Furthermore, it created an institutional framework aimed at collecting the economic benefits resulting from the extraction of mineral resources. Nonetheless, due to the breadth of this work, this study did not go further into the specifics of the implementation of legal and institutional frameworks. As a result, it is unable to present the practical issues that occur with regard to these laws, demanding additional investigation. More research and analysis are needed to identify areas for improvement, recommend reforms or adjustments to current rules and regulations, develop institutional capacity, and improve operational procedures.

4. THE NEED TO EXPLORE SMALL-SCALE MINING AND INFORMAL SECTORS:

It has been mentioned in earlier chapters that mining operations can be segmented in a number of different ways. One way of doing it is to classify it as a large-scale and small-scale mining operation. As previously stated, the current research is largely focused on large-scale mining

activities. On the other hand, in a country like Ethiopia, small-scale mining plays a crucial role, making research on this topic necessary. Accordingly, future research can look at the challenges in the governance that small-scale miners face, such as environmental impact, working conditions, and market access.

5. THE EXPLORATION OF QUANTITATIVE ASSESSMENT SUTAINABLE IMPACT OF MINING SECTOR

This research, as previously stated, examines the incorporation of ideals of sustainable mining within Ethiopia's federal system. The investigation focuses on regulatory and institutional elements, leaving other areas untouched. As a result, the findings of the study are primarily focused on governance-related components, i.e., legal and institutional, leaving other dimensions for further exploration. Accordingly, to gain comprehensive knowledge of the issue, a quantitative assessment of the mining sector, including the environmental, social, and economic repercussions of the mining sector, is required. This broader assessment would complement the findings made by the current research regarding governance of mineral resources while also providing a more complete picture of the sector's sustainability.

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APPENDICES

Annex I: List of Interviewees:

INTERVIEW Table 3

List of Interviewees		
Code (as cited in the text)	Profile and capacity of the Interviewee	Date of Interview
IP 1	Interview with an expert in ministry of Mine, mining License Administration directorate mining	June 2022
IP 2	Interview with Experts in the Ministry of Mine, Mining Directorate, Environmental Administration, and Mining	June 2022
IP 3	Interview with the Legal Head of the Ministry of Mine,	August 2023
IP4	Interview with CEO of License and Mineral Administration, in the ministry of Mine	August 2023
IP 5	Interview with an expert in the Oromia Mines and Energy Bureau in	June 2022
IP 6	Interview with an Official in Oromia Regional State Mining Bureau	June 2022
IP 7	Interview with expert in Benishangul Gumuz Mines and energy Bureau,	April, 2023
IP 8	Interview with an expert, on the economic, environmental, and social impact of mining	June, 2023
IP 9	Interview with an expert in the Oromia Mines and Energy Bureau in	April, 2024
IP 10	Interview with an expert Benishangul Gumuz Mines and energy Bureau,	March, 2024
IP 11	Interview with an Official in Benishangul Gumuz Mining Bureau	March, 2024
IP 12	Interview with an expert, on the economic, environmental, and social impact of mining	March, 2024
IP 13	Interview with an expert in Revenue sharing Department of Ministry of Revenue	June, 2024
IP 14	Interview with the Head of Finance at the Ministry of Mines	June, 2024

Interview Guideline

INTERVIEW QUESTIONS FOR FEDERAL GOVERNMENT OFFICIALS:

My name is Yared Hailemariam, and I am a doctoral candidate in the College of Law and Governance's Centre for Federalism and Governance Studies located at Addis Ababa University. Currently, I am conducting my dissertation on the title of "THE GOVERNANCE OF MINERAL RESOURCES AND SUSTAINABLE MINING IN ETHIOPIAN FEDERAL SYSTEM: OWNERSHIP, CONTROL, AND BENEFIT SHARING." As part of my dissertation, I am collecting data through various tools. One of the tools that I used to collect data is an interview with relevant stakeholders. Accordingly, I purposely selected you as a federal government official to gather data from the central government perspective. Your viewpoint as a federal government official will greatly enrich the scope and detail of my research. I would be honored if you could participate in this interview. I would like to inform you in advance that all information shared in the interview will be kept confidential and solely utilized for academic research purposes.

1. In your capacity as an official working for the federal government, what function or position do you play in the governance of mineral resources?
2. What is your view the nature of the assignment of ownership of mineral resources in the Ethiopian Federation? What are the most significant hurdles you've faced in converting the policy statement about the mineral ownership into action?
3. Could you explain the rationale behind the federal government's consolidation of authority over mining licensing? What input regional states and local communities do provide in the issuance of mining permits? Are there any efforts in place to promote stakeholder participation and cooperation?
4. How do you assess the division legislative power over mineral resource under the FDRE constitution? What is your evaluation of the federal and regional mineral laws and policies conformity with the FDRE constitution and international human right instruments? What are the most significant challenges you witnessed in the excise of legislative power over mineral resources at the federal level?
5. What systems are in place to coordinate legislative power over mineral resources between the federal and regional levels? How effective are these methods for coordinating laws and

resolving disputes? How does the government intend to resolve conflicts and ensure that the legislative framework is consistent with the constitution?

6. Why does the federal government take the lead in managing mineral resources? How does it intend to avoid conflict and grievances associated with it while also ensuring meaningful dialogue among the federal government, regional governments, and communities?
7. What measures does the federal government intend to take to strengthen subnational government and community engagement in the management of mineral resources? Are there specific mechanisms or platforms being developed to facilitate such engagement while also addressing the interests and concerns of all stakeholders?
8. How do you assess the capacity of federal agencies to administer mineral resources? What intergovernmental organizations exist to regulate the management of mineral resources? How do you evaluate their efficiency?
9. Are you of the opinion that the distribution of revenue power in relation to the economic benefit derived from the extraction of mineral resources is clear? To what extent does the federal government collect revenue from sources that are not designated as specifically designated? What steps could be taken to clarify and streamline the distribution of tax revenue and taxing authority across government levels?
10. In the context of the exercise of legislative authority over shared revenue sources, what are your thoughts on the role that regional states play? What steps can be taken to enhance openness and accessibility for subnational actors?
11. How do assess the existing legal and institutional frameworks the regulate the revenue sharing process derived from mineral resource extraction? What strategies can be implemented to enhance the efficiency of revenue sharing?
12. What changes have occurred in the legal and policy framework governing mining at the federal level in recent decades to incorporate sustainability considerations? In what ways do the government's actions and decisions reflect the fundamental principles that guide them?
13. What legal, institutional, and process changes have been made to achieve economic, social, and environmental objectives? In the context of the mining industry, what are some of the gaps that you see in the legal and institutional frameworks that are in place to enforce sustainability principles?

INTERVIEW QUESTIONS FOR STATE GOVERNMENT OFFICIALS:

My name is Yared Hailemariam, and I am a doctoral candidate in the College of Law and Governance's Centre for Federalism and Governance Studies located at Addis Ababa University. Currently, I am conducting my dissertation on the title of "THE GOVERNANCE OF MINERAL RESOURCES AND SUSTAINABLE MINING IN ETHIOPIAN FEDERAL SYSTEM: OWNERSHIP, CONTROL, AND BENEFIT SHARING." As part of my dissertation, I am collecting data through various tools. One of the tools that I used to collect data is an interview with relevant stakeholders. Accordingly, I purposely selected you as a regional government official to gather data from the regional state government's perspective. I thank you for your consent to conduct this interview. I would also like to inform you in advance that all information shared in the interview will be kept confidential and solely utilized for academic research purposes.

1. In your capacity as an official of the state government, what specific role do you play in the governance of mineral resources?
2. What is your view as to the nature of the ownership of mineral resources in the Ethiopian Federation? What are the most significant obstacles you've encountered in converting the policy statement about the mineral ownership into action?
3. How does the federal government's centralized administration of mining title influence your state's decision-making processes and the advantages it offers to its citizens? What type of contributions does the regional states and local communities have in the process of granting mining permits? Are there existing initiatives aimed at fostering collaboration among stakeholders?
4. How do you assess the division legislative power over mineral resource in Ethiopian federal system? What is your evaluation of the federal and regional mineral laws and policies conformity with the FDRE constitution and international human right instruments? What have been the most significant challenges you witness in the excise of legislative power over mineral resources?
5. What mechanisms are in place to coordinate legislative authority concerning mineral resources between the federal and regional governments? How effective are these mechanisms in coordinating laws and resolving disputes? What actions will the regional government implement to resolve conflicts and ensure that the legislative framework is consistent with the constitution?

6. What is the role of the regional state in managing mineral resources? How have regional governments and local communities shaped the decision-making processes of mining projects? What limitations are present in successful stakeholder engagement? What strategies does the regional government plan to adopt to enhance its engagement, participation, and decision-making in the management of mining projects?
7. Does the federal system provide a forum for intergovernmental organizations to regulate mineral resource management? How do you assess their efficiency? How does it intend to address the conflict and grievances while also ensuring effective communication among the federal government, regional governments, and local communities?
8. How do you assess the ability of federal and regional agencies to manage mineral resources? what enhancements should be made to the existing legal and institutional frameworks?
9. Do you think the distribution of revenue authority regarding the economic advantages derived from mineral resource extraction is well-defined? What measures can be implemented to enhance clarity and efficiency in the allocation of tax revenue and the delegation of taxing authority among various levels of government?
10. How do you assess the collection of undesignated revenue sources by both the federal and regional governments?
11. How do you see the role of regional states in the exercise of legislative authority over shared revenue sources? How can we make it more transparent and inclusive?
12. How effective are the current legal and institutional mechanisms for sharing the benefits of mineral resource extraction? How can revenue sharing be made more efficient?
13. What role do state administrative institutions play in advancing sustainable mining practices and what enhancements are they making?
14. How has state mining policy changed over the past few decades to incorporate sustainability considerations? What are the primary principles that currently dictate decision-making? What changes have been made to laws, organizations, and procedures to align economic, social, and environmental objectives?
15. What regulations have been put in place to ensure that Ethiopia's mining operations are sustainable, taking into account social, environmental, and economic factors? What limitations have you found in the legal and institutional frameworks for implementing sustainability principles in mining?

INTERVIEW QUESTIONS FOR EXPERTS IN THE GOVERNANCE OF MINERAL RESOURCES

My name is Yared Hailemariam, and I am a doctoral student at Addis Ababa University's College of Law and Governance, Center for Federalism and Governance Studies. My dissertation is titled "The Governance of Mineral Resources and Sustainable Mining in the Ethiopian Federal System: Ownership, Control, and Benefit Sharing." As part of my dissertation, I am gathering data using a variety of tools. Interviews with key stakeholders were one of the data collection strategies I employed. I believe that your considerable expertise and knowledge of the governance mineral resource in Ethiopia's federal system will be extremely beneficial to my research. I am grateful for your permission to conduct this interview. I would also like you to state in advance that any information revealed during the interview will be kept confidential and utilized solely for academic purposes.

1. What is your role or position and experience in the governance of mineral resources in Ethiopia's federal system?
2. What are your thoughts on the nature of the assignment of the ownership of mineral resources under the FDRE constitution? What is the differing interpretation and claims regarding the ownership of mineral resources under Ethiopia's federal system? In what ways have these uncertainties resulted in conflicts and discrepancies?
3. How does the federal government's centralized administration of mining titles influence the role of the subnational actors? Are there existing initiatives in the transfer of mining licenses that aim at fostering collaboration among stakeholders?
4. How do you assess the division of legislative power over mineral resources in the Ethiopian federal system? What is your evaluation of the federal and regional mineral laws and policies conformity with the FDRE constitution and international human rights instruments? What have been the most important problems you've seen in the exercise of legislative authority over mineral resources?
5. How do the federal and regional governments coordinate their legislative authority over mineral resources? How effective are these methods for coordinating laws and resolving disputes? What actions will the regional government implement to resolve conflicts and ensure that the legislative framework is consistent with the constitution?

6. What is the role of the regional state and local communities in managing mineral resources? How have regional governments and local communities shaped the management of mineral resources? What are the constraints in ensuring authentic stakeholder involvement?
7. What actions does the federal government implement to enhance the involvement, and participation of subnational actors in the management of mining projects? Are there particular mechanisms or platforms being created to promote such engagement while also considering the interests and concerns of all stakeholders?
8. How do you assess the ability of federal and regional agencies to manage mineral resources? what enhancements should be made to the existing legal and institutional frameworks?
9. Do you think the distribution of revenue authority regarding the economic advantages derived from mineral resource extraction is well-defined? What measures can be implemented to enhance clarity and efficiency in the allocation of tax revenue and the delegation of taxing authority among various levels of government?
10. How do you assess the collection of undesignated revenue sources by both the federal and regional governments?
11. How effective are the current legal and institutional mechanisms for sharing the benefits of mineral resource extraction? How can revenue sharing be made more efficient?
12. How have federal and state mining rules changed over the past few decades to incorporate sustainability factors? What modifications have been implemented to legislation, institutions, and protocols in order to enhance the congruence between economic, social, and environmental objectives?
13. What are the main challenges faced when incorporating sustainability principles in the mining industry? What reforms do you believe are needed to promote a sustainable approach to mining governance within Ethiopia's federal system? What are the most significant obstacles that hinder the implementation of sustainable practices in the mining industry?