



LAW
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LEAD

REGULATING MINING IN SOUTH AFRICA AND ZIMBABWE: COMMUNITIES,
THE ENVIRONMENT AND PERPETUAL EXPLOITATION

Tumai Murombo

ARTICLE



VOLUME
9/1

LEAD Journal (Law, Environment and Development Journal)
is a peer-reviewed academic publication based in New Delhi and London and jointly managed by the
School of Law, School of Oriental and African Studies (SOAS) - University of London
and the International Environmental Law Research Centre (IELRC).

LEAD is published at www.lead-journal.org

ISSN 1746-5893

*The Managing Editor, LEAD Journal, c/o International Environmental Law Research Centre (IELRC), International Environment
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This document can be cited as
Tumai Murombo, 'Regulating Mining in South Africa and Zimbabwe:
Communities, the Environment and Perpetual Exploitation',
9/1 Law, Environment and Development Journal (2013), p. 31,
available at <http://www.lead-journal.org/content/13031.pdf>

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TABLE OF CONTENTS

1.	Introduction and Historical Context	33
1.1	The Regional Context – Initiatives to Reform the Extractives Sector in Africa	33
2.	Mineralogy of South Africa and Zimbabwe: A Socio-economic Backdrop	35
3.	Impact of Mining on Community Livelihoods and the Environment	37
4.	Legal Regulation of Mining in South Africa and Zimbabwe	39
4.1	A Brief History of the Legal Systems	39
4.2	Post-Colonial Mineral Policy Reforms	41
4.3	Indigenisation or Nationalisation: The Inconclusive Debate	43
5.	Manifestation of Challenges to Legal Reforms	45
5.1	Mining Revenues, Land Rights and Community Exclusion	45
5.2	In Defence of the Environment and Communities	48
6.	Conclusion	49

1

INTRODUCTION AND HISTORICAL CONTEXT*

The extractive or mining industries generally have long been touted as key to anchor 'development' or 'economic growth' to alleviate poverty in developing countries. No doubt extractives underpin most economies in Africa.¹ However, since emerging from colonisation, many developing countries continue to struggle to meet their development ambitions and to alleviate poverty, while simultaneously having to contend with a myriad of problems caused by extractive processes. From being 'the robbed' to 'owners of natural resources', most post-colonial states have not independently developed models to sustainably use natural resources. Over time, with the need to attract foreign direct investment (FDI) and foreign extractives corporations, developing countries have had to tow the regulatory and governance line chanted by global actors.² Often, this is clothed within the discourse of good governance and the rule of law underpinning

structural adjustment programmes.³ The consequences of this post-colonial development and apparent failure of extractives regulatory reforms⁴ include the growth of a civil society body that advocates transparency and sustainable use of natural resources. It is hoped that the latter approach will address the continuity of exploitation and suffering of mining communities.

The purpose of this article is to discuss key issues in the mineral extractives industry in developing countries using the examples of South Africa and Zimbabwe. Firstly the discussion is contextualised through a general brief overview of mining and extractives regulatory developments in Africa. Thereafter the legal framework for mining in South Africa and Zimbabwe is analysed drawing insights on how entrenched are exploitative colonial mining laws. The article highlights how this lack of reform is fuelling a resurgence of the debate on nationalisation and indigenisation of the mining sector to further the socio-economic objectives of developing countries. The deficiencies of the current extractives regulatory frameworks manifest through different challenges. These are discussed in the context of recent and on-going upheavals in South Africa and Zimbabwe. The article concludes with suggestions on how environmental and mining law can play a better role in enhancing the sustainable livelihoods of mining communities and ensuring that mineral rich countries benefit from their resources.

1.1 The Regional Context – Initiatives to Reform the Extractives Sector in Africa

Recent developments in extractives regulation in Africa offer insights on how the rights of local communities affected by mining can be protected. The African Commission on Human and Peoples' Rights (ACHPR) established a Working Group of

* This article is the revised version of a background paper prepared for the Learning Route Programme: 'Learning from the impact of the extractive industry in Latin America and Southern Africa – Phase II South Africa – Zimbabwe' coordinated by Procasur and funded by the Ford Foundation, held between 19-31 March 2012 in South Africa and Zimbabwe. Feedback from Route participants, comments by journal reviewers, and the research assistance by Paradzai Garufu PhD candidate, School of Law, Wits University all proved invaluable. Views expressed do not represent the views of Procasur or the Ford Foundation.

1 Abbas M. Sharaky, Mineral Resources and Exploration in Africa (Paper presented at the International Conference 'The Revolution of 25 January 2011 and the future of Egypt's relations with the Nile Basin States' organised by the Cairo University, 30-31 May 2011), available at http://african.cu.edu.eg/Dr_Abbas/Papers/Minerals_2011.pdf and Willem Odendaal and Shadrack Tjiramba, The Extractive Industries Transparency Initiative (EITI) in Southern Africa: The Case of Namibia 5 (Report prepared for The Open Society Initiative for Southern Africa by Legal Assistance Centre, 2007), available at http://www.sarwatch.org/sarwadoocs/EITI_Namibia_CReport.pdf.

2 See generally World Bank, World Development Report: A Better Investment Climate for Everyone (Washington, DC: World Bank, 2005).

3 Sam Wilkin, 'Can Bad Governance Be Good for Development?' 53/1 *Survival: Global Politics and Strategy* 61, 62 (2011). He argues that economic development may flourish in bad governance in some cases, which is why the international financial institutions should change their approach to development assistance.

4 Bonnie Campbell ed, *Mining in Africa Regulation and Development 1* (Ottawa: Pluto Press, 2009).

Experts on Extractive Industries, Human Rights and the Environment in 2009 with an extensive mandate.⁵ This Working Group will look at the intersection of extractive industries including mining, oil and gas, human rights violations and environmental sustainability on the African continent. The Working Group was constituted in the wake of the persistent association of the extractive activities with human rights violations and environmental degradation.⁶

Other major regional and continental developments include the crafting of the African Mining Vision. The United Nations Economic Commission for Africa (UNECA) has produced significant reports. Similarly the African Development Bank (AFDB) has undertaken research into the economic contribution of the extractives sector to development. The African Union (AU) together with the AFDB, UNECA, UNIDO and other institutions produced the African Mining Vision, which states that:

The key elements to an African Mining Vision, that uses mineral resources to catalyse broad-based growth and development need to be, from looking at successful resource-based development strategies elsewhere, the maximisation of the concomitant opportunities offered by a mineral resource endowment, particularly the ‘deepening’ of the resources sector through the optimisation of linkages into the local economy.⁷

While intergovernmental regional institutions have been driving broad policy on the role of the extractives industry in Africa, civil society has been

equally vocal and has been mobilising against the harmful impacts of the extractives industry in Africa. There is a growing movement by civil society environmental organisations towards joining forces to share skills and experiences and strategies on how to protect the environment, indigenous or local communities and livelihoods from bad practices in the extractives sector. One of the key objectives of civil society initiatives is to promote transparency and accountability in this sector. A number of civil society organisations are working to encourage their governments to adopt the Extractives Industry Transparency Initiative (EITI) and partake in the Publish What You Pay (PWYP) campaign.⁸

The African Initiative on Mining, Environment and Society (AIMES) is another initiative formed by a network of African civil society organisations to lobby and advocate for the rights of communities affected by mining. Recently at their 13th Annual Strategic Planning Meeting the coalition reconfirmed its resolve to promote policies that ensure the optimum exploitation of mineral resources without degrading the environment and resulting in human rights violations.⁹ Civil society provides the counter-narrative to the dominant conception that mining is the hope of Africa.¹⁰ This counter-narrative is often attacked by developing

5 ACHPR/Res 148 (XLVI) 09: Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa, available at <http://www.achpr.org/sessions/46th/resolutions/148/>. The Working Group was established by the African Commission on Human and Peoples’ Rights at its 46th Ordinary Session held in Banjul, The Gambia from 11 to 25 November 2009.

6 *Id.*

7 African Union, African Mining Vision (2009), available at http://www.africanminingvision.org/amv_resources/AMV/Africa%20Mining%20Vision%20english.pdf. The Africa Mining Vision is informed by the outcomes of several initiatives and efforts made at sub-regional, continental and global levels to formulate policy and regulatory frameworks to maximize the development outcomes of mineral resources exploitation.

8 Luca Etter, Can Transparency Reduce Corruption? Evidence from Firms in Peru and Mali on the Impact of the Extractive Industries Transparency Initiative (EITI) on Corruption 10 (Master of Public Policy thesis submitted to the Georgetown University, 2012); Shamiso Mtisi ed, Sowing the Seeds of Advocacy Work on Transparency and Accountability in the Extractive Sector in Zimbabwe (Report on the Multi- Stakeholder Conference on Promoting Transparency and Accountability in the Extractive Sector in Zimbabwe, 22-23 September 2010) and World Bank, Implementing the Extractive Industries Transparency Initiative Applying Early Lessons from the Field (Washington, DC: The World Bank, 2008), available at http://siteresources.worldbank.org/INTOGMC/Resources/Implementing_eiti_final.pdf.

9 Press release by the AIMES at the occasion of its 13th Strategic Planning Meeting held in Harare, Zimbabwe, 21-24 June 2011, available at <http://www.minesandcommunities.org/article.php?a=11030>.

10 This was the dominant theme at the recent Mining Indaba (South Africa) held in Cape Town from 4-7 February 2013. The mantra of mining-economic growth (development)-jobs-poverty alleviation is often emphasised by President Zuma in his State of the Nation Addresses.

states and mining entities, and labelled a conduit for Western agendas. Despite this, regionalism is a promising avenue to address some of the local and transboundary issues in the mining sector. At the sub-regional level the SADC Protocol on Mining¹¹ could be used to harmonise standards on mining, the environment and sustainable development if fully implemented. The challenges posed by extractive activities causing concern for the regional bodies and civil society are exemplified by specific experiences in South Africa and Zimbabwe, among other developing countries. The main extractive activity in these countries is mining and therefore it is the focus of this article. In Central and West Africa key issues are additionally in oil, gas, fisheries and forestry. These are beyond the scope of this article.

2 MINERALOGY OF SOUTH AFRICA AND ZIMBABWE: A SOCIO- ECONOMIC BACKDROP

South Africa and Zimbabwe are rich in mineral resources yet Southern Africa remains the poorest in the world, based on World Bank and UNDP Human Development Index statistics.¹² Research exists on the persistence of poverty, and the perpetuation of the relations of production that have maintained the gap between the rich and the poor.¹³

During the colonial period droves of labourers flocked to South Africa from Malawi, Mozambique and Zimbabwe to work in the mines. Certain socio-economic relations developed then and still subsist today. These economic power relations have also ensured that major mining companies retain a grip on the mining industry and governments that attempt to open up the sector through various methods are treated with uneasy cordiality. For example the Zimbabwe Platinum (ZIMPALTS) experience shows the uneasy relationship between governments and mining companies.¹⁴ The community share ownership scheme negotiated by the Zimbabwe government and traditional leaders and the company may have been a strategy to avoid a backlash when the Indigenisation and Economic Empowerment law is enforced.¹⁵

Literature and statistics abound on the mineral deposit profiles of African countries, some of which are world leaders in terms of production and size of reserves.¹⁶ The Marange diamond fields in Zimbabwe are reportedly the largest ever found in the world.¹⁷ South Africa leads in platinum, chromium, manganese and other minerals.¹⁸ South Africa also produces a lot of coal, most of which is located in Limpopo and Mpumalanga provinces. Unfortunately the geographic spread and distribution of mineral deposits in South Africa and Zimbabwe, as elsewhere, appears to show that nature

11 SADC Protocol on Mining, Blantyre, 8 September 1997, in force 10 February 2000, available at http://www.sadc.int/files/3313/5292/8366/Protocol_on_Mining.pdf.

12 World Bank, *The World Development Indicators* (Washington, DC: The World Bank, 2012) and UNDP Human Development Report (UNDP 2013), available at http://hdr.undp.org/en/media/HDR_2013_EN_complete.pdf.

13 Some call it the resource curse. See Amy Poteete and Andres M. Gramajo, *Overlapping Sectors: Botswana's Inoculation Against the Dutch Disease?* 8-9 (Arlington, USA: Mercatus Center at George Mason University Working paper 60, 2005) and Antonio M. Pedro, *Mainstreaming Mineral Wealth in Growth and Poverty Reduction Strategies 5* (ECA Policy Paper No 1, UNECA, 2004). In my view the curse is not our resources; the real curse is the capitalist regulatory context in which extractive activities are regulated and undertaken – a curse of capital as it were.

14 Tawanda Karombo, 'Shock Blow to Implats as Mugabe Backtracks', *Business Day*, 6 March 2013.

15 N. Madanhire, 'Share Ownership Schemes a Zanu PF Poll Gimmick', *The Standard*, 23 October 2011, cf. Herald Reporter, 'Govt to initiate Employee Share Ownership Schemes', *The Herald*, 19 October 2011.

16 Thomas R. Yager, 'The Mineral Industry of South Africa' in *2009 Minerals Yearbook* (United States Geological Services (USGS), 2011), available at <http://minerals.usgs.gov/minerals/pubs/country/2010/myb3-2010-sf.pdf>; Philip M. Mobbs, 'The Mineral Industry of Zimbabwe' in *2010 Minerals Yearbook* (United States Geological Services (USGS), 2012), available at <http://minerals.usgs.gov/minerals/pubs/country/2010/myb3-2010-zi.pdf> and *African Economic Outlook 2011* (African Development Bank, 2011).

17 MISA, 'Zim's Diamond Deposits Largest in the World', *The Zimbabwean*, 18 May 2011 and Vladimir Mzaca and Zoli Mangena, 'Fabulous Wealth in Marange Diamonds', *The Times*, 8 August 2010.

18 See Yager note 16 above.

conspired against them in that often deposits lie on or beneath equally (if not more) treasured resources such as water, biodiversity, and protected areas where flora and fauna thrive. This reality is illustrative of the difficulties that confront these countries on how to balance the use of natural resources through prudent land use planning and conservation.¹⁹ CoAl of Africa's contested Vele Colliery in Limpopo South Africa lies in a water stressed area close to a national heritage site of international stature, Mapungubwe. The granting of the mining licence was contested and compounded by lack of regulatory coordination between various government departments.

Natural resources are a major export and contributor to foreign currency inflows of the economies of South Africa and Zimbabwe.²⁰ This is also replicated in Botswana and Zambia where diamond and copper mining respectively are central to economic growth.²¹ In addition, mining provides economic opportunities in mineral rich countries. Employment, a semblance of social development, and infrastructure development in some areas are among the potential returns from this industry. Towns like Rustenburg in the North West Province of South Africa and towns lying on the Great Dyke in Zimbabwe owe their existence to mining. Regardless of the social repercussions, mining is often projected as the biggest contributor to job creation and economic growth. This view often challenges civil society organisations to substantiate their agitation against the evils of natural resource extraction in certain areas. In South Africa for example with growing unemployment figures, the jobs proposition is often made to appear unequivocal. Youths relocated from the Marange diamond fields in Zimbabwe yearn for jobs from the mining companies operating in the area.

Increasingly, sustainable development is driving legal reforms of the environmental and mining codes. Thus the mining and environmental laws in South Africa have all recently been overhauled to embed good environmental practices aimed at promoting sustainability. On paper an impressive array of

environmental and sustainable development policies and laws promise a bright future, but the persistence of environmental degradation caused by mining; land, water and air pollution; and reduction of arable land for agriculture, are constant reminders of the inherently unsustainable nature of mining. Water pollution in Mpumalanga Province of South Africa, acid mine drainage (AMD) in the Witwatersrand basin, Johannesburg; and the constant air and water pollution from mine dumps in Davidsonville, Johannesburg and Bafokeng are clear examples. Johannesburg is encircled by mine dumps or tailings that leach into the water systems, and in the summer months blow toxics into the air. Even more complex is the lack of substantive transformation of the mining sector in South Africa where the poor, previously disadvantaged groups remain marginalised and only a few elites have broken into the sector.

Despite the above challenges, some mining companies do promote sustainability by 'greening' their activities. However, civil society must watch out against green washing and placation by some unscrupulous mining companies. Companies are conceived to maximise profits for shareholders. Recent calls for corporate social responsibility (CSR) and human rights obligations of corporations are secondary to what corporations were conceived to achieve.²² In the classical Anglo-conception of a company, a mining company did not primarily exist for public interest purposes of building hospitals, roads, boreholes, and schools for people who were not shareholders.

The orthodox conception of the company as solely aimed at profits for shareholders is however increasingly giving way to the good corporate citizen perspective. This view sees companies as existing in a social setting with expanded stakeholders including the environment broadly defined. As King would put it, the three pillars of sustainable development are now the three legs on which a company must stand if it is to survive in the 21st century. Companies that still limp on the classical financial (economic)

19 Pedro note 13 above at 5.

20 Sharaky note 1 above at 4.

21 Sharaky note 1 above at 1.

22 Modern company law codes are mainstreaming sustainability and companies are increasingly expected to consider all stakeholders apart from shareholders only.

leg would inevitably fall for want of social and environmental acceptance.²³

Quite questionable though is whether this has fully sunk into the thinking of the majority of the directors and shareholders of big mining corporations? Widespread evidence of disregard of their social and environmental responsibility by mining companies and artisanal miners appears to show that the 'sustainable mining' concept may be a smokescreen covering the flagrant global capital interest in reaping profits from the developing countries of the South. For instance, in South Africa many mining companies operate without water use licences, and some commence mining without all the necessary licences.²⁴ Nkomati Anthracite (Pty) Ltd started open cast coal mining in Madadeni, while CoAl Africa opened the Vele Mine without water use and environmental authorisations. Without generalising, there are some companies working in good faith to make mining sustainable.²⁵ In their favour also, mining companies have no legal duty to fulfil primary state obligations towards the citizens like providing social amenities and facilities. Is it equitable therefore to expect corporations to deliver public services while they are paying their taxes? Is this not an abdication of their socio-economic mandate by the state? Rather the inquiry should focus on how governments regulate mining taxation – that is whether the rate of taxation is justifiable and fair in relation to the social, economic and environmental footprint of the industry. However, where extractive activities disproportionately impact communities, such a duty is created. Civil society should not exclusively focus on pressuring mining companies. They must also push governments

to impose realistic levels of taxation and rehabilitation funds, while concurrently demanding and monitoring transparency in the implementation of agreements on these issues. The Extractives Industry Transparency Initiative (EITI)²⁶ and the Publish What You Pay (PWYP) networks come to mind. Recently the government of Zimbabwe proposed a Zimbabwe Mining Revenue Transparency (ZMRT)²⁷ initiative while the Zimbabwe Environmental Law Association (ZELA) launched the Zimbabwe chapter of PWYP.²⁸ The objective of all these initiatives is to try and prevent the adverse impacts of mining which are discussed in the next section.

3

IMPACT OF MINING ON COMMUNITY LIVELIHOODS AND THE ENVIRONMENT

While mining could anchor economic development as noted above, minerals have also been often referred to as a curse. This is due to the several negative impacts that mineral discovery forebodes for surrounding communities and the environment. The extraction of minerals can physically damage the environment and natural resources affecting water resources, forests and wildlife on which local

23 Mervyn King, King III Code of corporate Governance (Presentation at the Corporate Governance Workshop, the Mandela Institute of Law, Wits University, held on 9 March 2010).

24 As at 18 April 2013 50 mines operated without water licenses in South Africa- see Sandra Gore and Helen Dagut 'Streamlining water use licence applications into environmental mining regulation' *BizCommunity.com* 18 April 2013.

25 For instance the mining companies in Bafokeng have contributed to the development of education through building schools, while securing the future of local communities through share ownership schemes. Similarly ZIMPLATS has also entered into partnership with local community trusts to leave a legacy of wealth. It remains to be seen if these community share ownership schemes will in fact benefit future generations.

26 See Odendaal and Tjiramba, note 1 above on the EITI in Namibia.

27 Launched by the Zimbabwe Government on 2 September, 2011 with aim of initiating 'a national participatory process to promote dialogue and trust among stakeholders in the mining industry and enable greater transparency of Zimbabwe's mining revenues and sector information –as a first step towards Zimbabwe a first step towards Zimbabwe adopting the EITI standard and applying to join the global EITI process'. Government of Zimbabwe, Office of Deputy Prime Minister, Zimbabwe Mining Revenue Transparency (ZMRT): A Participatory Process, launch meeting held in Harare on 8 September 2011.

28 The Prime Minister of Zimbabwe also recently called for transparency in the management of revenue from diamond mining in Marange. Admittedly this call should apply to all natural resources and mining in all areas in Zimbabwe. See 'Mining Ops in Chiadzwa Impressive: PM', *The Herald*, 17 February 2012, available at http://www.herald.co.zw/index.php?option=com_content&view=article&id=34219.

communities depend for livelihood. Mining destroys the environment, reduces arable lands, and pollutes water and the air. Equally the commencement of mining can cause huge social disruptions and cultural shocks to the local communities.

In South Africa and Zimbabwe most indigenous local communities remain dispossessed and marginalised. Often they cannot point to the actors responsible for their condition given the flux and change in the *dramatis personae* from the pre-colonial to the post-colonial state. For instance, in some of the communities in Bafokeng, North West Province, South Africa, poverty and disempowerment are the order of the day while a section of the community calling itself the Royal Bafokeng Nation (RBN)²⁹ entered into lucrative contracts with mining companies. Similarly the CoAl Africa's colliery projects in Vele and Mudimelli occur in one of the poorest provinces of South Africa - Limpopo. Clearly this is not just an issue with the actors but also a structural challenge. Often local communities are left to deal with mining companies instead of the government interceding on their behalf. Thus for instance the relocation of communities affected by mining in Marange to ARDA Transau (Zimbabwe) and the Mudimelli communities (South Africa) placed the people's future in the hands of the mining companies.

The effect of mining on society, livelihoods, the environment and geopolitics has not changed fundamentally. The actors may have changed but the drama of the exploitation of Africa's resources continues unabated. The Bafokeng communities' marginalisation and exclusion started well before 1994.³⁰ However, the emergence of democracy, sustainable development and environmentalism toned down the exploitative nature of mining laws and policies in Africa generally. The modern mantra of 'development-through-capitalism' has seen linkages develop among mining, poverty alleviation, and good governance. A tour of the Bafokeng area in North West Province, South Africa as well as ZIMPLATS, Marange and MIMOSA mining

surrounds in Zimbabwe shows many billboards where mining companies claim to be sustainable and championing the social infrastructure development in their areas. This is visible especially in schools, hospitals and other amenities sponsored by the companies. To this end Hilson correctly argues that,

It is a well-known fact that mines can have a positive socioeconomic impact in local communities. Companies often contribute to the development of key socioeconomic infrastructure such as roads, hospitals, schools and housing. Moreover, the revenues accrued from activity contribute positively to export and foreign exchange earnings, and at the community level, projects serve as a major source of employment for local people, and trigger the rise of a wide range of small businesses such as catering, transport and cleaning services.³¹

Despite this optimism, questions remain: whether mining can anchor sustainable development in Africa,³² whether natural resources are the panacea for poverty alleviation and more importantly whether the democratic system of government and governance ideology underpinning capitalism can sustain these apparently noble dreams? Can the African dream be realised within the contemporary structure of governance, and relations of power and production? Poteete does not seem to agree.³³ Conversations and encounters with many authorities on development theory and globalisation seem to suggest otherwise. However, others whose world views are often nurtured in these very relations of production and system of governance suppose that it could be possible to make mining sustainable.³⁴ Admittedly there is also much to be said to give hope to local communities in mineral rich developing countries. The mixed feelings are apparent if one

29 Andrew Manson and Bernard Mbenga, "The Richest Tribe in Africa": Platinum-Mining and the Bafokeng in South Africa's North West Province, 1965-1999' 29/1 *Journal of Southern African Studies* 25, 46-47 (2003).

30 *Id.*

31 Gavin Hilson, 'An Overview of Land Use Conflicts in Mining Communities' 19 *Land Use Policy* 65-66 (2002).

32 *Id.* cf. Amy Poteete, 'Is Development Path Dependent or Political? A Reinterpretation of Mineral-Dependent Development in Botswana' 45/4 *Journal of Development Studies* 544, 544 (2009).

33 *Id.*

34 Pedro, note 13 above at 2, and Fred Cawood et al., Mining, Minerals and Economic Development and the Transition to Sustainable Development in Southern Africa (Mining, Minerals and Sustainable Development (MMSD) Project, September 2001).

interacts with communities affected by mining. Extractive activities are expected to deliver jobs, better living conditions and improved economic prospects for local communities. However, as Peter Leon rightly notes, in South Africa '[the] current approach to mine communities is not delivering these benefits. It presupposes a one-size-fits-all model for such communities, despite their diverse needs and circumstances, and reserves no seat at the regulatory table for the affected mine communities'.³⁵

In Zimbabwe diamond mining in Marange saw local communities being forcibly relocated. While some members of the community felt that the relocation brought a better life, with modern houses and amenities, including moving to a high rainfall area with better soils; some equally felt short-changed in that promised compensation had not materialised while there was no certainty regarding land tenure and ownership of the houses. Therefore despite the rich mineralogy of most Southern African states, the local communities living in mineral bearing areas continue to suffer. Civil society initiatives and lobbying to deal with the impacts of mining must be in addition to effective legal regulatory frameworks to which the next section now turns. The regulatory frameworks for mining in South Africa and Zimbabwe are analysed to see how effective they are and whether they are any different from the colonial laws.

4

LEGAL REGULATION OF MINING IN SOUTH AFRICA AND ZIMBABWE

4.1 A Brief History of the Legal Systems

Since the discovery of minerals, governments and mining companies have attempted to regulate extractive activities with a view to ameliorating some

of the impacts discussed above. However, a review of the legal regulation of mining in South Africa and Zimbabwe (which reflects the situation in many African developing countries) shows that the focus of the laws and policies was, and remains, to facilitate extraction with little regard to the impacts of mining on the environment, communities and local development. Self-regulation and corporate social responsibility interventions by mining corporations largely indicate that these were aimed at facilitating mining rather than as philanthropic community development gestures.

The legal systems of South Africa and Zimbabwe share many traits. These commonalities are based on the spread of the Roman-Dutch common law and partial Anglicisation by the English. The legal system transplanted at the Cape by the Dutch and the English was propagated in Zimbabwe during colonisation and to date the Zimbabwean Constitution provides that Zimbabwe's common law shall be the law applicable in the Cape as at 10 June 1891.³⁶ Subsequently this law has been developed by the courts and by legislation made by the legislature over the years.

As noted previously the regulatory frameworks developed during the colonial era were oriented towards promoting maximum extraction of resources. With political conquest also came conquest over the 'ownership' and control of Africa's resources, specifically land and minerals. Political victory spawned an extraction-oriented extractives sector regulatory trajectory. Thus began the history of dispossession, marginalisation and deprivation. Mining laws in South Africa and Zimbabwe with a colonial heritage remain in place. South Africa only recently changed the mining code to incorporate sustainability. In Zimbabwe the mining laws remain premised on the colonial models hell-bent on efficient extraction and trade in mineral resources. In both countries, consciously or unconsciously, local proxies and elites stepped into the shoes of the colonial powers and multinational companies. Hence the call for indigenisation in Zimbabwe and nationalisation in South Africa are not without merit.

³⁵ Peter Leon, 'Marikana Mangaung and SA's Mining Industry' *MiningM²*, 30 August 2012, available at <http://www.miningmx.com/opinion/columnists/Marikana-Mangaung-and-SA-mining-industry.htm>.

³⁶ Constitution of Zimbabwe, 1979, Section 89.

This history of the common law of South Africa and Zimbabwe is important not only because it shaped, but also often distorted, the legal regimes governing land tenure, mineral rights, and how these rights are exercised.³⁷ With minimal statutory changes, the Roman-Dutch law of property continues to govern land ownership and transfer. Under Roman-Dutch law a landowner owned the mineral resources beneath her land.³⁸

African customary law is also part of both legal systems. There was and is no single African customary law, but the legal rules vary depending on the tribe and culture.³⁹ While there are many variants of African customary law, the general principles are comparable. Relevant to this discussion is how customary law governs 'ownership' of land and natural resources. Under most African customary legal systems communities often do not 'own'⁴⁰ the land but only have the rights to use the land. Customary rights are often group rights grounded in common property rights and communal use regimes.⁴¹ Delius notes that this conception of 'communitistic or communal' title is 'misleading and partly reflects the difficulties experienced by outsiders in understanding or naming African systems, which

resulted in the use of inappropriate comparison and terminology often derived from European rather than African history'.⁴²

Often the state owns the land and manages it through local government functionaries together with traditional leaders. Being the landowner the state through traditional leaders has immense powers on where local communities live, as well as where extractive activities are authorised.⁴³ Thus traditional leaders play a leading role in representing communities affected by mining – this they do positively sometimes, but often they are hoodwinked.⁴⁴

The relocation of people from Marange in Zimbabwe, ZIMPLATS share ownership scheme in Zimbabwe, contestation of royalty in Bafokeng and Chief Mudimelli of South Africa's disruptions of community mobilisation, all show the significance of the role of traditional leaders and customary law. Currently, the Marange communities that relocated to ARDA Transau do not have traditional leaders and this mere fact is disempowering and cripples community collective organisation.

The overshadowing of African customary law by the foreign legal systems is relevant given the repercussions on security of tenure.⁴⁵ The convergence of legal systems saw the dislocation of local indigenous communities' entitlements to land and mineral rights – an issue never fully resolved in the independent state.⁴⁶

37 Elmién du Plessis, 'African Indigenous Land Rights In a Private Ownership Paradigm' 14/7 *Potchefstroom Electronic Law Journal* 45 (2011). du Plessis argues that the common law distorted the history and understanding of indigenous African land rights and customary titles.

38 *Agri South Africa v Minister for Minerals and Energy and others* CCT 51/12 [2013] ZACC 9, 2013 JDR 0770 (CC) para 7, see also PJ Badenhorst, *Mineral and Petroleum Law of South Africa* (Wetton: Juta Law, 2012) para 1-7.

39 Sindiso Mnisi, [Post]-colonial Culture and its Influence on the South African Legal System – Exploring the Relationship Between Living Customary Law and State Law (Unpublished PhD thesis, Oxford University, 2007).

40 Ownership is used here in the Western common law conception of proprietary individual title. The conception and understanding of ownership under African customary law is quite different from this individualistic western concept. This is one of the customary law concepts heavily distorted during the process of colonisation and transplantation of the common law to Africa. See further Wilemien Wilcombe and Henk Smith, 'Customary Communities as 'Peoples' and Their Customary Tenure as 'Culture': What We Can Do With the Endorois Decision' 11 *African Human Rights Law Journal* 422, 428 (2011).

41 *Richtersveld Community and others v Alexkor Ltd and another* 2003 6 BCLR 583 (SCA) para 18. See also Wilcombe and Smith, *id.* at 427.

42 Peter Delius, 'Contested Terrain: Land Rights and Chiefly Power in Historical Perspectives', in Aninka Claassens and Ben Cousins, *Land, Power and Custom - Controversies Generated by South Africa's Communal Land Rights Act 218* (Cape Town: UCT Press 2008).

43 *Id.* Delius gives a convincing account of how chiefs managed land in pre-colonial times and these processes at the local level have continued in some African societies especially in Zimbabwe. In South Africa the apartheid land policies seems to have destabilized these processes deeper. See also du Plessis, note 37 above at 56.

44 Samantha Enslin-Payne, 'Wild Coast King Fights Mining', *Business Report*, 28 May 2012.

45 Ben Cousins, 'Characterising 'Communal' Tenure: Nested Systems and Flexible Boundaries', in Claassens and Cousins, note 42 above at 116.

46 HWO Okoth-Ogendo, 'The Nature of Land Rights Under Indigenous Law in Africa' in Claassens and Cousins, note 42 above at 98 and generally *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* 2011 (4) SA 113 (CC).

Currently, issues regarding land redistribution and claims based on historical customary possession are unresolved especially in South Africa. The Bafokeng case in South Africa is precisely about this contestation of customary land title. The issue therefore is how to balance the interests of the traditional claimants against the acquired rights (sometimes, but not always, legitimate) under the conquering legal systems? Pending litigation by the Legal Resources Centre (LRC) of South Africa including the Bafokeng communities' land claims illustrates the intractability of this issue.⁴⁷ Similarly there are multiple land claims on the land that CoAl Africa is mining in Limpopo Province of South Africa with the Ga-Machete, Vhangona and Tshivula communities all staking claims. The distortion of customary law and contestation of land ownership has continued into the post-colonial state. Mining and land law reforms have done little to rectify these legal distortions.

Anecdotal evidence shows that usually colonial land dispossession laws reinforced mining laws. The history of colonisation left South Africa and Zimbabwe with certain common issues such as land dispossession, marginalised indigenous or local communities, and degraded environments, all flourishing in fundamentally flawed legal frameworks. Efforts to reform colonial mining and land laws and policies have been incremental in both South Africa and Zimbabwe, with the former having done more work towards wholesale review of the mining laws. It was hoped that some of the negative impacts of mining could be addressed through environmental regulatory reforms. But environmental law continues to play second fiddle to mining law, thus this has also been ineffective.

4.2 Post-Colonial Mineral Policy Reforms

The above developments saw hybrid regulatory systems in South Africa and Zimbabwe where African customary law, legislation and Roman-

Dutch common law co-exist within a hierarchy.⁴⁸ Since gaining political independence both countries revised the imperial mining laws to leverage the contribution of mining to economic growth.

In South Africa the Mineral and Petroleum Resources Development Act 2002 (MPRD) has been hailed as a revolutionary piece of law promoting sustainable mining and black economic empowerment.⁴⁹ Despite this hope, and alongside reform of the mining laws, South Africa has seriously considered the call to make mining sustainable by introducing environmental laws that seek to rein in the sector.⁵⁰ This has been ineffective, as the environmental laws have largely remained peripheral to the mining sector in practice, due to institutional resistance and poor enforcement. The sector, together with the relevant government department, has consistently resisted attempts to subject it to strict environmental regulations.⁵¹ Recently the Minister of Mineral Resources in South Africa joined a mining company in arguing that provincial and local government spheres of government could not stop commencement of mining activities once a mining company had been issued with a mining licence under the MPRD Act. The Constitutional Court rejected this argument and

48 Anything inconsistent with the Constitution is invalid (S 2 Constitution of South Africa, 1996), while legislation can change rules of common and customary law. Wilcombe and Smith, note 40 above, rightly observe that this pretence at the equality of sources of law in South Africa does not reflect reality as customary law has often being relegated to the 'other' law. As far as ownership of minerals is concerned it also seems that the Roman Law is consistent with African customary law as endorsed by the South African Constitutional Court in *Alexkor Ltd and the Republic of South Africa v The Richtersveld Community and others* 2004 5 SA 460 (CC) para 62 where the court ruled that 'The community had the right to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface'.

49 Act 28 of 2002.

50 These include the National Environmental Management Act 107 of 1998 (the NEMA) and sector specific environmental legislation like the National Water Act 36 of 1998 and other Specific Environmental Management Acts as defined in section 1 of the NEMA.

51 Yolandi Groenewald, 'Coal Mine Threat to World Heritage Site', *Mail and Guardian*, 25 February 2009 (then Minister of Environmental Affairs and Tourism said he could not support the granting of the mining rights).

47 The LRC is representing various community groups to claim the benefits of platinum mining on their ancestral lands, and for history, see *Bafokeng Tribe v Impala Platinum Ltd and others* 1999 (3) SA 517 (BH).

ruled that mining companies cannot just commence with mining in a municipal area without complying with the applicable municipal planning and zoning regulations.⁵² Proposed environmental law reforms may see further relaxation of the regulation of this industry.⁵³ Mining is further regulated directly or indirectly by a number of other laws which are not necessary to analyse in detail in this article.⁵⁴

A body of laws particularly relevant to the sector are laws on land redistribution. In South Africa, the key legislation is the Restitution of Land Rights Act 22 of 1994 under which communities dispossessed of land after 19 June 1913 can lodge a claim for their land. Significantly, some of the land claims are being made to areas that are protected areas and areas on which mining companies already have mineral rights or are already mining such as the Mapungubwe National Heritage site.

The Marange diamonds saga in Zimbabwe shows that communities suffer the consequences of insecure tenure as mining companies apply for, and often are granted, mining rights on communal lands. Such lands have been supporting communal livelihoods over the years and mining and land laws routinely ignore the emotional and spiritual value of land to local communities.⁵⁵ This, however, creates conflicts that often the government and the mining sector are

not prepared to resolve satisfactorily.⁵⁶ The land rights conflicts are often accentuated by information asymmetries and total lack of access to relevant, quality and accessible information by communities on the extractive activities in their areas. Thus some communities relocated from Marange allege that they have no information on compensation and delivery of promised social infrastructure. Often they receive conflicting information from local government officials and the mining companies.

In Zimbabwe mining is regulated by a number of laws. Of these, the main law is the Mines and Minerals Act Chapter 21:05. There are other laws that govern the administration of trade and dealing in mineral resources. Communal land is governed by the Communal Lands Act Chapter 20:04 as read with the Traditional Leaders Act Chapter 29:17 and the Rural District Councils Act Chapter 29:13. Environmental laws do apply to mining activities as well.

Overall traditional leaders are responsible for managing communal land, settling people within their areas under customary law while preventing illegal use of land and natural resources. Mining often disrupts this 'natural order' as in the relocation of the Marange communities. Some of the headmen supported relocation while others opposed it or imposed conditions on the process. However, traditional leaders do not own the land, which remains under state ownership. The Mines and Minerals Act trumps all these laws to the extent that once minerals are discovered and prospecting or mining rights granted; there is little in the law to stop mining activities. Again in Marange even the Environmental Management Agency (EMA) of Zimbabwe struggled to subject the mining companies to environmental impact assessment (EIA)⁵⁷ requirements as they commenced mining

52 *Maccsand (Pty) Ltd v City of Cape Town and others* 2012 (4) SA 181 (CC) and *Le Sueur and Another v Ethekwini Municipality and Others* (9714/11) [2013] ZAKZPHC 6 (30 January 2013).

53 National Environmental Management Laws Amendment Bill, General Notice 586 in *Government Gazette No 34558* of 26 August 2011 read with the Draft Mineral and Petroleum Resources Development Amendment Bill, 2012 General Notice 1066 in *Government Gazette No 36037* of 27 December 2012.

54 Diamonds Act 56 of 1986, Diamond Export Levy Act 15 of 2007, the Mineral and Petroleum Resources Royalty Act 28 of 2008 and the Mine Health and Safety Act 29 of 1996. Among other things, these laws regulate the trade, dealing, import and export of mineral resources and related products. Some of these also regulate the revenue from mining.

55 The Marange communities in Zimbabwe have been relocated far away from their customary lands, forced to rebury their dead, and abandon their subsistence way of life to a semi-urbanised environment of mixed cultures without traditional leaders.

56 Gavin Hilson argues that 'Mining land use conflicts are typically most intense in the developing world, where the issue of land tenure – more specifically, clarification of who actually owns land – is the cause of most problems'. See Hilson, note 31 above at 68.

57 Required in terms of section 97 read with the First Schedule of the Environment Management Act, Chapter 20:27.

without EIA studies.⁵⁸ Marauding illegal miners had already defaced the area anyway.

4.3 Indigenisation or Nationalisation: The Inconclusive Debate

Zimbabwe and South Africa are reviewing laws to address the dispossession of local communities of their lands and attached mineral resources. Strategies vary from voluntary empowerment deals to outright mandatory local ownership of companies.⁵⁹ The debate on nationalisation in South Africa and indigenisation in Zimbabwe rages on. There have been vocal calls for nationalisation in South Africa, until 10 February 2012 when President Zuma pointed out that nationalisation is not yet a policy.⁶⁰ In 2012 there was considerable policy discord in South Africa as some officials said nationalisation was off the table while others pledged that nationalisation would only happen over their dead bodies.⁶¹ Playing down Minister Trevor Manuel's speech⁶² at the Mining Indaba, the ANC Secretary General, Gwede Mantashe urged that:

58 George Maponga, 'Diamonds Discovered in Bikita', *The Herald*, 11 March 2013. (A Chinese and Zimbabwean consortium mining company reportedly discovered diamonds, started mining activities and building associated infrastructure before applying for the mining rights or environmental authorisations).

59 Zimbabwe's indigenisation law of 2010 requires international companies to surrender 51 per cent to locals in terms of equity ownership.

60 State of the Nation Address by Jacob G Zuma, President of the RSA on the occasion of the joint sitting of Parliament, 9 February 2012, available at <http://www.anc.org.za/show.php?id=9374>.

61 Trevor Manuel endorsed the Minister of Mines' position that nationalization will only happen over her dead body, while the next day Gwede Matanshe, the ANC Secretary General hastened to say that nationalization is not off the table and the ANC 'will not be bullied into stopping discussion on the nationalisation of mines because it will scare off investors'. See Amukelani Chauke, 'We Won't be Bullied: Gwede', *The Times Live*, 7 February 2012.

62 Trevor Manuel is a Minister in the President's Office who heads the National Planning Commission (NPC). He said 'The minister [Susan Shabangu] was pretty forthright in saying that there will be nationalisation over her dead body. Now you couldn't ask for a clearer statement than that', he told the Investing in Africa Mining Indaba in Cape Town'. See Staff Reporter, 'Nationalisation Isn't the Way for South Africa, says Manuel', *Mail and Guardian*, 7 February 2012.

What is important is what [are] the best practices internationally in terms of managing mineral resources... Why are investors and companies prepared to go 50-50 in diamond mines in Botswana, [but] say that we must not even discuss that? Why do companies say that they can work with a state company in Chile and in Brazil [but] if it is in South Africa [discussing it] is a no-no?⁶³

Apart from the politics, it is important to understand the comparative context that Mantashe alludes to. Indeed in countries such as Botswana and Chile, the state has negotiated some form of partnership with the extractives sectors.⁶⁴ The governments of those countries are involved in the sector, through taxation mechanisms or direct or local ownership.⁶⁵ Ultimately at its policy conference in June 2012,⁶⁶ the ANC government decided against outright nationalisation, opting to use economic instruments to promote equity in the sector.

The irony in South Africa is that calls for nationalisation of mineral resources are being made in the backdrop of the MPRD Act which, by making the state the trustee of all resources in the country, nationalised mineral resources. Section 3 provides that:

(1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.

(2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may –

(a) grant, issue, refuse, control, administer and manage any reconnaissance permission,

63 Chauke, note 61 above.

64 Anthony Bebbington, 'Extractive Industries in the Andean Region: Issues, Actors, Challenges' (Unpublished background paper, Procasur July 2011).

65 Debswana is often pointed to as a shining example of how a state private sector partnership. However there is a lot of foreign opposition to such initiatives in South Africa and Zimbabwe.

66 Maximising the Developmental Impact of the People's Mineral Assets: State Intervention in the Minerals Sector (Report prepared for the ANC Policy Institute, 2012), available at <http://www.anc.org.za/docs/reps/2012/simsreport.pdf>.

prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and

(b) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament.

3) The Minister must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.⁶⁷

As trustee of the country's mineral and petroleum resources, South Africa has virtually nationalised these resources. The real issue is how the government is managing its role as trustee in regulating licencing and access to the mining industry. In this regard, persistent marginalisation of local communities is not a problem of the multinational mining corporations *per se*, but of the government and its hesitation to exercise its section 3 powers.⁶⁸ Increasingly scholars are questioning if there is a clear understanding of the public trust doctrine as imported into South African law.⁶⁹

In Zimbabwe the state has taken the path of indigenisation through compulsory local equity ownership in certain sectors, not only mining. In terms of the law all companies must have a certain percentage of their equity in the hands of indigenous

Zimbabweans. Contentious issues that have cropped up include how to define 'indigenous Zimbabwean' and the equity and fairness of the whole scheme.⁷⁰ The definition of 'indigenous' in the Zimbabwean law is very context specific.⁷¹ What is clear though is the attempt to use the colonial history of marginalisation to address some of the impact of mining on communities. The contestation of 'indigeneity' and the temporal and space variability of this concept make it impossible to universalise its application.

The complexity of defining 'indigenous peoples' and 'previously disadvantaged communities' makes it difficult to craft laws that are exclusively aimed at benefitting the target groups. Often it leads to opportunists hijacking opportunities meant for the local communities. In South Africa for instance there is a general perception that the black economic empowerment laws (BEE) have largely benefited the upper middle class elites,⁷² and nationalisation is likely to lead to the same result. Very few benefits of empowerment have in fact empowered the poor and the historically disadvantaged.⁷³ One has to acknowledge that there has been some progress but it could be better.

This bleak picture of equity and black economic empowerment progress in South Africa directly reflects the inequities of the relations of production in the extractives sector, which has recently imploded in the platinum-rich North West Province. These relations of production have not fundamentally transformed from the colonial exploitative relations in which blacks are seen as cheap labour and multinational corporations are preoccupied with paying dividends to shareholders. The regulatory framework for mining has served to entrench these socio-economic relations and

67 MPRD Act 2002, Section 3.

68 The state's approach betrays a fear of and capture by powerful mining corporations. Unfounded threats of economic instability and investment flight are used to scare the state from an interventionist regulatory approach.

69 Tumai Murombo, 'The Public Trust Doctrine in South African Environmental Law: A Reappraisal' (Paper presented at the Annual Conference of the Environmental Law Association, September 2011), Loretta Feris, 'The Public Trust Doctrine and Liability for Historic Water Pollution in South Africa' 8/1 *Law, Environment and Development Journal* 1, 3 (2012) and Patricia Kameri-Mbote, 'The Use of the Public Trust Doctrine in Environmental Law' 3/2 *Law, Environment and Development Journal* 195, 197 (2007).

70 Indigenisation and Economic Empowerment (General) Regulations Statutory Instrument (SI) 21 of 2010.

71 *Id.*

72 Grietjie Verhoef, 'Economic Empowerment and Performance: Strategies towards Indigenisation/Black Economic Empowerment and the Performance of Such Enterprises in Nigeria and South Africa, Since the Early 1970s to 2002' 29 *Journal for Contemporary History* 92, 109 (2004).

73 The Employment Equity Act 55 of 1998.

therefore needs a complete overhaul if mining is to be sustainable.

This *status quo* is an obstacle to sustainable development generally and in the extractives sector particularly. This is exacerbated by environmental degradation wrought by mining activities, among other unsustainable activities. The mineworker finds himself working in squalid conditions, penniless, living in equally squalid crowded conditions, in an environment that may pose harm to health and wellbeing.⁷⁴ This cycle of want and impoverishment extends and reproduces itself into the family of the miner, as he may not be able to afford good education for his children, who then end up going down the shaft to toil for a miserable existence. Thus the owner of the means of production locks the working class in this capitalist ecosystem *ad infinitum*. Mining laws, among other socio-economic regulatory instruments, legitimise this situation. To change this *status quo* reform of mining laws must be embedded within sustainability, social equity, and community participation. Challenges to the overhaul of mining codes manifest variously in South Africa and Zimbabwe. The challenges, which are also the symptoms of archaic legal frameworks, show that reforms must focus on more than just mining codes. The process must be inclusive, extending to corporate governance, land use laws, and communal land tenure and fiscal systems to manage revenue from mining. The next section discusses how some of these challenges manifest and proposes solutions.

5

MANIFESTATION OF CHALLENGES TO LEGAL REFORMS

The extractives industry in South Africa and Zimbabwe remains a thorny issue for governments

⁷⁴ Right to an environment not harmful to health and well-being is protected in section 24 of the Constitution of South Africa 1996.

and the people.⁷⁵ Some communities believe that the presence of minerals is a curse. The experience and perspectives of local communities are by no means homogeneous. As seen in the relocation in Marange, some members of the community are happy to have been relocated while others resist or regret the move. This mixture of views is a challenge to civil society interventions that depend on community collective action while it is an opportunity for the state and corporate actors who thrive on divisions within the communities.

The state and communities are concerned with the distribution of revenue from mining activities. Communities are also unhappy with poor land use planning, which often disregards spatial plans; the failure of governments and mining companies to engage the communities when entering mining contracts that affect them; the continued uncertainty regarding tenure rights of communities especially under customary law; and the environmental impacts of mining. These grounds of community dissatisfaction are symptoms of the deficiencies in mining laws. By addressing them through legal and policy reforms they have the potential to produce double impact, firstly by modernising the law and secondly by mitigating the impacts of mining.

5.1 Mining Revenues, Land Rights and Community Exclusion

Whether mining corporations share enough of their profits with their host countries and communities remains a contentious issue. Both South Africa and Zimbabwe's legislation provide for mining companies to pay royalties to the state. The key issue is how much is paid in royalties and other taxes?

⁷⁵ South Africa and Zimbabwe are arguably representative and sometime have better experiences relative to other Southern African countries like Democratic Republic of Congo, Zambia, and Malawi. In the DRC poor regulation of mining has gotten entangled with conflict, geopolitics and a resurgence of the scramble for Africa. Botswana is portrayed as a paragon of sustainable use of natural resources. See Poteete, note 32 above. Yet developments show how indigenous communities in that country have been adversely impacted by mining. See *Sesana and Others v Attorney-General* (2006) AHRLR 183 (BwHC 2006).

Furthermore, to what extent does the central state share the royalties with the relevant communities affected by mining? Some countries split the royalty between central government and local communities.⁷⁶ While the central government might be benefiting, in South Africa many mining communities complain about the lack of development and investment in their areas by both mining companies and the government.⁷⁷ To the contrary often the mining companies leave a trail of damage to the environment, which they cannot or are unwilling to rehabilitate.⁷⁸ For instance despite huge profits made over centuries gold mining companies are unable to rehabilitate the Johannesburg area (Witwatersrand) inundated by acid mine drainage (AMD). While most of the corporations involved accept responsibility they simply claim inability to finance the clean-up costs.⁷⁹

The Zimbabwe government has been at war with itself regarding control of the revenue streams from Marange diamonds often with conflicting numbers being indicated by the actors involved.⁸⁰ What role can civil society and the public play in monitoring

revenue and promoting transparency?⁸¹ Is this possible without accountability and information disclosure regarding contracts concluded between the state and corporations being made public?⁸² Certainly not, based on the history and trends of regulation of mining in South Africa and Zimbabwe.

A major problem is the absence of effective legislative provisions in mining or fiscal laws to ensure transparency and accountability in how governments decide and collect taxes, royalties and other revenue from mining companies. In particular the public often does not know how much profit is made by mining companies and what proportion of that goes to the state. Compounding this problem, most mining laws do not require mining companies and the government to disclose the terms and conditions of mining concession contracts they enter into. Access to information laws in both South Africa and Zimbabwe have proved ineffective as tools to obtain such information.⁸³ Transparency would enable the public and local communities to demand that the government provide social services and funds to address environmental problems caused by mining.⁸⁴

76 Thomas Akabzaa, 'Mining in Ghana: Implications for National Economic Development and Poverty Reduction', in Campbell, note 4 above at 25, 36. Contrast with Amy Poteete and Jesse Ribot, 'Repertoires of Domination: Decentralization as Process in Botswana and Senegal' 39/3 *World Development* 439, 439 (2011) and Bebbington, note 64 above arguing that the Peru experience shows that decentralization is not necessarily better.

77 The Bafokeng experience in North West Province of South Africa is a clear case of this.

78 Green Renaissance, *Mining is in my Community: Mining, Communities, Environment and Justice* (Centre for Environmental Rights (CER) and Lawyers for Human Rights (LHR), 2012).

79 Mine Water Management in the Witwatersrand Gold Fields with Special Emphasis on Acid Mine Drainage (Report to the Inter-ministerial Committee on Acid Mine Drainage, Prepared by the Expert Team of the Inter-Ministerial Committee under the Coordination of the Council for Geosciences, December 2010), available at <http://www.dwaf.gov.za/Documents/ACIDReport.pdf>.

80 These actors are the Ministry of Finance, the Minerals Marketing Corporation of Zimbabwe (MMCZ), and the Zimbabwe Mining Development Corporation (ZMDC). Previously no such issues have been raised with other mining companies in Zimbabwe, including with existing diamond mining companies.

81 Sifelani Tsiko, 'Conflicting Mining Royalty Figures Spark Debate', *Sunday Mail*, 14 September 2011 (praising the Zimbabwe government's adoption of the ZMRT on the back of initiatives by the Zimbabwe Environmental Law Association (ZELA) to improve transparency in the whole natural resources sector in the country) and Musa Abutudu and Dauda Garuba, *Natural Resource Governance and EITI Implementation in Nigeria* (Uppsala: Nordiska Afrikainstitutet, 2011).

82 Accessing this information is quite a challenge given the complexities of contract law and privity of contract. It is argued that the contracts should be disclosed by the state acting as trustee for the people as they affect the public interest.

83 Centre for Environmental Rights, *Turn on the Floodlights: Trends in Disclosure of Environmental Licences and Compliance Data* (South Africa: Center for Environmental Rights (CER), 2013), available at <http://cer.org.za/wp-content/uploads/2013/03/Turn-on-the-Floodlights.pdf> and Centre for Environmental Rights, *Unlock the Doors: How Greater Transparency by Public and Private Bodies can Improve the Realisation of Environmental Rights* ((South Africa: Center for Environmental Rights (CER), 2012), available at <http://cer.org.za/wp-content/uploads/2012/04/Unlock-the-Doors.pdf>).

84 Shamiso Mtisi et al., *Extractive Industries Policy and Legal Handbook Analysis of the Key Issues in Zimbabwe's Mining Sector: The Case Study of the Plight of Marange and Mutoko Mining Communities* 9 (Harare: Zimbabwe Environmental Law Association, 2012).

The opaqueness of mining revenue has led to allegations that unscrupulous politicians in Zimbabwe are pilfering such revenue.⁸⁵

While in South Africa the situation is perceived to be better than in Zimbabwe, it is often alleged that mining companies externalise profits made from mining while they pay employees low wages and do not provide adequate social services.⁸⁶ The implosion in Marikana and its aftermath have been attributed to these exploitative tendencies of mining companies. The failure of mining and fiscal laws to provide effective revenue management has led civil society to take initiatives to promote transparency and accountability in the extractive sectors. The initiatives by non-state actors should by no means be substitute for much needed legislative reforms of out-dated mining laws. Anything short of legislative interventions is not sufficient to dislodge the economic relations and loopholes entrenched in existing mining laws and policies.⁸⁷

Lack of transparency and accountability is also a manifestation of the limited rights that communities and the public have legally to demand such entitlements from their governments and mining companies. There are other aspects that weaken the legal position especially of local communities.

In most countries communities do not own the land on which they have lived for centuries. There are few exceptions to this in many developing countries. As noted above African customary law vested communal land in traditional leaders. This means that their insecure tenure excludes them from crucial consultation and consent processes that the law

affords to landowners where extractive activities are about to commence. The rights of mere occupiers of land are weaker than those of landowners. This distortion of tenure rights is also a result of the distortion of customary and indigenous laws by Western colonial laws that continue to inform the approach to extractives sector regulation. The concept of ownership brought by Western style legislation is foreign to African customary law. The notion of 'ownership' under customary law has been erased from legal history and in its place substituted with individual title. Mining laws have been an integral part of this redefinition of land and mineral resources ownership. Local communities entrust their lives into the hands of their traditional leaders, recognising that they are the successors of their old caring unpaid customary leaders. The leaders are at the same time the port of call for proposed mining projects, and some of them willingly cooperate with mining companies.

In countries like Zimbabwe traditional leaders have been co-opted into the local government structures despite the pretence of keeping them 'traditional'. In this political minefield it is often difficult for communities to know who to trust. Traditional leaders are now information gatekeepers who routinely make decisions for the community. In the context of mining laws and without legal title to land, the whole notion of prior informed consent becomes a meaningless concept to rural folks. Legally speaking no consent from the affected communities is required by many of the mining laws. The communities are only 'consulted', which is often construed as a rounding of the community to a meeting where they are fed and the mining project is sold to them on the platter of jobs and development. The information shared is complicated, technical, full of jargon and local communities seldom understand it.⁸⁸

Despite the constraints caused by tenure systems and a weakened bargaining position, mining laws in South Africa and Zimbabwe do provide for some

85 Farai S. Mtondoro et al., Research paper on the power dimension to mineral related corruption: Preliminary findings on the state of corruption in the Mining Sector: The case of Gold Diamond and Platinum mining in Kwekwe, Gwanda, Marange and Mhondoro-Ngezi (Transparency International- Zimbabwe (TI-Z), 2013).

86 The South African government through state owned enterprises is also known to give big companies unrealistic subsidies to attract investment. See for example Vishwas Satgar, 'Beyond Marikana: The Post-Apartheid South African State' *African Spectrum* 33, 51 (2012).

87 Farirai Machivenyika, 'Need to Amend Mining Laws', *The Herald* (Zimbabwe), 14 February 2013.

88 This is a structural problem with mining and environmental laws that attempt to bring Western democratic processes in a context where the social and cultural processes do not permit free will.

consultation with landowners,⁸⁹ although the provisions are mostly weak in that they do not necessarily oblige the mining company to obtain consent – only to consult and often notify of their intention to mine.⁹⁰

Balancing the interests of customary landowners and mining companies in an environment where the law favours extractive activities is complex. African customary law and environmental law have been subordinated to mining legislation. The entrenched legal regulatory systems governing the mining industry marginalise local and indigenous communities, while favouring the state and multinationals. As noted above the South African MPRD Act has removed communities from the equation by assuming that the state can and will represent their interests as trustee and custodian of extractive resources. Nevertheless in South Africa courts were quick to confirm customary mineral rights.⁹¹

Coupled with the disempowering legal framework, there are environmental and land use planning laws that attempt to create room for public participation and consultation.⁹² Nevertheless, these laws are proving ineffective in the extractives sector as demonstrated by the commencement of mining activities by CoAl Africa in Limpopo (South Africa) and companies in Marange (Zimbabwe) without

EIAs and other environmental authorisations. A large number of mines in South Africa operate without water use licenses required under the National Water Act 1998 due to the *de facto* dominance given to the MPRD Act and extractive activities.⁹³ Environmental laws could be useful to regulate pollution, health and safety threats and environmental damage from mining activities.

5.2 In Defence of the Environment and Communities

The challenges discussed above and the deficiencies in current mining laws inevitably lead to conflict at various levels.⁹⁴ It is generally important to assess the extent to which mining laws provide for resolution of these conflicts. Generally many conflicts regarding the granting of mining rights often end up in the ordinary courts or administrative courts. However most of the social and communal conflicts resulting from extractive activities have to be negotiated outside the courts. Conflicts that come to mind include conflicts relating to control and access to land and other natural resources. In most cases the government and companies do not have appropriate legal and policy instruments in place to properly handle such conflicts.⁹⁵ The assumptions are that the mining companies will deal with such problems. On the contrary, many of the provisions in mining laws worsen conflict by leaving communal and even private landowners to the whims of the holders of mining rights. Landowners and communities are left to negotiate access, compensation and relocation with powerful mining houses.⁹⁶ In this bargaining environment communities are often left with the option of litigating their rights – assuming they have funds or a public interest organisation to assist them. As a last resort, those without legal options may have to resort to protest action to defend their rights or to bargain with government and mining

89 For example, Sections 5(4) (c), 10, 16 (4) (b), 40, and 79 of the MPRD Act and Sections 31, 34 and 38 of the Mines and Minerals Act (Zimbabwe) show how private landowners have better entitlements than communal rural land dwellers. Contrast with sections 5 (4) (c) and 27(7) (a) MPRD Act as applied in *Joubert and others v Maranda Mining Company (Pty) Ltd* [2009] 4 All SA 127 (SCA) para 13 and *Meepe v Kotze and others* 2008 (1) SA 104 (NC) para 13 and 17.

90 *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* 2011 (4) SA 113 (CC) para 62-68.

91 *Id.*

92 Legislation governing environmental impact assessment and issuing of water use licenses falls into this category. While commendable the provision for community/public participation and consultation in these statutes suffer from the general limitations of alienating local communities who have no clue of the science and technical aspects of project documents and reports.

93 In South Africa 46 mining companies operate without water use licences as of July 2012.

94 Hilson, note 31 above.

95 *Id.*

96 For instance the MPRD Act leaves issues of compensation for loss of surface use to the miner and the landowner as well as access issues.

corporations.⁹⁷ The rest reconcile themselves to the fate of relocation. No wonder why we have Marikana and the wild cat strikes in the North West Province in South Africa.

The challenges faced by local communities can be addressed from many angles using various approaches including using mining laws. Public interest organisations have been exceptionally helpful in empowering local communities to defend their socio-economic and environmental rights in the face of the unrelenting desire to mine. Nevertheless it must also be stated that public interest organisations do not always see what is in the interests of indigenous communities. Hence the shifts towards programmes that in fact benefit communities and let them own the processes to reclaim and enforce their rights. Often, public interest organisations see every incident or dispute as an occasion calling for radical action when sometimes measured negotiation and alternative dispute resolution mechanisms would achieve better results *for the community*.

While public interest litigation is necessary, there is need for introspection by public interest actors to assess strategies that have worked before and those that left indigenous communities worse off from unintended consequences. Understanding this dilemma of public interest actors brings insights into their work and enables shaping of new community-based interventions. Commitment to accountability in both countries is necessary if extractives are to bring mutual benefits to local communities. However even these strategies work where there are enabling laws, and mining and environmental laws should play this enabling role. The laws need not enable civil society and communities only, but also the state actors so that they negotiate better deals and are effective in implanting and monitoring compliance with the laws.

6 CONCLUSION

This article has discussed the historical origins of the extractive regulatory frameworks in Zimbabwe and South Africa, noting how these remain focused on maximum extraction of mineral resources. Extractive activities are often executed without regard to the rights of communities residing in mining areas. Also this is done in unsustainable ways as the corporations involved are focused on profit. While this situation has a colonial background, the post-colonial states in South Africa and Zimbabwe have done little to reform the mining regulatory environments to incorporate sustainable development, community participation and transparency. Rather, the manifestation of the deficiencies in the legal frameworks indicate that the post-colonial state, together with powerful multinational and empowerment mining entities, have teamed up against local communities and environmentalists, often under the guise of socio-economic development and sovereignty over natural resources.

What is apparent from the discussion is that the extractives industry is not a bad industry *per se*. Mining can contribute to economic growth and development but it must be appropriately and effectively regulated. This article concludes that this could partly be done by strengthening environmental regulation of mining activities and the rights of communities affected by mining. It is not only communities who suffer, but even the state, as it is unable to extract maximum benefit from extractive activities whilst burdened with rectifying the environmental and social damage caused by them. The onus still lies with the state to develop good laws and effectively implement them and empower the communities.

⁹⁷ Examples here include disturbances in Rustenburg due to strikes by underpaid mine workers and also the few families that have stayed put in Chiadzwa despite orders to relocate to ARDA Transau farm resettlement area.

*LEAD Journal (Law, Environment and Development Journal) is jointly managed by the
School of Law, School of Oriental and African Studies (SOAS) - University of London
<http://www.soas.ac.uk/law>
and the International Environmental Law Research Centre (IELRC)
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