



# INTEROGATING THE APPLICATION OF CRIMINAL SANCTIONS IN THE ENFORCEMENT OF MINING LAW IN ZIMBABWE

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# TABLE OF CONTENTS

## CHAPTER ONE: INTRODUCTION AND BACKGROUND OF THE STUDY

1. Chapter	1
1.1.Introduction	1
1.2.Background of the study	2
1.3.Literature Overview	3
1.4.Research Problem	3
1.5.Research Questions	4
1.6.Research Objectives	4
1.7.Research Methodology	4
1.8.Significance of the Study	5
1.9.Limitations of the Study	5
1.10. Chapter Synopsis	6
1.11 Conclusion	6
<b>2. Chapter 2: THE LEGAL REGIME FOR CRIMINAL SANCTIONS IN ZIMBABWE</b>	
2.1 Introduction	8
2.1.1 International Law	8
The Stockholm Declaration of the United Nations on the Human Environment (1972)	
8	
2.2 Regional Law	9
2.2.1 SADC Protocol on Mining	9
2.2.2 Africa Mining Vision (2006)	10
2.2.23 Kimberly Process Certification Scheme (2002)	11
2.3 National Law	
2.3.1 The Constitution of Zimbabwe (2013)	11
2.3.2 MMCZ Act	13
2.3.3 Mines and Minerals Act	13
2.3.4 Precious Stones Trade Act	14
2.3.5 Gold Trade Act	16
2.3.6. Environmental Management Act	17
2.3.7 Criminal Procedure and Evidence Act	18
2.3.8 Criminal Law Codification and Reform Act	18
2.3.9 Water Act	19
2.3.10 Forest Act	20
2.4 Conclusion	22

<b>3. CHAPTER 3: CHALLENGES AND WEAKNESSES OF THE CRIMINAL SANCTIONS IN MINING LAW</b>	
3.1 Introduction	23
3.1.1 Substantive Gaps	23
3.2 Procedural Gaps	26
3.3. Sentencing Gaps	27
3.4 Capacity Related Gaps	29
3.5 Conclusion	30
<b>4. CHAPTER 4: CIVIL REMEDIES AS ALTERNATIVES TO CRIMINAL SANCTIONS</b>	
4.1 Introduction	31
4.2 Mines and Minerals Act	31
4.2.1 Gold Trade Act and Precious Stones Trade Act	32
4.2.2. Enforcement: Department of Mining Engineering	32
4.2.3. Functions of the Department of Mining Engineering	32
4.2.4 Cancellation / Revocation /Forfeiture / Non-renewal of Licences	33
4.2.5 Imposing of Fines for Non-compliance by MMD	35
4.3.1 Comparative Analysis USA	36
4.3.2 Blacklisting	37
4.3.3 Compensation	38
4.3.4 Forfeiture	39
4.4 Challenges in the Civil Penalty Regime	39
4.4.1. Lack of Capacity and Resources	40
4.5 Overview of the Civil Penalty Regime	41
4.6 Conclusion	42
<b>5. CHAPTER 5: CONCLUSION AND RECOMMENDATIONS</b>	
5.1 Introduction	43
5.2 Summary of Major Arguments	43
5.2.1 Chapter 2	43
5.2.2 Chapter 3	43
5.2.3 Chapter 4	44
5.3 Summary of Main Findings	44
5.3.1 Chapter 2	44
5.3.2 Chapter 3	44
5.3.3 Chapter 4	45

5.4 Recommendations	45
5.4.1. Improved Security in all smuggling routes	45
5.4.2. Improved Inter-agency Collaborations	46
5.4.3 Harmonizing laws	46
5.4.4 Funding	47
5.4.5 Use of Civil Remedies as alternative Solutions	47
5.4.6 MFFFU Specialized Prosecutorial Agency within the NPA	48
5.4.7. Trans boarder Inter-Agency Co-operation	48
5.4.8. Creation of a Court mandated to deal with mining cases	49
5.5. Conclusion	49

## **ABSTRACT**

The grounds for determination which inspired this research was the need to make a critical analysis on the effectiveness of the use of criminal sanctions to enforce mining law in Zimbabwe. The two main objectives under consideration are, first, whether nature and characteristics of the criminal sanctions legal regime in Zimbabwe are effective in enforcing mining law and, if not, whether civil remedies can be applied effectively as complementary alternative enforcement tools. Secondly, the thesis considers ways in which the use of criminal sanctions and civil remedies can be made more effective in the enforcement of mining law in Zimbabwe.

In determining the purpose of criminal sanctions in enforcing mining law and establishing an effective criminal justice system, it is concluded that the main aim is deterrence. This raises a question of whether deterrence can adequately be achieved through use of criminal sanctions only.

A critical examination of the mining law in Zimbabwe shows an overwhelming reliance on criminal sanctions as compared to civil remedies., with criminal sanctions being used in almost all cases as the primary enforcement mechanism. It is argued that there are many challenges associated with the use of criminal law that weakens its use as the default enforcement mechanism and the conclusion reached is that they should be the use of civil remedies as complementary and alternative remedies where criminal sanctions fall short. The study examines several viable alternatives to criminal sanctions, both administrative and civil, and makes recommendations as to how these can be improved and used effectively to complement criminal sanctions for effectiveness.

In conclusion, the focus was on the challenges affecting the use of criminal sanctions and how these challenges can be improved to ensure efficiency. Recommendations have been suggested to improve the existing criminal sanctions in enforcing mining law in Zimbabwe.

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# CHAPTER ONE

## INTRODUCTION AND BACKGROUND

### 1.1 INTRODUCTION

Mineral extraction has become a very strong pillar of many economies including Zimbabwe and for that reason mineral crime has become rampant and prevalent. In the same manner the need to curb mineral crime has become an area of increasing concern hence the need to improve the role of the application of criminal sanctions in the enforcement of mining law in Zimbabwe<sup>1</sup>. The administration of mining law is dependent on favorable application and effective enforcement of criminal sanctions in the sector. The efforts of the legislature and the enforcement agencies contribute effectively to combating crime in the mining sector. The main objectives of management of minerals by the state are to “ensure effectiveness of the implementation and control of the mining activities, in an efficient, effective and competitive manner ,guarantee the benefits of mining in a sustainable and environmentally friendly manner, support and develop national capabilities to be more able to compete at national, regional and international levels, increase the income of local, regional and state communities and create jobs for the greatest welfare of the people and guarantee legal certainty in the mining sector”<sup>2</sup>

Sanctions are legal measures which are put in place with the aim to restrict criminal activities or to coerce compliance with the obligations under the rules of conduct. Therefore, criminal sanctions are meant to coerce, deter, punish or shame perpetrators and they have also been used as policy goals for peace<sup>3</sup>, stability, conflict resolution and progress in the mining sector in Zimbabwe in tandem with the principles of transparency, accountability, public interests and sustainable development. Illegal exploitation of minerals results in various negative effects such as water pollution, physical damage to the environment and it impedes the fulfillment of the constitutional

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<sup>1</sup> Resource policies and small-scale gold mining in Zimbabwe Author links open overlay panel Samuel J. Spiegel Geography Department, University of Cambridge, Downing Place, Cambridge CB2 3EN, UK Received 24 January 2008, revised 17 May 2008, Accepted 18 May 2008, Available online 6 January 2009.

<sup>2</sup> The effectiveness of implementing criminal sanctions in mine business without mining permits in Belitung District page 135

<sup>3</sup> <https://www.businessperspectives.org/index.php/journalscontroller=pdfview&task=download&item-id=8828>Accentuatingcriminalsanctionsfor> environmentaldegradation:issuesandperspectives

mandate<sup>4</sup> hence the basis of this study. The purpose of imposing criminal sanctions in the mining sector is to limit the likely damage to the caused to the environment, society and economy only to the target

## 1.2 BACKGROUND OF THE STUDY

“The purpose of criminal law can be derived from the theories of punishment, deterrence and retribution which have been extensively written by criminal law experts and authors regionally and internationally<sup>5</sup>. The three major theories of punishment include the retributive theory, the preventive theory and deterrence theory.<sup>6</sup> In accordance to the retributive theory the punishment for the criminal offence is made justifiable as a result of the just desert by the offender. The retribution is deemed to restore the legal balance that would have been disturbed by the commission of the crime.<sup>7</sup> The preventive theory is largely predicated on the prevention of crime and it goes in tandem with certain forms of punishment such as capital punishment, life imprisonment and forfeiture of the illegal products in some cases. This theory is largely accredited as a result of the court having to establish beforehand which accused are so dangerous that they should permanently, or at least for a long period be removed from society.<sup>8</sup> The deterrent theory is premised in the instilling of fear to the general public and its aim and emphasis is to raise an awareness of the effect of punishment on society in general. The major premise of this theory is that the society will develop an attitude to refrain from engaging in criminal conduct.<sup>9</sup>”

Punishment is the authoritative imposition of a sanction upon an individual, in response to a particular errant behavior that is deemed criminal and has been defined and promulgated as such<sup>10</sup>. Justification for punishment in the realm of the criminal law resides in theories of punishment which include retribution, deterrence, rehabilitation,

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<sup>4</sup> Section 8(1) of the Constitution provides that” The state and all institutions and agencies of the government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of sustainable, just, free and democratic society in which people enjoy prosperous, happy fulfilling lives.

<sup>5</sup> S v Kinnaird & Anor (HCAR 486 of 2015) [2015] ZWBHC 87

<sup>6</sup> Snyman 2001 THRHR 218 224-227; Dressler 17; Falls 1987 Law and Philosophy 25-27-3-

<sup>7</sup> Cotton 2001 American Law Review 1313. “*Back with a vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment.*”

<sup>8</sup> J.M. Burchell and J. Milton, *Principles of Criminal Law*, Juta, 1997, page 73-74.

<sup>9</sup> Cf the apt remarks in Dodo 2001 1 SACR 594 (CC) para 38.

<sup>10</sup> [Punishment - Wikipedia](#)



and prevention or incapacitation<sup>11</sup>. It is often said that punishment must fit the triad of the offender, the offence and the interests of justice which latter notion is represented by societal interests/expectations/legal values or convictions of society. Punishments differ in their degree of severity, depending primarily on the gravity of the crime.<sup>12</sup>The study aims to look at the obstacles against effective application and implementation of the criminal sanctions at hand versus compliance. In that, such obstacles are inclusive of the existence of smuggling syndicates some being controlled by the police<sup>13</sup> and some by political elites<sup>14</sup> who partner with local miners and provide security such that these perpetrators are seen to be above the law as their smuggling activities become public knowledge but there is no or very selective arrests and prosecution. These obstacles introduce the issues of the rule of law, corruption and equal application of the law.

### 1.3 LITERATURE OVERVIEW

The research will be focused on amongst other things, various pieces of legislation that govern mining law and there are and critically assess the stipulated modes of punishment provided. The statutes are the Mines and Minerals Act, Gold Trade Act, Precious Stones Act. Analysis is meant to figure out the most utilized mode of punishment and assess the effectiveness of the mode of punishment in the application of criminal sanctions in enforcing mining law in Zimbabwe. The research will also look at legislation, agencies, institutions and case laws of other jurisdictions.

Sentences for criminal contempt are punitive in their nature and are imposed for the purposes of vindicating the authority of the court <sup>15</sup>. The interests of an orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies public authority and willfully refuses his obedience does so at his peril<sup>16</sup>. In imposing a fine for criminal contempt .The trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's

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<sup>11</sup> S v Kinnaird & Anor HC /87/15

<sup>12</sup> S v Kinnaird & Anor HC /87/15

<sup>13</sup> [HTML]cigionline.org>2011The dark side of globalization Edited by Jorge Heine and Ramesh Thakur page 93

<sup>14</sup> [https:// www.zimfieldguide.com.zw](https://www.zimfieldguide.com.zw) Rushwaya gold-smuggling case exposes a microcosm of the corruption that exists in Zimbabwe today

<sup>15</sup> Gompers v Bucks Stove and Range

<sup>16</sup>[https://www.bing.com/ck/a?!&p=59363095ce9733e0JmltdHM9MTY1ODQ3OTk1MyZpZ3VpZD01YTczZTRiMC1iNGU3LTRlMDktYWZiZS04ZjYwZWQwMwVhNmEmaW5zaWQ9NTE0Mw&ptn=3&hsh=3&fclid=a0228e94-099b-11ed-bc49-](https://www.bing.com/ck/a?!&p=59363095ce9733e0JmltdHM9MTY1ODQ3OTk1MyZpZ3VpZD01YTczZTRiMC1iNGU3LTRlMDktYWZiZS04ZjYwZWQwMwVhNmEmaW5zaWQ9NTE0Mw&ptn=3&hsh=3&fclid=a0228e94-099b-11ed-bc49-792da33211e6&u=a1aHR0cHM6Ly93d3cuZmluZGxhdy5jb20vY3JpbWluYWwvY3JpbWluYWwtY2hhcmdlcY9jcmltaW5hbC1jb250ZW1wdC1vZi1jb3Vydc5odG1s&ntb=1)

[792da33211e6&u=a1aHR0cHM6Ly93d3cuZmluZGxhdy5jb20vY3JpbWluYWwvY3JpbWluYWwtY2hhcmdlcY9jcmltaW5hbC1jb250ZW1wdC1vZi1jb3Vydc5odG1s&ntb=1](https://www.bing.com/ck/a?!&p=59363095ce9733e0JmltdHM9MTY1ODQ3OTk1MyZpZ3VpZD01YTczZTRiMC1iNGU3LTRlMDktYWZiZS04ZjYwZWQwMwVhNmEmaW5zaWQ9NTE0Mw&ptn=3&hsh=3&fclid=a0228e94-099b-11ed-bc49-792da33211e6&u=a1aHR0cHM6Ly93d3cuZmluZGxhdy5jb20vY3JpbWluYWwvY3JpbWluYWwtY2hhcmdlcY9jcmltaW5hbC1jb250ZW1wdC1vZi1jb3Vydc5odG1s&ntb=1)

defiance as required by the public interest and the importance of deterring such acts in the future, because of the nature of these standards , great reliance must be placed upon the discretion of the trial Judge.

#### 1.4 RESEARCH PROBLEM

The legal framework in Zimbabwe particularly the mining fraternity has several provisions for criminal sanctions which are meant to enforce mining law. The ideal situation expected is that the criminal sanctions should be effective such that they will be able to deter criminal activities in the mining sector. The status quo in Zimbabwe is that the criminal sanctions are seemingly not deterrent enough to cater for the illegal activities which are rampant in in the mining sector and as a result the sector is characterized by smuggling of minerals out of the country<sup>17</sup>, illicit financial flows, illegal mining<sup>18</sup> and the abundance of mineral resources seems to be a curse that attracts more criminal activities , only benefits the political elite , continuously tramples on the rights of the poor and precipitates massive environmental degradation. The major reason for the status quo seems to be poor legislative framework, incompetent, incapacitated law enforcement agencies, lack of political will, lack of resources, corruption and poor technological advancement<sup>19</sup>.

#### 1.5 RESEARCH QUESTIONS

1. what is the nature of mining crime in Zimbabwe?
2. what is the legal regime for criminal sanctions against mining crime in Zimbabwe?
3. what are the challenges of criminal sanctions in mining law?
4. Use of civil remedies as alternatives to criminal sanctions
5. What conclusion and recommendations can be made in the research?

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<sup>17</sup> <http://www.zela.org/illicit-gold-trade-and-smuggling-vulnerabilities-exposed-by-rushwaya-case/>

<sup>18</sup> T Nyamunda &Patience Mukwambo, The State and the Bloody diamond rush in Chiadzwa :Unpacking the contesting interests in the Development of illicit Mining and Trading :Journal of Southern African Studies , vol 38 , no 1 of 2012

<sup>19</sup> According to Hernandez (2013), The advancements in technology has significantly enhanced the planning and execution of transnational crime. Criminals have advanced from the basic modes of communication like ordinary mail, telephone to more sophisticated and internet satellite communication facilities, and transportation modes of smuggling products such as drones thereby creating identification and investigation problems, whilst the law enforcement agencies are still using archaic modes of crime detection and investigation which makes it difficult to detect, investigate and provide evidence to prosecute matters successfully.

## **1.6 RESEARCH OBJECTIVES**

1. To discuss the nature and characteristics of mining crime in Zimbabwe
2. To determine the legal regime for criminal sanctions in Zimbabwe
3. To discuss the weaknesses and challenges affecting criminal sanctions in mining law in Zimbabwe
4. To assess the effectiveness of civil remedies as alternatives to criminal sanctions in mining law in Zimbabwe
5. To make recommendations for the effective use of criminal sanctions in mining law in Zimbabwe

## **1.7 RESEARCH METHODOLOGY**

Research methodology will be a combination of desktop research, doctrinal analysis, descriptive and comparative analysis research approaches. The research method will be a desktop study based on a collection of documentary information. The analysis of the research will be doctrinal in that, the focus will be on case law, legislation and other legal documents, in other words concentration will be on the law as an entity that can be distinguished and interpreted by local sources based on the doctrinal approach<sup>20</sup>. The first port of call of the research will be to focus on the letter of the law by means of analyzing the law as a body of principles that can be discerned using legal sources.<sup>21</sup> The research will also be inclusive of the description of the characteristics associated with the criminal sanctions in Zimbabwe.

This research will be desktop in nature with the aim to focus on various articles and documentary information written in relation to criminal law in the Zimbabwean mining sector. Analysis will be on the sources of law that is statutes, caselaw. The research will describe the existent legal regime and make a comparative analysis with other countries in order to come up with the ideal criminal sanction legal regime in the mining sector through looking at the status quo and the weaknesses resulting in the status quo and then come up with realistic solutions to reach the ideal setup.

## **1.8 SIGNIFICANCE OF THE STUDY**

The research will contribute to existing literature on criminal sanctions in the mining sector hence contribute to knowledge. It can also be used for reconstruction of mining policy in order to further the development of a more progressive legal framework in the sector which is clear and easy to enforce by different enforcement agencies who

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<sup>20</sup> <https://www.vaidhlegal.com/amp/what-is-a-doctrinal-research>

<sup>21</sup> <https://www.uweascllmsupport.wordpress.com/2017/01/18/research-methods-doctrinal-methodology/>

have different professions. The most important part of the basic idea and purpose of punishment has often gone unnoticed by policy formulation in the mining sector. Taking into consideration that the mining sector is continually becoming an area of interest for research, criminal sanctions are punishment oriented, there is need for research to interrogate the effectiveness of the implementation of the criminal sanctions in the sector and provide effective solutions that are applicable in practice. It is important for reconstruction of criminal <sup>22</sup>policies to include mining reality and law.

## 1.9 LIMITATIONS OF THE STUDY

The area of focus in this research will be the legal frameworks, sentencing provisions, penalties, enforcement, enforcement agencies, gaps, in the law and the obstacles to enforcement of the law. In addition, the research method to be used is subjective. Due to the researcher's primary role in analysis and interpretation of data, the researcher decides what is important and what is irrelevant in data analysis, so interpretations of the same data can vary<sup>23</sup>.

## 1.10 CHAPTER SYNOPSIS

### Chapter 1

This chapter presents the introduction, background of the study, the literature review, problem statement, research questions, research objectives, research methodology, the significance of the study and the limitations to the study.

### Chapter 2

This chapter will be focusing on the legal regime for criminal sanctions in the mining sector in Zimbabwe. The discussion will include international, regional and national sources of law which provide for the criminal sanctions used to enforce mining law in Zimbabwe.

### Chapter 3

Chapter three will be centered on the challenges and weaknesses of criminal sanctions in mining law in Zimbabwe.

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<sup>22</sup> <https://www.google.com/scholar/reconstructionofminingpolicyperspective> published by Ndaru Satrio Faisal, Andi Cery Kurnia / ICOLEG 2021: Proceedings of the 2<sup>nd</sup> International Conference on Law, Economic Governance, ECOLEG2021, 29-30 June2021, Semarang, Indonesia, 380, 2021

<sup>23</sup> <https://www.scribbr.com/methodology/qualitative-research/whatisqualitativeresearch/?/methods&examples> published on June 19 2020 by Patricia Bhandari Revised on February 10 2022

#### Chapter 4

This chapter will be focused on the use of civil remedies as alternatives to criminal sanctions in Zimbabwe.

#### Chapter 5

This chapter will be focused on the recommendations and conclusion of the research.

#### Conclusion

In conclusion, this chapter illustrates the introduction, background of the study, the literature review, problem statement, research questions, research objectives, research methodology, the significance of the study and the limitations to the study.

# CHAPTER 2

## THE LEGAL REGIME FOR CRIMINAL SANCTIONS AGAINST MINING CRIME IN ZIMBABWE

### 2.1. INTRODUCTION

This chapter discusses the legal framework for criminal sanctions against mining in Zimbabwe. The focus of the discussion being from the sources of the international sources of law that is principles derived from international declarations, regional protocols, certification schemes as well as Acts which have been enacted at national level such as the Constitution of Zimbabwe, the Mines and Minerals Act, Gold Trade Act, Precious Stones Trade Act and allied pieces of legislation such as the Water Act and the Forest Act.

#### 2.1 International law

##### 2.1.1. The Stockholm Declaration of the United Nations on the Human Environment (1972)

The Stockholm Declaration is one of the sources of international law which provides a foundation for criminal sanctions applied to regulate law in the mining Sector. The positions reflected in the 1972 Stockholm Declaration relate to the governance of natural resources and the founding positions condemn unsustainable exploitation and consumption patterns of humanity. The positions advocated for favor protection of the environment. According to the Harvard Law Journal, "the natural growth of population presented problems on the preservation of the environment and adequate policies and measures had to be adopted as appropriate to face these problems people were stated to be the most precious as, it is the people that propel social progress, create social wealth, develop science and technology and through their hard work, continuously transform the human environment. Along with social progress and the advance of production, science and technology, the capacity of man to improve the environment increases with each passing day"<sup>24</sup>.

In a bid to conquer poverty the continuous discovery of mineral resources has and continues to present new economic opportunities for many citizens who then resort to

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<sup>24</sup> Article 5 of the Stockholm Declaration

mining without licenses or permits in their local areas and some even migrate to other areas as well to conduct illegal mining activities<sup>25</sup>. These illegal mining activities result in massive land degradation and the destruction of specially protected areas such as heritage sites<sup>26</sup>. On this note, for example the legal framework for criminal sanctions that make it an offence to mine in specially protected areas such as heritage sites can be traced back to the Stockholm Declaration<sup>27</sup>. This is so for the purpose of creating such an offence stem from the principle of sustainable development provided for in the Stockholm Declaration which principle is meant to encourage exploitation of the natural resources in a manner that balances the social, economic and environmental interests.

However, the effectiveness of the application of the provisions have been affected by poor law enforcement of the criminal sanction by the agencies. Weak supervision and law enforcement seem to give flexibility rather than deter illegal mining activities in the sector, there is a low number of settlements of illegal mining cases, the police are selective in capturing and trapping illegal mining actors and this results in the loss of state revenue, poor investment climate, waste of mineral resources, legal harassment and social vulnerability<sup>28</sup>.

“The natural growth of population presents new problems on the preservation of the environment; the government must genuinely take the interests of the people at heart and adopt correct policy measures”.<sup>29</sup> Zimbabwe benefits policy formulation content and has established figures for monitoring the effective enforcement and implementation of mineral law through the use of criminal sanctions by adopting

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<sup>25</sup> <http://www.zimbabwe.com/> Afrochinesues mines minister over harmful Mavuradonha mining It emerged that there are miners from Guruve who had crossed over from Guruve into Muzarabani, some had papers others did not have papers and they claimed to have authority to operate in the Mavuradonha conservancy while others claimed to have authority from the Guruve Rural District Council but encroached into Muzarabani

<sup>26</sup> Section

<sup>27</sup> Principle 4 of the Declaration provides that, humans shall take it as a responsibility to safeguard and manage the heritage of wildlife and its habitat which are now in danger because of the acts done by them. Everyone has to come up as one unit for working effectively to protect our nature including wild life and must understand the importance of nature in planning for economic development

<sup>28</sup> Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India by Proff D. Aminante

<sup>29</sup> Harvard Law Journal Vol 14

principles set out in international sources of law<sup>30</sup>. The Stockholm Declaration was meant to provide inspiration and guidelines for governments<sup>31</sup>.

## **2.2 Regional law**

### **2.2.1 SADC Protocol on Mining**

The SADC Protocol on Mining was launched in 1997 and it came into effect in 2000. The purpose of the Protocol was to establish a basis for SADC member states to formulate their mining fiscal regime by allowing each member state to adopt the protocol to their specific needs and contexts. It introduced mining taxation schemes. Zimbabwe has adopted a taxation scheme and it has provisions in the Tax Act that make it a criminal offence to evade taxes. However, there are cases where taxes are evaded and most of the illicit financial flows that have been recorded where mineral resource revenue is syphoned out Zimbabwe constitutes evasion of the tax regime that was adopted by Zimbabwe. The Minister of Home Affairs Kazembe lost US 1,3 billion in 2018 and 2019 worth of mineral resource revenue total gold export through gold smuggling.<sup>32</sup>

The sources of law provide principles that act as guidelines and can be used to direct “the design of governance institutions that are legitimate, transparent, accountable, inclusive and fair, that exhibit functional and structural integration, capability and adaptability”.<sup>33</sup> They can also serve as a platform for developing governance monitoring and evaluation instruments crucial for both self-assessment and external audit purposes”<sup>34</sup>

### **2.2.2 Africa Mining Vision (AMV) (2006)**

One of the major intervention areas of the AMV is improving the capacity of the mineral sector governance. The AMV offers a combination of local and international strategies to enhance mineral governance capacities in Africa. These include an emphasis on skills transfer and capacity building during contract negotiations and on an ongoing basis, meeting skill shortages through pooled regulatory capacity at the sub regional level for

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<sup>30</sup> Principle 11 Provides that, “The government must introduce some environmental policies for controlling pollution and for the development of the countries so that pollution does not affect the present and future generations. The state should adopt an integrated and coordinated approach to developing such plans

<sup>31</sup> Harvard International Law Journal Vol 14

<sup>32</sup> <http://www.taxjusticeafrica.net/mining-sectorandillicitfinancialflows-iffs-in-zimbabwe>

<sup>33</sup> Governance Principles for Natural Resource Management by Michael Lockwood, Julie Davidson, Allon Curtis Elain Stratford and Rod Griffith, School of Geography and Environmental Studies, University of Tasmania Australia. Institute of Land, Water and Society Charles Sturt University Australia

<sup>34</sup> Governance Principles for Natural Resource Management by Michael Lockwood, Julie Davidson, Allon Curtis Elain Stratford and Rod Griffith, School of Geography and Environmental Studies, University of Tasmania Australia. Institute of Land, Water and Society Charles Sturt University Australia



infrastructure and joined natural resource management, out sourcing regulatory capacity in the short term while domestic capacity is built and ensuring compliance with regional and global mineral sector governance frameworks such as the AU African Peer Review Mechanism (APRM) , the Extractive Industries Transparency Initiative (EITI), the Equator Principles , the Global Reporting Initiative , the Kimberly Process Certification Scheme (KPCS) and other relevant policy instruments. Furthermore, there is an emphasis on building institutional capacities in related areas such as the judiciary, the financial sector, tertiary education, research and development.

The AMV provides that , “transparent, equitable and optimal exploitation of mineral resources should underpin broad based sustainable growth and socio economic development”.<sup>35</sup>As a tool for sustainable development, the extractive industry has the potential to provide a vast amount of wealth for the economy through the use of various taxes and royalties but for effectiveness there is need to implement principles of transparency and accountability at the beginning of the mining cycle to prevent shady deals.

### **2.2.3 The Kimberly Process Certification Scheme (2002)**

The KPCS lays the foundation for the policy formulation of criminal sanctions in the enforcement of mining law relating to the trade of diamonds. It is an innovation in the in global governance that combines a voluntary industry led certification system with an inter-state import /export control regime. The potential strengths of the KPCS relies in its interstate -led border controls which are being undermined by weak national governments<sup>36</sup>.It is a response by the international society to the threat posed by extraction of diamonds through imposing a certification process to prevent international trade of blood diamonds or diamonds that originate from conflict areas.

## **2.3 National law**

### **2.3.1 THE CONSTITUTION OF ZIMBABWE (2013)**

The Constitution is the supreme law in Zimbabwe and all laws, customs, practices and conduct must be consistent with the Constitution for them to be valid.<sup>37</sup>The constitution further imposes obligations on all institutions of the state and the three arms of

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<http://www.zela.org.rightingthewrongsinZim'smineralresourcegovernance:theZimbabweienvisionbyR.N.Geza>

<sup>36</sup> Haufler ,V .The Kimberly Process Certification Scheme : An innovation in Global Governance and conflict prevention .J Bus Ethics89,403-416(2009).<https://doi.org/10.1007/s10551-0100401-9> published 04 February 2010

<sup>37</sup> Section 2(1) of the Constitution of Zimbabwe

government namely the executive, legislative and judiciary to fulfill the obligations imposed by the constitution.<sup>38</sup>This therefore means that every criminal sanction in the mining sector should be traced back to the founding values in the constitution and that all institutions created for the purposes of enforcement of the criminal sanctions in the mining sector derive their obligations and duties from the Constitution.

The Constitution of Zimbabwe is founded on the principles of equality, rule of law and good governance.<sup>39</sup> The principle of good governance is inclusive of the principles of transparency, accountability and separation of powers. This means that when it comes to application and enforcement of criminal sanctions in the mining sector the agencies involved ought to be guided by the principles of separation of powers, transparency, accountability, rule of law and equality.

The effective application and enforcement of criminal sanctions in the mining sector is meant to address just and equitable sharing of mineral resources as per the constitution. “The main purpose of criminal law is to prevent socially intolerable conduct and or hold it within socially tolerable limits by threatening punishment to suppress anti-social conduct that disrupts law and order”<sup>40</sup>.The sources of criminal sanctions in the mining sector predates the Constitution of Zimbabwe 2013 and that means provisions that are inconsistent with the constitution are invalid to the extent of inconsistency.

The Constitution of Zimbabwe is characterized by principles which make up the spirit of the constitution and these can be derived from the preamble of the constitution which recognizes the “<sup>41</sup>richness of natural resources, the need to entrench democracy, good transparent and accountable governance and the rule of law and amongst other things, building a prosperous nation founded on values of transparency and equality”. The relationship between the constitution and criminal sanctions in the mining sector is interlinked by principles of state policy and fundamental duties as well as acceptable norms and values in the constitution.<sup>42</sup>

It is of importance to note that, several laws governing criminal sanctions in the mining sector predates the constitution of Zimbabwe of 2013 as they were enacted before independence. The Mines and Minerals Act was enacted in 1961, the Gold Trade Act

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<sup>38</sup> Section 2(2) of the Constitution of Zimbabwe

<sup>39</sup> Section 3 of the Constitution of Zimbabwe

<sup>40</sup> Burchell and Milton in Principles of Criminal law at page 2

<sup>41</sup> The Preambo of the Constitution of Zimbabwe 2013

<sup>42</sup> Research paper on the relationship between Constitution and Criminal Jurisprudence by Raju Kumah Chanakya Law University written 25 July 2020 <https://www.papers.ssrn.com>sol3>papers>

was enacted in 1970 and the Precious Stones Act was enacted in 1978. Further, of importance to note is that, comprehensive amendments have gone a long way towards incorporating contemporary principles from regional and international law. In 2013 the constitution introduced into national law the recognition of several contemporary principles relevant for natural resource governance and such principles are transparency, accountability, equality, rule of law and sustainable development<sup>43</sup>. This is so because the Constitution is the supreme law of the land and it provides that the above-mentioned principles are part of the founding values and national objective that are binding on all institutions and must be part of policy frameworks in Zimbabwe<sup>44</sup>, hence the principles automatically become themes underpinning criminal sanctions in the mining sector.

The Constitution of Zimbabwe provides a very progressive foundation for innovative strategies and mechanisms to ensure good governance, hence it lays a good foundation for criminal sanctions in the mining sector. The problem arises or lies with implementation of the principles. There is lack of political will, selective application of the law, corruption, gaps in the law that are taken advantage of by citizens and law enforcement agencies and the rich elite for personal benefit. All these factors allow for a continuation of criminal activities in the mining sector that deter effective monitoring, application and enforcement of punitive measures in response to breaching the law.

### **2.3.2 MMCZ ACT**

The MMCZ allows accepts gold that has been mined illegally with no questions asked, this means it provides a market for even gold that has been mined illegally. The most familiar definition of sustainable development is derived from the Brundtland Report which states that ‘Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs’<sup>45</sup>. An assessment of the rationale for mining legal framework in the light of this concept shows that the idea should be to ensure that mining activities, which are carried out illegally causes pollution, environmental degradation, is carried out sustainably<sup>46</sup>.

There seems to be a conflict between the provisions of the Gold Trade Act which criminalizes mining without a license and the MMCZ which provides a legal market for

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<sup>43</sup> Section 2 of the Constitution of Zimbabwe 2013

<sup>44</sup> Sections 8 and 9 of the Constitution of Zimbabwe

<sup>45</sup> World Commission on Environment and Development (WCED). Our Common Future (1987) at 43

<sup>46</sup> The protection of the environment through the use of criminal sanctions at 9

illegal miners. It appears that there is a gap in substantive law which needs to be addressed because the MMCZ is overriding the Gold Trade Act and this raises questions as to whether the police should be present when the artisanal miners sell gold to Fidelity Printers such that they can request a license or permit to sellers before the gold is sold and make relevant arrests since it is a criminal offence to possess and or deal in gold unless one has a permit or license in terms of section 3(3) of the Gold Trade Act

### **2.3.3 Mines and Minerals Act**

It is under Part 26 of the Act<sup>47</sup> which stipulate the offences and penalties that are sanctioned and sections 368 to 391 which prescribes the related breaches of the law. The Act under section 368 criminalizes or prohibits prospecting of mineral resources. In terms of subsection 4 of the same section the sentence for such violation is an imprisonment which is for a period not less than two years. On the other side of the spectrum, it makes an option for a fine for the same offence not exceeding level 10 that is if there are special circumstances in the matter.<sup>48</sup> In terms of section 372 of the Act illegal pegging is punishable by 6 months imprisonment or a level six fine.<sup>49</sup> It is manifestly clear that the bulk if not all the offences provided for in the Act prefers punishing the offenders with custodial sentences. One can have a question to ask as to whether this preferred form of punishment is effective enough to curb offences under the Act. The answer to this will depend on a multiplicity of factors which include but are not limited to state institutional frameworks responsible for governing the Act, the judicial system, the Mining Affairs Board and the police.

It is incumbent to look at section 389 of the Act which prescribes the paying of fine without appearing in court.<sup>50</sup> This provision seems to be a departure from other sections that are inclined towards imprisonment sentences. This section makes the Mining Commissioner to act as a quasi-judicial authority by virtue of the office and functions that he plays in terms of the said provision. A person who commits an offence under section 389 makes an admittance of guilt and avoids custodial sentence through payment of a fine of a level 3.<sup>51</sup> The admittance of guilt is signed before the Mining Commissioner and later forwarded to the court by the responsible authority.

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<sup>47</sup> Part 26 Mines and Minerals Act supra

<sup>48</sup> In terms of SI 25 of 2021

<sup>49</sup> Criminal Law (Codification and Reform) (Standard Scale of Fines) Notice, 2021

<sup>50</sup> Section 389 supra

<sup>51</sup> A level 3 fine is under \$5000 Zimbabwean dollars in terms of the SI 25/21

The procedure under this section is directly a provision which is in tandem with avoiding imprisonment and making it a route to bypass criminal sanction. However, this provision can be used by offenders as a haven or a guise to run away from stiffer penalties and offenders deliberately violate mining provisions and expeditiously evade justice by pursuing this provision which has the Mining commissioner as the quasi-judicial officer. The Mining Commission can easily be bribed and paid hefty amounts of money to protect offenders under this Act. It is vehemently argued that the period of imprisonment and the fines that are proscribed in the Mines and Minerals Act are disproportionate to the offence committed. There is therefore a need for a clarion call to amend the provisions under the Act on offences and penalties to represent a more realistic criminal justice scope that is in line with regional and global standards provided for under treaties such as the SADC Mining Protocol despite the fact that Zimbabwe has ratified the said instrument.<sup>52</sup>

#### 2.3.4 THE PRECIOUS STONES TRADE ACT

The Act is the statute which provides for the enforcement and regulation of precious stones in the country which include but are not limited to diamonds, emerald, rubies among others. In terms of section 3 prohibits unlawful dealing in or possession of precious stones.<sup>53</sup> The offence of unlawful dealing or possession of precious stones is meted with an imprisonment sentence not exceeding five years. Under section 15A the Act provides that after a conviction of a particular offence the State makes a forfeiture of the precious stones.<sup>54</sup> In terms of section 16 the Act clearly stipulates the related procedure for such confiscation. It is imperative to look at the efficacy of the act in curbing the illegal trade in precious stones in Zimbabwe.

The major drawback in this Act is on its definition of those who classify or qualify as the offenders under the purview of the Act. In terms of section 6 (2) (a) the provision refers and criminalizes “persons”.<sup>55</sup> Further to that section 18 of the Act refers to person convicted and similarly section 3 makes specific reference to persons as the likely if not sole offenders under this Act.<sup>56</sup> This it is argued seems to restrict liability on persons, the Act confines offenders in strict sense to persons. However other legal jurists can argue to the effect that “person” was in reference to artificial persons as

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<sup>52</sup> The SADC Mining Protocol of 1999.

<sup>53</sup> Precious Stones Act supra

<sup>54</sup> The forfeiture clause under the Act supra

<sup>55</sup> Section 6 (2) (a) supra

<sup>56</sup> Section 18 supra

well.<sup>57</sup> If one argues successfully that the intention of the legislature was to include artificial persons then they will have to bear the brunt of the consequences of such. The major hurdle will be on convicting the artificial persons which are in this instance companies and the corporate.<sup>58</sup> On the other view it can be argued that the Act expressly mentioned persons and that cannot be deduced to include and encompass artificial persons.<sup>59</sup> This view can be supplanted and predicated on the rules of interpretation or maxims which makes it clear that the express mention of one thing excludes the other. Therefore, it can be deduced that the intention of the legislature was strictly and expressly referring to persons as human beings and not artificial persons.

It is argued from a pragmatic viewpoint that it would be cumbersome to convict an artificial person or companies under the definition of a person or persons in terms of the Act. It would be an assiduous task and a more intricate duty for a public prosecutor to attempt to hold an entity which is not in strict sense a person under the parameters of the Act. It can be deduced in essence that the Act does not explicitly allude to corporate entities and companies as persons under its definition sections. It is therefore of paramount importance for this Act to reflect and correlate with express provisions that do not have loopholes which open an avenue of abuse and circumvention by the offenders.

### **2.3. 5 THE GOLD TRADE ACT**

The Gold Trade Act makes restrictions on the possession and control of gold in Zimbabwe.<sup>60</sup> In terms of section 13 of the Act it makes provision of various licenses that are duly issued out to the licensed dealers in in gold. These licenses include gold dealing, gold recovery works and gold assaying license. It is pertinent to note that the Act is enforced by the Criminal Investigation and Border Control Department under the auspices of the Zimbabwe Republic Police.<sup>61</sup> This Unit is regulated by the Mines and Minerals (Minerals Unit) and it works in conjunction with the mines inspector who is responsible for random inspections on mines and milling centers to check compliance with the Act.

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<sup>57</sup> The remarks of Lord Hale in *Salomon v Salomon* ALL ER 1871

<sup>58</sup> Piercing of the corporate veil is not easy especially in criminal cases exemplified in *CBZ v Matizamombe* ZLR (2) 314.

<sup>59</sup> The maxim expression *unius est exclusio alterius*

<sup>60</sup> The Gold Trade Act supra

<sup>61</sup> The CIBCD as an acronym spearheaded by the Zimbabwe Republic Police.

The offences and penalties are stipulated in terms of section 30 of the Act. Section 3 prohibits the dealing in and possession of gold and makes the offence punishable with an imprisonment not exceeding five years or a fine not exceeding level 9 or thrice the value of the gold that is the subject matter of offence.<sup>62</sup> In terms of section 23 the provision seems to be more progressive as conviction of any person will have an effect of cancellation of a license. This provision can be lauded as it serves a dual purpose of convicting and cancellation at the same period as a means of punishment against the transgressors. Similarly, in terms of section 24 the provision has the effect of prescribing a five-year embargo from carrying on trade, business or occupation after conviction.<sup>63</sup> Further the same provision provides that the convicted person will be barred from entering a mining location for a period of five years as a result of acting in contravention of the legislation.

The Act makes a limitation in the dealing and possession of gold to people that are solely holders of permits or licenses as well as those with registered mining locations, holders of an authority, grant or permit issued under the Mines and Minerals Act authorizing them to work on alluvial gold deposits or are employees or agents of the aforementioned.<sup>64</sup> This Act similar to other two pieces of legislation regulating mineral resources center their attention more on people and not on other entities who will be dealing in illicit gold dealings. In Zimbabwe there is the prevalence of gold smuggling and this is predominantly being facilitated by mining syndicates.<sup>65</sup> It is critical to note that these mining syndicates are looting and smuggling gold using channels and avenues which are not under the scope and purview of the Act.<sup>66</sup> The Act is silent and does not provide for these mining syndicates and their dealings hence they use political connections and thuggery to possess and control gold mines in Zimbabwe undisturbed.<sup>67</sup>

### **2.3.6 Environmental Management Act**

The criminal sanctions provided for in the Environmental Management Act (EMA) are meant to balance the conflicting interests of the environment and exploitation of minerals. The main criminal sanctions in the EMA which relate to mining are mainly pollution, the Act makes it an offence for mining companies and individuals to carry out activities which result in water pollution, air pollution and noise pollution. The Act

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<sup>62</sup> A level 9 offence is equivalent to the sum of \$480 000.00 RTGS

<sup>63</sup> Section 24 supra

<sup>64</sup> ibid

<sup>65</sup>Green Governance Zimbabwe Trust, *Gold Smuggling syndicates in Zimbabwe threaten Mining Development*,11 May 2021.

<sup>66</sup> New Zimbabwe.com, *Zimbabwe: Disjointed State Operations, Lack of Scanners Behind Surge in Gold Smuggling-Matanga*,21 May 2021

<sup>67</sup> The Standard, *Zimbabwe: Gold Mining Syndicates Exposed*,30 May 2021.

sets guidelines on standards of pollution which are accepted and exceeding these standards amounts to commission of a criminal offence.<sup>68</sup> An assessment of the sentencing guidelines show that the penalty provisions range from level fourteen fine<sup>69</sup> or five million dollars or imprisonment not exceeding five years.

As compared to other penalties in mining crime five years imprisonment and level fourteen fine is an improvement but considering the high inflation instability economic situation, mining fines are generally lenient in Zimbabwe and they leave a lot to be desired. As if leniency is not enough, excessive water, air and noise pollution is being done on a daily basis in the mining sector and no one is being prosecuted for and this defeats the whole purpose of deterrence. Further, the costs involved in acquiring the evidence to prosecute such cases are very expensive and the state is limited by the availability of resources which are seemingly always scarce. A proposal would be to use the environmental fund<sup>70</sup> to cater for such costs however the fund is not practically operative<sup>71</sup>

### **2.3.7 Criminal Procedure and Evidence Act (CPEA)**

The Criminal Procedure and Evidence Act provides a guideline or the set of rules to be used to govern the whole prosecution of criminal matters in courts.<sup>72</sup> this means that the CPEA also governs the prosecution of mining crime from the prospecting stage to trade stage which is characterized by offences such as smuggling and theft of gold and gold ore. The Act empowers the police to search and seizure property reasonably suspected to be of criminal use for example gold or gold ore in terms of section 49 to 51 of the CPEA.<sup>73</sup>

The challenges associated with the Act are that, police stations and the courts are not sufficiently equipped to contain evidence such as gold ore and this puts the evidence at risk of being tampered with as in some cases it is stored at the crime scene which can be accused person's premises. In addition to that such evidence in practice is only mentioned in court but it cannot be brought to court during prosecution to be tendered because the state does not have enough financial resources such as vehicles to ferry

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<sup>68</sup> Sections 57,63(2),70(5) of the EMA

<sup>69</sup> According to SI-25-2021 level fourteen fine is rgt\$1.600.000

<sup>70</sup> Environmental fund is created in terms of section 48 of the Environmental Management Act

<sup>71</sup> The Legal and Economic Framework for Natural Resources-Related Statutory Funds in Zimbabwe by James Tsabora at page 31

<sup>72</sup> The Zimbabwe Electronic Law Journal Commentary on Contemporary Legal Issues 2017 Part 1 by Dr T. Mutangi, Professor L. Madhuku and Dr. I. Maja (co-Chief editors) and Professors J. Stewart and G. Feltoe.

<sup>73</sup> Falcon Gold Limited Zimbabwe & Another v The Attorney General and Others HB-32-07



the evidence from the place of storage to court and in some cases the evidence does not get to be scientifically proven to be certified as gold ore and this weakens the evidence when it is challenged by the defence. There is dire need for the police stations, and the courts to be upgraded to be able to accommodate mining crime enforcement.

### **2.3.8. Criminal Law Codification and Reform Act (Criminal Law Code)**

“The goal of an efficient criminal justice system from an economic perspective is to maximize the safety of citizens and minimize criminal activity while also limiting the direct and indirect costs of criminal justice policies to individuals, communities and the economy”<sup>74</sup>. The criminal law code provides for sentencing provisions which range from a fine to community service and then incarceration. Incarceration and community service have the effect of financially incapacitating players in the mining sector who would have contravened the law, the fines provided for by the schedule of fines are being trivialized by an unstable economy characterized by high inflation. An analysis of the sentencing guidelines in the Code demonstrates a lack of coherence with the trending or current government policies in the extractive sector.

This is so for, the sentiments that were expressed by the finance Minister in the 2021 National Budget Statement<sup>75</sup> work hand in glove with the National Development Strategy 1 and the sentiments represent the aim by the government to optimize the value in natural resources for faster growth and protection of the environment, and the aim to prioritize the focus to attain upper middle income status as a country by 2030.<sup>76</sup> on that note it seems that a reliance on the sentencing regime in the criminal law code is not consistent with the spirit of the trending policies being developed in the extractive sector which are meant to maximize profit as much as possible.

### **2.3.9. FOREST ACT**

The Forest Act

The major offences created in the Forest Act relate to cutting, injuring, destroying, collecting and removal of trees from forests without lawful authority<sup>77</sup>. Mining activities are characterized by excavations, cutting down of trees and may even reach the extent of clearing a forest and such activities can be done with a permit from the Forest

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<sup>74</sup> Economic Perspectives on Incarceration and the Criminal Justice System April 2016 at page 34

<sup>75</sup> THE 2021 NATIONAL BUDGET STATEMENT ‘Building Resilience and Sustainable Economic Recovery’ Presented to the Parliament of Zimbabwe on November 26, 2020 by Hon. Prof. Mthuli Ncube, Minister of Finance and Economic Development

<sup>76</sup> National Development Strategy 1

<sup>77</sup> Section 78 of the Forest Act

Commission or without any lawful authority where the mining activities are illegal<sup>78</sup>. This makes the Forest Act an allied Act to legislation<sup>79</sup> which govern criminal sanctions in the mining sector.

The criminal penalties provided for in the Forest Act are classified into two forms which are major offences and minor offences and the difference between the two are in respect of the nature of the offence and the kind of punishment the offence attracts. In respect of major offences, the punishment after one is convicted ranges from imposition of a fine not exceeding level six to level eight<sup>80</sup> and or imprisonment not exceeding one year. Minor offences attract sentencing of a fine not exceeding level five<sup>81</sup> and or imprisonment not exceeding six months and restitution orders. It is important to note that despite the existence of criminal sanctions in the respective Act illegal mining activities in Zimbabwe continue to cause massive forest degradation<sup>82</sup>, the reason seems to be that there seems to be dire need for mining laws to incorporate mining activities in the informal sector and encourage safe mining methods<sup>83</sup>.

### 2.3.10. WATER ACT

The Water Act was enacted for purposes of governing development and use of water resources in Zimbabwe, provision of protection of the environment and prevention and control of water pollution.<sup>84</sup> In terms of the Water Act, policy formulation and implementation are duties of the Minister<sup>85</sup> and execution of that duty must be coupled with amongst other things, considerations of exploitation of water resources in a manner consistent with environmental protection and conservation. This is in tandem with the principle of sustainable development and it shows that there is harmony between the Water Act<sup>86</sup> and the other Acts such as EMA. Mining activities affect water

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<sup>78</sup> Press and Environmental Management Agency (EMA)'s Active Role in Reporting and Monitoring Environmental Degradation Caused by Small Scale Artisanal Gold Panning in Zimbabwe A Case of Shurugwi Peri Urban Painos Moyo<sup>1</sup> Orpah Onwards Chivivi<sup>2</sup> Nyasha Mapuwei<sup>3</sup> Caven Masuku<sup>3</sup> 1. Department of Media and Society Studies, Midlands State University 2. Business Management Department, Midlands State University 3. Department of Media and Society Studies, Midlands State University

<sup>79</sup> Mines and Minerals Act, Gold Trade Act, Precious Stones Trade Act, The Constitution of Zimbabwe and Water Act

<sup>80</sup> According to SI 25 OF 2021 level six fine is RTGS\$60 000 and level eight is \$200 000rtgs

<sup>81</sup>Level five is rtgs\$30 000

<sup>82</sup> Mining and Environmental Rights in Zimbabwe. A Case of Zvishavane District Elvis Munyoka School of Social and Political Sciences, University of Glasgow, G12 8QQ, Glasgow, Scotland, United Kingdom

<sup>83</sup> [Zimbabwe: Chinhoyi Loses Water Through Leakages | OOSKANews](#)

<sup>84</sup> Preamble of the Water Act

<sup>85</sup> Minister of Rural Resources and Water Development

<sup>86</sup> Section 6(2)(b) of the Water Act

use and can cause water pollution where waste is dumped in water sources and this can result in shortages in water supply. For example, a case study was carried out in Gwanda in 2013 and it showed that, informal gold mining activities resulted in environmental problems such as water pollution due to disposal of waste material and the use of chemicals such as mercury and cyanide.<sup>87</sup>

Issues of the relationship between criminal sanctions against mining crime and the Water Act come into play and the aim of the two is to strike a balance between maximizing profits thorough exploitation of mineral resources and environmental conservation i.e., sustainable exploitation of natural resources. However, the fact that illegal mining activities are causing massive water pollution in most parts of the country is not an issue that can be ignored and it seems as if it is being caused by weak policing which is compromised by political populism and disregard of responsibility to conserve the environment by actors in the mining sector.<sup>88</sup>

#### **2.4. Conclusion**

In conclusion, the policy frameworks discussed above as sources of criminal sanctions for the effective enforcement of mining law provide for the basic foundation for sustainable mining activities. These basic foundations laid are then developed into the statutes that constitute mining law such as the Mines and Minerals Act, Gold Trade Act, Precious Stones Trade Act and various pieces of legislation that will be discussed in the next chapter. However, the weakness arises on implementation as there exist a gap between the letter of the law and what is happening on the ground, often the executive powers are unable to enforce the law successfully and they tend to abdicate their responsibilities to the judiciary regardless of the effectiveness of the sanctions and the expertise of the judicial bodies concerned<sup>89</sup>.

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<sup>87</sup> A Case Study of the Perceived Socio-Environmental Problems caused By Illegal Gold Mining in Gwanda District, Zimbabwe Bhebhe D., Kunguma O., Jordaan A. and Majonga H.\* Disaster Risk Management Training and Education Centre for Africa, PO Box 339, University of the Free State, Bloemfontein 9300, SOUTH AFRICA \*kungumao@ufs.ac.za

<sup>88</sup> Accessing good quality water in hazardous mining environments: Coping mechanism for young women in selected districts in Mashonaland Central Zimbabwe David Kawere, Gillian Tafadzwa Chinzete and Charles Massimo \*Global Journal of Pure Applied Sciences Vol 24, 2018, 181-189 \* <https://dx.doi.org/10.4314/gjpas.v24i2.8>

<sup>89</sup> Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India by Proff D. Aminante

# CHAPTER 3

## CHALLENGES AND WEAKNESSES OF CRIMINAL SANCTIONS REGIME

### INTRODUCTION

This chapter will be focused on a discussion pertaining to the gaps and weaknesses of the criminal sanction's regime. The gaps and weaknesses will be divided into classes of substantive gaps and weaknesses, sentencing gaps, procedural gaps and capacity related gaps. These four classes of gaps will be discussed in detail with reference to case law, legal journals and articles, reports and practical examples in the mining sector.

### 3.1 Substantive Gaps

The Precious stones Trade Act criminalizes possession in and dealing with precious stones without a license or permit in terms of section 3(3) of the Act. The Act further provides for imprisonment of not less than 5 years and or a fine exceeding level fourteen in cases where there are no special circumstances. An observation that can be derived from the provision is that what qualifies as "special circumstances" is not clearly defined neither does the Act provide a list of examples of special circumstances. Provincial Magistrates and Senior Magistrates have the jurisdiction to entertain cases of precious stones and they have the discretion to decide as to what qualifies as special circumstances, although their discretion is subject to review by the High court<sup>90</sup>, there have been cases where the High court sets aside proceedings on the pretext that the magistrate failed to identify special circumstances<sup>91</sup>. This is a substantive gap in the law that seems to need amendments to clear the confusion, because it appears that it is not sufficient enough to define special circumstances as those that are out of the ordinary.

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<sup>90</sup> Magistrates Handbook G. Feltoe. Legal Resources Foundation, 1992

<sup>91</sup> S v Manase HH-110-15

The Act<sup>92</sup> also provides for the conviction of “persons” have been found to be in contravention of the law. In the case of *Salomon v Salomon*<sup>93</sup>, the court stated that, “persons” included artificial persons such as companies. The Parliamentary Portfolio Committee made findings that there was need to consolidate mining companies in Marange because poor monitoring and supervision had caused a loss of up to us \$15 billion worth of diamonds through leakages and smuggling and some of Zimbabwe’s diamonds had been found at Shanghai Export change but there was no explanation as to how they got there. Leakages of such a huge amount were facilitated by companies and according to Professor Feltoe’s Guide to Criminal law, any person who facilitates the commission of an offence is an accomplice hence should be prosecuted and convicted as well. However, piercing the corporate veil is not so easy in criminal law proceedings as was shown in the case of *CBZ v Matizamombe*.<sup>94</sup> Companies are very much involved in the mining and trade of precious stones in Zimbabwe and it seems that there is a gap in the law which allow for the companies to circumvent the law and escape prosecution hence there is need for review legislation to follow criminal trends so that there is effective prosecution and conviction of all perpetrators including artificial persons<sup>95</sup>.

The criminal sanctions seem to be not very effective because of the failure to recognize the causes of mineral crime such as the criminalization of mining without a license or permit in terms of the Mines and Minerals Act and illegal trade of minerals provided for in the Precious Stones Trade Act, Gold Trade Act and Minerals Marketing Corporation Act. The causes of such offences include, amongst other things the need to create an informal market because of the prohibitive legal costs of becoming legal actors, the failure of the law to legalize ASM and legally differentiate between small- and large-scale mining and the extra-legal costs also known as corruption unlike organized corporate actors, artisanal and small-scale miners were and remain without recourse to a free and fair judiciary. As a result, they operate in a “shadow economy” and are forced to find their own means of selling their product.<sup>96</sup> The main government

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<sup>92</sup> Presious Stones Trade Act section 3

<sup>93</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22

<sup>94</sup> ZLR (2)314

<sup>95</sup> The Parliamentary Portfolio Report led to the prosecution of Gudyanga only even though it was mentioned in the report that the illicit financial flow had been facilitated by Ped stock Company.

<sup>96</sup> Zimbabwe gold robbery report page 6

initiatives to manage mineral exploitation in recent years has proved counterproductive as economic returns have hemorrhaged due to increased illegal activity.<sup>97</sup>

It is important to regulate mineral exploitation as it is more than a source of income, it is both an anonymous and global currency as well as a conduit for money laundering. This occurs because once exported to the first destination be it Dubai or Switzerland where the world's refiners are based more than 70% of all global production lacks nationality.<sup>98</sup> The diamond industry plays a vital role in the socio-economic development of a country. In Southern Africa countries such as Botswana, Namibia and South Africa are realizing substantial socio-economic gains from the industry. In Botswana children receive free education up to the age of 13years and in Namibia the sector contributes about 40% of the country's annual export earnings and this has an important impact on the socio-economic development of the country. However, Zimbabwe's situation shows the opposite of what is happening after the discovery of huge deposits in Marange in 2000.<sup>99</sup>The purpose of using criminal sanctions to enforce mining law is to stimulate growth and productivity of the diamond industry through promoting transparency and accountability in the entire value chain with the ultimate result of improved revenues inflows to the treasury.<sup>100</sup>Mining law is capitalistic in nature whilst criminal law bears the interests of the society so the merging of the two sectors of the law must show realization of both interests.

The mining sector is experiencing serious challenges on issues like tax evasion, illicit financial flows and corruption which are detrimental to economic development. Tax evasion is a major challenge in many countries in the world that deprives many governments to meet their expected expenditures to finance the public goods and services. Zimbabwe is amongst the developing countries that experience tax gap due to no-compliance.<sup>101</sup>the main government initiatives to manage gold mining in recent years have proved counter-productive as economic returns from minerals have hemorrhaged due to increased illegal activity.<sup>102</sup>

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<sup>97</sup> Resource Policies and Small-scale gold mining in Zimbabwe by S Spiegel Resource Policy at 39-44, 2009

<sup>98</sup> Zimbabwe gold robbery report page 7

<sup>99</sup> Zimbabwe gold robbery report

<sup>100</sup> Zimbabwe gold robbery report

<sup>101</sup> N. Shadreck, D. Emmanuel and M. W. Pikisayi, Tax Evasion - A Protest or Lack of Knowledge for Artisanal and small-scale Miners in Midlands Province -Zimbabwe IJRA, Vol 3, No 4 pp170-178May 2022

<sup>102</sup> J. Spiegel Resource Policy page -Resource Policies and Small-scale Gold Mining in Zimbabwe page 34, 2009

It appears that there is need to call upon the government to craft policies that address and plug loopholes related to tax evasion, illicit financial flows and corruption in the sector thereby promoting transparency and accountability of revenue generated.<sup>103</sup> The amendment of the Mines and Minerals Act remains on the government's mining policy and legislative agenda as indicated in 2022 National Budget. However, the lack of finalization of the amendment to the archaic law remains a major concern. In its 2022 National Budget submissions to Parliament, ZELA called for the finalization of the Mines and Minerals Amendment Bill. The lack of inclusion of the Mines Bill on the legislative agenda for the 4<sup>th</sup> session of the 9<sup>th</sup> Parliament raises suspicions that citizens have that there is no political will within the government and political leaders to finalize the amendment to the Mines Act.<sup>104</sup>

There is greater need for the legislature governing authority to intervene and make amendments to the laws which govern our natural mineral resources in Zimbabwe. It has been noted above that our statutes which were promulgated as far back as 1961 like the Mines and Minerals Act are not speaking directly to the contemporary issues that are prevalent and dominant.<sup>105</sup> This calls for the responsible authority to make debates in Parliament for the amendment or alignment of the Acts with our Constitution in line with constitutional principles and values which are enshrined under section 3 and section 9 which incorporates good governance that shuns and eradicate corruption at all spheres of the economy.<sup>106</sup> This will enable the enhancement of the Vision 2030 which is earmarked to have goals which will allow the country to attain an upper middle-class status in the year 2030. In the same vein the legislature must align our statutes on minerals resources to complement the visions under the policy documents such as the National Development Strategy 1.<sup>107</sup>

### 3.2 Procedural gaps

The effectiveness of the criminal sanctions in the mining sector is also subject to procedural irregularities. This is so for, the police arrest and refer matters to court for prosecution. The prosecution department has the function of reviewing cases brought by the police to determine whether prosecution should be carried forward or discontinued. The aspect considered during this process are sufficiency of evidence and

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<sup>103</sup> Senate Hansard 10 may 2022 vol 31 No39

<sup>104</sup> <http://www.zela.org>>zela's-analysis-of-the-2022-national-budget-policy-pronouncements-a-special-focus-on-the-minig-sector

<sup>105</sup> <http://www.zela.org>>zela's-analysis-of-the-2022-national-budget-policy-pronouncements-a-special-focus-on-the-minig-sector

<sup>106</sup> Section 3 of the Zimbabwe Constitution Amendment (No. 20) of 2013

<sup>107</sup> NDS 1 The Policy document.

admissibility of the evidence. In some cases the police breach the legal requirements in obtaining evidence either by unduly prejudicial means or the police fails to bring the crucial evidence to court due to lack of resources or even temper with the evidence due to insufficient experience and knowledge. In addition to that, the prosecutor has the authority to decide on whether or not the case can proceed to court<sup>108</sup> or to decline the case for want of evidence, this means that the case may never get a chance to be prosecuted in court<sup>109</sup> due to mistakes by the police<sup>110</sup>.

The powers of the police and the prosecutor are vulnerable to interference and corruption and some cases are affected by incompetence or deliberate sabotage clothed within the powers of the law enforcement agencies under the disguise of procedural irregularities. In pursuit of mineral wealth there is altercation of shady deals and dealers and this poses a challenge to the development and functioning justice and governance system and it becomes characterized by bribery, questionable, fake invoicing and money laundering<sup>111</sup>. The impunity of a cabal of political zealots, the complicity of law enforcement agents, the lamentable misuse of prosecutorial authority bestowed on public prosecutors and the disinterest of trial courts rolled together is the epitome of all that should not happen in our criminal justice delivery system, this matter is an example of an injustice allowed to take root because of a serious dereliction of duty by those tasked with the protection of law abiding citizens of the country and the punishment of offenders without fear or favor<sup>112</sup>

#### Conflicting laws

According to CNRG<sup>113</sup>, over the past 5 years several mining companies have been forced to shut down operations due to unfavorable economic factors for example in April 2019 Metallon Gold shut down 3 of its companies due to limited access to forex Zimbabwe gold regulations stipulate that gold mining companies sell their produce to the central bank through Fidelity printers and refiners which allows companies to retain a portion of their export earnings being paid in RTGS dollars. In addition to that Globe and Phoenix was forced to shut down because of failure to comply with the EIAs requirements. The worst part is that there was no proper closure of the mining

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<sup>108</sup> S V Kasukuwere & Ors HH-562-19, the court held that the role of the Prosecutor is pivotal in criminal justice delivery and the prosecutor is independent and not subject to the discretion of anyone in regards to the decision he makes on case

<sup>109</sup> Prosecutor's Handbook 3<sup>rd</sup> Edition by J. Reid Rowland LLB(London) Legal Resource Foundation

<sup>110</sup> S v Muromo and Anor HH-286-12

<sup>111</sup> Zimbabwe gold robbery report page 2

<sup>112</sup> Mathonisi J in S V Muromo and Another HH-286-12

<sup>113</sup>From blood diamond to blood gold -A report on machete violence in Zimbabwe's ASM gold sector by F Maguwu ,S Mlevu , T Nhachi and H Napokoto

Accessed 23 August 2021

<https://www.cnrz.zim.org> >



companies and this paved way for unregistered illegal mining by artisanal miners resulting in illegal gold trade and this creates danger to host communities and rise in mineral crime.

### 3.3 Sentencing gaps

“The principal rationale for sentencing proportionality, that means offenders should receive the punishment they deserve for the offence”<sup>114</sup>. There is also a restorative rationale which manifests in the courts’ duty to consider making a compensation order in favor of the victim where there is death, injury or loss or damage. The other rationales are public protection and rehabilitation. Whilst the notion of general deterrence is crucial as an underlying justification for the punishment system, the idea of proportionality is of central importance. Some of the sentencing provisions of mining crime have no compensation provisions for the state to cater for issues such as environmental degradation caused by illegal mining activities such as mining without a license or permit. The imprisonment of the offender does not assist in the rehabilitation of the environment that would have been damaged such as pits and pollution and Zimbabwe has no resources to rehabilitate the environment. The Parks and wild life Act have provisions for compensation of money to the state if one hunts illegally and kills an animal<sup>115</sup>. It seems there is need for a similar provision in the Mines and Minerals Act to cater for environmental degradation resulting from illegal mining. However, it important to note that such an addition would require expertise to assess the extent of degradation on a case-to-case basis and the legal cost of prosecution will be costly as well<sup>116</sup>. There is reason to believe that, the deterrent effect of a sentence is not necessarily proportionate to its length. In this field it is likely that there operates a law of diminishing returns. Nor should it be assumed that retribution and recognition of the indignation and fears of the community at large will always demand a more severe sentence<sup>117</sup>.

There seems to be a sentencing gap in the criminal sanctions as the principles to be followed by magistrates in sentencing mineral crime have been laid out but the sentences seem to be lenient and ineffective on deterrence hence mining revenue is siphoned out of the country rather than towards the economy. Historically, the economy of Zimbabwe was funded or the main economic pillar was agriculture, the

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<sup>114</sup> Principles of criminal law Ashworth 2<sup>nd</sup> Edition Clarendon Press Oxford 1995 at 19

<sup>115</sup> Parks and Wild life Act

<sup>116</sup> <http://www.zela.org/case-alert-high-court-of-zimbabwe-orders-chitungwiza-municipality-to-upgrade-its-water-treatment-plants-and-sewer-systems/>

<sup>117</sup> S v Hunda and Another HH-124-10

discovery of minerals in most areas of Zimbabwe resulted in an expectation that the mining sector would become the main pillar to fund the economy considering the changes in climate. The mining sector seems to have failed to become the pillar of the economy because it is swamped by criminal activities such as smuggling and illicit financial flows from the mining phase to the trade stage. This shows that there is dire need for the criminal sanctions to be very effective.

This raises questions on the effectiveness of sentencing guidelines<sup>118</sup> present, effective sentencing guidelines provide for punishment that is deterrent. “Formulation of sentencing policy is a matter particularly within the remit of the judiciary and it is an art rather than a science and it has more to do with experience rather than being addressed by a set of principles”.<sup>119</sup> It appears that the Judiciary recruits’ new magistrates almost every year or regularly because the experienced magistrates resign looking for greener pastures hence the new legal minds recruited lack the experience and the power to give stringent sentences.

“At a time where the nation is in the middle of a concerted anti-corruption drive where there has been a buy in from all sectors of the nation. There has also been, understandably a dose of scepticism... the court must all times be alive to national policies that are relevant to the administration of justice and dealing with certain crimes and a court dealing with anti-corruption must give a voice to such and a court is not only able to support the drive by renovating courtrooms and by making appropriate rulings in appropriate cases, so that the scepticism can be stemmed.”<sup>120</sup>

### **3.4. CAPACITY RELATED GAPS**

#### **3.4.1. Weak monitoring system**

Section 3(3) of the Precious Stones Act prohibits the possession or dealing in precious stones without a permit or license and provides for imprisonment of not less than five years and or a fine up to or exceeding level 14 unless there exist special circumstances. According to the Parliamentary Portfolio Report<sup>121</sup> there is a lot of smuggling and leakages and diamonds of an estimated value of US\$15 Billion which could not be accounted for and Zimbabwean diamonds were discovered at Shanghai stock exchange in China and there was no explanation as to how they got there.

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<sup>118</sup> Emmins on Sentencing 2<sup>nd</sup> Edition by M Wasik Blackstone Press Ltd at page 20

<sup>119</sup> Emmins on Sentencing 2<sup>nd</sup> Edition by M Wasik Blackstone Press Ltd at page 43

<sup>120</sup> S V Mubaiwa HH-15-20

<sup>121</sup> Parliamentary Portfolio Report

The committee suggested that there was a weak monitoring and supervision system for the trade of precious stones which seems to be providing room for smuggling of minerals. Findings of the committee also showed failure to trace illicit financial flows through Ped stock company to an unknown foreign account. This shows there seem to be a weak crime detection and investigation system in the mining sector which can be manipulated to allow illicit financial flows it appears there are inadequate resources to track crime and secure convictions.

### 3.4.2 Porous crime detection infrastructure

Various stakeholders have been put in place to ensure enforcement of law to protect national interests through the use of criminal sanctions in the mining sector such as the EMA, ZRP MFFU, NPA, JSC, Immigration and ZIMRA to plug out illegalities at every stage. It will be very difficult to conduct an audit trail on some of the funds that siphoned from MMCZ. It appears that the government accounting systems were violated and there are no prospects for MMCZ to recover the US \$14 million lost. The committee noted with concern that there is too much political interference in the mining of diamonds in Marange particularly by the Permanent Secretary. Without a proper legal framework which outlines the responsibilities of various state actors in the diamond sector, the current system is porous and vulnerable to abuse. The diamond policy outlines the government's vision in the diamond sector but then again, a vision is not binding at law.

CNRG<sup>122</sup> noted that all smuggling routes went up during the lockdown as the illicit gold market adopted to the lockdown conditions in various ways. R.G. Mugabe International Airport remained open to both passengers and cargo planes whilst the country's porous border remained active. The closure of Beitbridge boarder post has seen a rise in organized crime as security officials on both sides of the boarder facilitate illegal passage of smugglers into both countries<sup>123</sup>.according to Hernandez," The advancement in technology has significantly enhanced the planning and execution of transnational crime. Criminals have advanced from the basic modes of communication like ordinary mail, telephone to more sophisticated e-mail and internet satellite communication facilities, thereby creating identification and investigation problems" (Hernandez, 2013).

The proof that security on airports needs improvements is that, In May 2021 Nyasha Masinire a Zimbabwean was arrested at the South African airport for smuggling 23 pieces of gold into South Africa from Zimbabwe<sup>124</sup>, the fact that the gold could not be

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<sup>122</sup> Centre for Natural Resource Governance

<sup>123</sup> blood diamonds to blood gold -A Report on machete violence in Zimbabwe's ASM gold sector

<sup>124</sup> driver found with 23 pieces of gold in SA Accessed 26 August 2021

detected at Joshua Nkomo airport is proof that the security set up is poor and needs improvements.

### **3.4.3. Lack of information to the Public**

The role of regulators in curbing mineral crime can be improved by conducting public awareness campaigns. Public awareness campaigns educate the general population on the advantages of conducting safe mining activities, environmental conservation and sustainable development. The awareness campaigns enable the public to have easy access to information on how to acquire and conduct legal mining activities. Mineral crime is on the rise and regulatory institutions are having difficulties in dealing with it because of economic factors and perpetrators who want to avoid the obligations that have been put in place by mining agencies and regulators such as evading tax payments<sup>125</sup> and fines. The roles to investigate, arrest and facilitate the prosecution of perpetrators in such cases. When the people are armed with the knowledge of how to legally acquire mineral claims and advantages of legal mining activities such as land conservation and sustainable development for, and the disadvantages of illegal mining which are land degradation, accidents, stringent fines and or incarceration after prosecution, the result will be deterrence and reduction in mineral crime.

### **3.4.4. Resource Capacity Challenges**

Regulatory institutions mentioned above have monetary challenges in dealing with mineral crimes. The role of conducting investigations involves travelling expenses, paroles, gathering information. In some cases, witnesses are afraid of supplying information to the officers about the syndicates and individuals who deal in mineral crime for various reasons, such cases require witness protection facilities which provide for safer placement of witnesses so that they can freely supply evidence without any fear whatsoever.

However, adequate financial resources have not been secured to cater for all their investigations as they rely on their own pockets to travel and investigate matters in most cases and considering that their salaries are inadequate for basic survival, shortage of income in their department obstructs them from efficiently performing their duties and makes the officers to be susceptible to handouts from accused persons thus corruption. In addition to those investigations are not done thoroughly and efficiently and this results in them supplying insufficient evidence and prosecution results in acquittals and when perpetrators of mineral crimes walk free the wrong message is sent to the society and mineral crime rises. The creation of a Fund will

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<sup>125</sup>S Sibarani, Law Enforcement to the Mining Crime of Class of C Without Permission Under Law No. 4 Year 2009 On Mineral Mining and Coal Law Faculty Borobudur University Jakarta, Indonesia ssibarani01@gmail.com

enable the institutions to cater for all their financial expenses in investigations and improve their role in dealing with mineral crime and do away with the need and acceptance of handouts and bribes.

### 3.4.5 Corruption and Selective application of the law

Dealing with mineral crime seems to be ineffective due corruption and selective application of the law amongst all. There are various provisions which criminalizes mining without licenses<sup>126</sup> and smuggling of gold<sup>127</sup> in Zimbabwe. Regardless of the existence of these provisions there has been a notable rise in smuggling of gold and other minerals for example the case of Henrietta Rushwaya the Zimbabwe Mining Federation President who was arrested at R G Mugabe International Airport for smuggling gold after she had been found in possession of 14 bars of gold in October 2020<sup>128</sup>. In addition, the manner in which artisanal mining without registered licenses has become rampant in cities rich in mineral deposits such as Chiadzwa<sup>129</sup> and Kwekwe<sup>130</sup> being describes as “Chikorokoza”. Illegal mining continues and it is being treated as anormal phenomenon and influential perpetrators are just arrested and they do not get prosecuted, artisanal miners involved are continuing with illegal gold trade and they are protected by influential people and politicians who benefit from their illegal mining activities.

It appears as if the available manpower is incompetent to prosecute elite members in mining crime. Deterrence will go a long way in terms of effectiveness where” the offender belongs to a class, the members of which whatever their race feel deeply the shame and stigma of a prison sentence. The publicity of the trial, the exposure as a criminal, the far reaching and devastating effect of imprisonment on his social, family and economic life are in the case of a first offender, aspects of punishment which should never be overlooked or underestimated. It is these consequences attendant on serious criminal conduct much more that the length of the prison sentence which are likely to deter other persons to reform the first offender”<sup>131</sup>

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<sup>126</sup> Section 369(1)(2) of the Mines and Minerals Act Chapter 21:05

<sup>127</sup> Section 3(3) of the Gold Trade Act Chapter 21:03

<sup>128</sup> <https://www.zimfieldguide.com>midlands>

<sup>129</sup> T Nyamunda and Patience Mukwambo, The State and the Bloody Diamond Rush in Chiadzwa: Unpacking the contesting interests in the Development of Illicit Mining and Trading; Journal of Southern African studies, vol 38, no 1 2012

<sup>130</sup> inside zim’s illicit gold mine trade-the mail& guardian Accessed 25 August 2021 <https://www.mg.co.zw>.

The fact that arrests are made and then there is no prosecution or completion of the criminal matters rather perpetrators are promoted to higher offices of influence in the mining sector such as in the case of Rushwaya results in demotivation of the police in conducting their role in curbing mineral crime. The fact that some people are portrayed to be above the law, weakens the role of the regulatory institutions in dealing with mineral crime. It seems that there should be equal application of the law to everyone so that the role of the regulatory institutions is not weakened by lack of political will or to enable the political elite to benefit from the proceeds of crime. Due course must be followed through all the way.

### 3.4.6 Low morale and remuneration

Generally the salaries of regulatory officers are low and there is need for the salaries of the regulatory officers to be increased and there are no motivational awards for good work where it is deserving. This is so for the officers are being paid salaries that are inadequate to cater for their survival and that of their families. This makes them vulnerable and desperate to receive bribes and weaken investigations because they will be getting more money from illegal mining activities and in some cases the officers' partner with perpetrators and help the perpetrators to circumvent the legal proceedings. Research findings show that police officials collaborate in the commission of illegal mining operations rather than stop them.<sup>132</sup> Their collaboration takes many forms, from receiving bribes during anti-crime operations to being on the payroll of the kingpins. Police also conduct raids, especially on Chinese pilling and smelting points, to seek cash bribes.

Even more complex and difficult to pin down are relationships between politicians, high-ranking police officials and master buyers. Politicians, both personally and through their campaign organizers, pursue these master buyers to demand campaign money.<sup>133</sup> A study by Human Rights Watch on rudimentary diamond mining in eastern Zimbabwe documented the activities of smuggling syndicates controlled by police officers: "Groups of between two and five police officers would partner with a large group of local miners under a loose arrangement where police provided the local miners security and escort in the fields in return for a share of the proceeds from selling any diamonds the local miners found"<sup>134</sup>. Therefore it is very important for the officers to have their salaries and benefits improved so that when they are exposed to illegal mining revenue

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<sup>132</sup> An example is the judgment in *Shoko v The State & Anor* HH-782-20 where members of the Unit were implicated in and arrested for being part of the Henrietta Rushwaya airport gold-smuggling incident.

<sup>133</sup> J Heine and R Thakur, *The dark side of globalization* page 94[HTML]cigionline.org.>2011 *The dark side of globalization* Edited by page 94

<sup>134</sup>J Heine and R Thakur, *The dark side of globalization* page 93 [HTML]cigionline.org>

and proceeds they will not be tempted to accept or demand bribes, rather they will be in a position to arrest and investigate and follow procedures required in dealing with mineral crime.

### 3.4.7. Lack of Independence

It is necessary to improve on and guarantee the independence of the Unit from all players including, but especially, players within State bodies. Independence implies that at institutional level, structures must be put in place to protect the Unit against external interference.<sup>135</sup> State bodies and people holding positions of influence within such bodies pose a great threat to the discharge of function by the Unit. This is because such persons are close to and invariably involved in the perpetration of the crimes for which the Unit exists to prevent. They know the workings and systems of the Unit, especially its weaknesses and personnel, and are by virtue of their proximity to power able to directly or indirectly interfere in its operations or exert their influence in undermining or evading its hand. Influence may be exerted for the sake of avoiding or evading detection and arrest, or to resist an investigation being carried out.

To avert these challenges there is need for the regulatory institutions to have independence to carry out their functions without interference. It has been judicially observed that bodies that invariably venture into assessing the use of power by State bodies need to be free of or independent from government itself before they may be independent from anyone else.<sup>136</sup> Independence of a body such as the Judicial Service Commission must first mean independence from the government and other government bodies. Courts have also concluded that to achieve this independence, such bodies need to have adequate funding and full control over their own operations. To this end the court, dealing with the independence of Chapter IX institutions under the Constitution of South Africa, 1996 in the case of *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) at para 27 stated:

*“It is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government. Furthermore, independence cannot exist in the air and it is clear that the chapter intends to make a distinction between the State and*

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<sup>135</sup> *Van Rooyen & Others v The State & Others (General Council of the Bar Intervening)* 2002 (5) SA 246 (CC) at para 31.

<sup>136</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1453 (CC); *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC); *Independent Electoral Commission v Langberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC).

*government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial or national.”*

There should be provisions for mechanisms that guarantee independence of the regulatory institutions from the government. The mechanisms would provide for funding, for example, by providing that the Zimbabwe Republic Police must receive a certain quota of fees paid for licenses or permits in the mining, wildlife and tourism sectors as well as some fines imposed on certain categories of crimes that fall within its jurisdiction. Funding received from these sources is not dependent on political will, unlike where funding is provided by the Executive. These would be assured sources of funding. Outside this model, funding would have to come from Parliament and not the Executive. This is an important requirement in all instances where the body concerned is one that must push back against some tendencies of the Executive, such as corruption.<sup>137</sup>

There are lack of funding mechanisms which make it possible for the institutions to devise ways by which to receive funding through donations, e.g., through a trust set up for the purpose. Expectedly, donations could come from stakeholders in the sectors within which the institutions operate, such as large mining companies and safari operators wanting to help capacitate the institutions for the sake of better detection and prevention of crime.

Another weakness is that it seems that the operations of the institutions are dependent or affected or wait upon decisions that are made by politicians or other bureaucrats who may have an interest in the extractive sector and they are not in charge of their own affairs, hence they seem to fail to put in place measures and methods of preventing its officers from partaking in the crimes that it is there to prevent.

#### **3.4.9. Lack of a Whistle-blower mechanism**

It is difficult to police and detect crime in the natural resources sectors because of rampant acts of corruption and bribery. Indeed, resource externalization takes place all the time even as police, immigration and security personnel man the country's borders. Despite having security in place all the time, the country's borders have been described as 'porous. This is a challenge that faces the law enforcement agents, whose function is hampered by the collaboration between security personnel and these criminal syndicates. There has not been an establishment of a whistle-blower policy in terms of which tip-offs are encouraged and rewarded. Such a policy may be introduced

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<sup>137</sup> *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at paras 98 - 100.



by statute.<sup>138</sup> Reward-free whistle-blowing is not a popular option because tipping-off against syndicates carries the risk of retribution and even death. It has been established that whistle-blowing that is associated with the promise of both anonymity and reward for the whistle-blower encourages the making of tip-offs resulting in higher levels of crime detection and prevention.<sup>139</sup>

This measure however, seems to be not functional in Zimbabwe because it requires that the institutions responsible for law enforcement be adequately financed in order that they may be able to reward whistle-blowers and provide them with witness protection services should their identity be discovered by syndicates and their security and safety thereby imperiled.

### **Conclusion**

Zimbabwe's economy has become highly reliant on mineral exploitation considering that mineral exploitation is a vital source of forex (foreign currency exchange) and often a country's main export, the extractive sector a handy cash cow for corrupt and incompetent cabals. Negotiation of mining contracts is individualistic in nature as it disregards national interests. National interests come in on royalties, taxes and environmental management issues such as EIA requirements., actors with mining rights are more interested in maximizing profits through sales and marketing. National regulation which criminalizes noncompliance with tax, environmental and royalties' requirements are meant to protect national interests in the sector.

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<sup>138</sup> An example is the whistleblower system established by section 34B of the Revenue Authority Act (*Chapter 23:11*). This policy was dealt with by the High Court in *Masunda v Commissioner General of the Zimbabwe Revenue Authority N.O & Others* HH-556-20.

<sup>139</sup> See for example, *Chapfika v Reserve Bank of Zimbabwe* HH-77-07.

## CHAPTER 4

# CIVIL REMEDIES AS ALTERNATIVES TO CRIMINAL SANCTIONS

### 4.1. INTRODUCTION

This chapter will critically examine the existing civil penalty regimes that are envisaged in the three core pieces of legislation that govern mineral operations and mining rights in Zimbabwe with the aim to establish whether the civil remedies can be used as an alternative remedy to effectively to fill the void that is being caused by shortcomings of criminal sanctions to achieve sustainable exploitation of minerals in Zimbabwe. The focus will be on whether there exist civil remedies in Zimbabwean mining sector and if they do exist, whether they are effective and how the efficiency of the civil penalty regime can be improved.

### 4.2 MINES AND MINERALS ACT

A departure from the criminal penalties' regime can be deduced from the provisions of section 389 of the Act.<sup>140</sup> which provides for the payment of a fine without appearing in court. In terms of this section, the Mining Commissioner as the case maybe can act as

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<sup>140</sup> Mines and Minerals Act Chapter 21:05

a quasi-judicial authority by virtue of his/her office where anyone who contravenes section 389 makes an admission of guilt and a fine is assessed not exceeding level three<sup>141</sup>.even though the process is not cumbersome, the prescribed fine is too lenient and it has been affected by high inflation rates which makes it profitable for both natural and juristic persons to offend as the leniency of the fine defeats the deterrence effect.

The procedure to be followed is clear and simple in that the offender signs an admission of guilt before the Commissioner for mining and does not appear on a court of law rather the fine and the admission and the fine are forwarded to the court for confirmation. This process is advantageous in that cases are completed expeditiously and such cases do not form part of the cases which are being affected by backlog in the criminal courts. Although the purpose of this provision is to clear minor cases expeditiously, the process is being taken advantage of by both officials at the Ministry of Mines and offenders and being used as an opportunity for corruption as it presents an opportunity for offenders to continue committing offences and bribing officials so that they will be eligible to be assessed a fine. Further, level three fine is \$5000 rths<sup>142</sup> and the amount is too lenient and being trivialized by inflation. There is therefore a need for a clarion call to amend the provisions under the Act on offences and penalties to represent a more realistic criminal justice scope that is in line with regional and global standards provided for under treaties such as the SADC Mining Protocol despite the fact that Zimbabwe has ratified the said instrument.<sup>143</sup>

#### 4.2.1 CIVIL PENALTY REGIME IN MMA, GTA AND PSTA

The civil penalty regime foundations can be traced back from the SADC Mining Protocol which states that, a civil penalty is a pecuniary penalty imposed on the wrong-doer in civil proceedings and it is a non-criminal remedy for a party's violation of laws or regulations.<sup>144</sup> Civil penalties are characterized by fines, damages, compensation, declaratory orders and cancellation of agreements. The purpose of imposing such penalties is premised on the notion of preventing or punishing public harm.<sup>145</sup> The MMA, GTA and PSTA have provisions that provide for civil penalties for non-compliance. As noted above the three acts have very little scope for civil penalty regime and leans more in favor of criminal justice. Other civil penalty regimes from other jurisdictions

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<sup>141</sup> According to S.I.25.2021 , Level three fine is RTGS\$5000 dollars

<sup>142</sup> A level 3 fine is under \$5000 Zimbabwean dollars in terms of the SI 25/21

<sup>143</sup> The SADC Mining Protocol of 1999.

<sup>144</sup> <https://www.law.cornell.edu> > wex

<sup>145</sup> Australian Law Reform Commission, *Criminal or Civil Penalty?* 17 August 2010

that Zimbabwe can also learn from provide for additional punishments to ensure effectiveness.

#### 4.2.2 ENFORCEMENT: DEPARTMENT OF MINING ENGINEERING

The civil penalties regime is executed by the Ministry of Mines and Mining Development specifically, the department of Mining Engineering. The department of Mining Engineering is a regulatory department which is headed by the Chief Government Mining Engineer who is also the Chief Inspector of Explosives and reports to the Principal director.<sup>146</sup> The department has inspectors who have the duty to go on the ground to monitor and inspect the work at mining sites and ensure that all operations are in compliance with the provisions of the mining laws and impose penalties where there is non-compliance.

#### 4.2.3 FUNCTIONS OF THE DEPARTMENT OF MINING ENGINEERING

- i. Enforcement of all mining statutes, to ensure a safe and healthy mine environment according to the MMA and all subsidiary mining legislation,
- ii. Monitoring and controlling of all mining activities through inspections of operations and investigation of mine accidents
- iii. Providing professional and technical advisory services to the Mining industry with special attention towards small-scale mining for the development of the sector
- iv. Conducting statutory examinations for Mining Blasting Licences, Mine Manager's Certificate of Competency, Mine Surveyor's Certificate of Competency etc,
- v. Administering financial (loans) and plant hire scheme through Mining Industry Fund for the small-scale mining sector,
- vi. Monitoring and audit mines on environmental requirements,
- vii. Monitoring and evaluation of mineral production and mine development.<sup>147</sup>

The most common civil penalties that are provided for by the mining statutes and are implemented by the MMMD are:

- Cancellation/revocation of mining leases/rights/registration certificates and licenses/permits to deal in precious stones
- Imposing fines by MMMD officials/inspectors
- Non-renewal of mining licenses

Other civil penalty remedies that are not in the Acts but that can also be considered to be added in the statutes in the future are:

- Establishment of Safety Health Rehabilitation Fund- this has been proposed in the Mines and Minerals Amendment Bill herein after referred to as the MMAB. It

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<sup>146</sup> <http://www.mines.gov.zw> > ...

<sup>147</sup> n 43 above

is suggested that it can be established as a stand-alone mining industry rehabilitation fund completely separate from the Environment Fund to avoid duplication.

- Attachment of mining company's property as damages for non-compliance
- Civil class action suits by local communities against non-compliant mining companies.

#### 4.2. 4 CANCELLATION/REVOCAION/FORFEITURE/NON-RENEWAL OF LICENCES

There are number of provisions that provide for cancellation of mining rights/licenses or permits as a civil penalty for non-compliance and these include:

- Registration of a prospector can be cancelled or suspended by the Secretary on the direction of the Minister if the prospector is convicted of an offence or has conducted himself in a manner which renders it necessary to cancel or suspend his registration,<sup>148</sup>
- The Mining Commissioner can at any time cancel a certificate of registration issued in respect of a block or site if satisfied that the provisions of the MMA relating to the method of pegging were not substantially complied with,<sup>149</sup>
- The Minister may direct the Board to cancel the lease in cases where the leaseholder would have failed to comply with any terms and conditions of the mining lease,<sup>150</sup>
- Failure to obtain an inspection certificate will render the block, mining lease of which such failure has taken place to be forfeited,<sup>151</sup>
- In the event of failure to protect open workings by prospectors, a court may order the forfeiture of the prospecting licence of the convicted person,<sup>152</sup>
- The President is entitled to cancel/revoke any licence/permit given in terms of the GTA if the holder of such permit is convicted of an offence or breaches any condition of the permit,<sup>153</sup>
- On the breach of any condition of a licence to deal in precious stones or upon conviction of the holder of the licence, the Minister may direct the Secretary to cancel the licence,<sup>154</sup>

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<sup>148</sup> Section 17 (1) (2) of the MMA

<sup>149</sup> Section 50 (1) (b) of the MMA

<sup>150</sup> Section 157 (1) (3) (b) of the MMA

<sup>151</sup> Section 260 and 263 of the MMA

<sup>152</sup> Section 370 as read with Section 392 (3) of the MMA

<sup>153</sup> Section 21 and 22 of the GTA

<sup>154</sup> Section 7 (3) of the PSTA

- On the breach of a permit to acquire, possess or dispose of precious stones or conviction of the holder, the Secretary or any official of his ministry authorised by him may cancel the permit.<sup>155</sup>

The provision for the cancellation of mining rights/lease/permit/licence is sound at law as it acts as a serious deterrent measure to miners as they will know that if they do not comply with the dictates of the law and the terms and conditions of their mining contracts then their mining rights will be cancelled. This is a very simple yet very effective way of ensuring compliance as no miner would want to have their mining rights cancelled.

There is a plethora of cases in which the MMMD, the Provincial Mining Directors as well as the Mining Commissioners have cancelled mining rights for alleged non-compliance with mining laws. The provincial mining director cancelled the certificate of registration of Ronald Davison Mugangavari in respect of mining claim known as Clifton 15 on Clifton Farm, Mberengwa, in terms of section 50 (2) of the MMA as it was alleged that his boundary encroached into another person's mining claims. Also, the Mining Commissioner cancelled the certificate of registration for Juve Zimba in respect of Mine Registration number 37885 for the reason that the area he had pegged were over-pegging into other blocks owned by another person. This civil penalty of cancellation is a very effective measure of enforcing compliance with the mining laws.<sup>156</sup> If wrongdoers licenses are actually cancelled this will send a loud and clear message to would-be offenders that if they breach the law, their mining rights will be cancelled or forfeited and hence it works as a deterrent measure.

#### 4.2.5 IMPOSING FINES FOR NON-COMPLIANCE BY THE MMMD

Another civil remedy that is provided for in the MMA is the imposition of fines for non-compliance. This penalty is not adequately provided for in all the three Acts. The GTA and the PSTA are silent on it and do not make any provisions for fines for any breach under those two acts. The MMA only provides for a pecuniary penalty where a leaseholder fails to comply with the terms and conditions of his mining lease, the Board may recommend the Minister that there be recovered from the leaseholder as a penalty such sum as the Board may deem appropriate or that the mining lease be cancelled.<sup>157</sup>

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<sup>155</sup> Section 8 (2) (b) of the PSTA

<sup>156</sup> See News 24, "Zimbabwe threatens mines over unpaid licence fees," wherein it was reported that Minister Winston Chitando had given an ultimatum to holders of licences to pay annual renewal fee by April 2020 or face losing their mining title in terms of the provisions of the MMA. This is a threat of the imposition of a civil penalty of cancellation of mining rights in terms of the MMA that obviously yielded some positive results and pushed defaulters to comply with the law.

<sup>157</sup> Section 157 (1) (a) (b) of the MMA.

It is very unfortunate that the legislature does not adequately cover this civil penalty. Imposing of fines is a very efficient enforcement mechanism if adequately provided for. It also has the benefit of generating revenue for the ministry which revenue can be used to rehabilitate the degraded environment for the benefit of the surrounding communities. Imposing fines by the officials from the MMMD yields better results as it is based on physical assessments of the damages caused to the environment by the mining activities. This is a better system as compared to the criminal justice regime wherein a magistrate will just impose a fine from the head without having occasion to physically visit the mining site and assess the damage and its impact on the local communities. A fine imposed by the mining officials who have first-hand information and the relevant expertise in determining and evaluating the damage makes more sense. There is therefore need for strengthening of the provision of fines for wrong doers. Civil penalty must be used as the first option for punishing non-compliance, the criminal justice should be resorted to as a last option.

To ensure success of the civil penalty's regime of imposing fines upon non-compliant mining entities, the MMMD officials together with those from the Ministry of Environment must be visible on the ground, monitoring and inspecting mining activities in order to identify any breach of the law and accordingly impose fines to offenders.

For the civil penalties regime to be successful, there is need for the MMMD to impose fines that are meaningful and deterrent enough. Fines imposed must be appropriate and proportionate.<sup>158</sup> If the fines are too little then the mining entities will actually prefer to rather intentionally breach the law and pay a fine than to comply as the cost of complying with the law will be much higher than breaching the same law. A very good example of this is that of Anjin and Marange Resources who have continued to pollute the Odzi River even after being penalised for a number of times. This is a clear indication that the civil penalties being charged are too little and hence do not achieve the intended purpose. When mining entities breach law they must be hit the hardest in the pocket. This will deter them from committing further offences.

Forfeiture of mining claims

The MMA in terms of section 6 creates a quasi-judicial board responsible for the administration of the Act

#### **4.3.1 COMPARATIVE ANALYSIS: USA**

United States of America (America), gives a comprehensive procedure for civil penalties in its Mine Act. The process starts with a proper inspection being carried out by an inspector. After his findings, the inspector will then issue an order. If after 30 days the

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<sup>158</sup> United Nations Environmental Programme Multilateral Environment Agreement Guideline 40 (c).

order is not contested then it becomes final. There are different categories of violations and these include: significant and substantial violations and also, unwarranted failure meaning aggravated conduct, constituting more than ordinary negligence- flagrant violations.<sup>159</sup> The USA Mine Act requires six criteria in assessing civil penalties and they are:

- The appropriateness of the penalty to the size of the business,
- The operator's history of previous violations,
- Whether the operator was negligent,
- The gravity of the violation,
- The operator's good faith in abating the violation,
- The effect of the penalty on the operator's ability to continue in business.<sup>160</sup>

The criterion is exhaustive and helps in coming up with the most appropriate penalty and the penalty regime is therefore on a case-by-case basis. Zimbabwe can learn a lesson from this. The American system is not a one size fits all. In most cases, a one size fits all, will fail to serve the purpose as you will see a very big mining entity being asked to pay a fine of a paltry 5000 RTGS which is too little and is as good as not even paying anything. This will lead companies to be habitual offenders as the civil penalty fines will be too little and not deterrent enough. In the USA, unwarrantable violations attract a civil penalty of USD 2000-4000 and "flagrant" violations have a civil penalty of not more than USD 220 000.<sup>161</sup> Such a penalty regime is sound as it imposes penalties that are strong and deterrent and this discourages non-compliance. This is also the case with United Kingdom.<sup>162</sup>

It is our considered view that for the civil penalty regime of imposing fines on defaulting miners to be effective there is need for Zimbabwe to adopt the guidelines that are used in America. The process must start by a proper assessment of the wrong/damage and its effect on the environment and community, then the criteria above is followed in coming up with a fine that is fitting in the circumstances. There is need for amending the relevant mining acts and add on the criteria that should guide officials in the MMD

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<sup>159</sup> U.S. Department of Labor Mine Safety and Health Administration, *Public Hearing on Proposed Criteria and Procedures for Assessment of Civil Penalties*, 4 October 2006.

<sup>160</sup> n 56 above.

<sup>161</sup> n 56 above

<sup>162</sup> The Guardian, *Companies pay out more than 1.5 million pounds for breaking environmental laws*, 30 January 2017. In this newspaper article it was stated that companies were paying more than 1.5 million altogether for breaking green laws. Fines imposed per entity ranged between 1 500 pounds and 375 000 pounds in enforcement undertakings as alternative to prosecutions for breaking environmental laws by polluting rivers, breaching permit conditions etc. On top of making the payments the companies accepted liability, and undertook work to repair environmental damage and invested to reduce the risk of similar breaches in the future.



in coming up with a proper fine that is appropriate for each particular offence. This will guard against imposing of fines that are too little and lenient and not deterrent, as is the case now, as fines will be imposed on a case-by-case basis.

### **4.3.2 Blacklisting**

In addition, another civil remedy that can be used as an alternative to criminal sanctions in enforcing mining law is blacklisting. In USA blacklisting is applied in cases where the offender is a corporate body and where there are no assets to attach belonging to the offender and where prosecution cannot be pursued for one reason or another. In cases of backlisting the offending company's name is added to a list of companies which are barred from acquiring mining rights and conducting mining activities in any part of the country for a certain period of time or forever depending on the nature and gravity of the offence committed. In addition, the nature of the offence will be on the list as well such that the public would be aware of the offender's habit or manner of doing business<sup>163</sup>.

The requirements for blacklisting are that the offender is given notice and the blacklisting order is granted and managed by a board which is already a quasi-judicial body. The effects of blacklisting would be stigmatization in the mining fraternity. The rationale behind adopting such a remedy in Zimbabwe would be for the protection of public interests because, "where harm to the public is threatened and the private interests infringed is reasonably deemed to be of less importance an official body can take summary action pending a later hearing"<sup>164</sup>. In Zimbabwe blacklisting can be adopted to cater for challenges raised in *CBZ v Matizamombe*<sup>165</sup> which are unveiling the corporate veil in prosecuting corporates as well as shortcomings of the existing remedies such as leniency of the penalties, in addition an aggrieved party may be allowed to approach the High court for appeal.

### **4.3.4 Compensation**

Noncompliance with mining law results in environmental degradation which may require a lot of financial resources to rehabilitate the environment, hence compensation may be another alternative solution to enforce mining law. Compensation as a civil remedy is a public regulation approach which is meant to address the adverse impacts of mining activities and it goes beyond mitigation, rather the offender is compelled to cater for the costs of rehabilitating the environment to the status quo which would have been disturbed by the offender's mining activities for example in a

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<sup>163</sup> Boston College Industrial and Commercial Law Review at page 762

<sup>164</sup> R.A. Holman & Co v SEC 299 F 2d 127,131 (DC Cir.1962)

<sup>165</sup> ZLR (2)314

case where one's mining activities will result in huge pits<sup>166</sup> and or dumping dangerous coal residue<sup>167</sup>, the Mines and Minerals Board may be given disciplinary powers to conduct investigations and a hearing as well as powers to impose an order on an offender who is found guilty to compensate the Ministry and the mining community for loss as well as a compensation order to rehabilitate the damaged environment and restore it to its previous standing before damage.

Compensatory arrangements are advantageous in that they guarantee positive social economic gains for mining affected companies, thereby redressing the inequitable distribution of mining costs and benefits<sup>168</sup>. Compensation may then be used as an incentive to the shortcomings and failures of the current criminal sanctions in enforcing mining law. The extensive costs to be incurred in rehabilitation and compensation would act as a deterrent factor to would be offenders and they would be hesitant to circumvent the law. Adoption of such a remedy in Zimbabwe can also cater for the lenient fines prescribed by the schedule of fines<sup>169</sup> which are constantly trivialized by unstable inflation. This is so for the amount to be compensated to the ministry, community and rehabilitation of the environment damaged will be calculated on a case-by-case basis and the offender would be obliged to meet the costs as the rehabilitation process is being carried out.

#### 4.3.5 Forfeiture

Illegal mining activities have adverse impacts on the environment as well as surrounding society. In some cases these illegal mining activities are carried out in designated areas of historical importance such as heritage sites and monuments.<sup>170</sup> A review of the United States, Canadian and Australian policies revealed basic approaches to resolving the conflict between mining and protected areas and amongst these is voluntary forfeiting of mineral licenses in prohibited areas in exchange for positive and corporate publicity.<sup>171</sup> The end result is preservation of heritage sites and the environment at

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<sup>166</sup> <https://www.hmetro.co.zw/save-mavhuradonha/>

<sup>167</sup> <https://www.africaportal.org> Environmental Impact Assessment Report for Hwange Coal Mining Activities

<sup>168</sup> <https://www.doi.org/10.1016/j.exis.2014.04-007.the-extractive-industries-and-society-volume> 1 issue2, Nov 2014, pages 200 -215 -Community Development Requirements in Mining Laws by Kendra .E.Dupuy

<sup>169</sup> SI-25-2021

<sup>170</sup> <https://www.allafrica.com/stories202106280908.html> for example Mavuradonha wilderness was gazetted as a national Monument in 2017, but it has been reduced to a shell due to rampant illegal mining, illegal settlers, poaching and deforestation according to an article: Outrage over Chinese Mining Project in Resort

<sup>171</sup> Integrated Environmental Assessment and management: An International Journal (3), 283-289, 2005

large. Zimbabwe can adopt this stance and add forfeiture of mining licenses voluntarily as described above and make additions of compulsory forfeiture where there is gross non-compliance with mining law as a penalty, compulsory forfeiture may also be used to acquire trading licenses as well from offenders involved in illegal trade of minerals since mining law covers the whole cycle from exploration to trade stage.

Factors to be considered on whether there should be voluntary or compulsory forfeiture may be that in cases where one has acquired mining rights in a protected area and no damage has been done yet but there is a risk of such damage to the protected area, and the holder of rights is open for negotiations in order to preserve and conserve the protected area or the environment, then voluntary forfeiture is applicable and may even be accompanied by compensation by the ministry in the form of allocation of mining rights elsewhere. Compulsory forfeiture would then apply in a case where mining rights have been acquired for whatever reason in a heritage site<sup>172</sup> or national park<sup>173</sup> and damage has been done to the protected area. The rationale behind forfeiture is that, a mining lease often contains an express or implied condition or conditions requiring mining activities to be carried out within a reasonable time with due diligence failure of which will result in forfeiture of mining rights<sup>174</sup>

#### **4.4 CHALLENGES IN THE CIVIL PENALTY REGIME**

##### **4.4.1. Lack of capacity and resources**

As mentioned above, in order for the civil penalty regime to be effective and efficient, there is need for vigorous monitoring and inspection of mining sites in order to pick any breach of the law, and impose penalties. However, an impediment that exists that makes such monitoring and inspections impossible is a lack of capacity and resources. The MMMD is understaffed and is also underfunded<sup>175</sup> such that it is difficult for it to effectively perform its duties. The MMMD lacks the capacity to inspect, audit and review the mining company's activities over the typically very long-life span of mining projects. This is the reason why operations can go on for a long time without any follow up and inspections from the MMMD as there won't be any personnel to carry out that function

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<sup>172</sup> <https://www.zimbabwesituation.com/news/chinese-firm-blocked-from-reserve/>

<sup>173</sup> <https://globalpressjournal.com/africa/zimbabwe/mining-threatens-wildlife-sacred-sites-people/>

<sup>174</sup> General state of the Law and Movement to further confine its application in the coal lease by Linda Rae Artirnez W Va .L. Rev . 86,1039,1983

<sup>175</sup> The MMMD's operations are funded by the Government through the Ministry's Vote and the MMMD Fund. The income of MMMD Fund consists of mining fees as provided for by SI 10/2016. The Ministry retains 25% revenue generated by this fund and the remainder 75% is remitted to Treasury. This explains why the MMMD is heavily underfunded.

and also resources will be limited. This is a major set-back to the effective implementation of the civil penalty regime.

According to the report by the Auditor General that was presented to Parliament in 2019,<sup>176</sup> the audit identified that the MMMD had not been able to carry out adequate monitoring of occupational health and safety (OHS) and that there was risk that mining operations would not comply with OHS regulations. From the Auditor General's report, the six mining provinces that were visited during the preparation of the report, documentary review and analysis of statistics revealed that inspections were not being adequately done and inspections conducted averaged 1.32 % for the six provinces. The audit established that, each province had at most two vehicles, one of which was allocated to the Provincial Mining Director and was not available for any other duties. The other vehicle was available for both administrative duties and for use by other departments that is geology, metallurgy and the inspectorate department for inspection duties. Such a situation is deplorable as it makes it impossible for any monitoring and inspections for compliance to be done due to lack of transport as one vehicle will definitely be overwhelmed by the demand.

Another sticky issue on capacity is that of lack of knowledge and expertise to handle the monitoring and implementation duties. If mining officials lack the requisite knowledge to perform their functions, then this will affect the success of the civil penalty regime. Mining inspectors must know the provisions of the law and possess some knowledge on mining operations so that they are able to dictate violations of the law and assess appropriate penalties. In Zimbabwe it appears from the cases that are taken on appeal/review at the High Court that most of the decisions of the provincial mining directors and MMMD in general, are set aside as they will be wrong at law.<sup>177</sup>

#### **4.5 Overview of the civil remedies regime**

An analysis of the study of the criminal sanctions in the enforcement of mining law in Zimbabwe shows that there is need to use civil remedies as well for the legal regime to be efficient. It is important to note that, there is need to strike a balance between interests represented by the civil and criminal sanctions in the mining sector as it is common cause that the aim is to establish a legal regime in the

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<sup>176</sup> OAG Zimbabwe, Report of the Auditor General on the Management of Occupational Health and Safety in Mining Operations by the Ministry of Mines and Mining Development. Presented to Parliament, VFM 2019:05

<sup>177</sup> See the High Court cases of Ronald Davison Mugangavari versus Provincial Mining Director-Midlands and 1 Other HB-63-20 and Gombe Resources Private Limited versus Provincial Mining Director, Mashonaland Central and 3 Others HH-405-18 wherein all the decisions of officials from the MMMD were set aside as they were wrong.

extractive sector that is sustainable, efficient, water tight and applicable practically to the issues that arise in the mining sector.

The ideal situation would be one that is characterized by a complimentary combination of civil and criminal remedies such that the shortcomings of the criminal regime will be catered for by the civil remedies and vice versa. Issues that come to mind are the cumbersomeness of the criminal justice system, the burden of proof that is required in the criminal court which is proof beyond reasonable doubt whilst civil remedies require proof on a balance of probabilities.<sup>178</sup> This means that, cases where illegal mining activities have caused adverse impact but there is insufficient evidence to prove a criminal case, the matter can be dealt with under the civil remedies regime hence no offender will get away unpunished.

In addition, the proceedings in the criminal justice system are time consuming, assuming that the civil remedies will be administered by the Ministry of Mines and in some cases Environmental Management Agency, the National Water Authority or the Forest Commission, the proceedings provided for under the civil remedies regime are likely to be as time consuming as criminal prosecutions. Therefore, backlog may be reduced by referring some cases to be dealt with using civil remedies. Hence it will be advantageous to apply both civil and criminal remedies.

#### 4.6 Conclusion

Conclusively, it is important to note that civil remedies may be used successfully to complement criminal sanction in enforcing mining law in Zimbabwe. This is so for, criminal sanctions provide for incarceration, restitution and fining whilst civil remedies provide for fines, rehabilitation of the environment and there is much room to improve civil remedies to encompass other remedies such as forfeiture, blacklisting and under the civil remedies regime, the rehabilitation costs may be calculated by experts such as engineers, EMA officers, scientists and others to assess the nature and degree of damage as well as the costs required to restore damaged environments to the status quo and such processes can be done expeditiously without damaging business relations.

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<sup>178</sup> In the case of *Milner v Minister of Pensions* 1947 2 ALL ER 372 at page 374, Lord Denning expressed the civil standard of proof as follows: “It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say “we think it more probable that not” the burden is discharged, but if the probabilities are equal, it is not.”

# CHAPTER 5

## CONCLUSION AND RECOMMENDATIONS

### 5.1 Introduction

The purpose of this chapter is to conclude the research by summarizing and acknowledging the major arguments, major findings and suggesting recommendations that have stemmed from the research such as improving civil penalty regime, harmonizing laws, awareness campaigns and blacklisting of offenders.

### 5.2 Summary of Major Arguments

#### 5.2.1. Chapter 2

- ❖ The legal regime for criminal sanctions in Zimbabwe derives its foundations from the international principles of sustainable development, transparency and accountability which were stated in the Brundtland Commission as well as the SADC Protocol on Mining. These principles are part of the founding values of the Constitution of Zimbabwe and it is important for the legislation governing criminal sanctions in the mining sector to be consistent with these principles as they are the guidelines to the international standards set for sustainable exploitation of natural resources.

### **5.2.2 Chapter 3**

- ❖ There are weaknesses and challenges affecting criminal sanctions in mining law in Zimbabwe, these challenges and gaps emanate from substantive gaps in the legislative provisions, procedural gaps in law enforcement, sentencing absurdities as well as development and or technology gaps.
- ❖ A discussion of the nature and characteristics of mining crime in Zimbabwe is dominated by tax evasion, illicit financial flows, corruption, smuggling and illegal mining activities<sup>179</sup>. These are being caused by poverty as well that lack of income-earning opportunities, abuse of power and greed.
- ❖ Effectiveness of the criminal penalty regime laws and institutions have been established to regulate mining crime to ensure economic and social development, however, efforts continue to be frustrated by corruption, porous crime detection facilities or mechanisms, lenient fines and punishments, poor remuneration of law enforcement agents, poor drafting of legislation or poorly crafted legislation and primitive crime detection facilities.

### **5.2.3 Chapter 4**

- ❖ Effectiveness of the Civil penalty regime is necessary to subsidize the criminal sanctions in the mining sector for efficiency. However, the civil penalties available need improvements such as stringent fines and additional penalties such as blacklisting, only then can it be possible to keep records of offenders and ensure rehabilitation and deterrence.

## **5.3 Summary of Main Findings**

### **5.3.1 Chapter 2**

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<sup>179</sup> Senate Hansard 10 MAY 2022 Vol 31No 39

- Criminal sanctions governing exploitation of minerals in Zimbabwe originate from international principles of sustainable development, transparency and accountability. These founding principles work in collaboration with theories of retribution, punishment and rehabilitation which govern criminal law generally. These sentiments are envisaged in the Constitution of Zimbabwe and it is compulsory for the criminal sanctions to be consistent with the Constitution as the supreme law of the land.

### 5.3.2 Chapter 3

- Countless initiatives have been put in place to curb mineral crime in Zimbabwe, yet despite being endowed with so many mineral deposits the country continues to face poverty and underdevelopment<sup>180</sup>. Factors causing the natural resource curse are amongst others, corruption, the public attitude towards mineral crime, lack of resources for the regulators, lack of political will and the fact that law enforcement is cumbersome and time consuming.
- There is dire need to amend the laws of mineral exploitation from acquisition of mining claims to trading such that the law can accommodate small scale miners<sup>181</sup>. Such a move is important to ensure harmonization of laws and practices since small scale miners play a major role in exploitation of minerals resources even up to the stage of trade.
- Corporate bodies both local and international, are playing a vital role in the extractive sector and in order to maximize profits, some circumvent the law by incentivizing public officials to obtain illegal mining claims, exploiting minerals illegally causing massive pollution, smuggling of minerals, tax evasions and incentivizing regulatory officials to qualify for lenient fines. Further prosecution of corporate bodies is complicated and piercing the corporate veil is not an easy task.<sup>182</sup>

### 5.3.4 Chapter 4

- An analysis of the existing legal regime for criminal sanctions in Zimbabwe shows that it is pertinent that additions be made to the law by introducing other official deprivation of liberties that can be applied with effective results to natural and artificial persons or offenders such as stringent taxation, deprivation of a portion

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<sup>180</sup> <https://issafrica.org/iss-today/exploiting-minerals-exploiting-communities> accessed 14/07/22

<sup>181</sup> National Development Strategy 1 of Zimbabwe

<sup>182</sup> CBZ v Matizamombe



of income or addition of compulsory levy to commercial transactions for example value added tax.<sup>183</sup>

- Civil remedies pose a great potential in catering for the shortcomings of criminal sanctions to combat mining crime in Zimbabwe. However, the civil remedies need to improve by imposing stringent fines and punishment for effectiveness.

## **5.4 Recommendations**

### **5.4.1 Improved security in all smuggling routes**

In order to successfully deal with smuggling of minerals the security of smuggling routes should be tight and there should be technologically advanced detecting machines that are up to date as well as adequate manpower. Security facilities should be made to be stricter in routes used for mineral crime such as smuggling such as airports and borders where there are high risks of smuggling. There should be advanced technological searching machines to detect minerals and revenue being smuggled.

Communications with countries who are markets for illegally obtained minerals and mineral revenue should be uncovered and supplied as evidence in courts during prosecutions. This information can be processed and obtained through Mutual Legal Assistance through the NPA and or Interpol.

A good example is that in Chiadzwa drones and the art-four-tier-remote surveillance has been established at the mines as a way of tightening security to avoid leakages at ZCDC by the Ministry of Mines and Mining Development<sup>184</sup>, the same can be recommended at borders, airports and other mines as well.

### **5.4.2 Improved Inter-Agency Collaborations**

There is need to improve the relations between the MFFU and other various agencies in dealing with mineral crime<sup>185</sup>. The MFFU works in collaboration with agencies such as ZIMRA<sup>186</sup>, EMA<sup>187</sup>, JSC<sup>188</sup> and NPA<sup>189</sup>. This means that if the MFFU works together efficiently with these agencies the end result will be improved efficiency

This can be achieved by improving inter-agency collaborations through having many awareness workshops, meetings in which the agencies aforementioned will be fully

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<sup>183</sup> Principles of criminal law by Ashworth 2<sup>nd</sup> Edition Clarendon Press Oxford 195 at page 10

<sup>184</sup> R Bande, Security tightened at Chiadzwa Accessed 26 August 2021

<sup>185</sup> S Faroque<sup>1</sup> and N South, Law-Enforcement Challenges, Responses and Collaborations Concerning Environmental Crimes and Harms in Bangladesh

<sup>186</sup> Zimbabwe Revenue Authority

<sup>187</sup> Environmental Management Agency

<sup>188</sup> Judicial Service Commission

<sup>189</sup> National Prosecuting Authority

participating and discussing problems being faced and recommendations and sharing any other relevant information, inhouse and interdepartmental trainings involving various stake holders including MFFU officers, prosecutors, magistrates, judges, and nongovernmental organizations to improve their knowledge, skill and capacity in dealing with mineral crime.

#### **5.4.3 Harmonizing laws**

Mining crime is regulated by a various interlapping legislation that have been discussed<sup>190</sup>. There is need to amend the complementary provisions in various Acts and Regulations and align them together in order to achieve one main goal. The conflicting nature of the pieces of legislation has resulted in poor law enforcement and gaps which allow birth and growth of mineral crime. Legislation should be harmonized in order to prevent creation of environments which are conducive for crime in order to help the various institutions responsible for law enforcement and regulation to combat mineral crime without clashing. The law should be amended to accommodate small scale miners by making it legal for them to move and possess minerals from artisanal miners for consistency since they are allowed to freely supply Fidelity Printers and Refiners.<sup>191</sup>

#### **5.4.4 Funding**

The MMA and the EMA have provisions for a fund for rehabilitation purposes however, there is need for improvements to be made to ensure proper management of the fund such that it is used for the purpose for which it was created in a manner that is consistent with principles of transparency and accountability<sup>192</sup>.

#### **5.4.5 Use of civil remedies as alternative solutions**

The shortcomings of the criminal penalty regime can be cured by remedies available in civil law such as cancellation of title, stiffer fines, blacklisting and imposing rehabilitation obligations on offenders. This is so for remedies available in the criminal sanctions are not sufficient enough to ensure sustainable exploitation of mineral resources.

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<sup>190</sup> these include the Mines and Minerals Act, Minerals Corporation of Zimbabwe Act, Gold Trade Act, Precious Stones Act and the Environmental Management Act as well as the regulations that stem from these Acts

<sup>191</sup>Institutional exclusion and the tragedy of the commons: Artisanal mining in Matabeleland South Province, Zimbabwe Author links open overlay panelNqobizithaDube<sup>1</sup>FunaMoyoMkhokheliSithole<sup>1</sup>GraciousNcube<sup>1</sup>PeterNkalaNevelTshumaMandlenkosiMaphosaCliffordMabhena

<https://www.sciencedirect.com/science/article/pii/S2214790X20302859>

<sup>192</sup> The Legal and Economic Framework for Natural Resources-Related Statutory Funds in Zimbabwe by James Tsabora at page 31

#### **5.4.6. MFFFU Specialized Prosecutorial Agency within the NPA**

Another recommendation is the introduction of a specialized prosecutorial agency within the national prosecuting authority<sup>193</sup>. Such an agency will be like the CID MFFU and will be functioning under the National Prosecuting Authority Act but the prosecutors will be specifically for mining crime. The initiative may also provide for constant educational upgrades in then form of courses to be attained and the prosecutors will be enabled to participate in making policy recommendations. In addition, working conditions for these specialized prosecutors such as remuneration and benefits need to be improved so that after furthering their studies, they will not leave the National Prosecuting Authority for greener pastures and also so that they do not become vulnerable to corruption and bribes.

#### **5.4.7. Trans boarder Inter-Agency Co-operation**

There is need to introduce and improve transborder inter-agency cooperation mechanisms which allow for shared responsibilities ad sharing of information with the aim of solving trans boarder organized mineral crime such as smuggling of minerals out of the country at regional and state level by integrating public private partnerships and efficient information sharing initiatives<sup>194</sup>.

#### **5.4.8. Creation of a Court mandated to deal with mining cases**

It is also recommended that there be creation of a court responsible for or mandated to deal with mines and minerals issues<sup>195</sup>. Currently mining issues are being dealt with in the magistrate’s court yet the mining sector has become a topical issue and the economy of the country has become heavily reliant on the mining sector for economic development. The creation of a Mines and Minerals court will be able to deal with issues of backlog.

### **5.5 Conclusion**

Conclusively it seems that the pieces of legislation governing the extractive sector are predominantly leaning on the side of criminal sanctions in comparison to the civil sanctions. The bulk of the provisions on penalties under the Mines and Minerals Act

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<sup>193</sup> [CMI Open Research Archive: Specialised anti-corruption courts: Uganda](#)

<sup>194</sup> Way through which sharing information would help in solving trans boarder organized crime in Africa

\* Umar Kabanda \*American Academic Scientific Research Journal for Engineering, Technology and Sciences 3(1), 30-35 2013,

<http://asrjetsjournal.org/index.php/AmericanScientificJournal/Article/view/505>

<sup>195</sup> JURISDICTIONAL PROBLEM IN ENVIRONMENTAL LITIGATION IN NIGERIA: LESSONS FROM NEW SOUTH WALES [JURISDICTIONAL PROBLEM IN ENVIRONMENTAL LITIGATION IN NIGERIA: LESSONS FROM NEW SOUTH WALES | IIUM Law Journal](#)

(MMA)<sup>196</sup> provide for criminalizing those offenders who would have contravened the law regarding mining activities. In the same vein the provisions under the Gold Trade Act (GTA)<sup>197</sup> and Precious Stones Trade Act (PSTA)<sup>198</sup> similarly prefer criminal offences rather than civil sanctions. In Zimbabwe, it can be concluded that from the empirical evidence under our legal statutes that govern natural resource, that civil penalties are very few if not non-existent at all. The mines and minerals Act which is the cornerstone legislation that governs mineral resource management is proactively in favor of applying the criminal justice system as an avenue for enforcement and legal compliance

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