The Case of the Impossible Mining License: Legal Rituals and 'Responsible Mining'

Doris Buss

This paper begins with the story of one gold miner in Western Kenya and his quest for a mining license that turns out to be all but impossible to secure. The story of this impossible mining license is an account of the place of law in the rise and rise of sustainable development initiatives built around mining as a means for improved development outcomes. The combining of mineral extraction with social improvement initiatives has yielded a profusion of law and policy initiatives, often financed through international donors, to link mineral extraction with requirements for human rights, social and environmental protections. I refer to this as the responsible mining assemblage (Sassen 2006, Sullivan 2014). Artisanal and small-scale mining, a form of mining primarily found in the global South is increasingly included in many of these initiatives, as I explain below.

Growing academic and activist concerns with the environmental and social impacts of mining, often encapsulated in the term 'extractivism', largely focus on industrial mining by transnational mining companies. The work of law in facilitating mineral extraction by these companies tends to be explored by legal scholars in terms of the gaps, distances or separations that are enacted through law. Dayna Scott, for example, emphasises extractivism as a 'mode of accumulation in which a high pace and scale of "taking" generates benefits for distant capital without

generating benefits for local (Scott 2021: 124). Penelope Simons and Audrey Macklin explore 'accountability gaps' for transnational mining companies (Simons and Macklin 2014) while David Szablowski considers the ways legal regulation 'encloses' local (mining) spaces so that 'populations living in extractive territories lack recourse to other legal spaces when they seek to access to justice' (Szablowski 2019: 722). This scholarship, in my reading, provides a much-needed account of the normalisation – through legal and analytical distancing manoeuvres – of the injustices of extractivism. I share this concern but this paper takes a different approach.

My focus is on 'artisanal and small-scale' mining that is undertaken mostly by individual women and men in rural areas in the global South, including in sub-Saharan Africa, where some of the research for this paper has been undertaken. Rather than viewing justice and extractive practices as separated, I am interested in the points of contact, the 'frictions' (Tsing 2005) that emerge when the globalising aspirations of law reform initiatives unfold within extractive contexts. Friction, for Anna Tsing (2005: 5) points to the importance of local manifestations of global connection; the kinds of meanings, modes of power, or cultural arrangements that emerge when universals are encountered even in highly unequal exchanges.

Artisanal and small-scale mining (ASM), is one of these contexts and is the subject of a sizable, and growing body of scholarly research in disciplines like Anthropology or Geography (see e.g., Lahiri-Dutt 2008, Geenen 2013, Spiegel 2014, Verbrugge 2015, Rutherford 2020), but much less so in Legal Studies (but see Mensah 2021, Munir 2023). The extant scholarship on ASM examines the lived experiences of mining populations in ways that close some of the analytical gap implicitly imported when 'local' mining areas are positioned at some remove from 'distant' capital or justice.

ASM is a largely informal, often criminalised type of mining, yet is growing in size and importance as a livelihood in the global South as other options, in agriculture for example, decline due to global trade inequities, climate change, and 'land grabs'. Increases in demand and

prices for minerals also make mining the best available livelihood, supporting hundreds of millions people globally.[1]

A profusion of initiatives are underway to include ASM populations within formal transnational policy and economic structures. Different nodes within the transnational policy assemblage on responsible mining repeat a similar demand: formalise the ASM sector through the introduction of mining licenses. The license is offered as a solution to various 'problems' and as a necessary condition for increased economic development in the global South. This is, in short, a rule-of-law solution that is now promoted almost uniformly across the eclectic responsible mining and 'clean' mineral supply chain assemblage. Yet, we rarely encountered a local artisanal or small-scale miner with a license in our research on gold ASM in Kenya, Sierra Leone and Mozambique (see further below). Our findings are not uncommon. In a sector where the benefits of formalisation and licensing are touted far and wide, few artisanal or small-scale miners have a license.

This paper explores the contemporary push for formalisation through ASM licensing as representing a new chapter in a longer story about law and mining, one in which the call for more law – again and again – has a ritualistic quality in its repetition and seeming contradiction. At the heart of this paper is the paradox that the ASM license is embraced by many different policy entrepreneurs in the full knowledge of its near impossibility. This paper takes up the Special Issue theme of legal ritual to consider the analytical openings it provides about this seeming paradox. In their study of religious rituals, Adam Seligman and colleagues refer to 'the subjunctive' of ritual; 'the creation of order as if it were the case' (Seligman et al. 2008: 25). These authors argue for an analytical focus on ritual less in terms of its congruence with a set of beliefs, and more on the 'endless work of ritual' that is needed precisely because of the disconnect between ritual and lived reality (Seligman et al.. 2008: 26-28, 32).

In the following discussion, I trace calls for legal 'formalisation' of ASM through licensing that are unfolding across diverse transnational policy sites. The turn to law, again and again, speaks in part to

what others have already observed about the fetishising of law in development initiatives on the continent (Manji 2003, Pahuja 2011, Eslava 2015), and the central place of 'formalisation' in international law (Alessandrini, Cortes Nieto et al.. 2022). Exploring this ritualised turn to law in terms of the subjunctive shifts the analytical focus from hypothesising about the force of law, to closer examination of what is made possible or put into motion when actors embrace legal solutions knowing their incongruence with the 'world of daily experience' (Seligman et al. 2008: 26). Centring ASM, a type of informal mining with extensive informal, transnational economic linkages, highlights the points of contact – the frictions – that unfold in legal regulation in extractive contexts that might be overlooked when large, transnational mining entities are disproportionately the focus of legal scholarship.

As I explore here, the ritualised turn to mining licensing as a solution to 'ASM problems', operates within a complex legal assemblage itself spanning decades and scales. The apparent consensus on ASM licenses across these different contexts is remarkable, pointing to the powerful processes of 'meaning making' as they move along the different aspects of this assemblage (Clarke 2019: 9). What interests me here are the varied knowledge regimes and framings that align in their conviction of the need for ASM formalisation (through licensing) to integrate ASM within global supply chains.

In the first substantive section of this paper, I introduce ASM in sub-Saharan Africa as a regulatory category of mining. I explore how some of the seemingly descriptive qualities of 'ASM' – customary, traditional and rudimentary – emerged in an historic context in which ASM was produced as a type of mining for 'Africans', distinct from industrial, 'European' mining (d'Avignon 2018: 2022). The legal production of ASM in colonial west Africa contrasts with the second regulatory segment I consider: the neoliberal, internationally-funded law reform programs from the 1980s and 1990s to promote foreign direct investment in continental mineral extraction. If some colonial-era policies produced the category of African mining as small and low-technology, this second context, in its preference for industrial mining

produced the conditions for ASM's illegality (Hilson 2013, Verbrugge 2015, and see further below). This informality becomes the focus of yet another wave of legal regulation in the 2000s, this time aimed at solving a series of problems linked to ASM and its informality, particularly in central Africa: armed conflict, environmental degradation, poverty and exploitation, and child labour being among the most commonly cited (see e.g., Amnesty International 2016).

A series of policy initiatives to formalise and license artisanal and small-scale miners have followed. Some of these are intended to solve the problems of armed conflicts, others to promote development, but all seek to integrate ASM minerals into transnational mineral supply chains through licensing. The ASM license is celebrated as a 'win win'; a way to correct problems, and provide a route to economic development in rural, sub-Saharan Africa. Yet, as I discuss, the ASM license is both a solution and an impossibility. And in this space of contradiction, the license opens up different repertoires in which the 'solution' through legal inclusion emerge as both obvious and urgent.

In the final section, I consider some of these different claims for legal inclusion of artisanal and small-scale miners; to pay taxes as responsible, entrepreneurial citizens, or as 'pro-poor' initiatives. These different frames point to a familiar dynamic in which legal solutions produce unplanned effects that then become the basis for yet more law-centred interventions. The terms by which artisanal and small-scale miners are identified as new objects of regulation within transnational mining initiatives point to the very immediate, material legal dynamics that operate within law and policy projects in the extractive sector, and which might not be captured when law or justice are located 'here', and mining and its effects 'over there'.

The research for this paper is comprised of annual visits of two – four weeks to an artisanal and small-scale gold mining area in western Kenya alongside attending and monitoring meetings of transnational mining policy initiatives since 2015. This research is part of a larger project, involving a team of researchers from Africa and Canada, focused on women's ASM gold livelihoods in Kenya, Mozambique and Sierra

Leone.[2] Two vignettes from this research anchor the paper. One is from an international mining policy meeting I attended on-line, and the other is from the ongoing research in a gold mining area in Kenya. The following section starts here, with the story of James and his quest for the (near) impossible mining license.

1 Law and the Making of Artisanal and Small-Scale Mining

The acronym 'ASM' that is in wide usage refers to two distinct mining categories: artisanal *and* small scale. An increasingly common approach in some countries is to have different licenses for artisanal and small-scale mining. Licenses can also be required for different stages of mining, with licenses for excavation, distinct from those for processing, distinct, in turn, from selling or exporting gold ore. Like many areas of regulation, ASM licensing is becoming increasingly variegated.

To set the stage for this paper, I begin with the story of James, a pseudonym for a gold miner in western Kenya we came to know through our research. James was born and raised in a largely agricultural area that also had colonial era mines that were worked on and off again by the local population since the 'colonials' left after independence in the 1960s. James tells stories of his youth, where both his parents and the local police would punish him if they found him mining. His father wanted James to get an education and a livelihood that was not mining; the police were enforcing what James describes as mining 'bans'. James got an education, but he also mines. Some of his grown children now mine too.

In our first post-COVID visit in December 2022, James showed us around his newly developed mine shaft and processing equipment. James explained that he invested in various pieces of equipment to undertake the multiple stages of processing gold-bearing ore while minimising environmental impacts such as using mercury, which is ubiquitous in this area. As we walked through his small operation, James was painting a picture of a 'mine to market' system for responsible, small-scale gold mining that would meet national and international standards for 'mercury free' gold: 'I have all the stages,

but I can't get a license [from the Kenya national government].' When he phones the relevant government ministry official to ask about the status of his license application', the official replies with frustration, 'Am I stopping you from mining?' The answer is no, but James is not satisfied with this de facto permission. He wants a license. He has been trying for a number of years 'to show the government it is possible to make money' from small-scale gold mining. He wants to pay taxes.

For all his efforts, James does not currently have a license to mine, process or sell gold. The 2016 Mining Act in Kenya requires these. Mining, processing, selling, or exporting minerals without a license is punishable by a prison term, a fine, or both (*The Mining Act,* No. 12 of 2016, Art. 202(1)). The Kenyan government imposed a ban on new licenses in the lead-up to the 2016 Mining Act (Amadala 2021). The ban was lifted formally in 2022, but delays remain in issuing licenses in James' area. James can openly engage in mining without a license but in technical violation of the formal law.

James is an unusual miner. He is a small-scale miner, well connected to international development organisations and universities, particularly in North America, with knowledge of the various, internationally-funded efforts to formalize ASM. James' desire to have a license, to use responsible mining techniques and equipment is aligned with dominant thinking in these international circles where mining and development 'best practices' for improving ASM are now emerging. All around James are artisanal and small-scale gold mining operations, many with far less equipment than James'. The term 'artisanal' might be a better fit for these operations. But here is where things get more complicated.

The terms 'artisanal and small-scale' or 'artisanal' or 'small-scale' often refer to the level of technology used and the amount of ore excavated, with artisanal mining demarked by the most basic mechanisation and shallowest excavation. Kenya's Act, for example, defines artisanal mining as: 'traditional and customary mining operations using traditional or customary ways and means' (*The Mining Act,* No. 12 of 2016). Artisanal mining licenses ('permits') are reserved for Kenyan nationals. Small-scale mining is defined by limitations on

the depth and size of the mine, the amount of financing to develop the mine, the volume of ore, and the limited use of equipment and chemicals (*The Mining Act*, No. 12 of 2016, Schedule 2, ss 1, 2). Small-scale permits are only available to Kenyan nationals or corporations where Kenyans own at least 60 per cent of shares (s 124(1)). Large-scale licenses, in contrast, do not impose limits on the amount of ore excavated, financing or the nationalities of owners, and are valid for a much longer term of up to 25 years.

Definitions like these are common in mining laws across the continent, and while numbingly technical, also point to the conditions for the (near) impossibility of James' quest for a license. In the following discussion, I trace some of the history of efforts to create formal state regulation of artisanal and small-scale mining on the continent, shaped by racialised logics and visions of mining technology and extractive–led growth. This overview is partly a story about the allure of law reform as a go-to solution, even in the face of repeated failures. But it is moreso an account of some of the different registers in which the 'artisanal miner' is legible as an object of legal regulation.

The following discussion begins with colonial constructs of artisanal miners (*orpailleurs*, in colonial west Africa) as primitive and African, in contradistinction to modern, European miners. In the busy law reform periods of the 1980s and 1990s, the artisanal miner is counterposed to industrial miners of the global North, defined as highly efficient and legitimate. While research on the colonial history of mining licenses in Kenya is still nascent (Roberts 1986, Amutabi and Lutta-Mukhebi 2001, Ogola, Mittulah et al.. 2002, Omiti 2013), Robyn d'Avignon's study of '*orpaillage*' in west Africa offers rich insights into the relationship between colonial rule and the construction of 'traditional' or 'African' mining. In d'Avignon's account, the colonial state in French West Africa 'created the category of "customary" African miner' who used 'customary' means to mine. These miners (orpailleurs) were given legal sanction to mine through a "customary rights" (droit coutumier) legal clause' (2022: 88). This sanctioning of orpaillage, d'Avignon demonstrates, inscribed a racialised distinction

between 'primitive' mining, deemed to be 'African', and the industrial mining of Europeans (d'Avignon 2018: 197, d'Avignon 2022).

The mining rights that followed were similarly indexed. '[O]rpailleurs were limited to mining "superficial" deposits with the use of locally forged iron hand tools,' with specified, allowable depths that could be reached with 'customary procedures' (d'Avignon 2018: 186). Europeans were eligible to apply 'for multiyear mining concessions' (d'Avignon 2022: 90–91), and to mine ore that, according to the regulating French engineer 'escaped the reach of the primitive techniques of the natives' (d'Avignon 2018: 186).

In these moves, colonial governments constructed artisanal mining as a particular category through which (limited) rights were extended, while also dispossessing Africans from land (for larger mining projects), and access to better (deeper) ore deposits. Related developments can be found in other regions, such as in southern Africa, where Rachel Perks found that the designation of some mining as 'African' had the effect of limiting rights and land access of Black African miners and orienting 'the whole productive labour markets towards the [European-owned] mines' (Perks 2013: 8).

As Kenya's Mining Act reveals, contemporary distinctions between artisanal and large-scale mining can be found that largely hew to those imposed by colonial authorities in French West Africa. Kenya is unusual on the continent as its 1940, colonial-era *Mining Act* (CAP 306) was not substantially revised until 2016, likely because the country's economic focus upon independence was on agriculture and tourism, more than mining. Countries deemed mineral rich, in contrast, have reformed their mining and related legal frameworks often. Some mining law reforms were conducted in the 1970s upon nationalising mining industries (Chachage et al.. 1993: 47), but the busier period of legal reform for many countries on the continent begins in the 1980s, a period dominated by donor government and agency interventions aimed at 'structural adjustment' (Chachage et al.. 1993: 45). These reforms, often with World Bank and IMF loans, focused on restructuring (retrenching) the role of the state in resource extraction

and attracting foreign direct investment to develop the continent's anticipated reserves (Campbell 2010).

The World Bank's landmark 1992 'Strategy for African Mining' set the stage for further reforms in the 1990s (Hilson and McQuiken 2014). The Strategy built from the premise that mining on the continent was hobbled by a 'paucity of exploration and capital expenditures', due primarily to African governments' involvement in mining operations (World Bank 1992: x, Ch 1). Delimiting the state's role while prioritising the private sector was the solution. To achieve this increased investment in mining required that the state shift its priorities away from policy objectives like 'control of resources or enhancement of employment,' in favour of long-term tax revenues from mining (World Bank 1992: x, 9-10). The state's role was to be 'regulator and promotor', with the private sector taking 'the lead in operating, managing and owning mineral enterprises' (World Bank 1992: x, 9).

A 'template' for mining law provisions, including on licensing, was embedded in the Strategy (Campbell 2010, 201) outlining an open market of mining licenses available to 'all potential interested parties' (World Bank 1992: 22). This 'one-size-fits-all' approach allowed a 'possible exception' for artisanal mining, noting its significant contributions to economic and rural employment. But while artisanal (but not small-scale) mining might require distinct licenses, artisanal miners would be treated like nascent industrial miners: given private property rights so they could 'grow and produce more revenue' for themselves and the state (World Bank 1992: 44).

Not surprisingly, the resulting licensing regimes benefitted well-resourced mining firms headquartered in the global North, who then secured large concessions with long time horizons, leaving little if any unclaimed land for artisanal miners (Hilson 2013, Campbell 2010). While reforms coming later in the 1990s introduced and/or revised ASM licensing regimes, these remained inaccessible for most artisanal and small-scale miners who lacked the education needed to complete complex forms, the money for application fees, and the ability to travel to distant capital cities to make and update application. Land

with promising deposits was also unavailable; still under large mining concessions in many cases. The paradoxical result was that these legal revisions effectively produced ASM's illegality: the introduction of requirements for licenses that remained inaccessible effectively reclassified artisanal and small-scale miners from 'unregistered' to 'illegal' (Hilson and McQuilken 2014: 111; see also Fisher 2007, Banchirigah & Hilson 2010, Brugger & Zanetti 2020, Werthmann 2009).

While more nuanced than I can fully explore here, these 'generations' of mining law reforms (Campbell 2004, Besada and Martin 2015), demonstrate a pattern in which industrial forms of mining, mostly financed through corporations based in the global North, were positioned as the legitimate form of mining. Artisanal mining, in contrast, was the (racialised) exception (at best). Cyclical reforms to mining and related legal frameworks reflected the view that law was needed to create 'a climate of stability and predictability' (Bastida 2020: 48). One World Bank report referred to mining law reform of this period as the 'bread and butter of Bank support' for the industrial mining sector, with the Bank spending USD $1 billion between 1988 - 2010 in 24 countries, 21 of which in sub-Saharan Africa (McMahon 2010: 7).

Where mining reforms in the 1980s and 1990s were firmly centred on large-scale mining as the legitimate form of mining, reforms in the first decades of the 2000s were organised around 'cleaning up' human rights and armed conflict – linkages to mining and mineral supply chains. ASM was more often included in these initiatives, generating in turn more reforms of mining laws. In the following, I turn to some of these new, 'clean' mining initiatives, as part of the 'endless work' of law reform in creating 'order as if it were truly the case' (Seligman et al. 2008: 20).

2 The Responsible Mining Assemblage and the (Rise and Rise) of the ASM License

It's early in the morning on April 27, 2023, and I am sat in my kitchen,

listening online to a live panel discussion at the annual OECD Responsible Mineral Supply Chains meeting in Paris. A speaker from the London Bullion Market Association (LBMA) is explaining the importance of sourcing gold produced through artisanal and small-scale mining. This is a 'pro-poor' move, explains the speaker, adding that with 'so many women miners [working] in ASM,' there is scope to make improvements for these women. The LBMA is looking for countries that have both large amounts of ASM-produced gold and the right kinds of regulations so that it can source more ASM gold. The LBMA wants gold from artisanal and small-scale miners who are mining legally with permits, where there is a searchable database of miners that sets out who mined what. 'This is a high bar', the speaker explains, but they want to find the 'gold that fits' the LBMA requirements.

Still in my pyjamas, drinking my first cup of coffee, I struggle to follow this discussion: what is the LBMA and why does it want to source more gold from ASM? Why does it want to be 'pro-poor' and involve women?

The answer to the first question can be found in LBMA publications: 'the international trade association that represents the market for gold and silver bullion…' (LBMA 2011). Its members include central banks, like the Bank of England that initiated the LBMA, as well as companies that buy and sell these metals; investors, mining companies, corporations whose products require gold and silver. Incorporated in 1987, the LBMA provides, among other things, accreditation of 'good' refiners, who apply to be on its 'good delivery list.'[3] This good delivery list (GDL) is another nodule in transnational, cross-sectoral efforts to foster responsible mining. In 2011, the LBMA introduced its first responsible gold guidance, a document that sets requirements for refiners to meet international responsible mineral supply chain standards for sourcing gold and silver to ensure they are not implicated in armed conflict, worst forms of human rights abuse, and environmental damage.

The LBMA guidance cues a shift in global policy on mining

starting in the second decade of the 00s, that stemmed, in part, from persistent armed conflict in eastern Democratic Republic of Congo and neighbouring states. Dominant accounts linked violence in the region to the flow of money from (primarily artisanal) mining (Autesserre 2012: 210, Bashwira, Cuvelier et al.. 2014). While the presumed causal relationship between ASM and armed conflict has been critiqued (Autesserre 2012), it lead to innovative, if controversial transnational regimes to regulate 'conflict minerals', principally tin, tantalum, tungsten, gold, and belatedly, cobalt from central Africa (for more discussion of these, see Ooms 2022). The commodification of something called a 'clean' mineral has evolved over varied, transnational developments that require corporations to monitor their supply chains to buy from only 'clean' sources (such as LBMA 'good delivery list' smelters). The intricate workings of 'clean' mineral supply chain initiatives deserve more attention (Vogel 2022), but they have been a central driver in 'responsible' mining initiatives of the 2000s.

These varied efforts are, once again, law-centric. Some are focused on corporations who mine, smelt or otherwise buy minerals, requiring them to monitor and report on their supply chains to encourage purchase from only 'clean' sources. Others promote mining law reforms in countries of the global South (principally). In one example, the eleven-member central African states of the International Conference on the Great Lakes Region agreed to a 'Model Law' to have regional uniformity across national mining laws in the name of securing greater peace and development. Section 16 of the Model Law sets out ASM-specific approaches to legalising the sector through licensing.

Other 'problems' – and 'opportunities' – linked to ASM have added increased momentum to law reforms to formalise ASM; human rights, child labour, environmental degradation, to name a few. Multiple actors now recommend ASM formalisation as the solution to these varied issues, and as a source of economic growth in poor regions. Some proponents are multilateral agencies, like the UN Environment Program and its 'Planet Gold' ASM mercury-reduction program (Buss, Rutherford et al.. 2021). Others are from continental associations, like

the ICGLR mentioned above, or the African Union with its guiding African Mining Vision (African Union 2009).[4] Each articulates a need for ASM formalisation, but they do so by mobilising different, sometimes contradictory repertoires, referencing varied claims about economic development, property rights, environmental protection, equality, improved democracy and citizenship rights.

Many of these varied promises rehearse arguments ascribed to Hernando de Soto (2019) about the benefits of formalised land titling. That is, ASM formalisation through licensing will offer tenure security, allowing miners to invest in better equipment, use less mercury (for hard-rock gold mining),[5] and improve their financial returns, benefitting the state, in turn, through increase tax and export revenue (Siegel and Veiga 2009). ASM licenses are also said to give more legibility and status to mining populations (as 'stakeholders' and full citizens) in resource extraction policy making. Rachel Perks, Senior Mining Specialist at the World Bank (and ASM expert), for one, characterises ASM-inclusive, mining law reforms 'as an important policy response to rural poverty alleviation,' and a redemptive move offering 'a means to redress structural exclusions in mining born over a century ago' (Perks 2013: 5, 8).

It is precisely this transnational policy context that James in Kenya, with his years of experience and connection with international mining development funders, likely has in mind when he tours me through his gold operation. But why, with all this support for ASM licensing, can a savvy, educated, well-connected small-scale gold miner, like James, not get a license? This question takes us back to Kenya as one context in which the legal ritual of formalising ASM is currently unfolding.

3 The Continuing Impossibility of the ASM License

James has often explained to us over the years the enormous effort he has taken to apply for a license; getting a computer, internet hook-up, multiple trips to Kenya's capital city, Nairobi, to file paperwork, pay fees, and push against unresponsive bureaucracy. James was successful, for a time, in getting a 'Mineral Dealer's (Processing) License', to

process and move gold but not to mine it. That license lapsed.

James' experience points to a range of problems, some of which echo those identified by Hilson and others from the 1990s: excessive bureaucratisation; licensing definitions inappropriate for the mining activities underway; and limited remaining mineral concessions open to artisanal and small-scale miners (Hilson 2013; Verbrugge 2015; Fisher 2007). These are all replicated in Kenya, even though its 2016 Act was passed when many of these problems were well known. A significant hurdle for licensing in Kenya is the very category of 'artisanal miner' who uses 'customary and traditional means'. ASM itself, in Kenya and elsewhere, is changing and growing in size, responding to global economic changes in trade and mineral prices that make ASM one of the few viable livelihoods for many rural Africans. Over the years visiting this region in Kenya, mining has become increasingly mechanised, with more finance circulating (likely from Chinese or European investors (Smith, Seguin et al.. 2023), more shafts opening, using explosives to go deeper into the ground, and with more chemicals used in cyanidation plants for processing. Gold mining in the 1930s or 1950s in western Kenya may have been 'customary,' using minimal mechanisation (Amutabi and Lutta-Mukhebi 2001), but from our visits, it is clear that much of the gold mining in Migori does not fit the 2016 Mining Act definition of either artisanal or small scale mining. Licensing here is a Goldilocks problem, except there is no license that is just right.

A further barrier to licensing is the lack of land that can be designated for artisanal mining as required by the 2016 Act. Where there is public land with gold deposits in Migori, the mining rights are currently held (but not worked) by a Kenyan-British corporation.[6] In this context, the Kenyan government has not yet issued mining permits. Even assuming land can be designated for artisanal mining, and when the government will start issuing licenses (which seems imminent), what category of license will it award to those like James, who use equipment and chemicals that are neither 'traditional' nor 'customary'; neither artisanal nor small-scale? A mining official we spoke with in

2024 was fully aware of this challenge, and suggested more reforms to the 2016 Act may be forthcoming to revise the definitions of artisanal and small-scale mining.

And here is the familiar pattern: the 2016 Mining Act, with its requirements for a mining license will need to be followed by yet another wave of law reform to address some of the conditions producing the impossibility of the mining license now legally mandated. Kenya is by no means the only country facing problems issuing licenses despite repeated law reform efforts. Collectively, the resulting waves of law-centered efforts have become increasingly technical; finding the 'best' solution to a problem defined in terms of ASM informality (and not global mineral supply chains, for example). While further legal reform may introduce needed refinements, there are also indications that each wave of law reform layers on new, technical licensing requirements. Sam Spiegel's study of Zimbabwe's ASM sector, for example, found that increasingly technical environment requirements for ASM licenses, when combined with the 'ideological framing of what a "modern" miner must do', increased the vilification of artisanal and small-scale miners as 'criminals' (Spiegel 2017, 105). The process Spiegel maps echoes the colonial indexing of African/European miners that d'Avignon highlighted in her study. The increasing demands for formalised ASM, found across so many different policy contexts increases the many demands placed on artisanal and small-scale miners to demonstrate their status as modern, responsible miners, a task that becomes ever more challenging with each round of legal refinement.

The LBMA's embrace of ASM gold as a 'pro-poor' and 'inclusive of women' is a further example. The gendering of ASM – as a type of mining that provides a livelihood for millions of the rural poor, of which at least 30 per cent are women – is now found across many ASM policy interventions, in which claims about the promise of women's economic empowerment through ASM formalisation are highlighted (Buss and Rutherford 2020). Not just environmental standards, but now also women's empowerment, index the standard of responsible, modern ASM.

These endless cycles of increasingly technical law and policy reforms, that are seemingly bound to fail yet so urgent in their necessity, have the feel of ritual; soothing repetition, familiarity, and hope that this time will be different. Seligman and colleagues note that the 'subjunctive world created by ritual is always doomed ultimately to fail' (2008: 30, 42) and herein lies some of its driving force: rituals of law reform take on a constancy and urgency of their own making. The repetitive failure to generate conditions for ASM licenses sets the stage for the next cycle to fix the problems of the previous one, reframing and sidelining larger questions about the transnational conditions producing and requiring ASM's informality. These cycles of law reform become contexts in which contemporary dynamics around 'including' informal, marginal economies within 'global values chains' is taking place. But this is also a process in which the 'social thickness' of mining is gaining increased visibility.

Seligman and colleagues' direction to focus on the constant repair of ritual echoes, in part, James Ferguson now legendary study of why 'failed' development projects are 'replicated again and again' (1994: 164). Ferguson concludes that 'failures' can have effects accomplishing 'important strategic tasks,' such as, in his account, performances of state power (1994: 164).[7] For my purposes, the repeated responsible mining law reforms tracked here also suggest some productive dynamics, in providing, among other things, discursive repertoires through which different claims can be made about mining populations, and the possible social goods to be delivered through 'responsible' mining. The LBMA's commitment to sourcing gold as 'pro poor' and empowering women, is one such example.

ASM is, without a doubt, a livelihood of growing importance to poor populations in the global South, while also sometimes more open to women's participation than other livelihood options. But is including ASM gold in global supply chains pro poor, and empowering of women? James' mining operation, and his failed licensing bids, suggests caution. James is an educated, well-connected, property-owning man. He is likely the type of miner the LBMA is envisioning in its quest

to include ASM gold in global mineral supply chains. He may not be wealthy, but he is not poor. He is capable of producing 'clean' gold and has access to resources and contacts. But James cannot get a license. Women miners in this region may vary by class and access to resource but they are mostly (with some exceptions) poor (Rutherford and Buss 2019, Buss, Katz-Lavigne et al. 2020). The vast majority of the women we meet in our research are not attempting to apply for a license. The application is far too expensive, requiring linguistic skills or assets, like computers, that they don't have (Buss, Rutherford et al.. 2019).

James, like many of the older miners in this area, understands ASM as a livelihood that helps the poor. He has seen the difference between the livelihoods available to women and men now, compared to the much poorer times of his own childhood. Nonetheless, James frames his own pursuit of a license in quite different terms than the LBMA's. He emphasises the history of exclusion of ASM miners from legalisation, but he speaks in the language of the state, highlighting the benefits to the government that would flow through tax revenue on a legalised ASM sector. While some of James' comments may be for my benefit, as an outsider, the transnational formalisation push within the larger 'responsible mining' assemblage gives James a language to make claims against the state. In emphasising taxation, James was offering ministry officials one of the key sites for the performance of stateness (Vogel 2022), in relation to which he positioned himself as a compliant, entrepreneurial citizen; a successful businessman who would dutifully pay his taxes. In the process, James also was promoting the recognition of miners from this region as part of the Kenyan polity.

These kinds of frames – by James or the LBMA – are varied, and sometimes contradictory, yet offer repertoires for contesting the terms by which extractive projects seek to enrol new subjectivities – like women or poor miners – into global mineral supply chains. The ASM license may be a near impossibility, but both the idea of the license and its impossibility reveal the complex entanglements of law and extractives, the kinds of meanings, subjectivities, and legalities that are produced, framed and reframed in the reparative ritual of law reform.

4 Conclusion

In this paper I have explored the (near) impossibility of the varied endorsements of formalising artisanal and small-scale mining through licensing. I have urged attention to both the idea of the ASM license and the material and discursive conditions of its impossibility to examine the centrality of law reform, and the significant engagement of mining actors across multiple scales, in the task of producing mining for 'responsible' development. As a story of law reform, I have suggested that the concept of ritual helps draw attention to the 'again and again' of law reform as part of the ongoing work of producing order 'as if' it existed, in the full knowledge of its near impossibility. Analytically, attention to the iterative processes of law reform reveals the productive frictions – the meanings, repertoires, subjectivities – that result and that merit close scrutiny in interrogating the intersections of law and the places of extraction.

The impossible ASM license reveals a long history of legal making, remaking, and unmaking of visions of development through mining, across multiple scales. The indexing of modernity through colonial and neocolonial constructs of the African and European miner are embedded in the seemingly technical requirements of the mining license. The rituals of mining law reform reveal the paradox of the repeated efforts to formalize artisanal and small-scale miners operate 'as if' artisanal miners could be ordered through licensing, in the full knowledge that the unlicensed artisanal miner is *a product* of (at least in part) repeated law reforms.

I have centred ASM rather than 'large'-scale mining in this paper to challenge some of the assumptions about the distance between sites of extractivism (in the global South), and the places of law and justice (in the global North), that might be imported when tracking larger patterns of 'extractivism'. ASM is the form of mining most relevant to the daily lives of those in the global South, employing far more people than its comparator large-scale mining. It is also more typical of the kinds of informal, 'popular' economies (Gago 2018) that function alongside of (and in relation to) formal markets that tend to be universalised as

capitalism in the global North. The rituals of law reform in pursuit of a formalised, licensed mining sector are where the busy work takes place of making, remaking order in and through responsible mining projects.

Endnotes

1. Firm data on numbers of miners and the economic activity they generate is notoriously difficult to gather because of the sector's informality and illegality (see https://www.delvedatabase.org/data, accessed 10 February 2024).
2. Research funding for this paper is from the Social Science and Humanities Research Council of Canada through two grants: 'Gold Mining in a Pandemic: Gender, Livelihoods and Building Back Better', #435-2022-1089; 'Women's Livelihoods in Artisanal Mining Sectors: Rethinking State-Building in Conflict-Affected Africa', #435-2014-1630. Carleton University's Research Ethics Board reviewed and cleared both projects. Research in Kenya was conducted with the expert assistance of Dr Sarah Katz-Lavigne, Mr Aluoka Otieno, Ms Eileen Alma, and Professor Sarah Kinyanjui. I am indebted to their assistance. My thanks particularly to Blair Rutherford, co-collaborator on this and other research, whose comments and ongoing conversations have been influential in developing the arguments in this article.
3. The LBMA maintains a list of accredited refiners deemed to have met international standards such as OECD's Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas. Being on the Good Delivery List gives legitimacy and potentially increased selling prices for a refiner. See https://www.lbma.org.uk/good-delivery/about-good-delivery accessed 24 September 2024.
4. The AMV calls for formalising ASM in national legislation, harmonising ASM policies, law, regulations, standards and codes, as well as 'empowering of women through integrating gender equity in mining policies, laws, regulations, standards and codes': African Union 2009: 32
5. The implementation process for the Minamata Convention on Mercury has focused extensively on reducing mercury use in gold mining in ASM countries in the Global South. ASM licensing and formalisation is a centre piece to these efforts. For a discussion, see Buss et al. 2020: 30-37.
6. Mid-Migori Mining (MMM)'s exploration license, covering large section of Migori, cancelled in 2016 by the Minister of Mining. Red Rocking Mining, a company headquartered in the UK, with a 15% stake in MMM, sued the Kenyan Government and was given the chance to regain its license as part of a court settlement: for more information, see Juma 2018.
7. My thanks to one of the reviewers for drawing this point to my attention.

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