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**Reading Restitution in District Six:  
Law, Discourse and ‘Governmentality’**

Thesis Presented for the Degree of

DOCTOR OF PHILOSOPHY

In the Department of English

UNIVERSITY OF CAPE TOWN

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**August 2012**

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**Declaration:**

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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## **Abstract**

This thesis carries out an interdisciplinary textual analysis of the legal documents (primarily contracts and court documents) used to negotiate and fix the terms of the statutory land restitution process in District Six, Cape Town, during the period from 1996 to 2012.

Utilizing French philosopher Michel Foucault's theorisation of 'discourse' and 'governmentality', it traces the interweaving of restitution's legislative concepts with heterogeneous political and cultural discourses emanating from District Six's unique history. It is argued that the hybridised configurations of discourse generated by this encounter serve as new instruments of power in the space of this restitution project, lending themselves to a range of unintended and sometimes paradoxical material outcomes.

The introductory chapter of the thesis contextualises land restitution within South Africa's broader political project of securing a peaceful transition from apartheid to a post-apartheid liberal democracy under a new constitutional regime. It argues restitution aimed simultaneously at redress for apartheid dispossessions and at building stability and legitimacy for the new regime, but has had limited practical outcomes, with District Six as one of the most prominent instances in this regard. The thesis methodology and theoretical framework in Foucault's work on discourse and governmentality are introduced.

Chapter two analyses restitution's legislative discourse and provides an overview of its application in District Six. The chapter distinguishes four main elements of restitution legislation, namely, its subjects, its objects of dispossession, its objects of restoration and its rules for administration (that is, the procedures for lodging, adjudicating and settling restitution claims, and the role of the state in governing those procedures).

Chapter three focuses on the re-inscription of restitution's 'object of dispossession' in District Six. It argues that in the District Six legal texts, historic notions of 'lost community' eclipse restitution's conceptual basis in property law. The result has been a 'rewriting' of restitution's legal object of dispossession in the legal texts, steering the conceptual and physical course of the project toward a collectivised, 'single-redevelopment' solution to restitution.

Chapter four examines the construction of restitution's 'subjects' in District Six. It argues that the legal notion of the 'claimant' has been transformed in this case through the imposition of institutional identifications created by a formal trust, which has tended to marginalise the legal subjects of restitution from decision-making or access to land.

Chapter five analyses the production of restitution's 'object of restoration' in District Six. It argues that the envisaged socially and physically 'integrated redevelopment' for the site has led to modes of urbanism that have, paradoxically, generated new and intensive modes of social segregation and exclusion, primarily of claimants themselves.

Chapter Six turns to the question of state administration in restitution, examining how the legislation's envisaged role for bureaucratic organs of state and laws of administration has fared in the case of District Six. It argues that, at various points throughout the restitution process, organs of state have found themselves branded with organisational identifications revived from the site's lexicon of anti-apartheid struggle texts, creating a fundamental legitimacy deficit for bureaucratic modes of authority and a progressive withdrawal of the state from the project.

The thesis argues, therefore, that in this case of restitution, the state and the law have receded in the space of 'governmentality' in Foucault's sense of the term, while the actual text of the law itself has undergone a range of appropriations and transformations. As such, this thesis argues that the debate on land restitution and reform in South Africa needs to be informed by a closer reading of inscriptions of 'the legal' in specific sites of restitution implementation.

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3. 'Notice of Intention to Oppose in the Land Claims Court Case Number LCC 11/1996 by Anwar Nagia on behalf of the District Six Civic Association and others. 1996. Cape Town.
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19. 'Responding Affidavit' in in the Land Claims Court Case Number LCC 145/07 by Anwah Nagia on behalf of the District Six Redevelopment and Beneficiary Trust. 2008. Cape Town.
20. 'Responding Affidavit' in in the Land Claims Court Case Number LCC 145/07 by Pogiso Molapo on behalf of the City of Cape Town. 2008. Cape Town.

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# Chapter One: Introduction to Restitution and ‘Governmentality’ - The Interweaving of Law and Heterogeneous Discourses in District Six

## 1. South African Restitution as Constitutional Project: The Case of District Six

There is broad consensus in the literature on post-apartheid<sup>1</sup> South Africa that building legitimacy for the country’s new democratic constitutional order will continue to be a partial, contested and hazardous process<sup>2</sup>. With the signing of the 1991 National-Peace Accord and a comprehensive review<sup>3</sup> of apartheid laws via the multi-party constitutional negotiations, the country introduced an internationally celebrated *Interim Constitution* in 1993 based on the principles of universal human rights, equality for all citizens before the law, and the division of powers between legislative, administrative and judicial organs<sup>4</sup>. However, as Bertus de Villiers and Jabu Sindane, in *Managing Constitutional Change* (1996) note, ‘democratization does not end with the adoption of a democratic constitution. In many cases the promulgation of a constitution is only an indication that a process of democratization has begun’ (1996: 336).

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<sup>1</sup> ‘Apartheid’ refers to ‘the hierarchical ordering of economic, political and social structures on the basis of race’ (Adebe Zegeye 2001: 4) that occurred under South Africa’s National Party rule from 1948 to 1994. The cornerstone of apartheid was the *Population Registration Act of 1950* which divided and registered South Africans into four population groups: ‘whites’, ‘coloureds’, ‘Asians’ and ‘natives’ (Field 2001: 22). See Nancy Clark and William Worger’s *South Africa: The Rise and Fall of Apartheid* (1998), A.J. Christopher’s *The Atlas of a Changing South Africa* (2001), and Tim Nuttall’s *From Apartheid to Democracy: South Africa, 1948-1994* (2004), among others, for historical accounts of apartheid.

<sup>2</sup> Key texts in this regard include Bertus De Villiers’ *Birth of a Constitution* (1994), Ian Liebenberg and Nic Rhoadie’s *Democratic Nation-Building In South Africa* (1994), Timothy Sisk’s *Democratization in South Africa: The Elusive Social Contract* (1995), Heribert Adam, Frederik van Zyl Slabbert and Kogila Moodley’s *Comrades in Business: Post-Liberation Politics in South Africa* (1997), Heinz Klug’s *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (2000), Hein Marais’ *South Africa: Limits to Change, the Political Economy of Transition* (2001), Andrew Reynolds’ *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (2002), Neville Alexander’s *An Ordinary Country: Issues in the Transition from Apartheid to Democracy in South Africa* (2002) and others.

<sup>3</sup> Legal analysts Andre Van der Walt and Gerrit Pienaar, in their *Introduction to the Law of Property* (2008) describe South Africa’s transition from apartheid to democracy as involving a fundamental re-evaluation of ‘the whole existing legal system and its tradition, its background and its sources’ (Van der Walt and Pienaar 2008: 3). This finds expression in Section 39 of the *Constitution*, which states that ‘when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.

<sup>4</sup> There are a number of accounts of South Africa’s transition to constitutional democracy, including Doreen Atkinson and Steven Friedman’s ‘The Small Miracle: South Africa’s Negotiated Settlement’ (1994), and Dorderech Bell’s *The Making of the Constitution: The Story of South Africa’s Constitutional Assembly, May 1994 to December 1996*.

South Africa's Constitutional Assembly endeavoured to facilitate multi-party consensus and public legitimacy for a negotiated settlement by including provision in the *Interim Constitution* for 'reparation' (Chapter 15) and 'laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender' (Republic of South Africa: 1993: principle 5, Schedule 4). Among the most politically significant of these mechanisms (which was included in the text of the *Interim Constitution* itself under Section 121) has been the statutory 'land restitution' process to return 'rights in land' to citizens formerly dispossessed of these rights under one or more of apartheid's racially discriminatory laws<sup>5</sup>. Its importance arose at the time due to the emotive role that 'land' plays in South Africa as a symbol of 'belonging' and citizenship, a role which the *Group Areas Act of 1950* tangibly violated<sup>6</sup>. Former Regional Land Claims Commissioner for KwaZulu-Natal, Cheryl Walker, for example, recalls from her experience of working with restitution claims that 'the popular account' of forced removals in South Africa has tended to 'function as a general metaphor for South Africa's history of dispossession and abuse' (Walker 2008: 42). Sites of forced removals like District Six, Sophiatown and Cato Manor have gained particular symbolic import in the lexicon of the 'new South Africa', both as metonyms for forced removals, and as historic sites of resistance struggle against the apartheid regime<sup>7</sup>. The orderly, legalistic approach of restitution offered the architects of the constitution an opportunity to publically enact a 'reversal' of specific past injustices while protecting the stability of property rights against unrestrained nationalisation or unruly 'land invasions'<sup>8</sup>. It would therefore serve as a pillar of what

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<sup>5</sup>According to the Department of Land Affairs 2009 document 'Restitution Policy Guidelines for Finalising Claims for Restoration' the laws used for dispossession (in addition to the *Group Areas Act of 1950*) include: the Native Land Act 27 of 1913; the Natives Trust and Land Act 18 of 1936; the Native (Bantu) Administrative Act 38 of 1927; the Forestry Acts; the Irrigation Acts; the Parks Board Acts; the Transvaal Asiatic Land Tenure Amendment Act 30 of 1936; the Coloured Persons Settlement Act 31 of 1967; the Rural Coloured Areas Act 24 of 1963; the Bantu Labour Act 67 of 1964; the Promotion of Bantu Self-Governing Act 46 of 1959; the Bantu Homelands Citizens Act 92 of 1969; the Bantu Affairs Administration Act 45 of 1971; the Native Areas Act 21 of 1923; the Community Development Act 31 of 1966 Prevention of illegal Squatting Act 57 of 1951; the Expropriation Act; and the Slums Act of 1934 (DLA 2009a: clause 2.3.1.1 to 2.3.1.17).

<sup>6</sup>South African Historian Anthony Christopher's account of apartheid in *The Atlas of Changing South Africa* (2001) states that the 'conservative figures' released by the state indicate that by 1984 a total of 126 000 families were displaced, of which 2 per cent were classified as white, and the majority classified as coloured (2001: 112). Although the apartheid state did offer some compensation to those people it removed, in many cases this was well below market value (see Deborah James's history of Restitution Laws in *Gaining Ground: 'Rights' and 'Property' in South African Land Reform* (2007)).

<sup>7</sup>The symbolic role of Sophiatown, and the details of its forced removals from 1955 onward, are discussed in *Reflections on Identity in Four African Cities* (2006) by Philippe Gervais-Lambony (2006: 65), while the fate of Durban's Cato Manor is analysed in Brij Maharaj's 'Politics, Community Displacement and Planning: Cato Manor – Past, Present, Future' (2001: 133).

<sup>8</sup>Mark Everingham and Crystal Jannecke note, for example, that 'the property clause attempted to strike a delicate balance between the protection of individual freedom and the pursuit of meaningful justice' (2006: 548). Similarly, Theunis Roux states that one of the key outcomes of the constitutional negotiations over the 'property clause' in the mid-1990s was that 'the restitution of

Heribert Adam, Frederik van Zyl Slabbert and Kogila Moodley term, in *Comrades in Business: Post-Liberation Politics in South Africa* (1998) ‘democratic consolidation’, that is, an acceptance by citizens of the ‘law, regulation, statutes and ordinances as the preferred way to settle their disputes and pursue their objectives’ (Adam, Slabbert and Moodley 1998:84)<sup>9</sup>. Indeed, as South African anthropologists Derrick Fay and Deborah James have observed, restitution has been used for similar purposes ‘in contexts of disjuncture and social change’ around the world (2010: 43)<sup>10</sup>.

However, South African restitution and other mechanisms of economic reform have come under increasing scrutiny as a result of limited practical outcomes, in spite of nearly 20 years of implementation<sup>11</sup>. The state’s timeline for settling restitution claims has repeatedly been pushed back, from 2005, to 2008, to 2011<sup>12</sup>, leaving apartheid land ownership and spatial planning patterns relatively intact. In light of this lack of progress, Ruth Hall argues in her ‘Comparative Analysis of Land Reform in South Africa and Zimbabwe’ that in both Zimbabwe and South Africa ‘the rule of law is made fragile

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land rights would not detract from the new legal order’s overarching commitment to the protection of property rights. Indeed, land restitution was central to that commitment in so far as the legitimisation of the post-apartheid property rights order was seen as a necessary condition for the constitutional protection of private property rights.’ (2009: 153). The Department of Land Affairs’ 1997 White Paper on Land Reform summarizes the goals of government’s policy of restitution and redistribution as to ‘redress the injustices of apartheid; to foster national reconciliation and stability; to underpin economic growth; and to improve household welfare and alleviate poverty’ (Department of Land Affairs 1997: 7).

<sup>9</sup> See also Timothy Sisk’s *Democratization in South Africa: The Elusive Social Contract* (1995), Heinz Klug’s *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (2000).

<sup>10</sup> Similar arguments occur in Bohlin (2002), Beyers (2007a), Walker (2008), and Roux (2009).

<sup>11</sup> Studies of restitution include a 1998 the Institute for Democracy of South Africa’s (IDASA) *Land Restitution in South Africa: A Long Way Home*, by Marj Brown, Justin Erasmus, Rosalie Kingwill, Colin Murray and Monty Roodt; Gary Howard’s survey ‘Righting the wrongs of the past: A review of the Land Restitution Programme’ (1999), compiled on behalf of the University of Natal’s Development Law Unit; a collection of papers by contributors to a 1999 conference in Pretoria on Land Reform organized by the Programme for Land and Agrarian Studies/University of the Western Cape/National Land Committee entitled *At The Crossroads: Land And Agrarian Reform In South Africa Into The 21<sup>st</sup> Century* (edited by Ben Cousins and published in 2000); Catherine Jenkins’s ‘After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa’ published in the *South African Journal on Human Rights* (2000); Sean Field’s *Lost Communities* (2001); Lungisile Ntsebeza’s 2004 essay ‘Reconciliation, Reparation and Reconstruction in Post-1994 South Africa: What Role for Land?’ (in Doxtader and Villa-Vicencio’s *To Repair the Irreparable: Reparation and Reconstruction in South Africa*) (2004); Anne Bernstein’s 2005 research report for the Centre for Development and Enterprise, *Land Reform in South Africa: A 21st Century Perspective*; Mark Everingham and Crystal Jannecke’s ‘Land Restitution and Democratic Citizenship in South Africa’, published in the *Journal of Southern African Studies* (2006); the 2007 collection of essays *Gaining Ground? ‘Rights’ and ‘Property’ in South African Land Reform* collated and edited by Deborah James (2007); Lungisile Ntsebeza and Ruth Hall’s 2007 publication for the Human Sciences Research Council, *The Land Question in South Africa: The Challenge of Transformation and Redistribution*; Cherryll Walker’s *Landmarked* (2008); Theunis Roux’s ‘Land Restitution and Reconciliation in South Africa’ in Du Bois and Du Bois-Pedain’s *Justice and Reconciliation in Post-Apartheid South Africa* (2009); the 2009 collection of comparative essays about different land restitution projects around the world, *The Rights and Wrongs of Land Restitution: “Restoring What Was Ours”* edited by Derrick Fay and Deborah James (2009); and a 2010 collection of essays edited by Cherryll Walker, Ruth Hall, Anna Bohlin and Thembela Kepe entitled *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa*.

<sup>12</sup> Walker (2008) notes that ‘in 2002 President Mbeki optimistically targeted 2005 as the year by when all land claims would be settled, but in March 2005 the national deadline had to be shifted back to March 2008, a target which was later quietly transmuted to the end of that year. Many analysts continued to regard the amended targets as unrealistic, and in March 2007 the Commission itself admitted that approximately a third of its outstanding rural claims, perhaps some 1400 in all, would not be settled by the end of 2008) In the 2008 Budget estimates for the DLA, the deadline was reset for 2010/11 — sixteen years on’ (Walker 2008: 21).

precisely because of a failure of these states and their laws to adequately promote redistribution and social justice' (2003: 260). Similarly, Lungisile Ntsebeza (2007) raises concerns about whether land reform will 'happen at a pace that will lend popular legitimacy to the state and encourage economic growth' since there is a 'huge gap between the political freedoms enshrined in the Bill of Rights and the economic realities of post-1994 South Africa' (2007: 124). A number of authors have argued that, in practice, restitution has particularly struggled to make inroads because of new and unforeseen modes of political contestation that it has met, often related to cultural and identity politics of the kind described above. The Centre for Development and Enterprise's Anne Bernstein (2005), for example, contends that land reform is 'an issue that lends itself to political exploitation, whether by interest groups seeking to draw attention to their specific causes by linking them to the much wider interest in "the land", or by political opportunists seeking to draw attention away from other matters' (2005: 5). She argues that the state 'is being asked to carry much of the weight of the past without enough consideration being given to how this squares with our present and future' (ibid: 6), with the result that '[p]opulist pressures on the government will grow, from inside and outside its own party' (ibid: 28).

The current thesis takes, as its point of departure, this fraught encounter between legal procedure and alternative modes of politics on the scene of restitution. It offers, as a case study, a textual analysis of the specific interweaving of legislative discourse with alternative political and cultural meanings within the legal instruments underpinning one of the country's most prominent restitution projects, that of the demolished suburb of District Six in Cape Town. District Six was declared a white group area under the *Group Areas Act of 1950* in 1966, resulting in the removal of nearly all of its 71 426 residents and the demolition of most of its 2375 properties<sup>13</sup>. The resulting destruction and social fragmentation drew condemnation from hundreds of political, literary, critical and media publications, public forums, and later, was memorialised by the establishment of a

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<sup>13</sup> These figures were provided to the National Parliament on 11 June 1991 by the Minister of Welfare, Housing and Works in reply to a parliamentary question. The reply further noted that the houses had been expropriated for an average cost of R9560 each. Of these properties, 66.4% were owned by people classified as white (Parliament of the Republic of South Africa. National Assembly 1991: 1846). Detailed historical accounts of the forced removals in District Six are provided by Deborah Hart (1990), Naomi Barnett (1994), Vivian Bickford-Smith, Elizabeth Van Heyningen and Nigel Worden (1999).

museum (the District Six Museum, in 1994). In September 1995, the first properties in District Six were announced as the subject of a restitution claim (Government Gazette, September 1995), prompting the Department of Land Affairs and the Commission on Restitution of Land Rights to begin work on identifying displaced former residents of the former suburb. The ensuing restitution process has been protracted and highly contested, opening with a Land Claims Court contestation between government organs and land activists over control of the redevelopment (from 1996 to 1997), followed by a second court encounter ten years later in 2007 between different claimant groupings<sup>14</sup>. By 2012, nearly 17 years since District Six was declared a restitution site, only 56 out of 2644 registered land claimants have returned to District Six (Commission on Restitution of Land Rights, 2012), while around 1300 have opted for financial compensation for their claims instead of waiting for physical return (Department of Land Affairs, 2001). Indeed, the site has been so heavily contested that in the late 1990s, a local newspaper was led to comment that:

Since the early 1990s, there have been times when the scarred half-emptiness of District Six has risked seeming less a testimony to apartheid's heartlessness than a perverse monument to the bickering incapacity of the new South Africa.

Arguably, that is apartheid's truest legacy. (*Cape Argus*, 2 September 1998)

In order to investigate the dimensions and broader implications of this political contestation in District Six, this thesis undertakes a textual analysis of how restitution's constitutional 'order of discourse' (as set out in the texts of the *Interim* and *Final Constitutions*, and ensuing parliamentary legislation) has been reproduced or 'inscribed' in the specific legal texts that have come to 'govern' rights, access, and developments on the site. By analysing the gaps, transformations and elisions in the ostensive reproduction of restitution's legal discourse in this case, I locate tropes and identifications within the

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<sup>14</sup> In late 2007 District Six land owners launched a Land Claims Court application to stop all projects in District Six 'pending a forensic audit of the District Six Beneficiary Trust' (*Cape Argus*, 28 January 2008, 'Bid to halt building on District Six'). The group also applied for an interdict preventing the City of Cape Town, the Commission on Restitution of Land Rights and the Trust from implementing a three-way restitution and redevelopment agreement the three bodies had jointly signed in November 2000 (in terms of Section 42 D of the *Restitution of Land Rights Act*). The respondents cited were the trustees of the District Six Beneficiary Trust, the Regional Land Claims Commissioner for the Western Cape, the Director General of Land Affairs, the City of Cape Town and the Master of the High Court (ibid).

legal texts that are associated with heterogeneous cultural and historical constructions of District Six, particularly in relation to historical imaginings of its lost ‘community’, and its subsequent prominence as a site of political resistance to apartheid from the 1950s through to the late 1980s. In some instances, these tropes and identifications have shifted the meaning of legal definitions and provisions, driving the restitution project in new and sometimes paradoxical directions. For example, the prominence of historic configurations of ‘community’ in District Six had become so pervasive by the time restitution began in District Six, that the claim itself easily shifted from its legal status as a group of claims lost by individual rights-holders, to a ‘communal’ claim that subsumed and even elided the rights of claimants (an outcome analysed at length in chapter 3). This thesis argues throughout that these appropriations of legal discourse, and their interweaving with alternative cultural and political meanings, have engendered new hybrid forms of legitimacy, generating material consequences for the project and its role in South Africa’s broader project of establishing governance through rights and legal proceduralism.

## **2. Methodology: Discourses and ‘Governmentality’ in the Sphere of Restitution**

The legal instruments of the District Six restitution process have not been the subject of previous textual analysis, although they clearly offer a worthy object of study given their pivotal role in negotiating and ‘fixing’ the terms of restitution in this case. The author is, furthermore, not aware of any other similar study undertaken in relation to any other restitution site in South Africa.

The approach to the District Six restitution project in this thesis follows a growing recognition in the social sciences, most recently articulated in the work of John Higgins, Heather Jacklin, Ivor Chipkin and others, that the interdisciplinary application of textual analysis can provide valuable insights into problems of public policy and law in the South African context. Higgins refers, for instance, in his 2007 essay ‘Institutional Culture as Keyword’, to the value of ‘critical literacy’ in the field of public policy, what he describes as the use of the ‘tools’ of textual analysis to interpret and understand ‘ideas and representations in the necessarily intricate combination of their historical, theoretical

and textual dimensions' (2007: 97). Higgins sees this approach as offering new insights into 'broader processes of cultural and political life in ways that are highly relevant to public discourse in contemporary South Africa' (ibid: 98). The potential of 'hybrid' social critique has been recently underscored by Theodore Schatzki in Peter Vale and Heather Jacklin's *Re-Imagining the Social in South Africa: Critique, Theory and Post-Apartheid Society* (2009), who argues that 'some of the most exciting research to emerge...are hybrid creations that draw on multiple disciplines from both sides of the [humanities and social sciences] divide (2009: 32).

The mode of analysis that I apply to the literary, historical, media and other genres of text, and my theoretical positioning of these documents within a larger context of 'governmentality'<sup>15</sup>, is predominantly informed by the ground-breaking analytical methods developed through the 1970s and 1980s by late French philosopher Michel Foucault. Foucault is widely acknowledged as one of the pre-eminent social theorists of the 20<sup>th</sup> century. Philosopher Gilles Deleuze, for instance, places his writings among 'the great works that for us have changed what it means to think' (1999: 98). His conceptualization of the operations of 'discourse' in the realm of 'governance' (in a very broad sense), is used in this thesis to theorise the relations between restitution legislation, legal instruments, literary and other genres of texts, and their participation in various modes of power (legal, cultural and so on). A brief discussion of Foucault's theorisation of the role 'discourse' plays in the sphere of social relations, and particularly in the realm of law, will help to illustrate how his theoretical assumptions serve the reading of restitution in District Six that follows.

In his inaugural lecture as professor at the College de France (delivered on 2 December 1970), Foucault uses the term 'orders of discourse' to describe texts that are characterised by relatively high degrees of 'permanence' or entrenchment in a given social and historical context (as distinguished from quotidian instances of language use that 'vanish as soon as they have been pronounced' (1984: 56)). Discourses become

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<sup>15</sup> I define this term below.

‘ordered’ through procedures of classification, exclusion, prohibition and discipline<sup>16</sup> ‘whose role is to ward off [language’s] powers and dangers, to gain mastery over its chance events, to evade its ponderous, formidable materiality’ (ibid: 52). ‘Orders of discourse’ are thus enduring texts, such as juridical or religious texts, which are able to ‘give rise to a certain number of new speech-acts which take them up, transform them or speak them’ (ibid: 57). This reading has been taken up by more recent proponents of ‘critical discourse analysis’ such as Norman Fairclough and Ruth Wodak<sup>17</sup>, and is central to this thesis insofar as I read restitution legislation as an order of discourse that gives rise to specific instances of restitution based on its legal objects and rules (the second chapter of this thesis sets this argument out in detail).

Foucault’s analytical work on language assumes that discourse is ‘not simply that which translates struggles or systems of domination, but is the thing for which and by which there is struggle, discourse is the power which is to be seized’ (‘The Order of Discourse’, 1984: 110). It is therefore a key instrument (alongside force and corporal forms of discipline) for governance in its broadest sense<sup>18</sup>. In this regard, Foucault uses the abstract noun ‘governmentality’ in his 1978 lecture series ‘Security, Territory and Population’, ‘Society Must be Defended’ and ‘The Birth of Biopolitics’ (Foucault 2003, 2007) as the ‘ensemble’ of mechanisms and systems that render ‘populations’ and individuals governable (from macro state institutions, scientific and medical forms of knowledge, as well as micro systems of family morals, self-control and so forth)<sup>19</sup>.

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<sup>16</sup> Among the ‘procedures for controlling and delimiting discourse’ (ibid: 56) include ‘principles of classification’, prohibitions, the ‘will to truth’, systems of exclusion and inclusion (ibid: 55-56). Thus a statement ‘must fulfill complex and heavy requirements’ to be able to belong to an order of discourse (1984: 60).

<sup>17</sup>For example, in his article ‘Critical Discourse Analysis’ (2005), Norman Fairclough describes an ‘order of discourse’ as the ‘semiotic aspect of a social field or institution or organization’ (2005:80). For Fairclough, ‘the political concept of ‘hegemony’ can usefully be used in analyzing orders of discourse... A particular social structuring of semiotic difference may become hegemonic, become part of the legitimizing common sense which sustains relations of domination, though hegemony is always open to contestation to a greater or lesser extent’ (ibid).

<sup>18</sup> For Foucault the term ‘government’ and its abstract noun ‘governmentality’, are used to define modes of social regulation that include, but are not limited to, sovereign modes of social authority such as the monarch, the state or the rule of law, for example. In his essay ‘the Subject and Power’, Foucault states that he uses the word in ‘the very broad meaning which it had in the sixteenth century. “Government” did not refer only to political structures or the management of states; rather it designates the way in which the conduct of individuals or states might be directed: the government of children, of souls, of communities, or families, of the sick. It did not cover only the legitimately constituted forms of political or economic subjection, but also modes of action, more or less considered, which were designed to act upon the possibilities of action of other people. To govern, in this sense, is to structure the possible field of action of others’ (1982: 221).

<sup>19</sup>In ‘Security, Territory, Population’ Foucault describes ‘governmentality’ variously as ‘the ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security’ (2003: 34). He argues that governmentality has progressively entrenched itself throughout Western society

This thesis follows Foucault in situating law as one discourse alongside other more or less developed mechanisms of governmentality, as described in his *History of Sexuality, Volume 1: An Introduction* (1979), ‘the law operates more and more as a norm’ while its institutions are ‘increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory’ (1979: 144). Similarly, in his ‘Society Must be Defended’ lecture series, Foucault argues that governance in the modern age ceased to be ‘a matter of imposing a law on men’ and has shifted instead to ‘the disposition of things, that is to say, of employing tactics rather than laws, or, of as far as possible *employing laws as tactics*; arranging things so that this or that end may be achieved through a certain number of means’ (2003: 38-39). He even goes as far as to state that ‘the techniques of discipline and discourses born of discipline are invading right’ and ‘normalizing procedures are increasingly colonizing the procedures of law’ (2003: 39). Following this approach, I therefore read constitutional law (including restitution law) as one ‘order of discourse’ within the broader horizon of ‘governmentality’, or, as Alan Hunt and Gary Wickham suggest, in their critical work *Foucault and the Law* (1994), as acting ‘alongside’ other forms of power<sup>20</sup> (1994: 75).

At first glance, Foucault’s point that the law in modernity exerts a limited form of domination alongside other forms of discourse appears to be congruent with the perspective adopted by political analysts who distinguish liberal constitutionalism from other forms of sovereignty by the relatively limited reach that it affords the state and its laws into matters of ‘private’ life and behaviour. Recent philosophers of liberal constitutionalism like John Rawls, for example, have noted that the liberal conception of

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since the Middle Ages leading to the ‘formation of a whole series of specific governmental apparatuses’ and the ‘development of a whole complex of knowledges (*saviors*)’ (ibid).

<sup>20</sup> Hunt and Wickham use the term ‘power’ as ‘a summary term for the vast array of governing techniques which come together in various combinations as governance, ranging from governance as ‘state power’, as forms of self-control through morality or ‘power over the self’, and even as forms of control over management of household living spaces, or ‘domestic power’. (1994: 81). Ben Golder and Peter Fitzpatrick, in *Foucault’s Law* (2009) extend Hunt and Wickham’s reading of the law in Foucault’s work arguing that a thorough reading of the law in Foucault’s work shows that it variously plays a ‘supporting role, either masking or legitimating the material, corporeal work of the disciplines’ (2009: 24), or ‘forms a central part of the governmental armoury, along with the disciplinary matrix and the requisite “knowledges of man” generated by the emergent human sciences’ (2009: 34). Golder and Fitzpatrick endeavor to generate a synthesis between these ‘shifting positions’ in Foucault’s work, to posit a ‘law which, if it is to ‘be’, must incipiently be ever beyond itself’ (ibid 39). However, engaging these debates is beyond the scope of the current thesis. Instead, I read these variances in the weight accorded to the law and other modes of ‘governmentality’ in Foucault’s work (such as the ‘disciplines’ or ‘biopolitics’) as a useful illustration of how these relations between differing orders of discourse shift in differing social and historical contexts.

political sovereignty, by its very nature, secures a set of ground rules in plural societies by refraining from intruding into the sphere of metaphysical discourses such as religious doctrines, ethnic identities and so forth. In *Political Liberalism* (1993) Rawls argues that the theoretical basis of liberal constitutionalism lies precisely in the limited nature of the ‘module’ of ground rules which constitute a polity’s ‘overlapping consensus’ on a set of sovereign ‘ground rules’ for political engagement and contestation, which refrain from offering any ‘specific metaphysical or epistemological doctrine beyond what is implied by the political conception itself’ (Rawls 1993: 10).

However, Foucault’s theory of discourse in the sphere of ‘governmentality’ has more troubling implications for law and constitutionalism. Although ‘orders of discourse’ are powerful, their reiteration and reproduction is also changeable, which is why Foucault notes that the ‘new speech-acts’ to which orders of discourse give rise can either ‘take them up’ or ‘transform them’ (ibid: 57). As we will see, this potential for instability applies to legal discourse as well, even in the domains that it seeks to regulate in intricate detail (judicial or administrative projects like restitution, for example). In the specific legal-administrative domain of South African land restitution, the law’s order of discourse aims to define and regulate the assignment of rights, decision-making authority, and resource allocation in cases where land claimants have laid claim to properties over which they previously enjoyed and then lost rights due to apartheid laws. One of Foucault’s contemporaries, sociologist Pierre Bourdieu, describes this function of naming and control that is a crucial assumption behind ‘the law’ as a social practice in his well-known essay, *The Force of Law* (1987):

The Law consecrates the established order by consecrating the vision of that order which is held by the state. It grants to its actors a secure identity, a status, and above all a body of powers (or competences) that are socially recognized and therefore productive...It also ratifies all processes related to the acquisition, augmentation, transfer, or withdrawal of those powers. The judgments by which law distributes differing amounts of different kinds of capital to the different actors (or institutions) in society conclude, or at least limit, struggle, exchange, or

negotiation concerning the qualities of individuals or groups, concerning the membership of individuals within groups, concerning the correct attribution of names (whether proper or common) and titles, concerning union or separation—in short, concerning the entire practical activity of "worldmaking" (marriages, divorces, substitutions, associations, dissolutions) which constitutes social units. Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular. It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects.' (1987: 838).

From this perspective, the law's position within the sphere of restitution as a specifically 'legal' process (and particularly within the texts of legal documents used to negotiate and 'govern' that process) should be a dominant one, a position, to return to Foucault's terms, that 'gives rise to new speech-acts' with a high degree of fidelity (Foucault 1984: 57). Yet, as we will see, in the case of District Six, the constitutional order of discourse has not only come up against the limits of state capacity and stakeholder politics, its specific terms have been increasingly 'appropriated' and reconfigured through encounters with alternative power formations and discourses. The significance of this development is underscored by the fact that this 'appropriation' and reconfiguration has been undertaken by state *and* non-state actors.

### **3. Objects of Study – Restitution's Legal Instruments in District Six**

Applying this set of theoretical assumptions to the legal restitution process in District Six, this study proceeds from the constitutional order of discourse for restitution inscribed in the interim and final constitutions and the various iterations of the *Restitution of Land Rights Act*, to an analysis of the series of legal instruments<sup>21</sup> that have been drawn up,

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<sup>21</sup> Legal instruments are documents that follow the conventions of a given legal system and are recognized by actors in that system as performing specific legal functions, such as giving rise to rights or obligations. This thesis analyses two broad types of legal instruments: court documents and contractual documents. 'Court documents' are used in the arena of legal contestation and adjudication, in this case the Land Claims Court. The bulk of the court documents analysed in this thesis are affidavits, that is, statements under oath (and sealed by a Commissioner of Oaths) that are admissible as evidence in the proceedings of a court case.

purportedly on the basis of the constitutional and legislative texts, to negotiate and contractually secure the restitution and redevelopment process on the site. The latter set of texts have been produced from the time of the District Six's announcement as a restitution site in 1996, up until 2012, the time of this study's completion. Before proceeding further I will provide a brief overview of these texts and their chronological context in the restitution process in order to ground the discussion that follows, while more detail on each text will be provided during the course of the chapters that follow (scanned copies of all of the original versions of these documents are included on the compact disk appended to this thesis document, as indicated in the contents page).

District Six's restitution process began with a confrontation in the Land Claims Court in June 1996, when an application by the state to have the direct restoration of individual land claims in District Six set aside in favour of a state-led 'integrated redevelopment' of the area was met with vigorous opposition by a group of local activists (even though it undertook to include claimants in the redevelopment). The application was made in terms of Section 34 of the *Restitution of Land Rights Act*, which states that local or provincial government may approach the Land Claims Court to set aside the restoration of a particular piece of land if 'it is in the public interest' to do so. The case eventually led to the court ordering a facilitation process (in late 1996), which was followed by the withdrawal of the application in July 1997 and the formation of a 'community' led body to drive the restitution and redevelopment in partnership with the Commission on Restitution of Land Rights and the City of Cape Town (the District Six Beneficiary Trust). As we will see, this encounter became a crucial moment in cementing power

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There are usually at least two fairly distinct discursive aspects to affidavits. Firstly there is the format and framing devices of the documents that make an affidavit recognizable as such (i.e. that make it qualify as an affidavit that is admissible into the court processes and discourse and associated practices of the legal system). Secondly, there is the content of the affidavits – the sworn statement of the person submitting the affidavit. 'Contractual documents', on the other hand, constitute agreements between different legal persons and/or entities, creating certain obligations on the signatories, and imparting a degree of 'authority' to the parties insofar as they recognize the standing of each other (usually to the exclusion of non-signatories or uninvolved parties). So, for example, the contractual documents under analysis recognise the common law institution of the contract, which, in their reference work *Contract Law in South Africa*, Louis Van Huyssteen, Schalk Van Der Merwe, and Catherine Maxwell (2010) describe as having 'the same general historical background as the common law of South Africa...rooted in Roman-Dutch law' (2010: 34). However, contracts are also subject to the supremacy of the *Constitution*: 'in the context of the law of contract...it is now clear that any relevant fundamental right that is protected in the Bill of Rights may apply horizontally when a court considers the enforcement of a contractual right' (2010: 63).

relations in the restitution process. The body of texts it generated include applications, counter-applications, affidavits, a ‘facilitator’s report’ and a court order<sup>22</sup>.

Following the court case, a series of contractual documents between the state and the new ‘community’ body calling itself the District Six Trust were introduced in an effort to formalise the terms for a restitution and redevelopment process, starting with a ‘District Six Record of Understanding’ (ROU), dated 13 September 1998, entered into by the local and national governments with a voluntary claimant association called the District Six Trust. This was followed on 26 November 2000 by a ‘Section 42D Framework Agreement for District Six’ that intended ‘to give effect to the vision’ (signed as a settlement of the terms of the restitution claim by the same three parties to the ROU in terms of Section 42D of the amended *Restitution of Land Rights Act*). Together these documents set the legal terms of the restitution process in District Six for the next decade.

Having taken up the role of *de facto* representative of the District Six claimants, the voluntary association calling itself the ‘District Six Trust’ became a trust in the formal legal sense in 2001, adopting a ‘Deed in Respect of the District Six Beneficiary and Redevelopment Trust’, authorised by the Master of the Court in terms of the *Trust Property Control Act 57 of 1988*. The Trust was established on 11 October 2001 to create a legal vehicle to provide ‘legitimate’ representation for the District Six ‘community’ and its redevelopment, making its founding ‘Deed’ a pivotal object for the analysis of this restitution case.

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<sup>22</sup> The specific texts that are analysed in this regard are:

- 1) the main application and founding affidavit which initiated the case, by Basil Davidson, CEO of the Cape Town Community Land Trust on behalf of the first and second applicants (the Cape Town Central Substructure or ‘city’ and Provincial Government of the Western Cape or ‘Province’ respectively)
- 2) A notice of intention to oppose dated 27 June 1996, followed up by a number of opposing affidavits, of which the affidavit of Anwah Nagia of the District Six Civic Association is by far the most substantial. Following the end of the court case, Nagia emerged at the helm of the body that gained legitimacy as representative of the District Six ‘community’, namely the District Six Beneficiary and Redevelopment Trust. The remaining opposing affidavits submitted by Tahir Levy, Mogamat Amien May, Abdurahman Parker, Miriam Richards, Gadija Ebrahim, Fatima Ebrahim, Faried Cader and Moegamat Faried Nordien are very short documents that are filed in support of the statements made in Nagia’s affidavit.
- 3) For a point of comparison with Nagia’s arguments, I have also analysed the opposing affidavit by land claimant Anthony Bernard Lawrence, and an affidavit in support of Lawrence by town planner Timothy Alfred Strain Turner
- 4) Davidson’s response to Nagia
- 5) the Court Order of October 1996
- 6) The final report on an arbitration process between the parties which was ordered by the court, and which was submitted to the court at the close of the case in July 1997.

In order drive the physical redevelopment of District Six (initially in the form of two 'pilot' housing projects), the City of Cape Town and the Department of Land Affairs (represented by the Commission on Restitution of Land Rights) entered into a further contract with the Trust entitled a 'Land Development Agreement for the first and Second Pilot Projects' (dated April 2006). Claimants wishing to return to District Six were then required to sign an individual 'Section 42 D Settlement Agreement' with the Commission on Restitution of Land Rights, after which they were left to contract with the Trust to obtain a property via individual agreements entitled 'Memorandum of Agreement Regulating the Construction of a House in the Township of District Six at Cape Town' (dated 2004 onward). The first pilot of 24 residential units began in earnest in March 2003 when the City of Cape Town made R1.6 million available for infrastructure and services (via a resolution of the municipal council), and were completed in February 2005 (*Cape Times* February 08, 2005). In October 2004, the City of Cape Town made a further tranche of R4.5 million available for planning work on the second pilot project of 114 residential units (*Weekends Argus* October 10, 2004). By February 2009, no properties had been handed to claimants in the second pilot project, and the Trust reported cash flow problems had halted the project (*Cape Argus* 13 February 2009). The Commission on Restitution of Land Rights moved to address these problems by appointing Deloitte and Touche to administer contributions of funds from national government, but by 2012, only 34 properties in the second pilot project had been transferred (Commission on Restitution of Land Rights, 2012).

While the second pilot project floundered, in 2007 a second Land Claims Court case initiated by a group of claimants in under the banner of a voluntary association called the District Six Advocacy Committee. This case produced three further affidavits that are included in the scope of this thesis. The Advocacy Committee sought to have restitution set aside by the Land Claims Court on the grounds that it had been procedurally flawed and had prejudiced the rights of claimants. The matter was postponed indefinitely in 2008, without any further outcome.

The analysis of the specific enunciations of restitution's constitutional order of discourse in the legal texts listed above has made it possible to single out some of the distinct competing modes of discourse that have supplemented, appropriated and even reconfigured the constitution's primary legal provisions for restitution. As I will show in the chapters that follow, restitution's legal 'subjects' (land claimants), objects (property rights), and administrative rules are taken up and transformed in the legal texts in ways that render them quite different in some cases from the original definitions set out in restitution legislation. The alternative discourses that have helped to inform these 'transformations' cannot be reduced to one 'order' in the way that legislation can. They are far more heterogeneous, with linkages extending from highly localised historical moments on the micro level, to discourses of 'national identity', on the macro level. Nevertheless, they do encode certain enduring assumptions, values and identifications that have developed consistency over time, for example, the figure of the 'victim' of forced removals, the natural activist 'leader', or notions of a 'lost community' that inform decisions about how the restitution process should be governed. While I elaborate on this set of discourses in detail in the chapters that follow with reference to specific texts in each instance, for the purpose of this overview we can describe these discourses as arising from a larger body or 'heritage' of representations of District Six and its residents dating back to the beginning of apartheid in the early 1950s.

#### **4. Historical Discourses of District Six – 'Competing Story Rights'**

Even before District Six was declared a 'whites only' area in 1966, a legacy of representations of the site and its inhabitants had started to form, and this body of representations has continued to grow ever since. Within it, we find what District Six Museum Board Members Crain Soudien and Lalou Meltzer<sup>23</sup> describe as a 'history of rival claims to the story rights of District Six' in which 'many have stepped forward to claim District Six, both for the value of the land and as a powerful political issue...in the name of power, culture, class, race and religion' (2001: 67). Soudien and Meltzer draw a particular distinction between what they call the 'official' and 'popular' narratives of

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<sup>23</sup>In their contribution to a volume of essays published by the museum *Recalling Community in Cape Town* (2001).

District Six, where the ‘popular claim’ describes it as a place where the “‘cosmopolitaness” of South Africa was begotten and continually remade’ while the ‘official claim’ refers mostly to earlier descriptions of District Six as a ‘slum’ needing to be invaded, cleared and replaced<sup>24</sup> (ibid). The latter view is attributed to ‘mainstream journalism, official commissions of enquiry, census returns, social analyses and white society leaders’ (ibid).

The most substantial examples of Soudien and Meltzer’s ‘official claims’ are found in the public rhetoric of political and administrative leaders in both local and national governments (although the local council favoured urban upgrades as a ‘solution’ to District Six’s conditions as opposed to the National Party’s forced removals). For example, in 1965 Cape Town councillor and former mayor Alfred Honikman proposed ‘urban rehabilitation’ in District Six for what he termed ‘one of the most squalid slums in the Republic’ whose living conditions ‘degrade thousands of citizens, mar their health and safety, menace the entire city and reflect adversely on the country as a whole’<sup>25</sup>. Similarly, the official in charge of the forced removals and demolitions in District Six, Director General for Community Development Louis Fouché, described it as ‘a slum of slums’, stating that: ‘I’m not ashamed to say I was responsible for District Six being wiped out – in fact, I’m proud of it’ (*Cape Times*, 8 March 1982). In the face of public criticism of the demolitions, the Department of Community Development and Department went as far as to issue a publication entitled ‘District Six: The Other Side of the Coin’. The booklet contains photographs of badly maintained buildings in District Six, and describes District Six as ‘a slum’ with ‘disgusting and humiliating living conditions’. (*Cape Times* 22 May 1981 – ‘600 000 People Moved for Law’).

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<sup>24</sup> The full passage reads as follows: ‘in official pronouncements and proclamations on the area...District Six is portrayed as a blight on the social landscape — a festering sore in danger of infecting the moral core of the city. Filth, crime, immorality dishonesty and booze are the marks of its people whose social genius is seen to best effect in their - capacity for evading the discipline of the civilised world. Told in this way, the official narrative presents itself as a tale in search of a good ending, as in Sodom and Gomorrah — the erasure of District Six. It is a racist narrative that assumes the moral fibre of the area would be strengthened by proclaiming it for ‘whites only’ (Crain Soudien and Lalou Meltzer in Rassool, C. 2001: 67).

<sup>25</sup> *The Cape Times*, 16 April 1965. In order to remedy the situation he proposed a plan to replace the old buildings with neighbourhood units which would consist of: ‘(a) Well-designed blocks of flats properly orientated and set in a “garden” environment. (b) A school, crèche, shopping centre, church, etc. (c) Ample open space. (d) Facilities for children in the open air and undercover, completely free from traffic hazards (internal roads having been eliminated from each unit)’. At the time Honikman proposed this as a large scale ‘urban renewal programme’ that would deliver two or more ‘neighbourhood units’ per year until ‘the slums of the city (in District Six, Woodstock, Salt River, Mowbray and elsewhere) were a thing of the past’. He also denied that the process was racially motivated: ‘the scheme is purely one of slum clearance and urban renewal. Consideration of race or colour played no part’.

Soudien and Meltzer's contrast between the 'official' and 'popular' readings of District Six is faced with some important exceptions on the side of 'popular' claims, given that key writers from District Six (especially Alex La Guma, and, to a lesser extent, Richard Rive) emphasised aspects of degradation in their major publications. However, it usefully identifies the revisionist political impulse among writers, academics and the media that followed in the wake of forced removals. So much so, in fact, that by the time Soudien and Meltzer had written their article, what they call the 'popular claim' on District Six had very much become 'official', particularly through the innumerable historical publications on forced removals (including those of Soudien and Meltzer), the Hands off District Six campaign, works of struggle literature, and the powerful influence of the District Six Museum.

This revisionism gathered momentum with the onset of forced removals during the 1960s, with a number of critiques of 'misrepresentations' of the District Six community in publications variously aiming to memorialise the site or engage in protest against the violence of the apartheid regime<sup>26</sup>. For example, one of the earliest books on the subject, George Manuel and Dennis Hatfield's 1967 *District Six*<sup>27</sup> opens with a passage that works to show the gap between stereotypes and reality:

Mention of District Six calls up in the minds of most South Africans a picture of total squalor, vice and danger. They have never been there. This is the stereotyped view, similar to the sinister Limehouse evoked by Thomas Burke in his once-popular romances. In fact the area is big enough to contain many contrasts: of respectability and rascality; of poverty and decent comfort; of tenements shamefully neglected and homes well cared-for and well-loved. More than 60,000 people inhabit the whole District, and the area now declared "White" contains upwards of half of this number. Many of them are, as the Cape Coloured Commission of 1937 commented, "creatures of conditions in the same way as are the slum and criminal elements in all the great cities of the world". No one in his

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<sup>26</sup> This is often coupled with efforts to 'memorialise' or at least 'document' the 'real' District Six. See, for example, Ridd (1981), Nasson (1986), McCormick (1990) and (2002), Jeppie (1990), Schoeman (1994) and others.

<sup>27</sup> According to Hatfield, the book originated when District Six resident George Manuel 'collected over years a profusion of memories, anecdotes and information' which was then edited by Hatfield and supplemented with illustrations by sketch artist Bruce Franck.

right senses would condemn a whole family for the wrongdoings of some of its members; yet this is what has happened over the years in District Six.

Sentimentalists talk of the “charm” and “character” of the area, and see it as a colourful period-piece. Indeed, it has come out well in many a water-colour, and certainly the lively and picturesque atmosphere will disappear in the social upheaval now imposed. (Hatfield in Hatfield, Manuel and Franck 1967: v)<sup>28</sup>

During the 1970s and 1980s the critique of ‘misrepresentations’ of the District Six community gained increasing reach with the publication of fiction works on District Six by former District Six residents, including Richard Rive, and Taliep Petersen (together with David Kramer). In the academic and historical sphere, analyses like Don Pinnock’s 1988 ‘Argie Boys and Skollie Gangsters’ and Naomi Barnett’s account of government and civic debates over slum clearance in District Six (in the 1994 publication *Studies in the History of Cape Town*)<sup>29</sup> provide some of the first historical critiques of misrepresentations of District Six and some of the economic motivations behind District Six’s forced removals.

With the revision of historical conceptions of the lost District Six, a set of new, positive notions of its former community emerged, mostly centring around memories of its social integration across racial, religious and class lines, as well as its history of political resistance or ‘struggle’ against apartheid. In fact, the revision of the destroyed District Six has created such a compelling and positive set of historical meanings, that Rive himself has noted that association with District Six has become a prestigious and exclusivist political symbol:

It is interesting to notice how attitudes towards District Six have changed over the years. Before we were forced to go, those who could, moved out for reasons of

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<sup>28</sup> Other texts that position themselves against the ‘stereotyping’ of District Six as a predominantly coloured ‘slum’ include *The Struggle for District Six: Past and Present*, published in 1990 to record the Hands off District Six Conference (as mentioned in my introductory chapter), Yosuf Rassool’s *District Six: Lest We Forget* (2000), and Crain Soudien’s chapter ‘District Six and its Uses in the Discussion About Non-Racialism’ in Zimitri Erasmus’s 2001 volume on ‘coloured’ racial identity in South Africa, *Coloured by History, Shaped by Place*.

<sup>29</sup> Barnett focuses on the justifications and counter-arguments made in municipal planning publications, public announcements, protest statements (including poetry) and mainstream media around the Cape Town municipality’s plans for ‘urban upgrades’ and ‘slum’ improvement in District Six (1994: 179).

upward social mobility. They left for the preferable social climates of Walmer Estate and Wynberg. The poorer ones in the community went to the City and Divisional Council matchboxes on the windy Cape Flats. Those who remained were by and large those who were unable to go. A few stayed because they just preferred to stay where they were. But a slum is never romantic especially for those forced to live in it. Once we moved we left the past behind and seldom discussed our origins. We did not wish to be recognised as someone who had “come out of that”: Today time has sufficiently romanticised and mythologised the District’s past. It is now a mark of social prestige to have ‘come out of that’. A criticism I once heard by a former inhabitant, levelled at Adam Small for his poetry on District Six, was “but he doesn’t even come from there”. (1990: 111)

The more politically charged representations of District Six emerged in the 1990s with the publication of *The Struggle for District Six: Past and Present*, which documents the Hands off District Six (HODS) campaign conference of July 1988. The conference included a series of lectures and essays by representatives of churches, sports, civic and cultural organisations involved in the campaign and conference, including key figures later involved with the District Six Museum and the District Six Trust, such as Anwah Nagia, Shamil Jeppie, Crain Soudien, and others. The text is described as a major precursor to the work of the District Six Museum by the latter’s board<sup>30</sup>, and as an ‘authoritative’ historical source during the Section 34 Court Case<sup>31</sup>. The volume includes a series of lectures and essay contributions on the history of District Six, its forced removals, and new efforts to redevelop the site by the state and corporations like BP, a move which is explicitly rejected by the contributors to the text: ‘the Conference sought to mobilise public support against the attempts of a multinational and a local company to redevelop District Six without consulting the people themselves’ (Jeppie and Soudien 1990: 4).

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<sup>30</sup>Museum board member Ciraj Rassool has described this as a ‘seminal book’ ahead of the formation of the District Six museum, with the HODS campaign as ‘one of the organisations to which the Museum traces its beginnings’ (2001: viii).

<sup>31</sup> In Davidson’s founding affidavit it is described as an ‘authoritative study’ of District Six (paragraph 13), and is used to provide a history of District Six for the court (in paragraphs 33 to 57. It is further cited in paragraphs 19.7 and 22.1 of Davidson’s second affidavit).

With South Africa's transition to democracy in the mid-1990s, representations of District Six proliferated, and increasingly focused on the positive meanings attached to the site. In literary works, a number of accounts by former residents emerged, including *Rosa's District Six* by Rozena Maart, *The House in Tyne Street: Childhood Memories of District Six* by Linda Fortune, and Nomvuyo Ngcelwane's *Sala Kahle, District Six* (1998), the last of which seeks to tell the story of black African residents of District Six: 'few outsiders knew about our lives there. I hope that through this book people now will get to know more of the truth about District Six' (1998:6). In the sphere of academic and historical texts, notable contributions during this time include Zimitri Erasmus's (2001) volume on coloured racial identity and apartheid, *Coloured by History, Shaped by Place*, Yossuf Rassool's history *District Six: Lest we Forget* (2001) and Shaun Field's *Lost Communities* (2001). The popular media followed suit, with increasing focus on the positive meanings of District Six's 'lost community'<sup>32</sup>.

During the mid-1990s the opening of the District Six Museum has, along with the inclusion of Richard Rive's *Buckingham Palace: District Six* in South African schools as a set-work book, probably been of the greatest importance for accumulating, re-presenting and canonising District Six's history. The museum held its first exhibition on 10 December 1994, primarily using contributions by District Six's former residents in the form of donated 'artefacts', photos, and stories (Bohlin 1998: 174). As a result, in addition to more traditional materials like maps, photographs, media clippings and records, the museum's exhibitions have been able to include original street signs salvaged from the demolition site, various household items, pieces of rubble, and an interactive 'memory cloth' on which former residents can write their names, comments and stories.

Apart from its exhibitions, the museum has produced a number of publications that memorialise District Six and promote a vision for its future, further disseminating the museum's work into the public realm. Its publications include newsletters, museum

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<sup>32</sup> The historical development of representations of District Six in the print media is explored in depth in chapter 3 of this thesis.

guides, reports and a full volume on the establishment and work of the museum edited by its own staff and board members, entitled *Recalling Community in Cape Town*<sup>33</sup> (2001).

Several commentators have noted that the Museum has played a key role in cementing a set of powerful symbolic meanings for District Six. For example, Charmaine McEachern's 'Mapping the Memories: Politics, Place and Identity in the District Six Museum, Cape Town' (1998)<sup>34</sup> argues that the exhibitions in the Museum offer both 'differentiated histories and memories which signify many District Sixes', based on individual autobiographical accounts and histories, and also 'the more homogenised District Six, the symbol of a history greater than the District itself' (ibid: 6). Similarly, Henry Trotter has argued that the museum has a 'condensing' effect on historical accounts of forced removals (Trotter in Adhikari 2009: 64)<sup>35</sup>. Anna Bohlin, in 'The Politics of Locality: Memories of District Six in Cape Town' has furthermore observed that the Museum has played an active role in the restitution process, by providing a space for mass meetings to elect trustees for the District Six Trust, and for the adoption of the Trust's constitution:

Recently the Land Commissioner granted authority to a group of former residents, the District Six Beneficiary Trust, to provide suggestions on how to redevelop the area and compensate the displaced community. The decision was taken on August 1997...the District Six Museum was temporarily transformed into a court room. In December 1997 the museum once more became a stage for a historic event, when the Trust launched its new constitution inside the exhibition hall. The capacity of the museum for re-appropriating the land of District Six, and

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<sup>33</sup> The essays in *Recalling Community* range from historical accounts of the museum's genesis, to readings of the museum's exhibitions, and also to historic accounts of activism in District Six both pre- and post-1994. Co-editor, Ciraj Rassool states that 'Recalling Community in Cape Town is a book about the history, the cultural work and the ongoing thinking on the part of the District Six Museum. It is a book about the Museum by members of the Museum — by its staff, and its trustees and founders. It is very much an insider's view of the District Six Museum' (2001: vii).

<sup>34</sup> *Social Identities*, October 1998, Vol. 4, Issue 3.

<sup>35</sup> These publications have been followed by several less substantial articles, including Haajirah Esau's 2007 thesis, Museum, medium, message, and Sofie Geschier's 2007 contribution on autobiographical texts in the Museum "So there I sit in Catch-22 situation": Remembering and Imagining Trauma in the District Six Museum' (in Field, Meyer and Swanson's book *Imagining the City: Memories and Cultures in Cape Town*) and Lara Simone Koseff's 2007 research paper (which originated as a Master's Thesis in Heritage Studies at WITS) 'Rebuilding Identity: The District Six Museum's Involvement in The Current Redevelopment Of The District Six Site' (which Koseff describes as setting out to examine 'how and to what extent the District Six Museum has contributed the current redevelopment of the District Six site' specifically insofar as it has 'challenged accepted definitions of heritage and has transcended common museological practices' (2007: 5)).

reconnecting it with its former residents, thereby transcends the symbolic level. The exhibition is transformed into an event with far-reaching pragmatic and judicial consequences (Bohlin in Lovell 1998: 173).<sup>36</sup>

This brief overview indicates the parameters of the historic discourses that weigh on the post-apartheid efforts to engineer a legally-driven restitution process in District Six. A brief overview of the chapters that follow will set out the dimensions of how this discourse has become interwoven with the specific provisions of restitution's legislative discourse, together with their broader implications for restitution, and for the project of entrenching liberal constitutionalism that restitution is designed to support.

## **5. Thesis Chapter Outline – Supplementation, Appropriation and Reconfiguration of Restitution Discourse**

Following this introductory chapter, the second chapter of this thesis directly addresses itself to the question of restitution's constitutional 'order of discourse'. With the aid of legal analyses of South African constitutionalism and restitution law's place therein, it separates out four main discursive elements of restitution legislation that form the basis for the chapters that follow, namely, its 'subjects', its 'objects of dispossession', its 'objects of restoration' and its rules for 'administration' (that is, the procedures for lodging, adjudicating and settling restitution claims, and the role of the state in 'governing' those procedures). Applying these categories to the legal instruments of the District Six restitution process, the chapter maps out the major areas of congruence between the concepts of the constitutional order, and their enunciation in this particular instance of restitution. The chapter argues that the main elements of restitution legislation are rooted in the concepts of South African property law, and that 'property rights' do feature as a dominant element of the case throughout. Yet the reading also identifies the emergence of significant lacuna, contradictions and mediations in the construction of restitution's subjects, objects and rules as the process unfolds, leading to the conclusion

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<sup>36</sup> A similar position is taken by Ciraj Rassool in his article for the journal *Museum International* entitled 'Making the District Six Museum in Cape Town' (2006).

that the vigorous deployment of property rights in the legal instruments has been partial and strategic, rather than a faithful reproduction of the law.

Chapter three examines some of the inconsistencies identified in the first chapter around the re-inscription of restitution's 'object of dispossession'. While restitution legislation clearly differentiates between claims based on individual property rights lost and communal rights lost, District Six legally falls into the former category, a fact acknowledged by all parties at the outset of the restitution process. Yet, in the District Six legal texts, the historic notion of a 'lost community' becomes so prominent as a descriptor of what has been lost under apartheid that it begins to eclipse restitution's legal object of dispossession. This centrality of 'community' in the legal texts is examined as a 'keyword' in the chapter, following prominent post-war British literary critic Raymond Williams. For Williams, 'keywords' can shape meaning<sup>37</sup> due to the connotations and even moral authority that they accrue in the public domain during their history of repeated use. His method is applied, in this instance to trace the development of 'community' as a keyword in some of the major sites of textual production associated with District Six, including literary, historic, academic, museum and mass media sources. The chapter concludes by arguing that the historically developed notions of a lost 'community' in District Six have become so compelling that they have helped to rewrite restitution's legal object of dispossession, steering the course of the project toward a collectivised, 'single-redevelopment' solution to restitution. This move has had profound and lasting practical consequences for the project.

Chapter four moves to examine the construction of restitution's 'subjects' in District Six. While restitution's legal subjects are claimants, defined as persons dispossessed of rights in land under racially discriminatory laws, in District Six the position of restitution's subject has been supplemented by an intermediary organisation in the form of the District Six Trust. Although the Trust purports to merely 'represent' or provide a 'voice' for claimants, the chapter argues that its role has in practice resulted in increasing

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<sup>37</sup> Williams uses the term 'keywords' to describe 'significant, binding words in certain activities and their interpretation; they are significant, indicative words in certain forms of thought. Certain uses bound together certain ways of seeing culture and society' (1983: 15).

marginalisation and deletion of the legal subjects of restitution from decision-making or access to the land to which they are entitled under law. Applying French philosopher Étienne Balibar's theories of identity formation, combined with theories of institutional identification, the chapter argues that the specific institutional structure of the trust arrangement has reproduced a historically entrenched bifurcation of identities in District Six. Representations of District Six over time have designated and normalised two interlinked sets of identifications for its former residents, either passive victims, or heroic activists associated with South Africa's liberation struggle. The District Six Trust arrangement recreates and reinforces these normalised identifications in the institutional form of the Trust, whose prevailing legislation offers only two roles for its members: either active 'trustees' or passive 'beneficiaries'.

In chapter five of this thesis, the focus of analysis is the realisation of restitution's legal 'object of restoration' in the case of District Six. Restitution legislation offers considerable flexibility around the object of restoration for restitution claims, ranging from the original piece of land lost, to an alternative piece of land or financial compensation. In District Six, the object of restoration for those claimants wishing to return to the site is a property within an 'integrated redevelopment' that aims to serve restitution and, in addition, develop a 'flagship' community whose class and racial integration will 'show the way' for national identity formation in the new South Africa. On the face of it, this appears to fall comfortably within the parameters set out in legislation. However, drawing on French philosopher Henri Lefebvre's insight that the design of urban space tends to encode ideological assumptions, many of which are latent, the chapter unpacks the contractual conditions and urban design stipulations for the project. The chapter concludes that the project suffers from a fundamental internal contradiction. The focus on engineering a site of social inclusion has paradoxically led to new and intensive modes of social exclusion, primarily of claimants themselves. As such, the legislative object of restoration in District Six has been displaced by an indefinitely deferred form of restricted tenure on the site.

The final chapter of this thesis turns to the question of state administration in restitution, examining how the legislation's envisaged role for bureaucratic administration has fared in the case of District Six. Utilising the sociological theories of Max Weber and Pierre Bourdieu on the authority of state organs and administrative law, I argue that the state has fallen short of its legally envisaged role in District Six due to a fundamental legitimacy deficit that has accrued to 'the law', 'officials' and the 'authorities' in District Six as a result of historical uses of these instruments of control under the apartheid regime. The historical readings of the state and its organs in District Six have found the bureaucracy at local, provincial and national levels unable to apply what Weber and Bourdieu term the 'universalizing' rhetoric of the law to prevail as the administrative authority over the site. Instead, at various points throughout the restitution process, the organs of state are branded with organisational identifications that position them on the negative term of South Africa's critical apartheid/post-apartheid political dichotomy. Even state officials appear to have endorsed this position, leading to a situation whereby the state administration finds itself placed in antagonism with South Africa's particular 'National Subject'<sup>38</sup>. Any administrative action that goes against the will of the District Six 'national subject', in this context, has easily been discredited as continuous with earlier instances of apartheid injustice on the site.

As this brief synopsis of the chapters that follow should indicate, restitution legislation has only partially determined the subjects and objects of restitution in District Six. It has not entrenched itself as the 'quintessential form of the symbolic power of naming' described by Bourdieu in the 'Force of Law' (1987: 838). Instead, it has entered the scene of restitution as one 'order of discourse' alongside other discourses traversing the site, and has been transformed in various ways in its final enunciation in the legal texts governing the process. The very fact that the key tropes and identifications described above have been able to find a place in 'legal' texts suggests that they enjoy a high level of 'authority' or legitimacy in their specific context, a point that proponent of critical discourse analysis Norman Fairclough makes well:

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<sup>38</sup> The term is used in Ivor Chipkin's sense in *Do South Africans Exist* (2007), which he uses (following philosopher Louis Althusser) to describe individuals who have internalised a belief in their identity as a citizen of a particular nation, or, as he puts it, 'when the subject (with a small 's') recognises that he or she does occupy the place that [national democratic] ideology designates for him or her' (2007: 212).

Not any discourse would work as a strategic nodal discourse for imagining and potentially operationalizing, actualizing, a new political-economic fix. A discourse can only work in so far as it achieves a high level of adequacy with respect to the realities it selectively represents, simplifies, condenses – in so far as it is capable (as these seem capable) of being used to represent/imagine realities at different levels of abstraction, in different areas of social life (economy, government, education, health, regional and social disparities), on different scales (international, macro-regional (e.g. EU), national, local). It is only if it is a plausible imaginary that it will attract investments of time and money to prepare for the imaginary future it projects, material factors which are crucial to making imaginaries into realities. (Fairclough 1992: 86)

District Six is not alone in this regard. Examples of the force enjoyed by popular political narratives in the arena of South African restitution has featured prominently in existing analyses, particularly those of Deborah James (2007), Cheryl Walker (2008), Anna Bohlin (2002) and others. Bohlin, for instance, states that during the course of restitution, major shifts in the meaning and values attached to people and places occurred as the apartheid script of South Africa's history was revised: 'figures that were previously assigned the roles of outsiders now assume centre stage in the production of heritage, as do places that formerly symbolized inferiority, danger or exclusion. The emerging new memories and commemorative practices that arise out of such initiatives are to a large extent inversions of the past as it was promoted by the former regime' (Bohlin 2002: 1). Similarly, Deborah James argues that the claimant and landless peoples' groupings which came to the fore after 1994 'drew impetus from experiences of the anti-apartheid struggle and from memories of a deeper past' (James 2007: 1), while Walker argues that restitution nationally has been informed by a nationalist reading of South Africa's more recent past, a 'headline history' of 350 years of undifferentiated black ('African') dispossession by white 'settlers' as the catalytic force behind our most pressing social and economic problems today (Walker 2008: 234)

The District Six case certainly resonates with some of the ‘master narratives’ attributed to restitution in South Africa by Walker, Bohlin and James. But it also involves a particularly specific set of ‘alternative’ and revised meanings due to the volume and relative permanence these meanings have gained via the site’s body of literary works, its museum, and its prominent place in historical and media texts. The resultant discourses, their specific tropes and narratives, have taken on some of the authority and forcefulness assigned by Foucault to ‘disciplines’, ‘sciences’, ‘knowledge’ in general and other mechanisms of ‘governmentality’ (2003: 39). In fact, as I have noted, they have been taken up in disciplines, such as ‘history’ and ‘literature’, as well as ‘museum’ exhibitions and archives. In the space of restitution’s governance in District Six, the definitions and rules of restitution’s constitutional order of discourse have been interpreted, filtered, appropriated and reframed in light of these alternative discourses. In so doing, it has, to a surprising extent, carried out what Michel de Certeau describes, in *The Practice of Everyday Life* (1988) as the appropriation of disciplinary power:

If it is true that the grid of “discipline” is everywhere becoming clearer and more extensive, it is all the more urgent to discover how an entire society resists being reduced to it, what popular procedures (also “miniscule” and quotidian) manipulate the mechanisms of discipline and conform to them only in order to evade them, and finally, what “ways of operating” form the counterpart, on the consumer’s (or “dominee’s”?) side, of the mute processes that organise the establishment of socioeconomic order. These “ways of operating” constitute the innumerable practices by means of which users re-appropriate the space organised by techniques of sociocultural production. (de Certeau 1984: xiv)

A common thread that informs my analysis throughout is that this ‘re-appropriation’ of legal and other discourses into a new ‘microphysics of power’ in District Six has occurred. One of the most striking features of this phenomenon is that the appropriation has not been driven exclusively by activists of the District Six Trust or other adversaries of the state. Rather, it has come to be shared by state officials, politicians, academics, the print media and the District Six Museum. It is therefore likely that the appropriation and

reconfiguration of the law characterising the District Six case has occurred elsewhere, not only in restitution, but in other instances where state administration has found itself in contestation with localised political formations. Moreover, this reading suggests that the alternative discourses vying with state laws and institutions in South Africa are not limited to the broad 'racial' or neo-traditional 'ethnic' forms of identity politics that tend to dominate critical accounts. Instead, they find their definition and their authority in historical narratives and tropes that have developed in response to historical forces acting within and upon District Six.

## 6. Limitations of the Study

In spite of its suitability as a methodology, there are also certain key theoretical and methodological implications and limitations to the analytical approach I have chosen in this thesis. Firstly, this thesis defines and constructs certain objects of study, but excludes certain others<sup>39</sup>. I have endeavored as far as possible to avoid artificially including some texts at the expense of others. As such, the legal instruments that form the primary textual objects of study for my thesis, as listed above, are all selected on the basis that they enjoy 'force' in terms of legislation, and are therefore material instruments that enable and further the restitution process. The texts that are excluded from this thesis due to space considerations are texts that either do not hold legal force (such as legal opinions, for example) or are less pivotal in other ways to the restitution process itself, although no less important as objects of study in their own right. These include tender documents and formal contracts between government and private companies for planning and development work on the District Six housing pilot projects, some of the shorter affidavits submitted in the court cases, and lawyers' letters, official correspondence, media articles and reports, letters and statements by claimants. These texts all provide a

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<sup>39</sup> Fairclough makes this point in his essay 'Critical Discourse Analysis', where he recognizes that the 'object of research' is *constructed* as such, selected on certain criteria: 'I see methodology as the process through which, beginning with a topic of research ... one constructs 'objects of research' (Bourdieu & Wacquant 1992). The choice of appropriate methods (data selection, collection and analysis) depends upon the object of research... The process of constructing 'objects of research' from research topics involves selecting theoretical frameworks, perspectives and categories to bring to bear on the research topic. It is only on the basis of such theorization of the research topic and the delineation of 'objects of research' that one can settle upon appropriate methods of data selection, collection and analysis.' (2005: 84-85)

wealth of material for analysis, but cannot be incorporated as primary objects of study into a single thesis given space constraints.

A further 'category' of texts that are delimited and constructed in this study are the texts that make up the 'context' of the legal texts. I take the position in this regard that historical discourse is itself a construct, whether it is narrative text of actions and actors that falls explicitly within the academic 'discipline' of history, or whether it is a more cross-disciplinary analysis that synthesizes a broad range of economic, political and multi-perspectival factors and attempts to draw conclusions about causality between actors and actions. This challenge is something which is recognized by Teun van Dijk, for example, who argues in his recent book *Discourse and Context: A Sociocognitive Approach* that:

Critical Discourse Analysis is crucially interested in the social conditions of discourse, and specifically in questions of power and power abuse, but has also failed to develop more explicit theories of context as a foundation for its own critical enterprise. Obviously, power is not shown just in some of the aspects of "powerful speech," and we need insight into the whole, complex context in order to know how power is related to text and talk, and more generally how discourse reproduces social structure.' (2008: vi).

The texts that form District Six's 'heritage' of representations are therefore, by necessity, selected and limited. As van Dijk points out, when speaking of context, 'intuitively nearly anything may become relevant for discourse' (ibid), so, for the purposes of constructing a historical context or backdrop for the District Six restitution process, I have had to 'delimit', what may otherwise 'extend to large part of society' (ibid).

A second key limitation of this thesis is that it is focused on the role of discourse in impacting on the direction of the District Six restitution process. It is important that this analysis not be read in isolation from some of the other practical and economic factors

impacting on the project. For instance, decisions by the state to limit financial compensation to claimants to a relatively paltry maximum sum of R40 000 per property lost, and its reluctance to put investment into the redevelopment over and above the standardised terms of the national policies for restitution (as per the conditions of the Section 42D Framework Agreement), have played a major role in delaying restitution on the site. Moreover, the relative inflexibility of the District Six Trust around selling some of the District Six property to raise funds to build homes for claimants, shut down the only alternative avenue for funding. However, it is clear that in both instances, the economic decisions taken are tied up in certain key assumptions and beliefs about the site and its relative value and meaning for both the state and Trustees.

A similar point, regarding relative prioritisation, would apply, in the case of the state, to the relatively limited provision made for administrative staff and infrastructure in the Commission on the Restitution of Land Rights, a factor which has been noted in a number of studies. For example, Colin Murray's 1998 study for the Institute for a Democratic South Africa, which included a series of interviews with staff of the Commission on Restitution of Land Rights, cites 'low staff numbers', 'insufficiently high levels of skill', 'scarcity of materials such as office equipment and motor vehicles' and poor communication between restitution authorities (1998: 7). He also noted a lack of information for claimants and inadequate explanation to them of the processes to be followed, which 'created false expectations' and 'disempowered the community from participating properly in the process' (Murray in Brown et al. 1998: 16). These difficulties were compounded by the inherent complexities of verifying claims, particularly where records were lost or non-existent (ibid). Similarly, Gary Howard, in his survey 'Righting the wrongs of the past: A review of the Land Restitution Programme' (1999), compiled on behalf of the University of Natal's Development Law Unit, identifies five key practical problems for restitution, namely, 'a lack of institutional capacity', lengthy processes, a 'lack of clear policy' on certain issues, 'ignorance of how land restitution works among the public and officials', and a lack of publicity about the restitution process' (1999:2).

Although Ruth Hall (2010) and others have noted that the introduction of the ‘administrative’ claims settlement process (through the incorporation of Section 42D of the Act) (2010: 27) has speeded up the settlement of claims by simplifying procedures, the general problems of capacity have persisted. It would appear, therefore, that the weak institutional arrangements for restitution have rendered the process all the more vulnerable to ‘re-appropriation’ by alternative discourses and their proponents. Thus, on the one hand it is important not to overstate the role of cultural and legal discourse in impacting the District Six restitution process, and acknowledge that discourse is only one among a range of broader economic, historical and social factors impinging on restitution and land ownership in District Six and other sites in South Africa, on the other hand in the District Six instance at least, the difficulties posed by the resultant overlaying of legal and social language have remained constant throughout, as the ensuing chapters will illustrate.

A third limitation on this thesis is the specific historical position of its author. Although I have endeavoured to maintain a critical distance from the objects of study herein, it must be stated that the critical perspective and information brought to bear in this study are of necessity historically bound and delimited by my own academic and autobiographical background<sup>40</sup>. The actual research for the project was carried out between 2008 and 2012, and focuses on an inevitably limited time period between 1996 (which, as noted above, was the year when District Six was first announced as a restitution project) until 2012. For this reason, before proceeding to further formal analysis, I will offer the reader a brief background of my own relation to the District Six restitution case, what prompted this study, how the object of study was circumscribed, and why I have chosen the specific methodology outlined above.

My decision to embark on writing a thesis about the interface between legal and cultural discourse in the District Six restitution process stemmed from my occasional

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<sup>40</sup> I write this bearing in mind David Simpson’s interesting critique of the notion of ‘situatedness’, and particularly his warning that claiming situatedness is sometimes ‘a function of opportunistic self-interest. At other times those who invoke arguments from one kind of situatedness do so in order to discredit others’ (2002: 15).

involvement with the District Six redevelopment during my work in the City of Cape Town. From 2006 to 2009 I was employed at the City in the capacity of Mayoral Spokesperson for then Executive Mayor Helen Zille of the liberal Democratic Alliance party. My postgraduate studies have consistently led me to focus on the philosophy and political dynamics of language (particularly in relation to the work of Jacques Derrida and Georges Bataille in previous dissertations), and with this background, I moved into the arena of government communications with my appointment to the Mayoral office in early 2006.

From the outset of my tenure at the City, the Mayor's Office had been directly involved with the District Six redevelopment as one of a number of high-profile infrastructure and housing development projects underway in Cape Town. This was my first real encounter with the matter of District Six, as I had previously lived in Johannesburg, where I matriculated at the age of 17 in 1994. Hence my knowledge of the history of the forced removals in District Six (and in South Africa in general), of restitution on the site, and of the broader dynamics of land ownership in Cape Town in general, was very limited. When I arrived in the Mayoral office in 2009, the City of Cape Town's role in the project was fairly narrowly set out in the Section 42D Agreement of November 2000, which, *inter alia*, included the provision of municipal infrastructure, and the provision of access to the municipally owned plots of land in District Six for redevelopment of homes for restitution claimants. However, before Helen Zille and the Democratic Alliance had taken over the running of the City from the previous African National Congress government (in April 2009), the City had also agreed to fund the first Pilot Project on the site, and (in 2005) entered into the Land Development Agreement for a second pilot project.

As the District Six Pilot Projects proceeded (albeit haltingly), I began to be exposed to the conflicted dynamics of the project, including numerous, sometimes tense exchanges between the City, the Commission on Restitution of Land Rights, the District Six Redevelopment and Beneficiary Trust, and individual claimants. It was during this time that the second Land Claims Court case on District Six was initiated by the District

Six Advocacy Committee, in which the City of Cape Town was named as a respondent. Given my role as one of the Mayor's political advisors, I was led by my work to carry out extensive research into the history of the District Six forced removals and the restitution process.

Through my research in the Mayor's office, I began to notice the particular interweaving of cultural and legal discourse in the legal texts that form the core object of study in this thesis. While the District Six case was proceeding, I also found myself exposed to a range of other highly contested 'development' projects in Cape Town (such as the ill-fated 'N2 Gateway' housing project), which made me increasingly aware of the legal and economic dynamics of governance in Cape Town and South Africa, as well as the more nebulous role of democratic sentiment and political mobilisation in generating (or preventing) concrete outcomes in major public infrastructure projects. My time spent working under the Mayor, and with other experienced public office-bearers (in the City and other spheres of government), as well as my encounters with claimants from the Trust, the Advocacy Committee, and beneficiaries in a range of other public development projects, left a deep impression on me. This experience led me to decide that there would be value in critically documenting and analysing the case of District Six in a space outside of the government or public media archive, subject to the rigours of balanced academic scrutiny. Hence I returned to the academic field and initiated the writing of this thesis.

In 2009, while still working on this thesis, my role shifted to the provincial sphere when the Executive Mayor Helen Zille was elected Premier of the Western Cape, and I accompanied her to the office of the Premier where I continued to assist with the District Six project and a range of other matters. In 2011 I was assigned by the Premier to work as Head of Ministry for Social Development in the Western Cape, which has taken me away from the District Six project, which, in some respects, has been a welcome distance for the finalisation of this thesis. I am acutely aware that my position in government, and particularly working with political office-bearers, may create the perception in the reader that this thesis has ideologically favoured the role of government, or of the Democratic

Alliance as the current governing party in the Western Cape. If this is so, I hope that the chapters that follow will convince the reader otherwise. In retrospect, I feel my work in government may have led me to be even more cautious in deploying the tools of critical analysis to the subject of District Six, and I have endeavoured, at all times to ensure that my arguments are supported and substantiated by evidence drawn from the texts under study. In addition, in terms of research ethics, I have not made use in this thesis of any confidential government documents, or used my position in government to access documents not otherwise available to the general public. However, my contact with claimants and government officials has helped to ensure that the documents included in this thesis are indeed relevant to the District Six case, which, I hope, will make this a useful consolidated record of the case between the years of 1996 and 2012.

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# Chapter Two: Restitution's Constitutional Order of Discourse

## 1. Introduction

South Africa's interim and final constitutions, together with the legislative and policy texts drafted to give effect to their provisions, constructs a set of discursive objects and rules for restitution that work together as a constitutional 'order of discourse' in Michel Foucault's sense of the term<sup>1</sup>. The constitutional-legislative discourse of restitution sets out what Foucault calls 'a domain of objects, a set of methods, a corpus of propositions considered to be true, a play of rules and definitions' (1984: 59), including what is to be restituted, the objective basis for restitution (unjust loss of a right in land), how restitution should be administered, and the legal subject who 'qualifies' as a 'claimant'. These definitions and rules form the 'requisites for the construction of new statements' (ibid) in the legal domain, such as court orders, claimant settlement agreements, contracts, and other legal instruments.

The legal instruments of the District Six restitution and redevelopment process are enmeshed in this constitutional order of discourse, within the specific terms of restitution, but also within the broader discourse of law, rights, contract and 'due process' (indeed their various formats, as affidavits, contracts and deeds, make tacit appeals to legitimacy within the discursive context of South Africa's legal system<sup>2</sup>). This is a complex inscription of meaning, since constitutional and legislative provisions for restitution undergo periodic amendments, and occasionally come into conflict with one another, requiring referrals to the Constitutional or lower courts for resolution.

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<sup>1</sup> Michel Foucault 'The Order of Discourse' (1984: 98).

<sup>2</sup> As I have stated in the introduction to this thesis, legal instruments *per se* are couched within South Africa's constitutional 'order of discourse' insofar as they indirectly draw their force *as legally valid* from the *legitimacy* of the *Constitution*.

However, these provisions do share a single basis of legitimacy in South Africa's political liberal social contract, which underpins the constitution. They are intended as part of the ground rules, in John Rawls' sense, that structure the post-apartheid South African political regime, including rules for legal contestation. To recall, Rawls' particular conception of how a social contract gain legitimacy describes a broad acceptance or 'overlapping consensus' among a particular population of what he terms a 'module' of basic (and fairly limited) political ground rules for co-operation (a module which is independent of comprehensive belief systems): 'the exercise of political power is fully proper only when it is exercised in accordance with a constitution, the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason' (Rawls 1993: 137).

In the District Six restitution process, the affidavits and court applications under analysis are texts formed within the broad rules of contestation set down for Land Claims court processes. Similarly, the contracts of the District Six restitution and redevelopment processes confer rights and obligations on the contracting parties as circumscribed in restitution legislation, legislation and common law<sup>3</sup>.

Does this mean restitution in its constitutional sense has been put into practice in the case of District Six? More specifically, have the District Six legal instruments re-inscribed the objects, subjects, and rules of restitution set by the constitutional order of discourse? And does 'the constitutional' feature in these texts as the highest source of

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<sup>3</sup> *Wille's principles of South African Law* by George Wille, François Du Bois and Graham Bradfield (2007) defines a contract as 'an agreement between two or more persons which gives rise to personal rights and corresponding obligations, in other words, it is an agreement which is legally binding on the parties' (Hutchison and du Bois in Wille, du Bois and Bradfield 2007: 736). What distinguishes contracts from other types of agreements is that 'the agreement is one for performance or non-performance in the future by one or more of the parties; that is, one or more of them undertakes to give something, or to do something, or not to do something' (ibid). The parties 'must have legal capacity to contract', they must 'intend to bind themselves', the contents of the agreement 'must be certain or ascertainable', the agreement must be 'possible' to perform, and the agreement 'must not be contrary to statute law, public policy or good morals' (ibid). Similarly, Van Huyssteen, Van Der Merwe, and Maxwell (2010) state that a common factor which forms 'the basis of the conclusion that, juristically, a contract has come into being' is 'a meeting of the minds (consensus) between at least two parties or, in the absence of such an actual agreement, the reasonable belief on the part of one of the parties that there is an actual agreement' (2010: 32). Under such circumstances, a contract becomes 'a legal fact, a juristic abstraction' that gives rise to obligations (2010: 32). Schalk Van Der Merwe (2007) presents a similar argument in *Contract: General Principles* that the 'basis of a contract is either consensus, that is an actual meeting of the minds of the contracting parties, or the reasonable belief by one of the contractants that there is consensus' (2007: 19). According to Van Huyssteen, Van Der Merwe, and Maxwell (2010), in South Africa 'there is no general legislation requiring formalities for contracts, but a number of statutes deal with particular types of contracts' (2010: 91-92).

legitimacy for restitution as envisaged in the text of the *Constitution*, and as envisaged by the architects of South Africa's post-apartheid 'political liberalism'?

The current chapter addresses itself to these questions by mapping the subjects, objects and rules of restitution's legislative discourse which, in District Six, have become the 'thing[s] for which and by which there is struggle' (1984: 110) in Foucault's sense. It argues that the key terms of constitutional restitution discourse, and their conceptual basis in property law, are ostensibly reproduced in the legal instruments of the District Six case. But their inscription is increasingly transformed and appropriated as the restitution process unfolds, generating a range of omissions, contradictions and conflicts with restitution laws. While the District Six legal instruments utilize the constitutional language of restitution, and, in the case of the contractual documents, speak in the language of legal 'authority', the inscriptions of restitution's subjects, objects and rules become less congruent with the legislative order through the course of this encounter between legal discourse on the one hand, and, on the other, the cultural, historical and political discourses that traverse the site.

## **2. Constitutional Order of Discourse: the subjects, objects and rules of restitution**

Land restitution found its first expression in post-apartheid South African constitutional discourse via sections 8, 121, 122 and 123 of the *Interim Constitution* (Act 200 of 1993), where it is defined as the return of property rights to those persons 'dispossessed' of such rights through laws 'inconsistent with the prohibition of racial discrimination contained in section 8(2) [of the *Interim Constitution*]' (Republic of South Africa 1993: section 121(2)(b)). With the introduction of the final *Constitution* in 1996 restitution shifted into the property rights clause<sup>4</sup> (section 25) of the Bill of Rights. In parliamentary legislation, the constitutional inscription of restitution found expression from 1994 onward with the introduction of the *Restitution of Land Rights Act* and its

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<sup>4</sup> As a whole, the 'property clause' sets the parameters for all property law in South Africa, including land ownership, and access to or enjoyment of certain other rights in land such as tenancy, access to mineral rights, trading space and so forth. The provision for restitution is also complemented with an addition provision requiring the state to grant redress for persons who are subject to insecure tenure as a result of 'racially discriminatory laws or practices': "(6) a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

subsequent amendments<sup>5</sup>. Underpinning these iterations of ‘restitution’ is a set of constructs and assumptions drawn from property law and other sources which set the parameters for all legitimate enunciations of restitution. The most important are the object of dispossession (a right in land), the subject of restitution (a land ‘claimant’), the object of restitution (a right in land or financial compensation), and the rules that establish and govern restitution processes (including, inter alia, for the establishment and running of a Commission for the Restitution of Land Rights and a Land Claims Court). I will briefly unpack the conceptual basis of each in turn before examining their re-inscription in the District Six restitution process. Understanding the specificity of each concept should help to demonstrate the extent to which these discursive elements have been appropriated and transformed in their encounter with the historical identifications and tropes that dominate District Six’s ideological space.

## 2.1. The Objects of Restitution

In the text of the *Interim Constitutions* and the *Restitution of Land Rights Act*, the ‘object of dispossession’ is construed as a ‘right in land’ in the sense applied in South African property law, dispossessed under laws inconsistent with the constitutional prohibition on racial discrimination, the first of which was introduced in 1913<sup>6</sup>. Section 121(2) of the Interim Constitution states that a person or community may claim restitution of a property right from the state if ‘such person or community was dispossessed of such right’ under ‘a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2) [of the Interim

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<sup>5</sup> The Restitution of Land Rights Act 22 of 1994 first gave effect to section 121 of the Interim Constitution, Act 200 of 1993. The *Restitution of Land Rights Act* was later amended and updated through the Land Restitution and Reform Laws Amendment Act of 1999. For more detailed accounts of how Land Restitution legislation, processes and institutions developed in South Africa, from the early 1990s through the final constitution’s property clauses and the restitution laws, see Du Toit (in Cousins 2000) and James (2007). Other related laws passed by Parliament to give effect to the *Interim Constitution*’s Section 121 and the final *Constitution*’s Section 25 provisions for land reform include the *Land Reform (Labour Tenants) Act 3 of 1996*, the *Communal Property Associations Act 28 of 1996*, the *Interim Protection of Informal Land Rights Act 1996 the Extension of Security of Tenure Act 62 of 1997* and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998* (Van Der Walt 2003: 164).

<sup>6</sup> According to the Department of Land Affairs 2009 document ‘Restitution Policy Guidelines for Finalising Claims for Restoration’ the laws used for dispossession include: the Native Land Act 27 of 1913; the Natives Trust and Land Act 18 of 1936; the Native (Bantu) Administrative Act 38 of 1927; the Forestry Acts; the Irrigation Acts; the Parks Board Acts; the Transvaal Asiatic Land Tenure Amendment Act 30 of 1936; the Coloured Persons Settlement Act 31 of 1967; the Rural Coloured Areas Act 24 of 1963; the Bantu Labour Act 67 of 1964; the Promotion of Bantu Self-Governing Act 46 of 1959; the Bantu Homelands Citizens Act 92 of 1969; the Bantu Affairs Administration Act 45 of 1971; the Native Areas Act 21 of 1923; the Community Development Act 31 of 1966 Prevention of illegal Squatting Act 57 of 1951; the Expropriation Act; and the Slums Act of 1934 (DLA 2009a: clause 2.3.1.1 to 2.3.1.17). For further detail see Deborah James’s history of Restitution Laws in *Gaining Ground: ‘Rights’ and ‘Property’ in South African Land Reform* (2007).

Constitution]'. The definition of property rights is expanded upon in the Restitution of Land Rights Act of 1994, which refers to dispossession of 'any right in land whether registered or unregistered', including tenancy, ownership, or occupation of land for business, work or agriculture (Chapter 1 Section 1 (xi)). The act lists as examples the categories of 'labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question'. In Section 25(7) of the final Constitution, 'dispossession' refers again to property lost 'as a result of past racially discriminatory laws or practices', but expands the definition of property (in Section 25(4)) to include other assets that can be the subject of ownership rights.

In the two constitutions and parliamentary legislation, the object to be restored in lieu of unjust dispossession is defined either as the same right to or in land<sup>7</sup>, or, where this is not feasible, an alternative piece of land, financial compensation or 'alternative relief' to be determined by the Court or Minister of Land Affairs<sup>8</sup>. There is, therefore, not necessarily a straightforward equivalence in restitution between rights lost and rights to be restored. The *Restitution of Land Rights Act* allows the Land Claims Court and Minister of Land Affairs a large degree of discretion in the redress it awards to claimants, leaving these authorities to interpret what constitutes 'just and equitable redress'. Section 4 of the *Act* states that 'The Court's power to order the restitution of a right in land or to grant a right in alternative state-owned land shall include the power to adjust the nature of the right previously held by the claimant, and to determine the form of title under which the right may be held in future', while section 42D of the *Act* allows the Minister considerable latitude to make settlements with claimants.

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<sup>7</sup> Section 121 of the *Interim Constitution* states that '(1) Where a claim contemplated in section 121 (2) is lodged with a court of law and the land in question is- (a) in the possession of the state and the state certifies that the restoration of the right in question is feasible, the court may, subject to subsection (4), order the state to restore the relevant right to the claimant'. Alternatively, if the property is owned by a private party section 1(b) provides for the state to expropriate or purchase of the property if the court finds it is 'equitable to do so, taking into account all relevant factors'.

<sup>8</sup>The provision for 'alternative relief' is carried through from the *Interim Constitution* into the legislation and final *Constitution*. Section 121 of the *Interim Constitution* states that 'if the state certifies that any restoration in terms of subsection (1) (a) or any acquisition in terms of subsection (1) (b) is not feasible, or if the claimant instead of the restoration of the right prefers alternative relief, the court may, subject to subsection (4), order the state, in lieu of the restoration of the said right- (a) to grant the claimant an appropriate right in available alternative state-owned land designated by the state to the satisfaction of the court, provided that the state certifies that it is feasible to designate alternative state-owned land; (b) to pay the claimant compensation; or (c) to grant the claimant any alternative relief.'

The potential disjuncture between the object of loss and the object of restitution is widened further by the lack of clear provision in restitution law for compensation for hardship or suffering (even though the state has acknowledged this deficit)<sup>9</sup>. Several authors have identified this as a major deficit in the legislation. Cherryl Walker argues, for instance, that this has resulted in ‘the programme’s failure to address in a sustained way the emotional and symbolic dimensions of dispossession’ (Walker 2008: 148), particularly in cases ‘where the underlying claim was about violations of human dignity or loss of community, rather than simply or only about the loss of particular pieces of land’ (Walker 2008: 168).

The logic of restitution’s objects is thus devoid of any symbolic or affective dimension, resting instead on the logic of property rights, persons and things which informs all constitutional property law in post-apartheid South Africa. Analytical literature on South African land reform generally concurs that restitution is legally defined as the restoration of unjustly dispossessed property rights within the system of South African property law. As legal analyst André Van Der Walt observes: ‘The restitution of land rights proceeds on the assumption that previously existing rights that have been lost or destroyed through apartheid laws and practices should be restored, or if restitution is impossible or impractical, compensated’ (2003: 208)<sup>10</sup>.

The basis of restitution in property law means that restitution’s constitutional ‘object of dispossession’ is formally defined as a ‘right’ over a specific ‘property’ (read as a

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<sup>9</sup> For example, the National Government’s *Green Paper on Land Policy*, published in February 1996 as a policy discussion document on implementation of the *Restitution of Land Rights Act* broadly divides the land rights affected under apartheid forced removals into two main categories: ‘Inadequate compensation for the value of the property’, and ‘hardship suffered which cannot be measured in financial terms’ (1996: 34). Yet no explicit ‘compensation for hardship’ clause exists in the legislation itself.

<sup>10</sup> Similar interpretations occur in the work of Brown, Erasmus, Kingwill, Murray and Roodt (1998), Currie and De Waal (2005), Van Der Walt and Pienaar (2006), Everingham and Jannecke (2006), Walker (2008), Roux (2009) and others. In particular, these authors concur that the fundamental principle of restitution legislation is the direct restoration of rights unjustly taken away from individuals or groups (via arbitrary laws of racial discrimination). For example, Roux states that the land restitution process was ‘designed to purge the post-apartheid property rights order of a particular set of unjust holdings, viz. those that could be related back to a dispossession suffered under a past racially discriminatory law. Although, as argued below, there were to be other parts of the land reform programme that would be more redistributive in character, the distinct purpose of land restitution was to redress the harm suffered by those who could show that they would have had a defined property right in land but for a particular past unjust transfer.’ (Roux 2009: 153). Thus restitution was ‘conceived as an attempt to do individual justice to those who could prove that their rights in land were lost as a result of a particular kind of unjust transfer after 1913, and land redistribution, at least initially, as a welfare scheme for those who were unable to relate their demand for land to an unjust transfer of the specified type.’ (ibid: 155). Christiaan Beyers makes a similar reading of restitution as a rights-based process in his article ‘State Capacity and Land Restitution’s “Rights Communities”’: ‘Any claim is based on the constitutional rights of the claimant... and all restitution claims are made against the state and not current owners or users, although the state may enter into negotiated settlements with the current owners or users in order to achieve restoration of land to dispossessed claimants’ (2007: 271).

corporeal ‘thing’), and the object of restitution is either a new property right (over the same or a substitute property as corporeal ‘thing’) or a right to a fungible financial object (money)<sup>11</sup>. Where land is restored, the right is secured via the Deeds Registry<sup>12</sup> under the *Deeds Registry Act*, although the system of alternative compensation for restitution introduced financial awards against land rights lost instead of restoration of land rights.

The conception of rights in each case is drawn from a set of apartheid and pre-apartheid era concepts and laws, including common law (see also Currie and de Waal, 2005: 538)<sup>13</sup>, which have been integrated into the new post-apartheid dispensation. If the object of dispossession is a ‘right in land’, and where the object of restoration is awarded as a restored or new right in land, ‘right’ can be read in the sense explained by Andre Van der Walt and Gerrit Pienaar (2008) in their reference work *Introduction to the Law of Property* as ‘a legally recognized and valid claim by a subject to a certain object’. A right

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<sup>11</sup> The terms for financial compensation are stipulated in the Commission on the Restitution of Land Rights’ ‘Standard Settlement Offer Policy’ (‘which defines the financial settlement offer as ‘a “recognition” of rights lost, not an attempt to calculate exactly what was lost’. According to the policy document, this standard settlement offer for financial compensation to restitution claimants was developed from the year 2000 because of challenges presented by the method of calculating financial compensation by establishing historical under compensation, including, ‘lack of historical material to “reconstruct” the past’; ‘historical valuations if done on an individual scale, were quite expensive and time-consuming’; and because attempts to restore ‘exactly what was lost by the Claimant’ often resulted in ‘complicated formulae being applied in order to establish value’. As such, the ‘Standard Settlement Offer Guidelines’ provides for the calculation of financial awards by the Commission on Restitution of Land Rights on a ‘sliding scale’ basis, with the amount calculated based on the square meterage of the property lost due to racially discriminatory laws. According to the ‘Restitution Policy Guidelines for Finalising Claims for Restoration of Land’ developed by the Commission specify which factors should be considered and what options can be exercised in order to give effect to this new provision in the Act, claimants can be offered financial compensation, restoration of their rights in land (either the same land lost through unjust means or an equivalent piece of land if the original land is unavailable), or a combination of the two.

<sup>12</sup> The *Restitution of Land Rights Act* requires the Land Affairs Director General ensure that awarded land ‘be transferred to the applicant in terms of section 31 of the *Deeds Registries Act, 1937*... the Director-General may perform all functions and sign all documents required in terms of section 31 of the *Deeds Registries Act* to achieve transfer of the land on behalf of the applicant.’ In its definitions, the *Restitution of Land Rights Act* designates former and current “owners” as identical to owner ‘as defined in section 102 of the *Deeds Registries Act*’. Similarly, the “Registrar” who finalises and logs property rights is referred to as ‘the relevant registrar of deeds as contemplated in section 102 of the *Deeds Registries Act*’.

<sup>13</sup> Van der Walt and Pienaar (in their *Introduction to the Law of Property*) state that the main sources of all South African laws of property since 1994 are ‘(a) (Roman-Dutch) common law (b) Statutory law (legislation) (c) Case law (precedent) (d) Customary law (e) Constitution’ (Van der Walt and Pienaar 2008:4). In its current form, property law in South Africa hinges on the notion of individual (or juristic) persons’ rights enjoyed against the sovereign state. Van der Walt and Pienaar (2008) define a ‘right’ as ‘a legally recognized and valid claim by a subject to a certain object’ and a property right as ‘any legally recognized claim to or interest in property’ (and a claim or action is ‘lawful’ ‘when it is acknowledged by existing legal principles’) (2008: 11). Van der Walt and Pienaar (2008) further define an object in post-apartheid South African law as ‘anything with regard to which a person can acquire and hold a right’, including property, which is ‘everything which can form part of a person’s estate, including corporeal things and incorporeal interests and rights’, where a thing refers to ‘a specific category of property, which is defined with reference to its characteristics: a corporeal object outside the human body, and an independent entity capable of being subjected to legal sovereignty by a legal subject for whom it has use and value’ (2008: 8). In the *Constitution* this logic is the basis of property as a ‘right’. Section 25 of the *Constitution* states that ‘[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’. Restitution in law is a ‘retrospective correction’, a returning of rights to individuals who were illegitimately stripped of these rights. The Constitution allows for expropriation under very specific circumstances (section 36). Property rights also do not allow owners to use property in a manner that unreasonably interferes with the property or other rights of another person or persons (for example, property uses for business, for certain types or sizes of buildings, and other aspects are limited by health laws, land use and zoning laws, such as the *Land Use Planning Ordinance* and Municipal by-laws on public nuisance).

in land is thus ‘any legally recognized claim to or interest in property’ (and a claim or action is ‘lawful’ ‘when it is acknowledged by existing legal principles’) (2008: 11).

Property law therefore construes land as a particular object ‘which can form part of a person’s estate, including corporeal things and incorporeal interests and rights’, where ‘thing’ refers to a ‘a corporeal object outside the human body, and an independent entity capable of being subjected to legal sovereignty by a legal subject for whom it has use and value’ (2008: 8)<sup>14</sup>. In the system set up by property law, land itself is divided into distinct ‘immovable things’ that are ‘units of land and everything permanently attached to them by means of attachment, as well as sectional title units’ (Van der Walt and Pienaar 2008: 18). The unique identity of each piece of land as ‘thing’ is itself determined through a system of registration governed in post-apartheid South Africa by the *Land Survey Act 8 of 1997* (although, as noted above, the *Restitution of Land Rights Act* does, in its definition of a ‘right in land’, make provision for claims against pieces of land not yet registered as such, extending its reach to grant rights in land to previously ‘informal’ land rights holders who have been historically excluded from holding legal title to land).

Restitution may be a narrowly defined legal process, but some analysts note that it can be read in the broader context of the full text of the *Constitution* alongside the preamble’s call for recognition of ‘the injustices of the past’ and the Bill of Rights’ call for the state to promote the gradual realisation of socio-economic rights through redistributive mechanisms such as land reform, housing and basic service provision, education and healthcare. Colin Murray (1998), for example, points out that the narrow legal approach to restitution need not be read in isolation from broader principles of redress and reconciliation in South Africa: ‘it is easy to assume that the restitution process is simply a bureaucratic and judicial mechanism to right certain specific historical injustices... This is a narrow view. Restitution has wider aims’ (Murray 1998: 30-31). In the final *Constitution*, this broader priority of redress and redistribution through land

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<sup>14</sup> Currie and de Waal offer a similar reading in their 2005 *Bill of Rights Handbook*, stating that that ‘Property then encompasses at least the real rights recognised by the law of property, rights such as ownership, mortgage, lease, servitude, mineral rights, liens. It also encompasses at least some of the component rights, making up what is termed the bundle of rights that constitutes plenary ownership’ (2005: 538).

reform is specifically referred to in sections 25(4) and 25(5)<sup>15</sup>. The state has read restitution as one of ‘three legs’ supporting ‘land reform’<sup>16</sup>, which seeks to gradually shift the balance of property in South Africa away from white rights-holders into the ownership of the racial majority (while still seeking to maintain a stable legal system of property rights in the country).

The difficulty with this arrangement, however, lies in the fact that restitution as a specific ‘leg’, has been drafted into legislation on its own. Hence a recent article on restitution legislation by former Land Claims Court judge Alan Dodson argues that in practice, the broader intentions of the *Constitution* have not been easily translated into specific legislative provisions or practices:

It is unlikely that the framers of the Constitution would have wished the beneficiaries of this right [to restitution] to receive nothing more than being dumped once more upon a bare parcel of land. Rather, a purposive and generous interpretation of the right requires that claimants are, as far as reasonably possible, restored to the position they would have been in had the dispossession not occurred...however, the Restitution Act that followed makes surprisingly limited provision regarding the implementation of restitution orders and settlement agreements. (Dodson 2010: 275).

The narrow reading of restitution by the state has been borne out in practice, especially in relation to monetary compensation. As Dodson has observed, the *Restitution of Land Rights Act* makes very little provision for the role of Commission on Restitution of Land Rights beyond the point of settling claims. It only has limited post-settlement monitoring and advisory functions to ensure implementation of restitution claims (in section 6), while the Minister of agriculture and land affairs is able to provide grants for planning, management and development purposes in terms of Section 42C (Dodson 2010: 276-7). As a result, the constitutional object of restitution has remained, in principle and

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<sup>15</sup> Walker has noted that these provisions have broadened the meaning and objectives of restitution when compared with the restitution provisions in the Interim Constitution (2008: 142).

<sup>16</sup> This three way legislative arrangement to give effect to ‘land reform’ has been analysed in depth by a number of authors, including Ruth Hall (2003), Field (2001), James (2007), Walker (2008), Fay and James (2009) and others.

in practice, limited to financial compensation or land rights, while return of these rights would appear to be this particular piece of legislation's main contribution to 'equitable access to land' and 'reconciliation'.

## 2.2. The Subjects of Restitution

The '*subjects*' of restitution in the constitutional order of discourse are rights-holders, described as natural or juristic persons (or communities) whose rights in land have been dispossessed through racially discriminatory laws. The term used in the constitution and legislation to describe this rights-bearing legal person is a validated 'claimant', whose status in law as a property rights holder is confirmed through a formal process of application, verification and confirmation by the Commission for the Restitution of Land Rights and the Minister of Land Affairs. In the *Interim Constitution* (Section 121(2)) a claimant is specifically defined as 'a person or community contemplated in section 121(2) of the Constitution or a direct descendant of such a person' who has made their claim within the time set by the Minister of Land Affairs for the state to receive claims. This definition of a claimant is given more detail in Section 2 of the *Land Restitution and Reform Laws Amendment Act of 1999* which defines a claimant as a person who has been 'dispossessed of a right in land after 19 June 1913' in the name of 'racially discriminatory laws or practices' or who is a 'direct descendant of such a person' and who has 'lodged a claim for the restitution of a right in land' not later than 31 December 1998. This can also include a 'community or part of a community' defined by shared ownership rights. In Section 25(7) of the final *Constitution* the definition of a claimant is simplified to refer to 'a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices' while the further specifications are left to 'an Act of Parliament'. Validated claimants are therefore rights-bearers who have been through a specific legal process of certification and recognition by the state.

As in the case of the 'objects' of restitution, the legal 'subjects' inscribed as validated claimants by restitution discourse are conceived within South Africa's broader system of

property rights, rights legitimized in the *Constitution*'s bill of rights and the underlying 'social contract' on which this rests, which I have described elsewhere using Rawls' concept of political liberalism's 'overlapping consensus' (1993: 10). Individual sovereignty over property is only limited by section 36 of the Constitution (which extends to the principle that property rights holders should also not use their property in a manner that interferes with the public interest or other rights-holders). This is a conception of property rights which can be traced back to a long history of liberal thought around property rights and political legitimacy, including that of English philosopher John Locke, who argued that 'The reason why men enter into society is the preservation of their property' (*Second Treatise on Civil Government*, 1690). Thomas Hobbes, in his 1651 work *Leviathan, or the Matter, Forme, and Power of a Commonwealth, Ecclesiasticall and Civil* reached a similar conclusion that ownership can only be guaranteed if the strongest power in the land protects its status. Indeed, Everingham and Jannecke note in their account of South Africa's Constitutional negotiations that during the process of reviewing property law, South Africa's entire 'property regime' was reworked 'through a universal rights enquiry approach that addressed political demands for the restoration of lost entitlements.' (2006: 547).<sup>17</sup>

### 2.3. Rules of Restitution

In addition to constructing the specific objects and subjects of restitution, the constitutional order of discourse defines and legitimises rules, systems and nodes of authority for the *administration* of restitution. These are numerous, but three institutions and the rules governing them are particularly relevant to the District Six case, namely, the *Interim Constitution*'s provision for the establishment of a Commission for Restitution of Land Rights<sup>18</sup>, and the specific roles allocated to the Courts and the Minister of Land

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<sup>17</sup>Further analysis of the relationship between liberal conceptions of property rights and South Africa's property law, including restitution, can be found in Andries Van der Walt's 1997 *The constitutional property clause: a comparative analysis of section 25 of the South African Constitution of 1996*, Carey Miller and Anne Pope's general overview of all new post-reform land laws in SA, *Land title in South Africa* (2000), John Murphy's 'The Restitution of Land after Apartheid: The Constitutional and Legislative Framework' in Rwelamira and Werle (1996) *Confronting Past Injustices: Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany*, and Van der Walt's later publications *Constitutional property law* (2005) and *Introduction to the Law of Property* (2006, co-edited with Pienaar), and Currie and de Waal's *Bill of Rights Handbook* (2005). These works in turn are written against the backdrop of a much bigger body of international writing on property rights in philosophy and law.

<sup>18</sup>The Commission is specifically described from the very first enunciation of restitution in the *Interim Constitution*. In Section 122 it is stated that restitution legislation must 'establish a Commission on Restitution of Land Rights, which shall be competent to: a)

Affairs under the *Interim Constitution* and the *Restitution of Land Rights Act*. The *Interim Constitution* sets out procedures for verification and awarding of claims<sup>19</sup>, which are listed in the first iteration of the *Restitution of Land Rights Act* (the final *Constitution* does not stipulate institutions or procedures for restitution, leaving the details to ‘an Act of Parliament’ (section 25(7))). Among these, the most significant for District Six have been the cut-off date for restitution claims; the claimant verification process; the provision for restoration of land to be set aside in the ‘public interest’ under Section 34 of the Act; and, lastly, the 1999 amendments to Section 42D of the Act allowing for the Minister of Land Affairs to settle claims directly with validated claimants (without the involvement of the court). I will provide further detail on each of these provisions and their significance below.

There are a range of further property laws that are crucial to restitution but not included in restitution legislation, the most significant being the *Deeds Registries Act* of 1937 (Act No. 47 of 1937), which provides the textual means by which restituted (and all other) land rights are recorded and secured by the state. Under this Act, restoration of ownership of a piece of land to validated claimants as land rights-holders is done by means of title deed lodged in the claimant’s name at a Deeds Registry office (Van der Walt and Pienaar 2008: 19)<sup>20</sup>.

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investigate the merits of any claims; b) mediate and settle disputes arising from such claims; c) draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court; and d) exercise and perform any such other powers and functions as may be provided for in the said Act.

<sup>19</sup> The *Restitution of Land Rights* inclusion of procedures for claims was in fact required by section 122 of the *Interim Constitution*, which stated that the procedures to be followed for dealing with claims in terms of this section shall be as prescribed by or under the said Act. In his essay ‘Righting the wrongs of the past: A review of the Land Restitution Programme’ (1999), Gary Howard traces the steps involved in restitution as follows: ‘a claim is launched by way of the completion of the prescribed land claim form by the claimant and the lodgement thereof with the appropriate regional commission... it is the role of the regional commissioner to investigate whether the claim meets the broad requirements of the Act... the commissioner is then required to provide notification thereof to the claimant, the current owner of the land being claimed, as well as the general public... Hereafter, the claim is exhaustively investigated by the Commission researchers and an extensive report is prepared... the Commission is [then] required to bring the claimant and the DLA together in order to discuss the settlement of the claim. Hereafter... the Commission will refer the matter to the Land Claims Court for adjudication of the claim itself and the settlement sought (in the event that no agreement is reached) or to make any settlement agreement an order of court’ (ibid: 3-4). Recent amendments to the *Restitution of Land Rights Act* have been made (63 of 1997) to streamline this process by allowing the Department of Land Affairs to settle claims outside of court.

<sup>20</sup> According to the Cliffe Dekker guide to South African property law “The South African system of registration effectively provides the registered owner of land with security of title... This security of title is the result of the respective responsibilities carried by professional land surveyors (under authority of a Surveyor-General), the deeds registries established throughout South Africa (each under authority of a Registrar of Deeds, with a Chief Registrar of Deeds exercising authority on a national basis) and an independent attorneys’ profession... South African law also recognises separate ownership of buildings or parts of a building. Such ownership is regulated by the Sectional Titles Act, 1986. Sectional title ownership is also registered in a deeds registry... Statutory rights in land are also provided for in the Share Blocks Control Act, 1980. This form of tenure entitles the holder of shares in a share block company to the use and enjoyment of land owned or leased by the share block company. This form of tenure is not registered in a deeds registry and the rights attaching thereto are protected by the Share Blocks Control Act... South African law recognises various limited rights in land, the most common of which is the relationship of landlord and tenant. Leases are capable of registration in the deeds registry and, in such instances, afford the tenant greater rights than in the case of an unregistered lease. Various servitudes recognised under South

### 3.1. Re-Inscription of the Subjects, Objects and Rules of Restitution in District Six - The First Struggle for Legitimacy

Having clarified the conceptual basis of these discursive objects, subjects and rules of constitutional restitution discourse, which, to recall Foucault's formulation, create 'requisites for the construction of new statements' (1984: 59) of restitution, we can now begin to determine the extent to which these terms shaped the District Six restitution process from 1996 to 2012.

Although District Six was announced as the subject of a restitution claim in the Government Gazette of September 1995, agreement on providing restitution via redevelopment of District Six was only reached between the various state bodies involved in 1997, following the outcome of a Land Claims Court case on the matter<sup>21</sup> (the case ran from June 1996 to July 1997). During these early phases of the redevelopment, the strategic deployment of the constitutional objects and subjects of restitution feature quite powerfully, and with a high degree of fidelity, in determining material outcomes in the process. The case was initiated by an application on behalf of local and provincial government to have direct restoration of land to validated claimants set aside in favour of a state-led redevelopment under section 34 of the *Restitution of Land Rights Act*<sup>22</sup>. This provision allows the Land Claims Court to deny restoration of land rights if it finds that: '(a) it is in the public interest that the rights in question should not be restored to any claimant; and (b) the public or any substantial part thereof will suffer substantial prejudice unless an order is made'. The application prompted an opposition by certain activists and claimants, who asserted that their property rights should take priority over

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African common law, and capable of registration in a deeds registry, confer limited rights in land, such as for example, the right to use land and/or to enjoy the fruits of land' (*Cliffe Dekker online guide*, accessed via <http://www.cliffedekkerhofmeyr.com> on 21 December 2009).

<sup>21</sup> Case number LCC 11/1996 in the Land Claims Court, (which will hereafter be referred to as 'the section 34 court case').

<sup>22</sup> In formal terms, the first applicant was the Central Substructure of Cape Town, and the second applicant was the Provincial Government of the Western Cape. The first respondent was the Commission on Restitution of Land Rights, while the National Housing Board, Government of the Republic of South Africa, Member Organisations of the District Six Development Forum, and the Claimants of Land were, respectively, the second, third, fourth through thirty-ninth, and fortieth and further respondents. Their application is made in terms of Section 34 of the Restitution of Land Rights Act, which states (in section a) that 'any national, provincial or local government body may, in respect of land which is owned by it or falls within its area of jurisdiction, make application to the Court for an order that the land in question or any rights in it shall not be restored to any claimant or prospective claimant.'

the state's plans. While the objects and subjects of restitution legislation were accepted by all parties concerned, the matter for adjudication was whether claimant rights or a set of broader benefits of a state-led housing development for both low income earners and claimants, should receive priority.

The applicants sought to meet both conditions of Section 34 of the *Restitution of Land Rights Act* for the direct restoration of land to claimants to be set aside. In support of the first condition (in Section 34(6)(a) of the Act), the application, founding affidavit and detailed 'motivation' by Cape Town Community Land Trust Chief Executive Officer, Basil Davidson<sup>23</sup> (acting on behalf of the Local and Provincial Governments) argued that chronic housing shortages in Cape Town meant that it would be in the public interest to maximize the efficiency and yield of housing provision on the site: 'to restore particular rights in land to land-owners (many of who had not lived in the area) should be the least likely option in view of the pressing housing needs of the majority of the population' (paragraph 68.9)<sup>24</sup>. In addition to housing for low income 'beneficiaries', job and business opportunities are also stressed as part of a broader set of socio-economic benefits of such an approach<sup>25</sup>. Thus the court is requested to allow a state-led body, the Cape Town Community Land Trust (CTCLT) (a trust formed by the City, Province and certain civic organisations)<sup>26</sup>, to hold and develop the land, while claimants would either be accommodated in the finished development, or be awarded alternative compensation<sup>27</sup>.

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<sup>23</sup> This is attached to the filing notice, and Davidson's authority to speak on behalf of the applicants is supported by attached affidavits (by Keith Nicol of the City and Leon Rautenbach of the Province).

<sup>24</sup> A similar argument recurs in paragraphs 63.1, 63.3, 65.3 and 68.5 to 68.10 of Davidson's founding affidavit as well as page 2 of the motivation attached to the founding affidavit (table 3), and paragraphs 17.2 (table 8) and 24.2 of Davidson's replying affidavit.

<sup>25</sup> The emphasis on the state's role in promoting socio-economic rights is expressed overtly in paragraph 68.10 of the founding affidavit and tacitly throughout, and is also supported through direct references to the national policy agenda of the democratically elected ANC national government at the time, namely the RDP in paragraphs 68.5 and 82. As mentioned in the introduction in relation to Rawls' notion of the 'difference principle', the *Constitution* places repeated emphasis on the promotion of socio-economic rights of citizens. In its preamble it is stated that the *Constitution* has been adopted to help '[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'. This is repeated in Section 1 where it states that 'the Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms'. Among these rights is the right to 'adequate housing' (Section 26). Government departments are bound to uphold these principles, as are municipalities. This is particularly spelled out in section 152 of the *Constitution*, which sets out the '[o]bjects of local government', including (a) to provide democratic and accountable government for local communities; (b) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (d) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organisations in the matters of local government.

<sup>26</sup> The proposal specifically envisaged a state-driven project, through a formal Trust (the Cape Town Community Land Trust, hereafter CTCLT) whose board comprised individuals from government and civic organizations, and whose main interface with the broader 'community' of District Six was through a District Six Development Forum (the 'Forum'), on which a number of civic organizations associated with District Six were represented. Its request for a court order to have the restitution process set aside in terms of the 'public interest' is included in its Notice of Application in Terms of Section 34 of the Restitution of Land Rights Act, 22 of 1994 (7 June 1996). The application requests a court order to the effect that 'the vacant land (or any rights in it) owned by the applicants and

The applicants sought to satisfy the second requirement of Section 34 of the Act, namely, to show that the public would suffer ‘prejudice’ if restoration of the claimants’ original pieces of land proceeded, by arguing that doing so would create an impossibly complex and unmanageable urban development. Davidson’s affidavit argues that only the state has the capacity to execute the redevelopment, that the state’s plans for an integrated redevelopment are the only ‘rational’ ones (by virtue of their grounding in ‘town planning’ principles), and that these plans and direct restoration of land in District Six to claimants are mutually exclusive. According to Davidson, restoration of individual claims would lead to an impractical ‘piecemeal’ redevelopment, (paragraph 68.3) which would therefore ‘prejudice’ public and claimant interests, and the aspirations of the state to create low cost housing. The legislative responsibilities of local government, including ‘town planning’ are deployed throughout the founding affidavit and the appended motivation to assert the undesirability of a ‘piecemeal’ redevelopment (paragraph 68.2 and pages 23-25 of the motivation) and sketch an alternative vision of a development that is both egalitarian and aligned to ‘sound’ planning principles (page 1, 31 and 32,) (this is supported by an eight point argument is made against the ‘piecemeal’ approach on pages 23-25 of the motivation).

These ‘public interest’ arguments were effectively countered by assertions of the primacy of claimant property rights in the opposing application and affidavits from land claimants and prospective claimants, led by civic activist organization The District Six Restitution Front and its chair, Anwah Nagia. These assertions follow the letter of restitution legislation quite closely, framing the state’s application as a threat to the legal rights of restitution’s subjects, read as validated claimants, and as a further ‘dispossession’ of the object originally taken from them: ‘The Second Applicant is now,

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second and third respondents and listed in the schedule attached to his notice, situated in the area known as District Six, Cape Town, not be restored to the claimants (the fortieth and further respondents) who have lodged claims with the first respondent in terms of s 10 of the Restitution of Land Rights Act, 22 of 1994 (“the Act”) in respect of properties in the area known as District Six, or to prospective claimants who intend to lodge claims with the first respondent in terms of the Act in respect of the area known as District Six.’

<sup>27</sup> For example, paragraph 24.2 of his responding affidavit denies that the application ‘attempts to deprive “the respondents” or the claimants or prospective claimants of their “prospective rights”’. He goes on to state that should the application be successful, then the claimants or prospective claimants will ‘have the following rights under the Act and the interim Constitution to: a) participate in the development of the vacant District Six land, b) the provision of alternative land, c) payment of compensation, and d) access to state resources in the form of allocation of housing or financial aid’

once again, attempting to dispossess the Land Claimants of their lawful claims to the restitution of their properties and their rights of tenure' (paragraph 4.2).

Consistent with the broader constitutional reading of restitution mentioned above, Nagia further argues that a state-led redevelopment would be 'inimical to the interests of national reconciliation' (paragraph 4.5.4.2 iii). Nagia's assertion that individual claimant property rights under restitution legislation should take precedence over the applicants' conception of the 'public interest' is echoed in other opposing affidavits, for example, that of restitution claimant Anthony Bernard Lawrence<sup>28</sup>. Lawrence argues that the applicants' plans 'to provide housing, community facilities and services (in District Six) to the disadvantaged' is 'laudable' but 'not necessarily consonant with the aims and objectives of the Act and the provisions of the Constitution regarding restitution of land rights' (paragraph 41.3). His concern is that the beneficiaries of the state's proposed integrated redevelopment may be 'outsiders', and not original inhabitants of District Six: 'the overwhelming majority of persons who are socially, economically or politically disadvantaged [may not] be persons with any connection to District Six at all' (paragraph 43.5).

The opposing applicants' assertion of claimant property rights under the constitution achieved a position of primacy following an extended 'facilitation process' ordered by the court<sup>29</sup>. A Facilitators' Report, compiled by Dr Neville Alexander and Dr Elaine Clarke, was submitted to the court on 14 July 1997 noting an 'agreement' to proceed with

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<sup>28</sup> Lawrence identifies himself as 'one of the persons listed as a claimant' in the application (par 3) by virtue of submission of a claim on 26 February 1996 for land that was expropriated from his uncle, Willie Alexander, in 1971 (par 4). He states that he has 'the necessary *locus standi* to oppose the present application' (par 5) because his uncle was pressured to sell his property on Erf 9111 for R10 505,00, 'which was considerably below its then market value' (par 5.3), and 'I would have, upon my uncle's death, inherited the aforesaid property' (5.6).

<sup>29</sup> The 'facilitation process' was initiated by a court order dated 29 October 1996, in which Judge Fikile Bam of the Land Claims Court postponed the case to 1 April 1997, and ordered (in paragraph 2) that the applicants and deponents enter a 'facilitation/negotiation/mediation process' in terms of section 13 of the Restitution of Land Rights Act' and that the Commission on Restitution of Land Rights appoint 'persons with particular knowledge of District Six and land issues in general' to facilitate this process (in terms of section 9 of the Act). The Court required that a written report be submitted by 14 March 1997 (a date later postponed to 15 July 1997). The court further required that land claimants 'should be fully informed by the interested parties of their rights and the effects and advantages, if any, of a section 34 application and integrated development' (paragraph 2.4). The order also set out the terms of reference for the facilitation process, which focus on informing claimants of their rights and of the various challenges and implications of the differing approaches to the project. The terms of reference further call on the parties to reach agreement on an acceptable way forward, with clearly defined roles and responsibilities for all involved (paragraph 2.5.12).

restitution as defined in constitutional discourse<sup>30</sup>, and the applicants subsequently withdrew the Section 34 application (in a simple Notice of Withdrawal).

### **3.2. Re-Inscription of the Subjects, Objects and Rules of Restitution in District Six – Building Consensus**

With the decision taken to redevelop District Six for claimants, the constitutional objects, subjects and rules of constitutional restitution were utilized to formalize the terms of the project in a three-way Record of Understanding (ROU) signed by the Minister of Land Affairs, the Cape Town local government and the District Six Trust in 1998<sup>31</sup> and, thereafter, in 2000, a further three-way Framework Agreement<sup>32</sup> under Section 42D of the amended *Restitution of Land Rights Act*.

The ROU sets out the terms for restitution, including its subjects and objects, within the basic discursive features of the ‘contract’ under common law. Claimants as the subjects of restitution, and the object of dispossession in this case, are described in the same terms as the *Interim Constitution*, that is, as: ‘persons dispossessed of land rights, as a result of racially discriminatory laws or practices, in District Six, in the City of Cape Town’ (claimants are further described as ‘stakeholders’ as defined ‘by the Act’ in clause 1.2 of the document). The rules of restitution legislation are recognized by the inclusion as signatories of the State, being the legal party against whom the claim is made (represented by the Minister of Land Affairs as per the *Act*), and the property right holder whose land is the subject of the claim (the municipality). The ROU commits the parties to ‘fulfil their obligation in terms of the *Constitution of the Republic of South Africa* (Act 108 of 1996) and the *Restitution of Land Rights Act* (Act 22 of 1994) (here after referred to as the Act), to implement a process of restitution of land rights and redevelopment, or

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<sup>30</sup> The report stated that ‘the community-based organizations, individual claimants as well as other respondents in the case’ had been consulted and agreed that the Section 34 application should be withdrawn and that the Land Claims Court be approached for an order in terms of Section 35(2)c of the Restitution of Land Rights Act ‘entrusting a Beneficiary Community Trust (the Trust), a Section 21 Company or, if all the claimants agree, a Communal Property Association (CPA) with the task of driving, co-ordinating and monitoring the process of restitution’.

<sup>31</sup> The Record of Understanding was signed on 13 September 1998 by Anwah Nagia on behalf of the District Six Beneficiary Trust (identified as a voluntary association), Terence Fife, the Provincial Director of Land Affairs for the Western Cape, acting on behalf Land Affairs Minister Derek Hanekom, and Mayor Nomaindia Mfeketo on behalf of the City of Cape Town.

<sup>32</sup> The Section 42 D Framework Agreement was signed on 26 November 2000 by the Minister of Agriculture and Land Affairs, Thoko Didiza, the District Six Beneficiary Trust represented by Anwah Nagia and the City of Cape Town represented by City Manager Andrew Boraine.

equitable redress'. The specific object to be restituted by this 'process of restitution' is an 'integrated redevelopment' on the site (stated in the Vision paragraph of the document), although there is no stipulation for individual property rights to be restored.

Where the ROU sets out the constitutional objects and subject of restitution, and defines a vision for the redevelopment of District Six, the S42D Framework Agreement seeks 'to give effect to' the 'vision' in the ROU<sup>33</sup> by contractually binding its signatories under the authority and rules of Section 42D of the 1999 amendment to the *Restitution of Land Rights Act*. As noted earlier, Section S42D of the Act allows the Minister of Land Affairs to enter into agreements with claimants to settle their claims without having to refer the award to the courts, offering a fair degree of flexibility and discretion for how this can be achieved. The purpose of Section 42D is described in the preamble to the amended Act as being 'to do away with the need for a claim to be referred to the Court where the interested parties have reached agreement as to how a claim should be finalised and to authorise the Minister to make an award of a right in land, pay compensation and grant financial aid in such a case'. This provision was made through the introduction of a new set of clauses in section 42D to the Act (via a parliamentary amendment to the *Act* in 1999) including a provision for the Minister to 'enter into an agreement' with legally qualifying claimants providing for:

- (a) The award to the claimant of land, a portion of land or any other right in land...
- (b) the payment of compensation to such claimant;
- (c) both an award and payment of compensation to such claimant;
- (d) the acquisition or expropriation by the State of such land, portion of land or other right in land;
- (e) the manner in which the rights awarded are to be held or the compensation is to be paid or held;
- or (f) such other terms and conditions as the Minister considers appropriate.

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<sup>33</sup> The preamble states that the agreement is intended to 'give effect to' a 'joint vision' 'captured in the District Six Record of Understanding'.

The Framework Agreement between the signatories applies this legislative mandate to contractually<sup>34</sup> cement the terms of restitution in District Six, setting a framework and process that will lead to a final settlement between the Minister of Land Affairs and claimants. As in the case of the ROU, the subjects of restitution are reproduced in the text as rights-bearing individual claimants, and the text provides for individual ‘Claimants Settlement Agreements’ to be completed in order to legally finalise claims between the Minister of Land Affairs and individual claimants, as per Section 42D of the Act<sup>35</sup> (clause 5.1.1). The latter provision suggests that the state regarded the District Six case as a set of individual claims for individual property rights lost (although, as I will show in ensuing chapters, this is complicated by the fact that the section 42D agreement is signed on behalf of claimants as a collective)<sup>36</sup>.

Two possible ‘objects’ of restitution are set out as options for claimants in the S42D Framework Agreement. The first is participation in an ‘integrated redevelopment’, where the object of restitution is the ‘designated land’, identified by erf numbers and urban planning diagrams (based on Deeds Registry data). The second is payment of specific amounts of monetary compensation in terms of the National Department of Land Affairs’ policies for financial settlement of claims<sup>37</sup> (clause 2.1).

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<sup>34</sup> It contains, inter alia, a preamble, formal definitions (including of the parties), an objective, provisions for monetary settlement of claims, specifications for claimant settlement agreements, provisions for grants and subsidies to claimants, specifications for a land development agreement for District Six, timeframes, as well as subsidiary sections for waiver, notices, and authority (signatures of parties and declaration of *locus standi*).

<sup>35</sup> Clause 7.1 sets out the terms for this final settlement, whereby each individual claimant will receive individual Settlement Agreements which will ‘fully and finally settle his/claim(s) for the purposes of undertaking the Development or electing to receive solely financial compensation’. These agreements will, among others ‘indicate the properties or describe the “rights in land” (as provided for in Section 1 of the Act) in respect of which the Claimant was dispossessed’ (7.2.1); indicate and determine the monetary value of the Claimants claim(s) and the compensation categories applicable to the Claimant’ (7.2.2), ‘specify the benefits to which the Claimant is entitled in respect of the Development, which benefits may include a serviced site and other settlement benefits’ (7.2.6) and also ‘confirm that the Claimant has no further claim to any portion of the Designated Land nor to any further compensation in respect of restitution’.

<sup>36</sup> Although it may be argued that the discretion provided to the Minister of Land Affairs and Land Claims Court by the constitutional and legislative provisions for restitution would still allow for this kind of collectivisation, provided that the processes required for such a settlement set out in the legislation are followed. As pointed out by an external examiner for this thesis, in a 2006 Constitutional Court case relating to a Port Elizabeth Land and Community Restoration Association (PELCRA) restitution claim, the court’s ruling stated that negotiated group settlements for individual claims were not legally incompatible with the constitutional commitment to restitution. A media summary of the ruling in this regard recorded that: ‘Section 25(7) of the Constitution confers a right to restitution and equitable redress but leaves the form and manner of redress to legislation. The legislative scheme confers upon the Minister and claimants a wide discretion to determine the manner in which the awarded land rights are to be held or compensation to be made. Neither a claimant nor a community may insist as of right on original land dispossessed. Whether property restitution of equitable redress to historical dispossession is appropriate in any case is bound to vary and be subject to the specific context’ (Constitutional Court of South Africa, 2006, accessed via website <http://www.saflii.org.za/za/cases/ZACC/2006/14media.pdf> on 9 December 2012).

<sup>37</sup> The District Six financial compensation awards have followed the same procedure and rules applied in restitution projects across South Africa. As per S42D of the amended Restitution of Land Rights Act, and the DLA Standard Settlement Offer Policy, claimants that qualify for restitution and choose a financial award are offered a settlement amount calculated on a sliding scale according to the property that they lost by the Commission on Restitution of Land Rights, and the settlement is finalized with the signing of a Section 42D Settlement Agreement and a Proof of Payment document (a ‘receipt’ that is signed by the claimant and the departmental official

Although the S42D Framework Agreement was itself not a full and final settlement with claimants (this role was played by the S42D Settlement Agreements described below), it did have certain binding outcomes. Firstly, it entrenched a singular redevelopment approach, with no provision for individual claimants to develop land privately. Secondly, it mandated a three-way arrangement of authority to implement the integrated redevelopment option, with the District Six Trust positioned as the representative for claimants, and with similar decision-making powers to those conferred on the local and national government signatories<sup>38</sup>. Thirdly, the document serves as an agreement between the state and claimants on amounts for monetary settlements of claims<sup>39</sup>. Finally, it sets a host of further procedural administrative steps to be followed in order to give effect to restitution<sup>40</sup>. Through these key formal and conceptual linkages to constitutional discourse, the S42D Agreement therefore purports to legitimize the arrangement of power and set key terms in the redevelopment on the basis of the specific provisions of Section 42 D of the Restitution of Land Rights Act, on the basis of more general legal principles of contract.

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making payment). The District Six financial settlements were carried out in terms of the Commission's 'Standard Settlement Offer Policy' (which defines the financial settlement offer as 'a "recognition" of rights lost, not an attempt to calculate exactly what was lost'. According to the policy document, this standard settlement offer for financial compensation to restitution claimants was developed from the year 2000 because of challenges presented by the method of calculating financial compensation by establishing historical under compensation, including, 'lack of historical material to "reconstruct" the past'; 'historical valuations if done on an individual scale, were quite expensive and time-consuming'; and because attempts to restore 'exactly what was lost by the Claimant' often resulted in 'complicated formulae being applied in order to establish value'. As such, the 'Standard Settlement Offer Guidelines' provides for the calculation of financial awards by the Land Commission on Restitution of Land Rights on a 'sliding scale' basis, with the amount calculated based on the square meterage of the property lost due to racially discriminatory laws. According to the 'Restitution Policy Guidelines for Finalising Claims for Restoration of Land' developed by the Commission specify which factors should be considered and what options can be exercised in order to give effect to this new provision in the Act, claimants can be offered financial compensation, restoration of their rights in land (either the same land lost through unjust means or an equivalent piece of land if the original land is unavailable), or a combination of the two.

<sup>38</sup> As a signatory to the S42D Framework Agreement the Trust is described as a 'voluntary association established by land claimants on 8 August 1998 for the purpose of resolving their claims pursuant to forced removals from properties previously occupied by them or their ancestors in District Six. With the established of a formal trust in 2003 with a deed lodged with the master of the High Court includes in the description of its 'purpose' to 'assist the individual beneficiaries in acquiring land rights' (3.3.4), and also 'assist, investigate and negotiate with any interested party to improve, establish and protect the rights of Beneficiaries in particular, but not limited to, the validation and approval of land claims in respect of District Six; [and] the upgrading of tenancy rights to ownership rights, (3.3.6 – 3.3.6.3)'. The Trust Deed's definition of its beneficiary and its purpose does not end there, however, as the following chapters will show.

<sup>39</sup> Clause 6 notes that 'the STATE and the Claimants have agreed to the value of the compensation to be received by the claimants, as R17 500,00 per land right lost' (6.1). The agreement also calculates that there are 1698 claimants, of which 50% desire a financial award, amounting to R14.85 million in payments, and a further R22.57 million for 'redevelopment award costs' and R1.22 million for a 'planning grant'. (6.2). It is noted that this may change as the number of claimants electing to return changes, and will also be affected by changes in funds available following the settling of ownership claims. It is also noted that 'the extent to which the Designated Land shall be redeveloped in terms of this Agreement from State funds shall be determined according to the total monetary value of the Claimants claims set out in the Claimant Settlement Agreements.' (6.4).

<sup>40</sup> Apart from plotting a formal path for further contractual arrangements ('implementation agreements') to finalise individual claims under Section 42D of the Act (clause 5.1.1), there is also provision in the S42 D Agreement for a 'Fund Administration Agreement' (5.1.2) and a 'Development Agreement' (5.1.2), which would allow for due handling of state resources during the redevelopment process in terms of the Public Finance Management Act (1 of 1999).

### 3.3. Re-Inscription of the Subjects, Objects and Rules of Restitution in District Six - The Pilot Projects

With the confirmation that restitution in its constitutional sense would proceed in District Six, and the contractual formulation of its terms in the ROU and Section 42 D Framework Agreement, the award of an object of restoration to restitution's subjects was governed by a further set of contractual documents. From 1999 onward, the settlement of claimants' restitution claims against the state was legally settled between the state and claimants by means of individual Section 42D Settlement Agreements (not to be confused with the S42D Framework Agreement) signed by the claimant and the Commission on behalf of the Minister of Land Affairs.<sup>41</sup> These Settlement Agreements either 'awarded' claimants (as defined in restitution legislation)<sup>42</sup> a monetary amount (calculated as per the formula set out in the earlier S42D Framework Agreement)<sup>43</sup> or a specific piece of land in a District Six 'integrated redevelopment' (paragraph 3.1), and stipulate that the award is in final settlement of the individual claim (paragraph 1.2). In the case of physical restoration of land the object restituted is defined as 'title' to a piece of land in District Six identified by an 'erf number' and position in urban layout diagrams of District Six, together with a restitution support grant as defined in Section 42C of the *Restitution of Land Rights Act*<sup>44</sup> (paragraph 3.1).

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<sup>41</sup> The full title is 'Agreement for the Settlement of District Six Land Claims in Terms of Section 42D of the Restitution of Land Rights Act No.22 of 1994. I will refer to this as the S42D Settlement Agreement for the remainder of this chapter. Each contract contains the same wording, and awards a specified amount of money to the claimant as 'final settlement' of his or her claim. The definitions for the contract (see paragraph 2) are directly drawn from the Constitution and the Restitution of Land Rights Act (including the role definitions of National Government departments and Ministers), and from government financial procedures prescribed under the Public Finance Management Act (1 of 1999). The S42 D Settlement Agreement is signed by the Commissioner acting with delegated authority by the Minister of Land Affairs, consistent with S42D of the Act which grants this authority to the Minister or a delegate. The claimant's rights to restitution are likewise described and legitimized in specifically statutory terms (in relation to the Restitution Act in paragraphs 1.1, 1.3, 1.4).

<sup>42</sup> To be precise, the agreement identifies claimants as having 'a right to restitution of rights in land because... they were dispossessed of registered rights in land by a Proclamation in terms of the Group Areas Act in the mid- 1960s... they lost these rights as a result of racially discriminatory laws and practices as contemplated in section 2(1)(a) of the Act' and 'the State, represented by the Regional Land Commission on Restitution of Land Rights, Western Cape, accepts that the Claimants did not receive just and equitable compensation at the time of the dispossession' (Paragraph 1.4).

<sup>43</sup> Financial settlements were made with approximately 50% of claimants in District Six, and followed the same principles as other claims around the country (Department of Land Affairs, 2001).

<sup>44</sup> S42 C of the *Act* allows the Minister of Land Affairs to 'grant an advance or a subsidy for the development or management of, or to facilitate the settlement of persons on, land which is the subject of an order of the Court in terms of this Act or an agreement in terms of section 14 (3) or 42D, to- (a) any claimant to whom restoration or the award of a right in land has been ordered; (b) any claimant who has entered into an agreement contemplated in section 14 (3) or 42D; (c) any person resettled as a result of an order of the Court.'

With the signing of a Section 42D Settlement Agreement, the Minister of Land Affairs (or a delegate) settles the legal restitution obligation and relation with the claimant, leaving those who accepted financial awards to either utilize the funds they had been awarded, or those who choose to return to participate in the ‘integrated redevelopment’ of District Six. The claimant is not obliged, in this document, to engage further with the Commission in order to receive their award in land. As a ‘full and final settlement’, the Commission’s only remaining responsibility is to pay the resettlement grant, ensure transfer of the land has taken place, and for the Minister to exercise first right of refusal on resale of the property for a 10 year period.

Although settlement of the claimant’s legal claim against the state is defined as a title to a piece of land in District Six ‘awarded’ by the state, in practice the stipulation that the ‘award’ be made via inclusion in an ‘integrated redevelopment’ complicated this object of restitution, and placed claimants as subjects of restitution in a complicated contractual situation awaiting their place in a redevelopment not managed by the state. The redevelopment began in the form of ‘pilot projects’ on the site executed by the District Six Trust as developer.

The pilot projects, through which the object of restitution was to be awarded to claimants, were formalized in a 2006 ‘Land Development Agreement for the first and Second Pilot Projects’ between the local government as land holder, the District Six Beneficiary and Redevelopment Trust as developer, and the Commission, representing the Minister of Land Affairs. This resulted in claimant access to their restitution award becoming dependent on being allocated a place in the redevelopment by the Trust, for which they were required to contract with the Trust.

While the property law basis of restitution continues to inform the agreements for redevelopment work in District Six,<sup>45</sup> the texts introduce further conditions and

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<sup>45</sup> The document’s definitions are drawn directly from constitutional and legislative orders of discourse, including the definition of ‘claimants’, which includes both former tenants and owners, extending the reach of the project beyond the terms of the S 42 D agreement of 2000: “claimant” means the person who were previously tenants or owners in District Six, Cape Town who have successfully claimed restitution from the State in terms of the Act and who have elected to participate in the redevelopment of District Six Pilot Project and who are listed in “Annexure H” hereto (paragraph 2.2.17).

intermediaries that recast claimants as ‘purchasers’ of a house to be constructed in District Six, and position the Trust as a quasi-governmental authority for the settlement. More specifically, the Land Development Agreement confers legitimacy on the Trust to develop the District Six site, apply its ‘sole discretion’ to select claimants for inclusion in the project, to handle and transfer houses to claimants and the right to take funds from claimants to pay for the houses developed for them. It also enforces the Trust’s chosen urban designs and individual housing designs, commits the Department of Land Affairs to pay restitution grants to the Trust to help cover project costs, and requires the City to provide infrastructure and services. The local government is prevented from making restitution land available for redevelopment by any other party except through the Trust (clause 3.2.5). Thus restitution discourse, property rights discourse and government planning discourse continue to structure the documents, but the District Six Beneficiary and Redevelopment Trust’s assumes rights and roles of both government and claimants (including developer, selector, and recipient of claimants’ S42C grants), while individual claimants remain absent from the agreement.

This complication of the constitutional subjects, objects and rules of restitution is deepened when the Land Development Agreement is read alongside the contracts that would-be returnee claimants were required to sign with the Trust in order to gain access to their restitution award. The contracts in question, each entitled ‘Memorandum of Agreement’<sup>46</sup> (MOA), were signed by the claimant and the Trust, named as ‘developer’. These documents included a ‘social compact’, and entitles claimants to a completed house in the District Six pilot project, but requires payment of R60 000 from the claimant to the Trust, requires the claimant to conform with the provisions of a ‘social compact’ for the redevelopment, grants the Trust authority to ‘develop’ the property according to prescribed plans and also gives the Trust first right of refusal on the resale of property. The memorandum and social compact therefore effectively limit claimants rights in terms

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<sup>46</sup> This document is a standardised contract entered into between each individual claimant and the ‘developer’ (the Trust), entitled ‘Memorandum of Agreement ....Regulating the Construction of a House... in the Township of District Six at Cape Town’. The first of these contracts were signed by the Trust and claimants during the handover of the pilot projects (from 2004 onward), and each contract carries the same body text (with the exception of the name, erf number and signature of each individual claimant). Each MOA for the Pilot Projects includes a copy of the S42D Settlement Agreement as an appendix, and reference is made to it in the preamble of the MOA as one of the bases of the claimant’s *locus standi* as party to the agreement.

of financing, utilizing and reselling of their restored properties, and effectively position the Trust as *de facto* ‘intermediary’ for restitution of land rights in the District Six case.

At this point, several contradictions become evident between the textual inscription of restitution discourse in the claimant contracts and the MOA. On a basic level, the earlier texts inscribe the subject of restitution as validated ‘claimants’, while the MOA recasts claimants as ‘purchasers’, with financial and contractual obligations between the Trust as a third party. While the Section 42 Settlement Agreement grants the Minister of Land Affairs ‘right of first refusal’ on any resale of the ‘claimed land’ for a period of 10 years (in paragraph 3.2)<sup>47</sup>, the MOA provides for the Trust to enjoy and indefinite ‘first right of refusal’ (paragraphs 20.1 and 20.2). Where the Section 42D Settlement Agreement provides for a restitution grant to be paid to the claimant to assist him or her for ‘planning purposes’ (in paragraph 5.1, also drawn from the Commission’s ‘Restitution Grants: Guidelines’)<sup>48</sup>, the Land Development Agreement provides for this to be paid to the Trust (paragraph 7.2). While the Commission is expected to be the authority to adjudicate claims and the Minister the authority to make awards, the Section 42D Settlement Agreements leave claimants to contract with the Trust, and the Land Development Agreement grants the Trust ‘discretion’ to select beneficiaries (paragraph 6.1).

The ROU, S42 D Framework Agreement and the pilot project contracts therefore see ‘restitution’ in its constitutional sense deployed in a strategic manner that is gradually complicated with additional processes and intermediaries, rendering the subjects and objects of constitutional restitution discourse inscribed in the legal instruments conceptually unstable. They are increasingly subsumed under the ‘unifying’ impulse of the District Six Trust’s land activists, and their appeals to ‘rebuilding’ the lost community of District Six along historically imagined lines. As I will show in the ensuing chapters,

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<sup>47</sup> This provision is drawn from the Commission on Restitution of Land Rights’ ‘Policy Guidelines’ principle of ‘considering and including issues of development and sustainability’ in restitution (clause 5.4).

<sup>48</sup> The Commission on Restitution of Land Rights’ ‘Restitution Grants Guidelines’ policy document is based directly on S42C of the Act, and defines the parameters of grants for resettlement. Section 5 terms the grant a ‘Restitution Settlement Grant (RSG)’, and defines it as ‘a grant awarded to restitution claimants in order to assist claimants to plan for the acquisition, settlement on, use and development of restored land and to manage and secure their restored land’. The planning work includes ‘legal and financial planning, land use planning, infrastructure planning, and assisting with land purchase negotiations including the formation of a legal entity’ while managing and securing land includes ‘arrangements for relocation like transport and settlement’.

the Trust may have been formed with the express purpose of promoting the rights of claimant's as legal subjects of restitution, but its institutional form has imposed new roles on claimants, while elevating its former activist trustees to governmental roles. In turn, the new 'vision' for District Six envisaged by both the state and the Trust began to expand the terms of restitution's object of restoration well beyond the purposes of restitution (a phenomenon unpacked in detail in chapter 5).

### **3.4. Re-Inscription of the Subjects, Objects and Rules of Restitution in District Six – Return to the Land Claims Court and the Second Struggle for Legitimacy**

The gradual subsuming of claimants and their object of restoration under the Trust and its pilot projects led to a vigorous re-assertion of claimant rights under the Constitution when, in December 2007, an application to the Land Claims Court<sup>49</sup> was made by the District Six Advocacy Committee<sup>50</sup> to have the pilot projects Six halted on the grounds that the entire process undermined certain claimants' rights, particularly those of former land owners (although the Advocacy Committee did not address the issue of the larger number of claimant cases relating to dispossessed tenancy rights, which constituted the majority of claimants). The founding affidavit<sup>51</sup> by claimant Moegamat Majiet asks, *inter alia*, that the 'respondents be restrained from and interdicted from implementing its [sic] Tripartite agreement, entered into between the same on 26 November 2000, for as far as the redevelopment of District Six is concerned' (clause 2.4.1) and that the respondents be 'interdicted from continuing with and/or implementing any such activities with regard to the redevelopment of District Six, and as far as the Restitution Process with regard to District Six is concerned' (clause 2.4.2)<sup>52</sup>. The basis of

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<sup>49</sup> Case number LCC 145/07 in the Land Claims Court.

<sup>50</sup> The District Six Advocacy Committee identifies itself in its founding affidavit as 'a voluntary association that represents the plight of the Property Owners' (paragraph 58.4).

<sup>51</sup> The application comprised a notice of motion submitted by registered claimants Mogamat Amien Majiet and Hannah Manley (named as first and second applicants respectively), and a founding affidavit by Majiet. In the opening paragraphs of the founding affidavit Majiet purports to represent former land owners of District Six (paragraph 6), and the application is worded throughout as being on behalf of the latter. In their notice of motion the first to seventeenth respondents are named as the trustees of the District Six Beneficiary Trust, including Anwah Nagia, while the eighteenth respondent is the Commissioner on Restitution of Land rights: Western Cape, the nineteenth is the Director-General of Land Affairs, the twentieth is the City of Cape Town, and the twenty first is The Master of the High Court (presumably in its role as authority under which the Trust was formed).

<sup>52</sup> In addition, the application asks the court to order that 'the activities of the First Seventeen Respondents be suspended pending a forensic audit conducted by the Master of the High Court' (paragraph 2.1); that 'the cut-off date for the completion of the restitution process with regards to District Six, be it 28 February 2008 be extended, pending the investigation process of the activities of the First Seventeen Respondents and of all matters incidental thereto' (paragraph 2.2).

the Advocacy Committee's argument was that individual claimants, particularly former owner claimants, had been wrongly excluded from the state's contractual dealings with the Trust via the ROU, Section 42D Framework Agreement and Pilot Projects:

The Beneficiary Trust has signed the Tripartite agreement on its own, therefore it can simply not be true that the applicants and or any of the Property Owners could have been aware of the Framework agreement entered into as to the restitution of rights in land between the Beneficiary Trust, the Minister of Land Affairs and The City of Cape Town, on 26 November 2000 (paragraph 40.3).

Majiet supports his contention that claimants as the subjects of restitution have been undermined by the S42D Agreement and implementation of the pilot projects by arguing that restitution legislation required the state to settle claims directly with claimants, while claimants had not ceded their claims to the Trust: 'neither the Beneficiary Trust nor The Trust were ever mandated by the applicants and/or any of the Property Owners to act on their behalf' (paragraph 40.1. See also similar arguments in paragraphs 43, 49 and 51). As a consequence, the affidavit argues former owners wishing to return to District Six had been unfairly excluded from the restitution processes (paragraph 40.2). Majiet states that the action that ultimately prompted the Committee to form and approach the court was a post-facto endeavour by the Commission to rectify this discrepancy by obtaining a signed mandate from individual claimants for the S42D Framework Agreement formally accepting and endorsing its terms (paragraph 43).

In spite of being designated as one of the 'respondents' in the case, the City's affidavit (submitted by the municipal restitution manager, Pogiso Molapo, on 29 April 2007) supports the Advocacy Committee's assertion of individual claimant property rights in the redevelopment. The City's affidavit concurs with the Committee that the power enjoyed by the Trust is legally questionable given that each individual rights-bearing claimant should be able to enjoy restitution of his or her rights, and that anyone claiming to represent these rights-bearers would have to obtain formal legal authorisation to act on their behalf, by a 'ceding' of rights or 'power of attorney' under law:

The D6 Trust does not in fact represent all the individual claimants; and the Trust in fact admits that it does not represent the former owner claimants. Moreover, there is nothing in the Act (specifically in section 42D thereof) that entitles an organisation such as the D6 Trust to represent claimants in the conclusion of an agreement in terms of that provision. It is important in this regard to emphasise that the restitution claims to District Six are not a “community claim” within the meaning of the Act. The Framework Agreement in any event also does not, in an adequate contractual sense, constitute an agreed award to identified claimants. (Paragraph 78. Similar arguments occur in paragraphs 19-20, 29.6, 29.7, 69 and 74)

Molapo’s affidavit argues that the District Six restitution case does not fit the definition of a ‘communal claim’ in the sense applied in the *Restitution of Land Rights Act* (paragraph 24). Molapo maintains claimants would have had to have ceded each of their individual rights in land to the Trust, and even empirical evidence of *majority* support among claimants would not be sufficient from a formal legal point of view to make the trust into a representative of all claimants for the purposes of entering into legal agreements on their behalf (paragraph 70). As such, he argues that those claimants who have chosen not to settle their claims via the Trust have been unfairly excluded from the process, rendering the Section 42D Agreement legally invalid (paragraph 42).

In spite of the concerted reassertion of the letter of the law by the City and the Advocacy Committee, the Trust successfully defended its position and its pilot projects (in an opposing application and affidavit submitted by chair Anwah Nagia), acknowledging that the claim was not a ‘group claim’ in a legal sense, but de-emphasising the *de facto* limitations created by the ‘single development’ solution (or ‘integrated redevelopment’) embraced and driven by the state and trust under the Section

42D Framework Agreement<sup>53</sup>. The court left the status quo intact, with Judge Fikile Bam postponing the matter on 7 May 2008 *sine die* pending ‘further consultation’.

#### 4. Conclusions

Returning to the question posed at the outset of this chapter, it is clear that the objects, subjects and rules of restitution as a constitutional order of discourse have played a decisive role in the District Six case. The legal instruments governing the process reproduce the conceptual basis of restitution in property law by inscribing the object of dispossession as land rights, the subject of restitution as a rights-holding claimant, and the object of restitution a material claim for land or financial compensation against the state. The authorities and rules governing restitution (such as the Minister of Land Affairs, the Commission and processes set out in Section 42D of the amended Restitution of *Land Rights Act*) are likewise reproduced, and even in instances of contestation over the relative primacy of rights or over the correct procedures to be followed, the role of the Land Claims Court is accepted as a legitimate arena for contestation.

However, this chapter has noted that the deployment of constitutional discourse becomes increasingly inconsistent and conflicted as the process unfolded. Even in its early phases, it has tended to be partial and strategic, both within the affidavits and, more surprisingly, in the contractual documents governing restitution. In the multilateral contractual documents of the ROU and S42D Framework Agreement, as well as the Land Development Agreements, the Commission on Restitution of Land Rights, as custodian of claimant rights, the Minister of Land Affairs and the municipal government, all accept the District Six Trust as representative of all claimant rights-holders, without legal evidence that claimants had granted a mandate to the Trust to act as proxy (in the form of a power of attorney, for example). By so doing, increasing control was conceded to the

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<sup>53</sup> Nagia’s affidavit stresses the absence of coercion of claimant right-holders, and frames the S42D framework agreement and pilot projects as ‘voluntary’ and non-exclusive options created for claimants, while state individual claimants have had the ‘liberty’ to pursue their own method of restitution (paragraphs 37 and 56.2). This is supported by a formal legal distinction made by Nagia between the Section 42D Framework agreement, which sets out broad principles for the ‘integrated redevelopment’, and the specific, individual S42D Settlement Agreements, which are binding contracts that offer claimants final settlement by the Department of Land Affairs (paragraphs 33.1 and 33.2).

Trust over material and procedural elements of the District Six restitution process, putting it into competition with the role of the Commission and Minister of Land Affairs, *inter alia*, in terms of selection of beneficiaries and resale rights over the restituted properties respectively.

The subject of restitution, as claimants, shifts from individual rights bearers, to a 'beneficiary community', to 'purchasers' in the documents, as the state gradually shifts control over the redevelopment and access to land in District Six to the Trust as *de facto* proxy for claimants. The object to be restituted undergoes a conceptual shift away from individual restoration of land rights, toward a singular and particular 'integrated redevelopment' project, with specific housing and urban designs, and a requirement that claimants enter into complex contracts with the Trust in order to receive access to their restored rights in land. The rules of restitution, which designate it as a process of engaging in a claim against the state, with the Minister of Land Affairs as the designated representative of the state for this purpose, have been shifted to place a Trust as intermediary and quasi-governing body for the restituted object. These shifts in the inscription of the subjects, objects and rules of restitution point to the operation of meanings, identifications and legitimising discourses which fall outside of the very specific terms of the constitutional order of discourse for restitution. They have played a critical role in the space of governmentality within which District Six is situated. The task that remains is to map the dimensions of these heterogeneous discourses, and determine the products and outcomes of their interweaving with the 'legal' in this case.

# Chapter Three: ‘Community’ and Restitution’s Alternative Object of Dispossession

## 1. Introduction

The previous chapter identified the basis for a land restitution claim in post-apartheid South Africa as an unjustly dispossessed right in land, where ‘land right’ is defined in terms of South African property law. I described this as the ‘object of dispossession’ within the system of objects and rules that comprise restitution’s constitutional ‘order of discourse’ in Foucault’s sense. The current chapter will show, however, that the language used in the legal instruments of the District Six restitution process to describe the ‘object of dispossession’ interweaves lost property rights<sup>1</sup> with discourses of lost ‘community’ inscribed in decades of representations in literary, historical, media, and more recently, museum texts.

The outcome of this interweaving of the legal and historical imaginaries cannot be reduced to the legal. This chapter argues that it is, instead a hybrid object whose pervasiveness in the space of the court cases and contractual documents speaks to the legitimacy of these constructions of lost ‘community’ among the parties concerned. The genesis of the discourse, and the outcome of its permeation within the space of the legal is analysed with the aid of British literary critic Raymond Williams’ method of unpacking ‘keywords’. In his 1983 *Keywords: A Vocabulary of Culture and Society*, Williams argues that in the language we use some pivotal terms or ‘keywords’ develop historical force and become ‘binding words’ (1983: 15) that shape ‘actual alternatives in which problems of contemporary belief and affiliation are contested’ (ibid: 22).

Drawing on William’s understanding of ‘keywords’ and his assumption, in his earlier work *Culture and Society 1780 – 1950*, that in the realm of political discourse, ‘our vocabulary, the language we use to inquire into and to negotiate our actions... is a practical and radical element’ (1979: 323), I argue that the ability of ‘community’ to compete with the

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<sup>1</sup> To recall, the *Restitution of Land Rights Act of 1994* cites the loss of ‘any right in land whether registered or unregistered’, including tenancy, ownership, or occupation of land for business, work or agriculture’ as the basis for a restitution claim (Chapter 1 Section 1(xi)).

constitutional order of discourse within the texts of the legal instruments lies in a combination of factors. Firstly, the construction of District Six via mapping, census, museum and published texts as a micro or sub-national ‘imagined community’, to adapt Benedict Anderson’s term from his 1983 *Imagined Communities: Reflections on the Origins and Spread of Nationalism*<sup>2</sup>, has lent credence to readings of its former residents as a unified body. Secondly, as an imagined space and symbol of lost unity, it enjoys fitness to fill the symbolic deficit left by the legalistic, rights-based restitution process. Finally, the specific positive connotations attached to ‘community’ as a construct have rendered the term particularly enduring, presenting a virtually unassailable basis of legitimacy in the face of challenges from the state or individual claimants.

This chapter opens by surveying the instances where ‘community’ serves as a ‘binding’ keyword alternative to legal conceptions of ‘land rights’ in the legal instruments of the District Six restitution process to describe what was lost through apartheid era forced removals. My analysis then proceeds to examine how these uses of the term ‘community’ developed and gained historic credibility in the texts produced by historical accounts of the site, literary works by prominent authors such as Richard Rive, David Kramer and Taliep Petersen, the print media and the District Six Museum. I argue that this production and reproduction of historical power-discourse developed through a process of condensation of meanings, a process which Williams describes as the selection of meanings that ‘fit’, and the exclusion of ‘meanings which [are] inconvenient’ (1983: 17).

The chapter argues that the vocabulary of ‘community’ as a unified ‘collective’ has had material consequences for restitution praxis in District Six, helping to generate a *de facto* ‘collectivisation’ of District Six’s redevelopment under a single, integrated redevelopment. This arrangement has been fixed in contracts entered into between the Trust and the state which position the former as the single representative for claimants, including the 1998 Record of Understanding, Section 42D Framework Agreement of 2000, and the Land Development Agreement for the first and second pilot projects on the site (2006). The encounter between the historic imaginings of District Six’s lost community and the legal notion of ‘lost rights’ have therefore come together in this instance to produce a new set of

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<sup>2</sup> First published in 1983, republished 2003.

fundamental governing principles for the redevelopment that go beyond restitution's legislative provisions.

## 2. 'Community' as Restitution's Alternative Object of Dispossession

A number of scholars of restitution in South Africa have noted that conceptions of lost community have proven more compelling for restitution claimants, and even some state officials, than the narrow 'property rights' discourse of the state's restitution programmes. 'Lost community' is described as a critical component of the narratives of 'loss and return' posited by Du Toit (2000), Walker (2008) and Fay and James (2010) that I have discussed in previous chapters. For example, Du Toit argues that this narrative rests on 'the notion of a unitary, organic and harmonious community' that has been lost and will be restored (2000: 82). He finds that:

the neighbourhoods and communities which were destroyed are often described in idealized, romantic and evocative terms, and the ways in which these accounts emphasise the racial harmony, the spontaneous generosity, and the vibrancy of these communities often work to make them a function of the metaphors of the unified non-racial society we are thought to be aiming for today. (Du Toit 2000: 81)

In turn, Walker has noted that 'simplistic notions of a unitary 'community' as the social basis of group claims, so prevalent in both state and civil society talk, frequently obscure the very different interests and experiences of the individual members of these groups.' (Walker 2008: 23). In the case of District Six, this language of 'lost community' has been able to 'cross over' into the realm of legal discourse, not only obscuring 'different interests and experiences', but setting up new systems of dominance and subordination among claimants, with increasing acquiescence from the state.

The role of 'community' as a keyword in the legal texts of the District Six restitution case first becomes evident in the documents of the 1996-1997 Land Claims Court case, where the term is used by both applicants and opponents as a rhetorical strategy during the contestation. Indeed, in *Keywords* Raymond Williams has noted that 'community' often features in political discourse as a vague but compelling term, a word that tends to be 'warmly persuasive', even when its precise meaning is left undefined (1983: 76). However, in the

court case, the term itself became contested, starting out as a broad signifier of the ‘public interest’ in the state’s application (including the interests of claimants, civic organizations and current residents in the area of District Six), and shifting, in the language of the opponents and final facilitators’ report, as a signifier of a singular or authentic, unified body comprising the lost community of District Six.

The application to have restitution set aside in favour of a state-led redevelopment appears to have anticipated the force that the notion of ‘community’ exerts in the context of District Six. The founding affidavit is at pains to emphasise that it has ‘consulted’ the community, that it has made the application in the interests of the ‘community’, and would establish structures to continue to ‘promote and to ensure maximum and transparent community involvement in the planning and redevelopment of District Six’ (paragraph 66). Even the organisation established by the municipal and provincial governments with other civic bodies to drive low cost housing developments in District Six and other parts of the City bore the moniker ‘Cape Town *Community* Land Trust’. However, this strategy foundered on the lack of political currency attached to the state’s ‘version’ of ‘community’. In the affidavits, the term refers variously to residents or organisations currently in or adjacent to District Six, claimants or potential claimants, the general public, and also low income housing beneficiaries<sup>3</sup>.

### **3. Which Community?**

The opposing application by the District Six Restitution Front’s Anwah Nagia shifted the terms of the debate away from the ‘public interest’ notions of community applied in the rhetoric of the state, toward an emphasis on the plight of one singular, specific community – namely the ‘dispossessed community’ of District Six. The object of dispossession in District Six is described as a ‘once vibrant and socially integrated society’ (paragraph 4.4), while the state is positioned outside of, and in antagonism to, this community: ‘the old habit of the authorities deciding what, in the authorities opinion, is in their best interest and in the interest of the public, without proper consultation...should be avoided at all costs’ (paragraph 4.4.14).

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<sup>3</sup> In paragraph 64 of his affidavit, Basil Davidson states that the Cape Town Community Land Trust had been ‘in discussion with community and other organizations with an interest in District Six. The Trust approached these organizations and has facilitated the formation of the District Six Development Forum (“the Forum”). Ex-resident organizations are now (together with other organizations) negotiating with the Trust on how the area can be developed and on the identification of an appropriate beneficiary selection criteria’. In paragraph 66 the members of the forum are listed as ‘various organizations and institutions (whose names, contact persons and their addresses from Annexure “A”) which together represent residents, ex-residents, schools, churches and mosques. The Forum does not exclude the possibility of claimants or prospective claimants joining the Forum (through an appropriate organization)’.

Nagia's language of singularity and unity further extends to notions of authenticity when the community structures referred to by the state are dismissed as 'dummy organisations'. Nagia's contention is that the 'displaced community should be at the forefront' of the redevelopment (paragraph 4.4.14). This argument prevailed with the withdrawal of the application. The facilitators reported to the court that 'the motivation for... withdrawal of the Section 34 application is that, firstly, one of the bases of the original application, i.e., the supposed non-existence of 'a community' in terms of Act No 28 of 1996 (Sections 1(iv) and 2(d)) no longer holds'.<sup>4</sup> In one of the only existing analyses of this case, Canadian anthropologist Christiaan Beyers has noted that 'ownership' of the legitimate voice of 'the community' was at the heart of the Section 34 court case, since this determined whose version of the 'public interest', the state's or the opponents', would prevail, an encounter he describes using Pierre Bourdieu's concept of a 'classification struggle':

As a result of the [land reform] programme prioritization of cases where a unified group of "community" mobilization is in evidence, there was considerable competition by different organizations and agents to position themselves as 'the community's' most legitimate representative. These struggles for hegemonic position among Applicants and Opponents, and among Opponents themselves, can be usefully viewed as what Pierre Bourdieu calls 'classification struggles' namely, efforts by various agents to constitute groups in order to gain access to, to accrue, and/or to produce economic, social and cultural capital. The biggest stakes of such political struggles are the categories of perception: the social group is thus itself an instrument of struggle. (2007b: 255)

For Beyers, the outcome of the mediation process and withdrawal of the application saw the opponents achieving 'hegemonic status' by 'successfully positioning itself in the centre of "community"-building efforts, and harnessing symbolic-discursive ideas of the restitution of "community" in popular and official discourse, and in the media at large' (2007b: 262).

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<sup>4</sup> In July 1997, the applicants withdrew the Section 34 application (in a simple Notice of Withdrawal), and a Facilitators' Report, compiled by Dr Neville Alexander and Dr Elaine Clarke, was submitted to the court on 14 July 1997 noting an 'agreement' to proceed with restitution in constitutional sense.

#### **4. The ‘Single Redevelopment Solution’ – The Body of the Community and its Collective Claim**

As the restitution process unfolded, the designation of the object of dispossession in District Six as a singular and authentic ‘community’ is reproduced in the contractual documents for redevelopment, subsuming property rights as the object of dispossession. The critical outcome has been the shaping of ‘actual alternatives’ (Williams 1983: 22) in this process, shifting its terms to a *de facto* ‘collectivised’ claim, single redevelopment, and single decision-making mechanism for claimants in the form of the Trust.

The 1998 Record of Understanding for restitution in District Six, for example, is entered into with the state by the trust acting on behalf of claimants, with the latter described as a ‘dispossessed community’, distinct from any individual claimant, or the ‘broader disadvantaged community’ mentioned in the text (paragraph 1.3). Individual claimant rights-holders are also absent from the list of signatories to the agreement.

The ensuing S42D Framework Agreement (of 2000) to give ‘effect’ to the ROU is likewise signed in the absence of individual claimants by the Trust as ‘representative’ of former tenant claimants, and indicates that the state has accepted ‘the claims of the Claimants as a group’ in terms of Section 42D of the *Restitution of Land Rights Act* (clause 2.3). The agreement mandates a collectivised means of settling the restitution claim in District Six, inter alia, by means of a ‘Development Agreement’ for an integrated redevelopment of District Six, to be executed between the Trust and the state (Clause 11). This provision for a singular ‘integrated redevelopment’ to settle restitution in District Six was put into effect in the form of the first and second pilot projects for the site, mandated by the 2005 Land Development Agreement, and regulated as a social project under the ‘social compact’ formulated by the Trust for each claimant to sign.

The collective management of District Six claimants in these contractual documents, and the trust’s role as proxy and governing body for this community, is congruent with the trust’s definition of itself in its founding Deed, which designates the organisation’s legal beneficiary as a ‘dispossessed community’ (paragraph 1.2.3), used interchangeably with ‘beneficiary community’ (ibid). The Deed describes the Trust as a body formed to redevelop the site for ‘the members of the community forcefully removed from District Six’ (preamble paragraph

4). As such, the ‘collectivising’ implications of community appear to have been internalised by the parties in their inscription of a final ‘object of restitution’ in District Six.

A recurring trope that appears through the legal documents around this stage of the restitution process is a set of metaphors that describe the lost District Six as a violated or ‘dismembered’ living ‘body’ which is to be ‘healed’. The preamble of the District Six Trust Deed, for example, describes how government officials ‘*dismembered* entire communities’ (my emphasis) precipitating ‘social disintegration’ (ibid) that the Trust seeks to ‘heal’. This personification of ‘community’ invokes the fundamental unity of the human body, which is first and foremost, a singular unit. It furthermore, invokes an organic conception of community, pointing to the ‘naturalness’ of its cohesion. While this metaphor usefully captures the tangible nature of social cohesion in sociological and historical accounts<sup>5</sup>, in the context of District Six, its emotive force is co-opted and reconfigured to naturalise the unified governance of the redevelopment.

The poetics of a living ‘community’ lost in District Six are not limited to the discourse of the Trust. They are used by the state as well, indicating acceptance of this figure. In its ‘Motivation for an Integrated Development’ attached to the 1996 Section 34 Court Application, for example, the authors (from the municipal planning offices) argue that one of the virtues of a state-led redevelopment will be to restore District Six’s lost ‘life’ to the city: ‘an integrated redevelopment will not only provide additional housing and employment opportunities but bring life back into the city. This life died with forced removals and the trend towards suburbanization’ (page 4). Similarly, the history of District Six furnished to the court by the state in this case (in Davidson’s affidavit) contains a number of references to the unifying traits of District Six’s community, including its ‘culture of sharing’ (paragraph 17), its ‘communal consciousness’ (paragraph 17), its lack of ‘class divisions’ (paragraph 18), its ‘religious and cultural diversity’ (26), and the argument that its ‘urban structure was an integrated one’ (paragraph 19).

The state therefore appears to have shared the view held with the activists in opposition to the case that the site was primarily a unified entity, and subsequently accepted the Trust’s assertion that it represented District Six’s dispossessed community as a single body. The

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<sup>5</sup> In Chapter 5 I compare this to Ferdinand Tönnies’ famous notion of ‘*Gemeinschaft*’, for example.

ROU, Section 42D Framework Agreement and Land Development Agreement impart considerable power to the Trust in the restitution process by virtue of granting formal recognition to its role as the only 'party' to each of these agreement. No other development agreements for any of the gazetted restitution land in District Six have been permitted.

In 2007 the notion of a unified 'community' was again deployed by Nagia in the Land Claims Court to defend the role it had attained via the Section 42D Framework Agreement, this time in the face of the District Six Advocacy Committee's challenge to the *de facto* 'single redevelopment' solution that the state had acceded to in District Six. As the previous chapter noted, the Advocacy Committee maintained that the signatories to the S42D Framework Agreement from the District Six Trust did not have legal standing to represent all claimants as a group. The Committee therefore denied that the Trust could hold and develop land on their behalf because the claim was not a 'communal claim' in the legal sense, but rather a collection of individual claims. The Advocacy Committee's position was supported by the local government, which lent further strength to their case:

Section 42 D(2) of the Act stipulates that if the claimant contemplated in subsection 1 is a community, the agreement must provide for all the members of the dispossessed community to have access to the land or the compensation in question, on a basis which is fair and non-discriminatory and which ensures the accountability of the person who holds the land, or compensation on behalf of such community to the members of such community. The City does not consider the claims in respect of District 6 land to be a community claim in the sense of the word used in the Act. (Paragraph 24)

Nagia's strategy to counter this reassertion of individual claimant rights is particularly telling, demonstrating the centrality of historical imaginings of 'community' in structuring the course of the restitution process toward a collective process and 'single redevelopment' solution. Firstly, he asserts the collective nature of the loss precipitated by forced removals in District Six, downplaying the significance of differences in individual property rights lost. In his opposing affidavit to the Advocacy Committee's application, he states that:

Tenants would have been left without any option but monetary compensation without an integrated plan which allows for all claimants to exercise an election as to the

manner of restitution they would prefer. Any course of action in terms of the misapprehension of the +/- 300 property owners would have excluded tenant claimants and would, in my humble opinion, effectively have amounted to discrimination against them in that the underlying message would have been that because they had not owned property and merely been tenants that their forced removal was of less significance than that of persons who had owned property. (Paragraph 53.3)

Nagia's emphasis on the equal importance of former tenant and owner claims alludes to principles of symbolic loss and violation of agency, home and community, and de-emphasises the more narrow legal focus on the specific property lost. It is consistent with a position expressed by Nagia early in the restitution process, where he called for claimants to 'pool' their claims and eschew class divisions in an interview with the District Six Museum:

Class prejudices are expressed today through the land restitution process by former owners rather than ex-tenants being more likely to make land claims. Property owners, Nagia says, should be mindful of the fact that they were able to own land because others, more especially Africans, were not legally allowed to do so. To ensure greater equality, the District Six Beneficiary Trust demands that property owners place their land in a pool claim alongside that of tenants as forced removals created victims equally in both groups. Ultimately, he says, claims for compensation are a political statement too – a rejection of the flawed attempts to create a society divided by race and class. (Nagia 1999: 6-7)

A second strategic step in Nagia's response to the Advocacy Committee is a critique of the applicants' break with the solidarity of the 'community' through the use of emotive terms such as 'dissenters' (paragraph 45) to describe claimants who raised concerns about the process. The members of the Advocacy Committee are therefore positioned as marginal and insignificant voices, possibly even insubordinate of the authority of the Trust and the unified restitution strategy. Nagia ties this to a 'straw man' positioning of the applicants as self-interested individuals seeking preferential treatment over former tenant claimants, opposed to the collective and generous 'spirit' of restitution:

The Trust has at all times entered into negotiations with the specific intent that no claimant be prejudiced. Applicant appears to want owner claims to take precedence over tenant claims. In my respectful view, this is not in line with the spirit or aims of restitution. (Paragraph 56.3)

This line of argument is contiguous with a similar statement made by the Trust a year earlier during one of the vitriolic encounters between claimants that had led up to the court case. During the meeting, chaired by the Regional Land Claims Commissioner, Nagia and other trustees had their ‘credibility questioned by disgruntled claimants’, and offered to hand in their resignation, an episode that prompted one of the Trustees, Nadeem Hendricks, to comment that the tragedy of the meeting was ‘the level of materialism that was revealed at the expense of community interest’:

Most people were just concerned about what they would get out of the land restitution process, which was very disappointing. But perhaps such materialism is to be expected. However, I still believe that most people support the process in the spirit of community<sup>6</sup>.

The juxtaposing of the ‘spirit’ of community with banal ‘material’ ownership, serves in this instance, much like the metaphor of the body, to assert a higher value of community that supersedes rights in land (where land is a mere inert or dead ‘thing’). This value of restoring community is therefore held out as a political project of greater importance than restitution as narrow restoration of land rights, subsuming the individual under the collective. Its singularity and authenticity co-occurs, overlaps and sometimes elides property rights in describing restitution’s discursive ‘object of dispossession’ in District Six.

Where this reading of community has redefined the claim as a ‘collective’ claim, to be settled through collective decision-making, under a single representative body, and a single ‘integrated redevelopment’, it has helped shape the course of the restitution process. Indeed, the Trust has gained much of its standing as a legal person in this process, contracting with the state. This can be understood by contrasting the Trust’s particular standing in the process with that of the state actors. The local and national governments gain *locus standi* to act as

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<sup>6</sup> (*Voice of the Cape* ‘District 6 Trust resigns en masse’ 30 October 2006, accessed online via <http://www.voefm.co.za/public/articles.php?Articleid=22798> on 30 March 2010).

signatories to the ROU, Section 42D Framework Agreement and Land Development Agreement by virtue of their formal legal standing as government entities, and, in the case of the National Government, the specific legislated role of the National Minister under Section 42D of the *Restitution of Land Rights Act*. The order of discourse that identifies them, and legitimizes their role in the process is the Constitution and subsidiary legislation. The Trust, however, contracts with the state as a legal representative of claimants, in a manner that resembles a juristic person holding claimant property rights, rather than as a civil society advocacy body.

The state's acceptance of a collective agreement with claimants, and the Trust as its proxy, may appear to have been supported by evidence presented by the Trust of broad (if undefined) support from claimants. As we will see in the next chapter, the Trust's credentials in this regard were chiefly drawn from its history of activism and the advocacy role of its trustees in the Section 34 Court Case, as well as the trappings of democratic support in the form of the trust's election by a sector of former District Six residents held in the District Six Museum, in December 1997<sup>7</sup>. However, the election of the Trust was neither exhaustive of potential claimants (a fact conceded by Trust in an annexure to its Deed of Trust)<sup>8</sup>, nor did it serve as a formal ceding of claimant land rights to be 'held in trust'. Equally, the provision in South African legislation for 'communal' restitution claims did not apply in this case, ruling out a legalistic explanation for the collectivisation of restitution under the Trust. The provision for the restitution of dispossessed 'communal' property rights', and provision for shared property rights under customary law to be converted into communal property rights under the *Communal Land Rights Act 11 of 2004* define community as 'a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group'. In the case of District Six, however, the forced removal dispossessed a diversity of rights in land, including former land owners with title deeds under the *Deeds Registries Act*, tenants with contractual lease-holding agreements and traders with trading rights. Similarly, while dispossessed communal land rights restored to the community in question under the *Communal Land Rights Act* are transferred by the Minister of Land Affairs 'by means of a Deed of Communal Land Right or other appropriate deed' to a

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<sup>7</sup> According to reports on the meeting, the Trust was elected by around 1000 people at the Museum: 'Former District Six residents are a step nearer restitution for being uprooted from their homes under the Group Areas Act after the election of a beneficiary trust. Nearly 1 000 people attended a meeting of the Interim Beneficiary Trust in the District Six Museum on Saturday. Land restitution chairman Anwah Nagia said the establishment of a democratically elected beneficiary trust was an important step' (Cape Argus, 8 December 1997 'Uprooted District Six people a step nearer justice').

<sup>8</sup> The Deed describes its constituency as 'a mass of some 26 000 persons who, at this stage have not yet been properly identified' (Deed Annexure Paragraph 1).

Communal Property Association (under the *Communal Property Associations Act 28 of 1996*)<sup>9</sup> or similar body, restituted property rights in District Six have been restored to individual title holders under the *Deeds Registries Act*.

If neither democratic nor legal principles lend force to inscriptions of ‘community’ as the object of dispossession in the legal instruments of the District Six restitution process, the basis (or bases) of legitimacy to which these inscriptions of community appeal (and entrench) must be sought elsewhere. Given the centrality of District Six’s history of ‘community’ lost as a rhetorical strategy throughout the restitution process (and the assertion that its ‘community’ was unitary, specific and authentic), it is to historic instances of the term that my analysis now turns.

## **5. Historical Development of Community as keyword in District Six**

The various inscriptions of the District Six ‘community’ in the legal instruments as a specific, singular and unified social entity refer to a community that no longer physically exists. Instead, it is a variety of Benedict Anderson’s ‘imagined community’ (2003: 6). Although Anderson’s work largely concerns itself with national communities, his observation that ‘all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined’ (ibid) usefully points to the crucial role that *representation* plays in the formation of a political community (even in the most basic sense of a ‘neighbourhood’, which implies designation and contestation of who is included and who is excluded in a broadly recognised social unity)<sup>10</sup>. In the case of District Six, this is particularly apt, given the absence of all but a handful of buildings and people residing on the current site of District Six. Anderson uses the example of how historical literature shaped the French Revolution into an ‘event’ in order to illustrate how an imagined community is formed in discourse:

The overwhelming and bewildering concatenation of events experienced by its makers and victims became a ‘thing’ – and with its own name: The French Revolution. Like a vast shapeless rock worn to a rounded boulder by countless drops of water, the experience was shaped by millions of printed words into a ‘concept’ on

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<sup>9</sup> In terms of this Act, "holding of property in common" is defined as ‘the acquisition holding and management of property by an association on behalf of its members, in accordance with the terms of a constitution’ (Act definitions).

<sup>10</sup> It may be that further consideration of the limits of community through an analysis of Hegel’s *System of Ethical Life and the First Philosophy of Spirit* (1979) and *Elements of the Philosophy of Right* (2003), or Helmuth Plessner’s *The Limits of Community* (1999) would yield interesting results for the idea of restitution, although beyond the scope of the current thesis.

the printed page, and, in due course, into a model. Why 'it' broke out, what 'it' aimed for, why 'it' succeeded or failed, became endless subjects for endless polemics on the part of friends and foes. (2003: 80)

At the time that restitution commenced in District Six, its 'community' had equally been 'shaped by millions of printed words into a 'thing'. Indeed, its construction in discourse has involved much of what Anderson calls the 'grammar' of place and people, through mechanisms such as the map, the census, and the museum (2003: 163-164). All three mechanisms have been applied to District Six, although in very different ways in different eras. The site was first named and mapped as District Six in 1867, when the British administration (under Sir Philip Edmond Wodehouse) divided Cape Town into six districts (Bickford Smith 1987). This designation of the site as 'District Six' remained, even after the name of the site was dropped in ensuing decades. In addition to mapping, a census was conducted under National Party rule ahead of forced removals, and the District Six Museum was established after the fall of apartheid (in 1994). In the context of District Six, as noted in the introductory chapter of this thesis, we can add a string of historical publications, literary works and popular media reports to the mechanisms of mapping, census and museum that define 'imagined community'. A brief survey of how 'community' figures in this history of discursive production illustrates how it developed its specificity and credibility in relation to District Six, allowing it to transform property rights and generate a new hybridised object of dispossession in the legal texts, in spite of the current physical absence of community in the geographic area mapped as District Six.

### **5.1. Community during the Forced Removals: The 1960s to the 1980s**

At the time of the proclamation of District Six as an exclusively 'white' group area on 11 February 1966, District Six became the focus of intense attention in the print media. While earlier reports on the site tended to focus on debates over its living conditions, municipal proposals for urban renewal, or accounts of gang activity, by the early 1960s print media reports on the topic became increasingly concerned with the planned destruction of the site, mostly taking a negative view of the actions of the apartheid state. A number of these reports employed descriptions of 'community' in District Six as a 'vibrant', integrated whole in order to emphasise the disruptive and harmful effects of the state's interventions, and the loss it would incur for Cape Town. For instance, in April 1964, with growing rumours of the

impending proclamation of District Six, *The Cape Times* takes a clear position on the value of the area under the bold headline ‘District Six: Destroy it and Cape Town will Become a Ghost City’: ‘Purely in the context of our multi-racial situation, it is one of the few realities left in South Africa. People of five different races and of as many religions live and work happily and harmoniously together’ (*Cape Times*, 11 April 1964).

In the wake of the official announcement of District Six’s fate, the Cape Argus offered an extensive report on the site including photographs of home interiors by Cloete Breytenbach (who was to publish *The Spirit of District Six* four years later) which, together with the title, ‘Behind the Dark Doors of District Six’, invites readers to reconsider the negative perceptions of the site as a slum used by the Community Development Department as a justification for the demolitions of the site. The caption to the main photo of a Muslim family in their tidy bedroom states incredulously: ‘And they call this a slum?’, while the body of the article declares District Six ‘the home of South Africa’s gayest and most vital community’. This positive conception is juxtaposed with its planned destruction:

It is difficult to believe, after one has got to know the real District Six, that some day in the future it will be gone, that in its place there will rise a new Hillbrow...among the tombstones of a once happy but now hopelessly dispersed community’ (*Cape Times*, 5 March 1966,)

Through the 1970s and 1980s, the narrative of lost community developed and proliferated in inverse proportion to the disappearance of the physical settlement. In 1981, for example, with forced removals nearly complete, the Weekend Argus newspaper describes District Six as a lost place of ‘life, colour, vibrance and squalor’, replaced by ‘a monument to wasted years and obtuse ideals’. The metaphor of community as a living being destroyed accompanies this account: ‘District Six has been flattened and its people dispersed across the sands of the Cape Flats far from the embracing amphitheatre of a city whose soul is its citizens’ (*Weekend Argus*, 19 September 1981).

Similar views are reproduced by a range of commentators reported in the press, including current and former residents. In 1979, Rev Peter Gelderbloem of the NG Kerk appealed to the National Party Government to de-proclaim District Six, referring to it as a ‘broken’ people, and a body that has been ‘raped’: ‘In past decades there was organised crime here. Now a

new organised gang has moved in under the name of ‘authority’ and it is leaving a broken, dispirited people. And every day District Six is raped a little further’ (*The Cape Argus*, 24 April 1979). In 1981, in a report on the release of figures by the state on the number of people moved under the Group Areas Act, Dr Wolheim of the SA Institute for Race Relations argued that ‘the Group Areas Act had had the effect of “tearing to pieces” the social fabric created over the years by communities such as that in the former District Six’. His critique of the forced removals in District Six is based on the notion of the former community as an entity unified by social reciprocity: ‘Many people seem to believe a community is merely a lot of houses and people located in certain areas. This is a false and superficial view, because the real basis of a community is in the relationships, both interpersonal and intergroup, within those houses and among those people’ (*Cape Times* 22 May 1981).

Former residents interviewed by the media on their new lives in the Cape Flats offered similar accounts of their experiences of ‘social fragmentation’ and dispersal of community. For instance, a pensioner who had been moved to Valhalla Park recounts that the authorities ‘rent our family apart and scattered little bits in every part of the world’, destroying the unity and reciprocity of community in District Six: ‘Everybody helped everybody –we were like one family with no divisions between white, coloured people, Indians or Africans, but then the Group divided us all’ (*Cape Times*, 11 February 1981).

During this period, a series of publications began to memorialise the lost District Six, among the earliest of which (noted in the introductory chapter) is Franck, Manuel and Hatfield’s *District Six* (1967), later followed by Cloete Breytenbach’s photographic memorial *The spirit of District Six* (1970) and the more academic works on community identity in Rosemary Ridd’s *Position and Identity in a Divided Community : Colour and Religion in the District Six, Walmer Estate and Woodstock Area of Cape Town* (1981), Bill Nasson’s *Oral history and the Reconstruction of District Six* (1986), as well as a documentary by Lindy Wilson entitled *Last Supper at Horstley Street* (1983). The most significant texts of this period in terms of shaping popular conceptions of ‘lost community’ are probably the literary works of Richard Rive, David Kramer and Taliep Petersen. These texts are often regarded as preserving the lost community via narrative and representation, creating a script for the renewal and restitution of community in the post-apartheid era. For example, Sean Field argues that the leading tropes in these authors’ representations of District Six are a sense of inclusiveness, cohesion and unity.

The force of Richard Rive's account in *Buckingham Palace: District Six* (first published in 1986), for example, lies in its use of narrative to highlight and valorize the assimilative and unifying role of community in District Six, a narrative thrust that is cut short by the tragic collapse of community in the face of forced removals. At the opening of the novel, residents of Buckingham Palace (a dilapidated row of houses in District Six) occupy the margins of the 'legitimate' social order (they are poor and many are involved in petty crime)<sup>11</sup>. However, they become gradually integrated into District Six's dominant social structures (centring around the church) by helping others, building relationships of trust, and contributing toward the common good<sup>12</sup>, leading one of the central characters, Zoot, to remark that District Six 'was never a place...it was a people' (2006: 197-198). The community is dispersed at the end of the novel with the demolition of Buckingham Palace, along with the rest of District Six, emphasising the tragic destruction of place and communal bonds. The first-person narrator of the passages which open each of the three main sections of the book describes the destroyed community in the emotive terms of life lost found in the District Six Trust Deed, court affidavits and sites of discursive production mentioned above:

We all died a little when we parted from the District. Many were forced to move to small matchbox houses in matchbox townships... There was one essential difference between the old places and the new ones. District Six had a soul. Its centre held together till it was torn apart. Stained and tarnished as it was, it had a soul that held together. The new matchbox conglomerates on the desolate Cape Flats had no soul. The houses were soulless units piled together to form a disparate community that lacked cohesion... They had taken our past away and left the rubble. They had demolished our spirits and left broken bricks. They had destroyed our community and left dust and memories. (Rive 1996: 126-128)

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<sup>11</sup>The main character, Zoot, is a bouncer for a brothel run by 'Mary and the Girls', Pretty Boy, who lives with Zoot, is an expert thief who fully furnishes Zoot's house with stolen goods and never gets caught. The Jungle Boys who live with their parents, the Knights, are aggressive thugs. Only the Knights themselves and Mrs Abrams are socially accepted in the broader District Six community and have formal jobs.

<sup>12</sup> Key events, such as the role of Mary and the girls in helping the Knight family when Mr Knight falls ill, Mary and Zoot's enthusiasm for helping in the Church fundraiser, and Zoot's role in meting out 'justice' on Faith's rapist, eventually see them increasingly accepted into the broader community. This is symbolically affirmed at the point when all of the residents of Buckingham Palace and other key District Six figures go to Kalk Bay together. It is also confirmed when people decide to buy goods from their 'Persian Market' stand in the Church fundraiser, which sees them praised in the church by the parishioners and Father Rowland for raising a large sum for the congregation (Rive 1996: 71).

This key passage, together with the overall narrative thrust of the novel, defines District Six as a living ‘soul’ that is ‘torn apart’, while the Cape Flats are ‘desolate’ and lifeless. Other writers have observed the importance of the metaphor of a living centre in defining District Six in the work of Rive and others. For example, Christiaan Beyers remarks: ‘In the absence of social cohesion and solidarity on the Cape Flats, and the loss of a “past that they had taken away from us”, District Six is imagined as uniform in essence. It is visualized as having a “centre’ (2009: 87-88).

The notion of community as violated unity likewise occurs in Kramer and Petersen’s *District Six: The Musical* (1986), which depicts the state as interloper and destroyer of a coherent community from the opening scenes onward. The story’s narrative parallels the effect of forced removals on the community with violence and death, particularly the death of blind herbalist Damaka during demolition work, and the death of gangster Nines due to his anger at being a ‘second class’ citizen.<sup>13</sup>

## 5.2. Community, Struggle, and Museum: 1980s to the 1990s

The loss of the District Six ‘community’ gained increasing attention in critical, historical and academic works during the late 1980s and early 1990s<sup>14</sup>, part of a growing national critique of apartheid, and, in Cape Town, in specific protest against efforts by the National Party government and large corporations to redevelop the District Six. Efforts to redevelop District Six by ‘outsiders’ to the displaced ‘community’ were regarded by religious leaders, activists and opposition politicians as pouring salt in the wound left by the forced removals, and local activists responded by arranging a ‘Hands off District Six’ conference in July 1988, documented in the 1990 publication *The Struggle for District Six: Past and Present*.

<sup>13</sup> Nines, a gangster who knows no other way of life, is shot dead with his own gun in the closing scenes after his aunt Hester tries to prevent him from shooting the main character Cassiem. Nines is portrayed as a character who has been driven into a rage by his life circumstances, a point made by his repeated run-ins with Vosloo and his angry utterances about being treated as a second class citizen because of his colour. For example, when he confronts Cassiem about his aspirations as a musician, and his involvement with Sandy, Nines’s aggression is linked to his frustration at the racial hierarchy:

NINES: Djy’s phoney. Just because you hang around with a Milky Bar doesn’t make you better than us.

SANDY: Come on, Cassiem. Just ignore him.

NINES: (To SANDY) Ja, ignore me. To you, I’m nothing. Just another coloured boy. A skollie

CASSIEM: Naai! Your problem is you’re blind! Your gedagtes are stuck here in the District.

NINES: Kak, man! In District Six, I’m number one!

CASSIEM: Ag wake up, Nines, man! There’s a big wide world out there: London, New York, overseas. District Six is nowhere, man!

NINES: Nowhere! (NINES pulls out a flick knife) I’m everywhere! I’m gonna cut a world map on your face, so everyone can see how well-travelled you are. (Act II Scene 1). He dies as a result of his own violence, but, like Rive’s Zoot, in his dying moments he seems to have a ‘moment of clarity’ in which he realises the importance of preserving memory and community: ‘Cassiem my broer, you were right ... about the Steps. You mus’ save them ...’ (ibid).

<sup>14</sup> Noteworthy among these are Don Pinnock’s article ‘Argie Boys and Skollie Gangsters’ (1988), Deborah Hart’s *Master plans* (1990), Kay McCormick’s *Language in The Jewish community of District Six 1880-1940* (1990), Shamil Jeppie’s thesis *Aspects of popular culture and class expression in inner Cape Town, circa 1939-1959* (1990).

Conceptions of the specificity and authenticity of the District Six ‘community’ are central to this text, and have informed debates on the topic ever since. Historian Vivian Bickford-Smith’s contribution notes, for example, that ‘the people of District Six have been seen as part of a discreet and integrated community’ (1990: 18), particularly due to the area’s well-known racial integration:

It was one of the most cosmopolitan areas in the Cape if not the whole of sub-Saharan Africa. Yet there were no examples of wide-scale racial or ethnic antagonisms. Even if we cannot say that working-class or community solidarity was ever fully achieved, the G.W.U and/or District Six ratepayers association...are just two examples of non-racial organisations that united residents across the potential divide of colour. (1990: 64)

Deborah Hart observes that when District Six was destroyed, the result was ‘fragmentation of the identity and heritage of a particular community, which had profound implications for its social, political and cultural expression’ (1990: 54). Her reading is therefore particularly close to the District Six Trust Deed’s references to ‘social disintegration’. As in the case of the Trust Deed, the language of community is further reinforced in *The Struggle for District Six* with frequently used metaphors describing it as a living being or body later violated by apartheid. ANC political activist Dullah Omar refers to ‘the murder of District Six’ (1990: 182-184), while another contributor, Bill Nasson refers to ‘the death of District Six’ and the ‘bare and bony landscape’ left behind (1990: 70). The redevelopment efforts are in turn described by Jeppie and Soudien as ‘threats of its second rape’ (ibid: 4).

In 1994 many of the activists involved in the HODS campaign opened the District Six Museum, which is described in one of its visitors’ guide as ‘a space for the community to come together and share their experiences and retrace their memories’ (District Six Museum Foundation, 2000). The Museum has acted as a critical site for canonising previous imaginings of community, and engaged and involved former residents of District Six directly in contributing to the museum’s content through oral history, personal memorabilia and other materials, thereby focusing ‘on historical experience and subjectivity as ways of creating community and shaping society’ (ibid). The museum’s publications, especially *Recalling Community in Cape Town* (2001), have taken a similar view of how the exhibited materials

have helped memorialise the lost community of District Six, and, have further disseminated these imaginings of community.

The significance of the museum's work to preserve memories and narratives of District Six, condensing them into a bigger narrative of a specific 'lost community', has been noted in a range of analyses, to the extent that these works have further disseminated the meanings of 'community' constructed by the museum. In *Locality and Belonging*, 1998 (edited by Nadia Lovell), anthropologist Anna Bohlin notes that the District Six museum's exhibitions contribute toward creating an 'imagined community' in District Six through the selection of everyday objects and markers of place:

While stimulating individuals to reflect on their personal perceptions of the past, the objects simultaneously allow for the comparison and mirroring of personal memories of those of a larger group. A link is established between an individual's personal, biographic experiences and experiences common to the neighbourhood as a whole. In this way an 'imagined community' of former District Six residents can be created in both past and present. (Bohlin in Lovell 1998: 177)

The link between conceptions of community in the exhibitions and publications of the Museum on the one hand, and the legal instruments of the restitution process on the other, is not only evident in their shared assumption that a unified and identifiable 'community' was lost and must be reconstituted in District Six. It is equally evident in the common use of metaphors that construe the lost community as a living essence or 'body', violated by forced removals, to be healed by restitution. Museum curator, Peggy Delpont argues in *Recalling Community in Cape Town* that the bulldozing of District Six 'constituted a concrete parallel to the less visible tearing down of the 'webbing' of extended families and neighbourhoods built up over four or five generations. The rupturing of the networks of community was socially devastating (2001: 39). In the same volume Soudien and Meltzer argue that the Museum presents a narrative trajectory of District Six as a place of community plenitude ('families lived their lives in the shared space of the street and were happy') destroyed by apartheid, leaving behind 'a magical stage...awaiting the return of its subjects' (2001: 67).

Alongside metaphors of the violated body, the museum's use of the term 'community' is frequently qualified with references to positive unifying traits of the lost community,

including ‘neighbourliness’, generosity, and tolerance of cultural, racial and religious difference, a set of values which, as we have seen, feature in the imaginings of community in the legal instruments analysed earlier. In the guide given to visitors at the District Six Museum for example, District Six is described as a ‘once vibrant and cosmopolitan community’, leading Bohlin (1998) to note that the museum’s exhibitions refer ‘to a geographic entity – the land of District Six – while simultaneously becoming the epitome of a vision of equality, justice and non-racialism for a larger territorial unit, the entire new nation of South Africa. The nature of District Six, its celebrated multi-culturalism and alleged tolerance, help explain why it serves as a perfect representation of how South Africa should ideally be shaped in the future’ (Bohlin in Lovell 1998: 183). In *Recalling Community in Cape Town* Delpont elaborates on this reading of the District Six community:

One significant feature of the symbolism of District Six is that of the human potential for coexistence as, it was known there. Part of its uniqueness lay in the circumstance that people of many origins, cultures, political groupings and religions lived together in mutual acceptance... Rive writes that ‘the place had a mind and soul of its own. It had a homogeneity that created a sense of belonging. It became more than a geographically defined area. It developed a separate and unique attitude. It cultivated a sharp urban inclusivity’ (Peggy Delpont in Rassool and Prosalendis 2001: 42)

A similar argument is found in Sofie Geschier’s work on the autobiographical and recorded oral history texts in the Museum “‘So there I sit in Catch-22 situation’: Remembering and Imagining Trauma in the District Six Museum’ (published in the Human Sciences Research Council’s *Imagining the City: Memories and Cultures in Cape Town*) argues that District Six ‘was a very heterogeneous place that housed workers and artisans from various countries and cultures. Although there were dynamic hierarchies according to class, ethnicity and gender, a sense of community and cosmopolitanism prevailed’ (Geschier in Field, Meyer and Swanson 2007: 37-38).

The inscriptions of ‘community’ as a unified body by the museum and its commentators support the notion of restoring this unity through a ‘single redevelopment’ solution for District Six. Indeed, Nagia, as one of the contributors to the Museum’s publications, co-authors an essay on the topic (included in *Recalling Community*) that makes this argument explicit:

The community has... channelled their thoughts and demands into a central vehicle called the District Six Beneficiary and Redevelopment Trust. This Trust enjoys legitimacy as the negotiating instrument to interact with other bodies, especially Council and Government. (Prosalendis, Marot, Soudien and Nagia 2001: 87)

Various other authors have noted the key role played by the Museum in informing restitution praxis in District Six. Geschier sees the archived narratives as simultaneously constructing District Six as a 'lost place' and as an 'imagined new community projected into the future' (Geschier in Field, Meyer and Swanson 2007: 51).

We could add to this, the role of the Museum as one of the named supporters of the opposing application in the Section 34 Court Case. Indeed, many of the activists that later became involved in the Trust's redevelopment efforts have been or continue to be members of the museum board, including Anwah Nagia himself, Terence Fredericks and others (District Six Museum 2011: 39).

The museum's readings of 'community' have become canonical during the years leading up to and during restitution in South Africa. However, both prior to and in parallel to the museum's work, a range of historical (and some anthropological) texts on District Six forced removals in Cape Town have played their own role in shaping the meanings of the District Six 'community' as keyword.

### **5.3. 'Community' and Restitution: late 1990s to 2012**

With the introduction of restitution as an option for District Six, the earlier constructions of 'community' re-emerged and feature as a fairly repetitive set of adjectives, metaphors and 'sound-bites' in the public domain. In 1997, for example, with the Land Claims Court case coming to a close, the *Cape Times* reported that 'former residents of District Six are hoping to re-establish the once vibrant community that was forced out by apartheid...' (*Cape Times*, 21 July 1997). With the signing of the Record of Understanding a year later, the *Cape Argus* newspaper reported that the 'former vibrant community' sought to 're-establish the vibrancy of District Six in its redevelopment' (*Cape Argus*, 12 September 1998).

Following an announcement in 1999 that the University of the Western Cape would carry out validation of claims for the Department of Land Affairs, *The Cape Argus* described the post-apartheid restitution process as an ‘on-going battle by District Six residents to reclaim their heritage 30 years after apartheid bulldozers razed their cosmopolitan community, nostalgically known as Fairyland.’ (*Cape Argus*, 17 December 1999).

A year later, with the signing of the Section 42D Agreement at a ceremony in District Six, a *Cape Times* report on the ‘once-united community.’ (*Cape Times*, 26 November 2000) sees the same epithets echoed by then state President Thabo Mbeki:

We will have to continue to work together to ensure that this place - which was once a caring, committed community where different people lived, worked together and worshipped together - recovers its laughter and its joy and once more becomes a centre for non-racialism, a vibrant place of diverse people sharing common values and aspirations. District Six must once again show us the way to create peaceful, prosperous and non-racial cities (ibid).

The *Cape Argus* reported the event in similar terms: ‘after more than three decades, the laughter, music and sense of community that once defined District Six returned to the strip of barren land, as former residents gathered for the country’s most heart-warming homecoming’, while Mayor of Cape Town at the time, Nomaindia Mfeketo, urged residents to ‘Return with the best of the old community and the spirit of good neighbourliness’ (*Cape Argus*, 27 November 2000). In the ensuing years, similar uses of the term ‘community’ have continued to feature in the print media, further cementing the credibility of ‘community’ as restitution’s object of dispossession<sup>15</sup>.

Following the establishment of the District Six Museum and the onset of restitution, a number of academic publications have taken up the theme of memorialising, defining and documenting District Six, often utilising a similar lexicon to describe its ‘community’ and the

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<sup>15</sup> For example, with the handover of the first homes constructed under the District Six pilot projects in 2004, the *Cape Argus* described the beginning of a ‘rebirth’ of community: ‘the building of houses is just the beginning of the recreation of the District. Over the next few years, a memorial park, sidewalk cafés and shops will flesh out its rebirth as a community’. (*Cape Argus*, 10 February 2004). In 2005, with growing unhappiness among claimants over delays on the pilot projects, the *Weekend Argus* described their plight in standardised terms: ‘a close-knit community was torn apart and scattered across the sandy Cape Flats’ and ‘had to make the best of it in the soulless so-called “sub-economic” and “economic” shoe boxes that made up the new council housing estates’ (*Weekend Argus*, 2 October 2005).

effects of forced removals<sup>16</sup>. For instance, in Zimitri Erasmus's 2001 volume on coloured racial identity and apartheid, *Coloured by History, Shaped by Place*, historian Crain Soudien argues that 'strikingly persistent and common to the area's evolving discourse were themes of community and solidarity' forged around 'sharing', 'social harmony', 'cosmopolitanness and hybridity' (2001: 115). Yossuf Rassool's history *District Six: Lest we Forget* (2001), applies the now familiar metaphors of District Six as a violated body to describe his experiences there as a teacher: 'I saw District Six begin to die in the early fifties as shops in Hanover Street the main artery of the area started closing. The haemorrhaging for years was gradual but definite. All that vibrant community scattered and disintegrated irrevocably pulverised by apartheid' (Rassool 2001: 144-145).

Some of the more recent works on District Six also turn to an anthropological reading of how the imaginings and memories of the earlier District Six 'community' might shape the new District Six and other post-apartheid micro-polities. For instance, in the 2001 volume on forced removals in South Africa, *Lost Communities* (edited by Shaun Field), Jane Harries and Felicity Swanson argue that former residents 'have a deep sense of belonging and identity' linked to, and expressed in, 'music, plays, poetry, literature and art' that have 'come to embody collective memory of home, family, neighbourliness and, above all, community' (in Field 2001: 62). Field reproduces this view in the same volume when he states that communities like District Six 'might be physically "lost", but former residents continue to sustain and express their memories as a community-in-memory' that is both 'shaped around the experience of loss' and also characterized by 'a brave and creative response to this loss, which allows people to move into the future without forgetting or denying their shared past' (Field in Field 2001: 119). Cultural productions have been particularly celebrated for their role in shaping conceptions of the lost 'community' in this regard. Indeed, the first decade of the twenty-first century has been characterised by the canonisation of earlier literary accounts of 'community' in Rive, Kramer, Petersen and other 'struggle writers' in key sites of ideological production, including the museum, public school curricula, or academic literary criticism publications, most notably in the work of Fritz Pointer (2001) on La Guma, Lewis on Rive (2001), Adhikari (2005) on Rive and La Guma, and Beyers on Rive, La Guma and others (2006). The representations of District Six in the work of Rive and others are described

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<sup>16</sup> Chris Schoeman's *District Six: the Spirit of Kanala* (1994), Naomi Barnett's 'The Planned Destruction of District Six in 1940' in *Studies in the History of Cape Town* (Bickford-Smith et al. 1994), Yossuf Rassool's *District Six: Lest We Forget* (2000), Zimitri Erasmus's 2001 volume on 'coloured' racial identity in South Africa, *Coloured by History, Shaped by Place*, and Henry Trotter's *Removals and remembrance* (2002), and McCormick's *Language in Cape Town's District Six* (2002).

in a 2009 essay on literature of forced removals by Henry Trotter as key components of ‘commemorative narratives’ that ‘have taken on a surprising new relevance’ in the post-apartheid era:

With the decline and demise of apartheid, coloured cultural entrepreneurs have been publicizing the commemoration narrative beyond the borders of the townships. The publication of Richard Rive’s novel, *Buckingham Palace District Six*, which later became a standard textbook for high school students in the Western Cape, represents a crucial breakthrough in this regard. Then followed musicals by David Kramer and Taliep Petersen, and dramaturgical performances such as *District Six* and *Onse Boet* that embodied the sentiments of the narrative on stage. ...community members have taken the lead in promoting the commemoration narrative as an alternative to the discredited apartheid transcript. Because of its popular resonance with removees – and its widespread acceptance, or tolerance, by other Capetonians – the narrative has been taken up as the official transcript by the post-apartheid regime (Trotter in Adhikari 2009: 64).<sup>17</sup>

It is this canonised status as an ‘official transcript’ that has made the popular imaginings of *District Six*’s lost community so compelling, even within the tightly prescribed discursive space of restitution legislation.

## 6. Conclusions

The legal texts reaffirm and even reproduce historical inscriptions of the imagined *District Six* ‘community’ as constructed in the work of the *District Six* museum, literary figures, oral and written histories, with a particularly pointed reassertion of the singular, specific, and unified meanings attached to this keyword in these earlier accounts. Further evidence that links obtain between the historical inscriptions of community and the legal texts of the restitution process is found in the metaphors of community as violated body or living essence that occur across both sets of texts, and other recurring associations of unity and solidarity attached to ‘community’ as keyword, such as ‘neighbourliness’, generosity, and tolerance of cultural, racial and religious difference. It would appear, therefore, that the multiple sites of discursive production surveyed above have helped entrench alternative

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<sup>17</sup> These tropes are also emphasized in Mohamed Adhikari’s collection of essays on ‘coloured’ identity, *Burdened by Race* (2009) by Beyers.

power discourses to the constitutional order in the Cape Town micro-polity, historical discourses with sufficient force to vie with, and even supplant the political liberal order of discourse encoded in the *Constitution*, property law and restitution legislation.

I have argued that the ability of ‘community’ as keyword to enter and reshape legalistic property rights-based conceptions of restitution’s object of dispossession in the legal texts under analysis is likely to be the result of some combination of at least three factors. Firstly, its credibility in describing what was lost, as inscribed and reproduced by the District Six Museum, historical texts, literary works and print media. Secondly, its symbolic value for the restitution process, given that the legal conceptions of the object of loss fail to address the social, emotive and psychological dimensions of forced removals, which should not be underestimated. Thirdly, the linkages of community as keyword to powerful ‘universal’ pejoratives render it a powerful principle that is difficult to challenge. The term is linked via metaphor, connotation and/or adjective to notions of ‘life’, ‘soul’, ‘connectedness’, ‘tolerance’ and ‘generosity’, as opposed to ‘violence’, ‘social disintegration’, ‘murder’, and, in the face of challenges from claimants, to selfish individualism or materialism.

If the keyword community was a source of alternative legitimacy that was able to transform constitutional restitution discourse in the documents, and even, in some cases, displace the role that restitution discourse delegates to the state, is this community really the non-hierarchical, open community that echoes the imaginary of the early District Six? To take the question a step further. If the ‘community’ was indeed made up of claimants as the returning subjects of restitution, why does it appear that even they did not equally fill out the ideological ‘space’ of ‘community’, and collectively ‘own’ it? It would appear that the ‘community’ which formed the basis for the District Six restitution claim is not simply a marker of ideal egalitarianism to be recovered and recreated. It is a far more malleable configuration that lends itself to ‘ownership’ and manipulation within the struggle to build new hierarchies and exclusions within this site of restitution.

# Chapter Four: The Subject of Restitution in District Six – from Victims to Beneficiaries, from Activists to Trustees

## 1. Introduction

The previous chapter noted that the ‘collectivisation’ of restitution in District Six resulted in the creation of a single institutional vehicle to represent claimants in the form of the District Six Trust. As a number of authors have noted, such arrangements can, in practice, introduce problematic social dynamics for restitution practice. Deborah James, for example (2007), argues that ‘activists in South Africa’s land NGOs have become acutely aware that the promise of land offers opportunities for political power and patronage’, leading to a ‘proliferation of competing brokers trying to prevent the ‘undue influence’ of others, while claimants have, in some cases been ‘directed rather than merely represented’ (2007: 217). Similarly, Christine Murray (1998) argues that ‘several NGOs have in practice acted as “ginger groups” on behalf of “communities” making claims and have inserted themselves as intermediaries in the various processes of investigation, negotiation and resolution of conflict’ (1998: 1). This can lead to ‘marginalisation within claimant and prospective claimant groupings’ fuelled by the uncritical acceptance of land activists’ credentials by the officials of the Commission on Restitution of Land Rights (ibid: 21)<sup>1</sup>.

However, in the District Six case, the Trust has acted as more than just an ‘intermediary’. If we accept sociologist Rom Harre’s definition of an institution as ‘an interlocking double-structure of persons-as-role-holders or office-bearers and the like, and of social practices involving both expressive and practical aims and outcomes’ (Harre 1979: 98), it becomes evident that by absorbing claimants and their leaders into the legal structure of a trust, it has generated additional institutional roles for claimants, over and above their status as rights-bearers under restitution law. The current chapter argues that this arrangement has, in turn, had a transformative effect on the ‘subject’ of restitution in District Six. If the constitutionally inscribed notion of a ‘claimant’ is a ‘legal person’ entitled to claim an unjustly dispossessed

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<sup>1</sup> Bohlin et al. (2010) make a similar observation: ‘although in general NGOs have played a valuable role in pressuring the state on behalf of claimants and providing claimant organizations with much-needed expertise and resources...the client/patron relationships that develop are not innocent of power relations or without ambiguity’ (2010: 5).

land right back from the state<sup>2</sup>, the incorporation of claimants into a trust has interposed a new set of roles and identifications.

The formalisation of the District Six Trust under the *Trust Property Control Act 57 of 1988*, positioned claimants and local activists within one of two primary classes of ‘legal person’ through ‘the constitutive role’ of law in shaping identity, to borrow a term from legal theorist Costas Douzinas (2002: 379)<sup>3</sup>. On the one hand, those designated as ‘trustees’ took on active, leadership powers in the restitution process by ‘holding’ the process and property ‘in trust’ for claimants. On the other, those positioned as ‘beneficiaries’ of the Trust, primarily land claimants in this case, are defined by trust law and the Deed of Trust as passive recipients of the entrusted land and redevelopment, later to become ‘purchasers’ of their new properties from the trust.

Applying, as a point of departure, philosopher Etienne Balibar’s observation in his essay ‘The Nation Form’ that ‘there is no individual identity that is not historical or, in other words, constructed within a field of social values, norms of behaviour and collective symbols’ and, moreover, that identity shifts as the ‘dominant reference points of individual identity change over time and with the changing institutional environment’ (1991: 94), the current chapter examines how this legal constitution of identity developed and sustained itself. I argue that, as in the case of District Six’s ‘object of dispossession’, the reconfigured ‘subject’ of restitution progressively inscribed by the legal instruments of the District Six restitution process owes much of its definition to pre-existing ideological scripts set out by and for the actors concerned within the various power-discourses transecting the site. These identity positions are encoded and condensed in a set of tropes that have historically developed in discourse on District Six, and are reproduced in the legal instruments, following the pattern noted by Balibar that the ‘practical definition’ of identity ‘requires a reduction of complexity, the application of a simplifying force’ (Balibar 2002: 76).

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<sup>2</sup> To recall, according to Section 2 of the *Land Restitution and Reform Laws Amendment Act of 1999* ‘2. (1) A person shall be entitled to restitution of a right in land if—(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices or a direct descendant of such a person; or (b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who—(i) is a direct descendant of a person referred to in paragraph (a); and (ii) has lodged a claim for the restitution of a right in land; or (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and (e) the claim for such restitution is lodged not later than 31 December 1998.

<sup>3</sup> In his essay ‘Identity, recognition, rights or what can Hegel teach us about human rights?’ Douzinas argues, following Hegel, that ‘law is a major contributor to the social process of recognition’ (2002: 286), even if it is only ever partial because it ‘can only deal with universalities and generalities’ (ibid: 402).

From this perspective, I argue that the legal identifications of (active) ‘trustee’ and (passive) ‘beneficiary’ that help constitute an alternative, institutional, subject for restitution in this case are historically adapted from two dominant sets of tropes that have developed in relation to District Six as a site of forced removals. The first pre-ordained the role of District Six’s Trustees by positioning them as activist leaders in a local site within South Africa’s anti-apartheid political struggle. The second set of tropes position claimants as passive beneficiaries following from their earlier identification in public discourse (variously imposed and accepted) as a ‘victimised’ people. These two contrasting but interdependent political identifications have granted sufficient political legitimacy to an otherwise ill-fitting and paternalistic legal-institutional arrangement that has become interwoven with the legal subject of restitution in the negotiation and contractual settlements of material restitution in District Six (*inter alia*, resulting in claimants’ access to restitution being limited by new forms of organisation and control). In the final analysis, the resulting mechanism is more than a Trust alone, and is not identical with the subject of restitution. Instead, it is a hybrid of historical identity positions, the legislated identity of the ‘claimant’, and the institutional identities set out in Trust law. In spite of objections from the Cape Town local government and claimants (including competing claimant groupings such as the District Six Advocacy Committee), this new hybrid of law and social identification enjoyed sufficient legitimacy in the eyes of claimants and the state to sustain itself in the District Six site as a mechanism of ‘governance’ in Foucault’s sense<sup>4</sup>.

## 2. The Trust and the Hybrid Subject of Restitution

District Six’s ‘subject’ of restitution began to develop institutional form when the District Six Trust was first elected into existence as a voluntary association at a meeting ‘of all known beneficiaries’ (District Six Trust Deed, annexure paragraph 2) in the District Six Museum on 6 December 1997<sup>5</sup>. According to the Trust, ‘the constitution was workshopped with the community over a period of six months and adopted in January 1998’<sup>6</sup>. Its leaders

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<sup>4</sup>To recall, Foucault uses this term in a broad sense to designate ‘the way in which the conduct of individuals or states might be directed: the government of children, of souls, of communities, or families, of the sick. It did not cover only the legitimately constituted forms of political or economic subjection, but also modes of action, more or less considered, which were designed to act upon the possibilities of action of other people. To govern, in this sense, is to structure the possible field of action of others’ (1982: 221).

<sup>5</sup>According to newspaper reports the ‘democratically elected beneficiary trust’ leaders were named as Rashida Ridley, Mariam Richards, Yasmien Abrahams, Nadeem Hendricks, Nazier Khalfe, Cyril Mandidi, Abduragmaan Parker, Sedick Christians, Terence Fredericks, Stan Abrahams, Princess Makapula, Carel August, Jennifer Price and Anwah Nagia (*Cape Argus*, 8 December 1997, ‘Uprooted District Six people a step nearer justice’).

<sup>6</sup>District Six Trust 2012, accessed via <http://www.districtsix.za.org/district-six-beneficiary-trust> on 11 July 2012.

subsequently contracted with the state in the Record of Understanding and Section 42D Framework Agreement (examined in previous chapters) as ‘duly authorised’<sup>7</sup>. As a ‘voluntary association’, the body existed under common law<sup>8</sup>, with no structuring legislation, and, as such, only created loose institutional roles for its elected members as ‘trustees’, who would ‘exercise direct personal control over the trust’ (Deed annexure paragraph 7), while those who had nominated the trustees were a ‘represented’ group described by the Trust as ‘a mass of some 26 000 persons who, at this stage have not yet been properly identified’ (Deed Annexure Paragraph 1). However, these institutional roles gained formal definition in law when the voluntary association was superseded in 2001 by a trust formed under the *Trust Property Control Act 57 of 1988* named the District Six Beneficiary and Redevelopment Trust. The founding document for the latter was a deed<sup>9</sup> of Trust lodged with the Master of the Cape High Court<sup>10</sup>.

A trust is a very specific legal entity designating and authorizing legal institutional roles for trustees and beneficiaries, usually ‘entrusting’ trustees with the authority to manage property rights<sup>11</sup> and/or a particular purpose on behalf of a beneficiary<sup>12</sup>. In *The Trust Property Control Act* a trust is specifically defined as:

the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust

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<sup>7</sup> The Trust identifies itself as a primary party to the agreement in Clause 1.3 of the ROU. The notion of ‘primary parties’ situates District Six Trust on similar footing as co-signatory state institutions. In clause 1.4 it is stated that all three parties have power to include or exclude others. Clause 1.7 also mandates the parties to develop a public land holding agreement, which, although left undefined, implies equal decision making-powers on the part of all three parties over property holding rights, as defined in property law.

<sup>8</sup> In spite of its name, this elected body was not yet a trust in the legal sense. According to Ricardo Wyngaard’s contribution to *The International Journal of Not-for-Profit Law on South African Voluntary Associations and other Non-Government Organisations*, ‘the voluntary association is established in terms of common law...through a verbal or written constitution’ (*The International Journal of Not-for-Profit Law*, Volume 12, Issue 2, February 2010). Legislation for Voluntary Associations in South Africa was only introduced in 1998 in the form of the Non-Profit Organisations Act No. 71 of 1997, which came into operation on 1 September 1998. This Act provides for a ‘registration facility’ for Voluntary Associations to allow them to become incorporated Associations under Common Law. Prior to the passing of the Act, Voluntary Associations could not register with a government registry.

<sup>9</sup> According to *Black’s Legal Dictionary*, a deed is ‘a sealed instrument, containing a contract or covenant, delivered by the party to be bound thereby, and accepted by the party to whom the contract or covenant runs...In its legal sense, a “deed” is an instrument in writing upon paper or parchment, between parties able to contract, subscribed, sealed and delivered’ (1995: 341).

<sup>10</sup> The mechanism by which the Trust’s authority is granted is through a ‘Letter of Authority’ signed by the trustees and signed and stamped by the Master of the Court (in this case on 11 October 2001).

<sup>11</sup> The 1988 *Trust Property Control Act* draws on the definition of property in the *Administration of Estates Act 66 of 1965*, which itself relies on the *Deeds Registries Act* namely “Immovable property means land and every real right in land or minerals (other than any right under a bond) which is registerable in any office in the Republic used for the registration of title to land or the right to mine.” The 1988 Act also defines property in these terms in its definitions section: ‘trust property’ or ‘property’ means movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee’ Similarly, in the *Land Reform (Labour Tenants) Act 3 of 1996*, “owner” is defined as ‘the owner, as defined in section 102 of the Deeds Registries Act, 1937 (Act No. 47 of 1937)’.

<sup>12</sup> Like other Property Law, Van der Walt and Pienaar attribute the sources of Trust law in South Africa since 1994 to ‘(a) (Roman-Dutch) common law (b) Statutory law (legislation) (c) Case law (precedent) (d) Customary law (e) Constitution’ (Van der Walt and Pienaar 2008:4).

instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument.<sup>13</sup>

The trust in South African law therefore results in the designated trustee taking on the authority<sup>14</sup> to manage a property or purpose<sup>15</sup> on behalf of a beneficiary or beneficiaries, exercising *control* over the property, but not owning it. As *Honoré's South African Law of Trusts* puts it, South Africa has adapted the trust from Roman-Dutch and modern Dutch law to construct an institution wherein 'control rather than ownership is the essential feature' (Honoré and Cameron *et al* 2007: 6)<sup>16</sup>. As a consequence, the legislation does not require any specified mechanism in a trust whereby beneficiaries can moderate the actions of the trustees except by approaching the Master of the Court, nor is there any legislative provision for beneficiaries to exit the trust by taking ownership *and* control of their property, unless such provision is made in the founding documents of a trust. The institutional identities created by trust legislation for trustees and beneficiaries are therefore differentiated along active/passive lines, creating a somewhat paternal set of relations.

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<sup>13</sup> *Honoré's South African Law of Trusts* identifies the basic requirements for a trust to be validly formed in law, including '(a) the founder must intend to create one, (b) the founder's intention must be expressed in a mode appropriate to create an obligation, (c) the property subject to the trust must be defined with reasonable certainty, (d) the trust object, which may either be personal or impersonal, must be defined with reasonable certainty, and (e) the trust object must be lawful' (Honoré and Cameron *et al* 2007: 117). In addition, 'for a trust to exist the founder must either (i) have handed over control of the trust property by a legally valid mode of transfer such as delivery or (ii) have bound him- or herself (e.g. by contract) or some other person (e.g. the executor by virtue of a will) to hand it over or (iii) must be bound in some other way (e.g. by statute or judicial decree) to do so' (Honoré and Cameron *et al* 2007: 10).

<sup>14</sup> Trustees gain legal authority by virtue of the Master of the Court's authorization, and this authorization makes the Trust deed a legally binding document: In Section 6 (1) of the *Trust Property Control Act* 'any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master'. According to Honoré and Cameron *et al* 'The Act recognizes and preserves the distinction between the appointment of a trustee, which occurs in terms of the trust instrument, and a trustee's written authorization, which derives from the Master by virtue of statutory powers. The trust instrument remains the defining source of the trustee's power and may have to be consulted by persons dealing with the trustee. While the creation of a trust in general thus remains a private act, the authorization of a trustee ceases to be so. Statutory authorization is added for two purposes: not only in the interests of the beneficiaries, so as to reinforce the requirement of security, but to serve to outsiders as written proof of incumbency of the office of trustee.' (2007: 131-132).

<sup>15</sup> The *Cliffe Dekker* guide to Trust law notes that trust law can also apply to a defined purpose: 'The primary intention of a trust is to place certain assets under the control of trustees for the benefit of the beneficiaries named or defined in the trust deed, although trusts can also be established to achieve a certain defined purpose' (*Cliffe Dekker online guide*, 2009). The District Six Trust Deed sets up a trust to control the R100 'subject matter', but also in relation to the purpose of holding and developing the restitution land set out in a map annexed to the trust deed.

<sup>16</sup> Honoré and Cameron *et al* describe as an adaptation from the appointment of an administrator in Roman-Dutch law or a *bewinhebber* in modern Dutch law (Honoré and Cameron *et al* 2007: 6).

The primary role prescribed for trustees in the District Six Beneficiary and Redevelopment Trust Deed is to be entrusted with the purpose of the Trust<sup>17</sup>, as described in Paragraph 3: ‘to acquire and hold land or any right to land within District Six or any other land to build dwelling house or other residential accommodation for the beneficiary community’. Because the actual title to the District Six restitution property is still held by the local government, the primary item that is ‘entrusted’ by the Deed to its trustees is *control* over the restitution development, including deciding on which claimants will receive the new properties first (upon the trust’s decision to grant a house to a claimant, the title would then be transferred from the City of Cape Town directly to the claimant)<sup>18</sup>. The trustees are given broad scope to execute the purpose of the Trust<sup>19</sup>, and are governed by a set of rules, procedures, principles (Section 13), and guidelines for conduct and financial management (Sections 4 to 12 and 14 to 20). Accordingly, the Trustees exercised the power to contract with the state on behalf of claimants, to execute a particular type of redevelopment on the site for its beneficiaries, and determine beneficiary access to each house in the redevelopment. In this respect, the Trustees of the Trust gained ‘control’ over the property, but not ownership. This leadership role is cast in the language of democratically elected political leadership where the Deed refers to ‘freely elected representatives’ (preamble, paragraphs 1 and 4), but, as noted earlier, the Deed also indicates that the bulk of claimants had not been identified or confirmed as such at the time of the election (‘a mass of some 26 000 persons who, at this stage have not yet been properly identified’), rendering this assertion of democratic legitimacy problematic.

In contrast to the extensive roles and powers of trustees, ‘beneficiaries’ of the District Six Beneficiary and Redevelopment Trust, defined as a ‘community’ made up of claimants opting to participate in an ‘integrated redevelopment’<sup>20</sup>, have narrowly limited rights and

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<sup>17</sup> In accordance with the prescripts of South African trust legislation the District Six Trust Deed’s property and purpose is donated to the Trust by a ‘donor’ (Anwah Nagia, also the Chairperson of the Trust) who signs his intention to hand this donated object (both the trust subject matter of R100 as stated in Paragraph 2 of the Deed and the listed ‘purpose’ of holding and redeveloping land in District Six, to the trust and its trustees to be ‘held in trust’ for a beneficiary.

<sup>18</sup> To date, all transfers of title deeds in the District Six redevelopment have been made from the current owner, the City of Cape Town, directly to the claimants by the Director General of Land Affairs as per the *Restitution of Land Rights Act*.

<sup>19</sup> These powers and functions are set out in paragraphs 3.3.2, 3.3.5, 7.1 through 7.1.11 and 9.1 through 9.6.3, although this power is limited in line with the *Act*, by, for example, the requirement that the Trustee use all proceeds of the Trust for the designated beneficiary or purpose of the Trust, and not for the profit of the trustees (paragraph 3.2).

<sup>20</sup> The ‘community’ that has ‘democratically elected’ its representatives and mandated them to form a representative body read as the Trust (preamble paragraphs 1 and 4), and the formal beneficiary of the Trust (paragraphs 1.2.2 and 1.2.3), are both identified as being made up of claimants defined under Restitution legislation as persons ‘who were previously tenants in District Six; and whose claims have been verified and accepted by the Commission as per Annexure D; whose claims have not yet been verified and accepted by the Commission who shall be deemed to be claimants, on being verified and accepted by the Commission’. The Preamble to the Trust Deed also describes claimants as ‘victims of forced removal’ and ‘forming part of the dispossessed’. All of these definitions circumscribe the beneficiaries of the District Six Trust within the same legal definition of ‘claimants’ to that in the prevailing legislation at the time, namely the Land Restitution and Reform Laws Amendment Act of 1999, and the original 1994 Land Restitution Act. Indeed, the latter makes use of the same terminology of ‘dispossession’ and ‘racially based discriminatory law’ in its pre-amble: ‘To provide for the restitution of rights in land in respect of which

powers in the document. Beneficiaries are able to elect or remove ‘further trustees’ (but the original trustees are not subject to this provision)<sup>21</sup>, and the trustees are required to have beneficiaries ‘participate’ and give ‘input’ to the redevelopment, although no specified structure or process for this purpose is stipulated (paragraph 3.3.3). Apart from these provisions, beneficiaries are left to passively ‘benefit’ from the actions of the Trustees. The entry of beneficiaries into the institutional arrangement of the Trust appears to have been equally passive. Although the Trust’s ‘beneficiary community’ is described as being made up of claimants (or other persons selected by the ‘beneficiary community’) who ‘elect to take part in an integrated redevelopment of District Six as a form of restitution’ (paragraph 1.2.3.2, my emphasis), when the Deed is read with the 2004 District Six Land Development Agreement’s requirement that the City of Cape Town not alienate land in District Six except through the Trust<sup>22</sup>, it becomes evident that the Trust offered the only point of entry for those claimants wishing to recover their property rights on the site.

As recently as 2011, the Trust has continued to maintain that it wishes to remain the only point of entry for claimants to access land in District Six, justifying this paradoxically exclusivist approach to its stated ‘inclusive’ project by invoking threats of ‘gentrification’ of the site. For example, in September 2011 local radio station *The Voice of the Cape* recorded an exchange between the Trust and claimants mobilizing a voluntary association called the District Six Concerned Claimants to demand their land to be restored directly to them so that they could build their own homes, to which Nagia responded that ‘it was a pipe dream to believe that claimants will be given land in District Six in order to build their own homes... If we were to agree to their demands to give them the land, it would mean the end of the restitution process as what is left of District Six would be cannibalised by profit-mongers’<sup>23</sup>.

As in the case of the object of restitution analysed in the previous chapter, the establishment of an alternative subject of restitution in District Six can be explained in part by the lack of clarity around the formal legal subject of restitution from the outset of the process. This difficulty was acknowledged in the Facilitators’ Report submitted to the Land

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persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith’.

<sup>21</sup>Under paragraph 5.7 a Trustee must vacate office ‘if the Trustee is a Further Trustee elected by the Beneficiary Community, and such Beneficiary Community decides to terminate such Trustee’s appointment’.

<sup>22</sup>Paragraph 3.2.5 of the Land Development Agreement states that ‘The Local Authority shall not in any way let, alienate, transfer, hypothecate or encumber any residential erven forming part of the land other than through the Developer in terms of this agreement’ (with the ‘Developer’ referring to the District Six Redevelopment and Beneficiary Trust).

<sup>23</sup> *Voice of the Cape Online*, 25 September 2011 accessed online via <http://www.voefm.co.za> on 20 July 2012.

Claims Court in July 1997 by Dr Neville Alexander and Dr Elaine Clarke, which recommended that ‘the objective basis for full membership of the Beneficiary Community Trust [be] given by the fact of a validated claim’, although claimants who were awaiting validation could also be considered (paragraph 2.7). This assumption led Canadian anthropologist Christiaan Beyers to describe the group mobilising as recipient of restitution in District Six as a ‘rights community’ identified by a common legal categorisation under restitution legislation (in his essay ‘Land Restitution’s Rights Communities: The District Six Case’, republished in 2007<sup>24</sup>). Although he notes some of the divisions within the claimant group (particular between former tenants and former land owners in District Six (Beyers 2007: 271) he argues that the court application by the City and Province had the effect of ‘consolidating “the community” as a political entity’ because ‘District Sixers had to be seen to act with one voice’ (Beyers 2007: 270). As a result, he sees this as an instance of constitutional restitution:

working to expand citizenship by bringing into being a new rights community consisting of those who qualify and are empowered to claim the rights and entitlements set out in the Restitution Act... groups with a strong sense of collective identity (often explicitly referred to as ‘the community’) where the primary enabling condition for putative solidarity is a project vested in the politico legal apparatus of land restitution and its associated form of governance... creating a certain congruence between law and social identification’ (Beyers 2007: 268)

However, there was a significant consequence to this narrowing down of the subject of restitution: the elision of some ‘26 000’ persons who had yet to come forward and make restitution claims. Both applicants and opponents to the case conceded that the actual number of claimants as rights-bearers in the process were few at the time of the court case. Apart from the Trust Deed’s reference to ‘a mass of some 26 000 persons who, at this stage have not yet been properly identified’, Davidson’s affidavit cites Commission on Restitution of Land Rights statistics indicating around 300 claimants registered at the time of the application (paragraph 72) out of 71 426 persons living in District Six in 1960 (paragraph 30). In a 2002 occasional paper ‘Reflections on Practicing Applied History in South Africa 1994-2002’ UWC historian Martin Legassick (who was contracted to verify claims for the

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<sup>24</sup>In *Journal of Southern African Studies*, Volume 33, Issue 2, 2007, hereafter referred to as Beyers (2007).

office of the Regional Land Claims Commissioner for the Western Cape in 1999-2000) recalls that the claimant registration and confirmation process was slow and difficult:

I took on twelve researchers and two people to supervise them. There then existed a District Six Claims Unit, under the auspices of the Land Claims Commission. That had been initiated by Rhoda Kadalie but she had resigned. At the time I took on the work the Unit had I think verified something like 40 owner's claims in a period of some two years. I was asked to research the claims of the tenants... We conducted some 1427 interviews, being unable to locate 224 claimants, and verified 672 claims. Most of the rest were outstanding because they did not submit the documents that they needed to (Legassick 2002: 7).

Legassick notes that even at the time of the signing ceremony for the S42D Agreement with the District Six Trust, most claims had not been processed, a situation worsened by a lack of capacity at the Commission on the Restitution of Land Rights<sup>25</sup>. This difficulty with defining the legitimate 'subject' of restitution has continued to dog the redevelopment ever since, culminating in the challenge to the Trust's role in the 2007 Land Claims Court application by the District Six Advocacy Committee. In November 2006, for instance, following growing concerns from claimants about the lack of movement on the redevelopment, and calls for greater accountability of the Trust, Nagia wrote in a newspaper article that 'the Beneficiary Trust has never received a complete list of who the claimant body is, thus making it impossible and unfair to hold the kind of technically correct annual general meeting that has been called for' (Nagia 2006). Nagia noted that the Trust had tried to compensate for this problem by holding 'innumerable public meetings' and media engagements, including taking the redevelopment plans to the public on a number of occasions' (ibid). It is worth recalling that to date, the total number of registered claimants in District Six is 2644, of whom 1444 have chosen to return (Commission on the Restitution of

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<sup>25</sup> Particularly significant for the purposes of this thesis is the insight that Legassick gives into his experiences of working with office of the Regional Land Claims Commissioner for the Western Cape. Although his account is somewhat informal, it does outline complexities in the restitution process that resonate with observations by other authors such as Walker, James, Hall and others below regarding administrative complications at the Commission on Restitution of Land Rights. One key example is his point that the Commission did not seem to have a well-established information system to manage data about claims: 'Some five months into this research I was summoned to a meeting with the Commission at which it was mentioned that there were problems with the work I had done on District Six! This was seven months after the District Six handing over ceremony! My report had been submitted at the end of August 2000, but the Commission did not request the files on individuals until January 2001 – after the handing over ceremony! I do not believe that they studied the detailed tables in my report even then, and I believe that they muddled up piles of verified with piles of unverified files. Eventually I got hold of a critical report on the District Six work, which contained many false allegations. For example we were told we had submitted a two-page report when it was 13 pages with 12 detailed tables totally hundreds of pages! We were criticized for not undertaking Deeds Office research when we had been told at the start of the research that this was irrelevant for tenants! Other equally muddled claims were made which indicated that our report had not been read and understood' (Legassick 2002: 9).

Land Rights, 2012). In the conceptual gap reserved for the legislative subjects of restitution, the District Six Trust therefore served as an alternative means to constitute the ‘subject’ of restitution as a ‘unity’ for the purpose of engaging the state. This is a view shared by the Trust itself:

The Trust exists because the community needed a unified voice to articulate its cause. It was formed in 1998 after a lengthy process and formally registered in 2001. At the time it was thought that the best vehicle to develop the District was a Trust. Over the years the Trust has doggedly protected the rights of the beneficiaries.<sup>26</sup>

The remaining lacuna in this account, however, is that a Trust was not the only (or even the most suitable) institutional option in law. Alexander and Clarke’s report for the Section 34 Court Case had, for example, put forward a communal property association or a Section 21 Company (under the *Companies Act 61 of 1973*) as alternatives to a trust (paragraph 2.6 of the Facilitator’s Report). Other options available in law at the time included a public company (under the *Companies Act 61 of 1973*), or a non-profit company under the *Non-Profit Organisations Act No. 71 of 1997*.

Why, then, was this institutional option chosen? It would appear that the specific choice of a Trust by its Trustees prevailed as a result of two key precedents. Firstly, the District Six Redevelopment and Beneficiary Trust took its lead from the local and provincial government-led Cape Town Community Land Trust (which was set up to drive the redevelopment in the event that the Section 34 application succeeded). According to the District Six Trust, its ‘constitution’, initially adopted in 1998, was ‘modelled on the old Cape Community Development Trust that was proposed by the City of Cape Town as the developer of District Six before its role was nullified by the creation of the District Six Beneficiary Trust’<sup>27</sup>. Secondly, the decision to continue using a Trust as the proxy organisation for claimants builds on an existing set of assumptions about the respective role of community leaders and claimants that was shared by the state and the activists of the District Six Trust. The Trust Deed itself argues that this development merely formalized the existing role of ‘community’ leaders in District Six:

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<sup>26</sup>District Six Beneficiary and Redevelopment Trust 2012, accessed via <http://www.districtsix.za.org/district-six-beneficiary-trust> on 11 July 2012.

<sup>27</sup>District Six Beneficiary and Redevelopment Trust 2012 accessed via <http://www.districtsix.za.org/district-six-beneficiary-trust> on 11 July 2012.

Although the Trust is only registered now, it has existed as a cohesive unit since 1997. Prior to that the Trustees have acted in unison in their capacities as leaders of their communities. As such, the registration of the Trust is simply a matter of formalizing the status quo, which has existed for many years (appendix paragraph 4).

However, implicit in this identification of District Six's Trustees as established community leaders is its passive counterpart, the figure of the 'victim' of forced removals. The introductory phrase of the Deed's preamble captures this identification in the 'voice of the people':

Notwithstanding the democratization of South Africa, we the masses and victims of forced removal will always remember those who died as a result of the human tragedy of Apartheid and of the forced removals at the hand of the "Heerenvolk" Government. Our tragedy in District six must serve as a reminder to society of its inexcusable blindness that it displayed year after year... We therefore, though our freely elected representatives adopt this Trust...

This introduction reads as the enunciation of an identifiable 'people' unified by common victimhood under forced removals by the 'Heerenvolk' government, a people who speak 'through... freely elected representatives'. This 'people' is defined as the collective beneficiary of the Trust using the well-known South African catch-phrase 'formerly disadvantaged community', and 'the dispossessed and disadvantaged community who formerly resided in District Six' (paragraph 1.2).

If we look to the occurrence of similar tropes of victimhood and activist leadership throughout the restitution process, it becomes evident that the use of these tropes to structure and legitimise the Deed is not simply a coincidence, or even a poetic embellishment on the more legalistic descriptions of the roles of trustees and beneficiaries in the text. Instead, these recurring uses of language point to an evolution of the specific institutional configuration of the District Six Beneficiary and Redevelopment Trust out of pre-existing assumptions about *how* claimants needed to be 'governed', and by whom.

In the Section 34 Court Case, for instance, the importance of the figure of the struggle ‘activist’ as legitimate leader for claimants is particularly evident in the opposing affidavit by Anwah Nagia. Nagia emphasizes the efforts of the Hands Off District Six committee (of which he was a leader) to ‘resist the Apartheid Government on a social, political and educational front’ in District Six in order to assert the legitimacy of his organization’s standing in the former ‘community’ of District Six (paragraph 4.4.3). To illustrate the historical and moral credibility that this commands in the South African context, he describes District Six as a key ‘battlefield’ in the national struggle, situating his organization at the forefront of this national liberation struggle:

Between 1988 and 1994 the organizations [under HODS] had a low intensity campaign as a moratorium on the development of District Six seemed to be in place and the attentions of these organizations were directed at the broader liberation of our Country from the oppressive Apartheid regime... (Paragraph 4.4.16).

Particularly noteworthy in Nagia’s account is the emphasis on specific personalities with ties to District Six who led ‘the struggle’, figures he calls ‘significant political leaders’, including Dullah Omar, Ben Kies and Siraj Desai (who chaired the Cape Town Community Land Trust at the time of the application), making District Six and its schools and churches ‘a training ground of cadres in the liberation struggle’ (par 4.4.6). This emphasis on the ‘struggle credentials’ of the opponents to the District Six Section 34 application found considerable political purchase at the time given the recent ascent of the former party of liberation, the ANC, to the national government. The facilitators’ report to the Land Claims Court embraces this importance attached to the role of activists and activism in District Six: ‘the application itself, by generating opposition and resistance to it, may have been the decisive factor in (re-)establishing a community of District Six, although there is, naturally, a very long history of community resistance to the violation of the human rights of the people of the District’ (Alexander and Clark paragraph 2.7). This proved to be a critical victory in the process, since it led to an agreement among the parties to the case to the formation of a Steering Committee that would establish a Trust or Community Property Association<sup>28</sup>, a committee led by Nagia himself.

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<sup>28</sup>Alexander and Clarke describe this outcome as follows: ‘the community-based organizations, individual claimants as well as other respondents in the case’ had been consulted and agreed that the Section 34 application should be withdrawn and that the Land Claims Court be approached for an order in terms of Section 35(2)c of the Restitution of Land Rights Act ‘entrusting a Beneficiary Community Trust (the Trust), a Section 21 Company or, if all the claimants agree, a Communal Property Association (CPA) with the task of driving, co-ordinating

Nagia's defence of the Trust's historical credentials as an activist organization rooted in the broader national liberation struggle re-emerged at points in the restitution process where the standing of the Trust and the process it put in motion was challenged. For instance, in 2006 Nagia defended the Trust against its critics both in terms of its long history of struggle (i.e. its 'struggle credentials') and on the basis of the political virtue of its continued work there:

The District Six Beneficiary Trust to respond to the question about its legitimacy has its roots in successive waves of popular resistance to attempts to erase District Six from the cartographic and legal landscape of the city. It emerged out of the work of the Hands Off District Six Campaign which fought against attempts by the national government, in collaboration with local authorities and certain multinational companies, to impose their narrow and exclusivist visions on the area... The District Six Beneficiary Trust is the direct descendent of the Hands Off District Six Campaign and was established as an umbrella structure in 1997 consisting of religious organisations, educational institutions, cultural and sports organisations. It was established in the tradition of the Hands Off District Six Campaign... For nine months before it was formally launched, its founders held dozens of meetings around the Peninsula to talk through the principles of the trust. Out of this came a re-affirmation of the non-racial project and a commitment to developing District Six as a space for all the city's people, including and especially its poor. The work of the trust to this day is informed by this mandate... If the process of the redevelopment is not managed with the clear non-racial and pro-poor approach that the Beneficiary Trust is fighting for, it will, moreover, make the district vulnerable to the kinds of forces market in the main, but not only which seek to turn the area into a gentrified and intolerant playground... members of the trust have placed their own assets at risk in attempting to finance the development process so far it will also show the special generosity of builders, architects and project managers in giving of their time and expertise without the kind of payment they would normally get. (Nagia 2006)

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and monitoring the process of restitution'. According to the report, the new 'legitimate' committee included Anwah Nagia (District Six Restitution Front), Stan Abrahams and Terence Fredericks representing the District Six Museum, Karel August of the Moravian Church, Sedick Christian (ex-Bloemhof flats resident), and ex-District Six residents Abdurahman Parker, Rashida Ridley, and Cyril Mandindi (par 2.6). For the final body/Beneficiary Trust, the report also recommends that the City Council and Provincial Government be listed as 'ex-officio members' (par 2.8)

The Trust's legacy of 'involvement' in 'social activism' and the 'struggle' returned as primary discursive markers of Nagia's identity as trustee when the Trust was called before the Land Claims Court in 2007 to respond to the District Six Advocacy Committee's application to have redevelopment halted (paragraphs 1 and 2 of Nagia's opposing affidavit). In Nagia's affidavit, the question of the Trust's legitimacy to represent claimants and enter into the Section 42D Framework Agreement with the State is met with the language of mass participation and a 'popular mandate' for the Trust (described in terms of 'mass meetings' with 'thousands of claimants') (paragraphs 30, 45 and 52.2) The Advocacy Committee's concerns over the lack of structured engagement and accountability for claimants through annual general meetings and audits (paragraph 41 of its founding affidavit) is similarly deflected with the discourse of social activism:

The trust started off as a social movement and at all relevant times has been involved in the process to the benefit of all claimants. The priority functions of the trust have thus far been far removed from holding meetings and audits. (Paragraph 44)

While identifications with political activism perform an overt role in cementing the institutional identity and legitimacy of the leadership of the District Six Beneficiary and Redevelopment Trust, tropes invoking the 'victimhood' of claimants feature in a more subtle strategy in the discourse of the state and the District Six activists. However, these tropes are probably been even more important in rationalising the positioning of claimants as 'beneficiaries' of a Trust with limited powers or functions. Indeed, during the Section 34 Court case, the 'disadvantaged' status of claimants, their trauma, loss of agency and suffering are conflated with the plight of other 'disadvantaged' South Africans to justify a 'public interest' driven redevelopment managed by the Cape Town Community Land Trust for the 'socially, economically or politically disadvantaged'<sup>29</sup>.

Davidson's founding affidavit describes the forced removals as having a severe 'social and political impact' (paragraph 31) on claimants, causing 'fear, humiliation, and degradation' (paragraph 35)<sup>30</sup>. His proposed remedy is to have the state-led Community Land

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<sup>29</sup>Davidson's founding affidavit, paragraph 68.6.

<sup>30</sup>Davidson repeats this emphasis elsewhere in his affidavit: 'the applicants and the Trust acknowledge the injustice, trauma and untold suffering caused by the forced removal of the original District Six residents (among them the claimants and prospective claimants). Indeed,

Trust redevelop the site and ‘to target beneficiaries (almost certainly the claimants or prospective claimants) who have been socially, economically or politically disadvantaged’ (paragraph 68.6). The opponents to the case initially foregrounded this same trauma and victimhood of claimants to argue against further state intervention. Nagia argues that agency in the redevelopment process should be restored to claimants, since they ‘are certainly the best judges as to what is in their best interest’ (paragraph 6). He argues that this is the primary reason for the Section 34 application to be rejected:

The human tragedy suffered by the ex-residents of District Six have (sic) been totally understated by the Applicants and in fact almost completely obscured in this application. It should certainly be the most important factor and compelling reason for this court to dismiss the application. (Paragraph 50.2)

Ironically, in spite of this critique of the paternalism of the state’s proposal in its application, the state’s same discourse of victimhood was adopted in the vision and principles of the ROU that ended the impasse<sup>31</sup>, and appropriated almost verbatim by the District Six Beneficiary and redevelopment Trust in its own deed. The Cape Town Community Land Trust, for instance, describes its proposed beneficiaries as those persons ‘who have been socially, economically or politically disadvantaged’, while the District Six Trust Deed declares its own intention to hold and redevelop District Six for ‘the Beneficiary community and other members of the general public who have been socially, economically or politically disadvantaged’ (paragraph 13.1 of the Trust Deed).

The Deed’s tropes of community leadership and victimhood in turn appear to have supported the legal institutional identification of trustees and beneficiaries in the Trust in a relationship that characterises them respectively as active and passive role-players, with Trustees serving a quasi-governmental function. This relation played itself out in the lack of accountability of the trustees to beneficiaries alluded to above, and in significant power differentials in favour of the trustees introduced in the contractual relations established for the ‘pilot projects’. In the ‘Land Development Agreement’ signed between the City of Cape

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the damage, loss and human suffering caused by the removal under the Group Areas Act (and the relevant slum laws) is beyond calculation’ (paragraph 79).

<sup>31</sup> For instance, the ROU’s ‘vision’ is, inter alia, to reestablish a ‘community whose dignity has been restored’ through a process that must ‘be grounded in the needs of the dispossessed community, and the broader disadvantaged community’ (paragraph 1.3). Against the backdrop of the S34 court case, it is evident that the ROU aims to fix a specific political identification of who is included in the District Six ‘community’ (claimants and the ‘disadvantaged’), what the redeveloped District Six should be (a community without cultural or class division), and who should be the lead agents in the redevelopment process (the activist leaders of the trust together with the state).

Town, National Minister of Land Affairs and the Trust in 2006, for example, allows the trustees of the Trust to exercise ‘sole discretion’ in selecting claimants for inclusion (paragraph 6.1.6), as well as discretion over the selection criteria to be applied (one of which is ‘ability to pay’, per paragraph 6.1.5). The trustees are given considerable control over a range of aspects of the finished development, particularly through the introduction of a social compact that claimants must be willing to sign in order to participate in the redevelopment (paragraph 6.1.2). The Trust is even given specific control over the manner in which transfers of title are handled, by being authorized to select its attorney to manage the transfer via processes prescribed in South African property law (paragraph 5.1.7).

The powerful role of the trustees set out in the Deed of the District Six Beneficiary Trust is similarly invoked in the Memorandum of Agreement (MOA) signed by the Trust and claimants, particularly through the role of ‘Developer’ afforded to the Trust and ‘purchaser’ to the beneficiary. As previously noted, this positioning of claimants as ‘purchasers’ via a ‘sale’ (par 5.1.6) places the claimants in obligation to the Trust in a manner not contemplated in restitution legislation (restitution implies a one-way obligatory transfer of restituted rights<sup>32</sup>). Even though the sale is not a profit-making transaction (clause 6.3), the MOA and Land Development Agreement’s principle of payment required from claimants in order for them to be included in the redevelopment has become a potential factor of exclusion from restoration of land, and therefore their desired route to restitution, for those claimants without financial means.

Further power differentials in favour of the trustees and at the expense of beneficiaries are apparent in the MOA’s provision for the Trust to exercise indefinite ‘first right of refusal’ on resale of the property sold to claimants (in paragraph 20.1), as well as a range of non-cancellation clauses and associated liabilities for the claimant (paragraphs 12 and 19), which are subject to the *Conventional Penalties Act 15 of 1962*.<sup>33</sup> There are no clauses that introduce penalties or other consequences for the developer in the case of default on its part. In fact, the developer is protected by clauses that give grounds for ‘reasonable extensions’ on

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<sup>32</sup> In paragraph 7.2.2 provision is also made for the Trust to receive funds from former owner claimants. This appears to go beyond the role assumed by the Trust under the S42D Framework Agreement, which addressed itself only to former tenant claimants. I have not been able to ascertain the basis of this extension of the Trust’s role. This provision for the inclusion of former owners in the pilot projects also contrasts with the Advocacy Committee’s court application, which argues that former owners have been entirely excluded from the District Six redevelopment process.

<sup>33</sup> The *Conventional Penalties Act 15 of 1962* (as amended by the Justice Laws Rationalisation Act 18 of 1996 to align it with the *Constitution*) provides for ‘the enforceability of penalty stipulations, including stipulations based on pre-estimates of damage, and of forfeiture clauses’.

the delivery of its contractual obligations (paragraph 15). This power differential recurs throughout the document<sup>34</sup>.

It appears, therefore, that the institutional identifications formalized by the Trust helped perpetuate presumed historical identifications and roles established during and following forced removals, giving expression to Balibar's observation, in his essay 'Three Concepts of Politics: Emancipation, Transformation, Civility' that 'subjects act in accordance with the identity which is imposed on them, or which they create for themselves' (1991: 1). The 'status quo' referred to in the District Six Beneficiary and Redevelopment Trust Deed has been sufficiently reproduced and canonised in public discourse on District Six to generate social identifications through what Balibar describes as an 'uneven, unfinished process, of hazardous constructions' (Balibar 2002: 27-28). Much like the concept of a particular 'lost community' of District Six, the complementary tropes of active struggle leadership on the one hand and, on the other hand, the passive victims who must be 'led', 'uplifted', 'benefited' or restored to 'dignity', developed their legitimacy through reproduction and canonisation in the public domain via a range of 'context-texts' on District Six published prior to and during the restitution process. The remainder of this chapter will survey the key points where these tropes have fashioned said identifications, starting with the role of the anti-apartheid 'activist'.

### 3. Trustees and Activist Identity Positions

Although it has not been as widely proliferated as the concept of a lost 'community' in District Six, the figure of the anti-apartheid struggle activist has been the focus of a number of texts partly or wholly dedicated to capturing a 'struggle heritage' on the site. The most substantial contributions in this regard have been Yossuf Rassool's *District Six: Lest We Forget* (2000), Jeppie and Soudien's *The Struggle for District Six: Past and Present* (1990), contributions on 'coloured' racial identity (including Adhikari 2005 and 2009), accounts of

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<sup>34</sup>For instance, paragraph 19.2.5, wherein the claimant agrees to a very low burden of proof in the event of court proceedings between the parties, rendering him or her easily exposed to liability for default on the contract. The claimant is required to agree that 'a certificate signed by a director of the Developer specifying the amounts or claims arising out of this agreement' and 'a certificate signed by the architect or designer appointed by the Developer that the works have been completed satisfactorily and in accordance with the plans' shall be 'prima facia proof of the facts stated herein for the purpose of obtaining summary judgment or default judgment against the Claimant'. At certain points, clients are even warned against 'bad faith', while no equivalent provision is made to protect the rights of the claimant in relation to the Developer. In paragraphs 16.2, 16.5, and some of the ensuing paragraphs preclude the claimant from 'impeding', 'frustrating', issuing any 'false statement' or 'preventing' their mortgage funding being transferred to the Trust. Paragraph 19 also carries several further similar connotations, together with references to other more conventional potential risks to the claimants' performance of their contractual obligations, such as sequestration/liquidation. No similar potential for 'bad faith' is attached to the developer in the text of the contract. Other powers afforded to the Trust, including its authority to require a R60 000 payment from each of the claimants (paragraph 3), and its right to retain the claimant's property until the payment is made (paragraph 5).

forced removals in Cape Town (such as Shaun Field's 2001 *Lost Communities*) and the work of the District Six Museum.

Common to most of these accounts is an emphasis on the history of political activism in District Six, dating back to early 20<sup>th</sup> century, including the Non-European Unity Movement (NEUM), the Anti-CAD Movement, and the All Africa Convention described by Anna Bohlin in 'The Politics of Locality: Memories of District Six in Cape Town' (1988), and later by Deborah Hart (1990), Crain Soudien (1990), Vivian Bickford-Smith (1999), Yosuf Rassool (2000), and others. These authors regard the early resistance movements of District Six as key contributors to South Africa's liberation struggle, canonising developments like the publication of the NEUM's 10 point manifesto in 1942, and the publication of radical newspapers from District Six like *The Torch* and *The Guardian*. The history of activism ascribed to District Six becomes a defining feature of its former community in these works. In *The Struggle for District Six: Past and Present*, for example, Richard Rive's contribution to the HODS campaign notes that: 'District Six was not all music, song and dance. It was already at the forefront of the fight against constitutionalised racialism which was finally to kill it' (1990: 115). New Era Fellowship leader and former NEUM member Richard Dudley takes the link between District Six and the national liberation struggle a step further when he states that District was:

by any historical measure the birthplace of the truly national democratic movement, the fountainhead of literature and art that has fed so many streams and the bridgehead from which the intellectual and ideological development of democratic groups was defended and advanced with such notable success. (Dudley in Jeppie and Soudien 1990: 193).

Yosuf Rassool's *District Six: Lest We Forget* (2000) places a similar importance on the role of District Six in South Africa's liberation struggle. For Rassool, the activists of District Six brought 'a new lexis to The Struggle' including rejection of 'the Herrenvolk' (ibid: xi), invoking the discourse that later found its way into the Trust Deed. The 2001 volume on sites of forced removal around South Africa edited by Sean Field entitled *Lost Communities* contains similar emphasis on the role of District Six in South Africa's broader liberation movement. Harries and Swanson, for instance, describe the literary works of District Six as

‘very much part of the broader history of struggle against racism, prejudice and segregation in South Africa’ (Harries and Swanson in Field 2001: 80).

Against this backdrop, most of the texts on District Six emphasise the particular social status of those District Six residents identified (or who identified themselves) as activist leaders in the liberation movement. Figures such as the NEUM’s Isaac Tabata, Abdullah Abdurahman of the African Political Alliance, ‘Cissie’ Gool (of the Anti-CAD movement) and Alex and James La Guma loom particularly large in this discourse. Rassool describes these ‘men and women who founded the Movement’ as ‘visionaries’ whose ‘contribution to The Struggle cannot be swept under the carpet of history’ (Rassool 2000: xi). The author particularly notes the writers of the ‘struggle’ who published texts in spite of the white dominated publishing environment: ‘we must salute Richard Rive and Alex La Guma, two writers who seemed to have penetrated this iron curtain. No doubt there are others, like my friend, Victor Wessels, who left behind upon his early death, numerous poems that need to form part of the literature of The Struggle.’ (Rassool 2000: x).

In a more popularly accessible form, the role of political activists in District Six has been documented and entrenched in the work of the District Six Museum. The Museum’s guide for visitors introduces the institution first and foremost as a place ‘to commemorate the area and honour the people who fought against the forced removals and Group Areas Act’, while the Museum space displays a timeline of political resistance in District Six on its lower floor, and a set of portraits of key political figures from the site, including Cissie Gool, IB Tabata, the La Gumas and Rive, on its upper floor.

The conceptual situation of particular activists in the struggle by these texts expresses a particular identity position that is informed by local and national political scripts, a position which comes to be occupied (or perhaps appropriated) by the leaders of the HODS campaign, many of whom went on to become the trustees of the District Six Trust. This linkage is most explicitly described in Crain Soudien’s lecture in *The Struggle for District Six: Past and Present* (1990)<sup>35</sup>. Soudien situates the HODS campaign in terms of ‘three phases’ of struggle in District Six (Jeppie and Soudien 1990: 144):

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<sup>35</sup> To recall, this text recorded the HODS campaign conference, organised in July 1988 at Zonnebloem Estate by churches, sports, civic and cultural organisations which had been vocal during the forced removals and redevelopment efforts, as well as senior ANC figures like Dullah Omar. The campaign’s objective for former residents was to prevent further interventions or development in District Six (Jeppie and Soudien 1990: 12).

A first phase can be identified with the formation of the District Six Defence Committee (DSDC) later to be known as the District Six Association (DSA); a second with the emergence of the 'Friends of District Six' (FDS) in 1979; and a third phase with the proliferation of small struggles beginning with the Save Our Silvertree' campaign of 1984 and coming to a head with the Hands off District Six (HODS) Campaign begun in 1987. As a tradition, protest is deeply embedded in the culture and history of the area which has come to be known as District Six. (ibid)

Soudien's 'three phase' analysis therefore defines the HODS movement of which Nagia and Soudien were a part as the historical culmination of earlier developments, including the site's historical role in the national 'struggle' against the Tricameral Parliament<sup>36</sup>. This generates a revolutionary narrative in the radical intellectual tradition, in which Nagia, Soudien and other activists take on a particular historical identity as agents of social and political change in District Six and South Africa. Soudien accordingly uses the language of the Russian Revolution to describe the site's community leaders as 'mature political cadres' (Soudien in Jeppie and Soudien 1990: 148).

The role of the HODS campaigners in resisting forced removals and state redevelopments in District Six, and, indeed, in setting up the District Six Museum itself, is well noted in the Museum's publications and in other published work by the Museum board members. In *Recalling Community in Cape Town* Soudien describes the Museum as a 'spin-off of the Hands off District Six (HODS) campaign' (Soudien in Rassool and Prosalendis 2001:5). Rassool describes the museum as 'an institution which has brought together community-connected academics — some of whom see themselves as 'activist intellectuals', but who often bear the restrictive marks of the academy — and former residents, many of whom have been activist intellectuals for decades, with their roots in District Six-based political and cultural organisations' (in Rassool and Prosalendis 2001: xi) while Lucien Le Grange describes the museum as working to 'engineer a collective spirit and camaraderie' that arose from the Hands Off District Six campaign and 'the period of heady protest politics'. (Le Grange in Rassool and Prosalendis 2001: 7). Stan Abrahams regards the museum's venue in Buitenkant Street Methodist Church as further speaking to its rootedness in activism, since

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<sup>36</sup> Soudien also documents the activities of the Woodstock and Walmer Estate Residents' Association (WOSAWA) (formed in mid-1980) and the Organisations United Against Traitors (OUT), which brought together activists from the United Democratic Front (UDF), the New Unity Movement (NUM), the Cape Action League and other smaller organisations (1990: 148).

the church itself had ‘a rich history of vision to overcome the oppression of race’ (Abrahams in Rassool and Prosalendis 2001: 3).

Several authors have seen the Museum’s involvement in restitution and reconstruction of District Six as a continuation of the historic activism associated with the site, rather than simply a statutory process under the new Constitutional dispensation of South Africa. Rassool (2006), for instance, notes the active role of the Museum in the Section 34 court case, as well as its growing influence in the events following, among which ‘the most powerful expression of the District Six Museum as a forum occurred when its spaces were turned into official land-restitution hearings’ (2006: 14)<sup>37</sup>. In a later publication on the Museum, Zayd Minty (2006) articulates the relationship of the Museum to restitution efforts by referring to the District Six Trust as the Museum’s ‘sister structure’ (Minty 2006: 5).

The discourse positioning District Six’s activists as leaders in South Africa’s liberation struggle has been taken up by popular media reports on these individuals. At the signing ceremony for the Section 42D Framework Agreement in 2000, for example, Trust Chair Nagia is identified as having ‘championed the cause to reclaim the land for more than 20 years’ (Cape Argus, 27 November 2000). When the first houses of the pilot project were handed over at a ceremony in 2004 officiated by former South African President Nelson Mandela, the *Cape Argus* reported that Nagia was ‘revered as a hero among the thousands who have waited patiently for so long to return’ (Cape Argus, 12 February 2004). A similar tribute was paid to HODS activist and Trustee, Terence Fredericks in a profile in the *Cape Argus*, headlined ‘Champion for District 6’. The article states that claimants can ‘thank Terence Fredericks for helping to get their land back’ through ‘his career campaigning for the rights of the community that was booted out of the city centre.’ (Cape Argus, 6 April 2003). These portrayals in the public domain have further entrenched the social and institutional identities assumed by the District Six Trustees in the restitution process, vindicating the control they have exercised over the redevelopment to date.

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<sup>37</sup>Elsewhere Rassool notes in the same vein that ‘the Museum is convinced that one of the most important contributions it can make to the fields of culture and history in South Africa is to articulate a position which questions the validity of race and racial categories. One of the most important aspects of the mission of the District Six Museum is to question race at every turn and to assert a politics of nonracialism and anti-racism in every facet of its work. ...It is out of its ‘core business’ of memory work conducted in support of the struggle for the restitution of land rights in District Six that the District Six Museum seeks to recall community in District Six. The notion of ‘recall’ used here and in the title of this book refers both to the Museum’s memory work on District Six and its desire to see the community of District Six restored and called back to resettle, redevelop and heal the scarred landscape at the foot of the mountain. (Rassool in Rassool and Prosalendis 2001: x-xi). Minty similarly describes the Museum as ‘an activist space, not funded primarily by government’ which enables it to play ‘a vital role in the restitution process and towards healing the city through memory’ (Minty 2006: 2).

#### 4. Victims, Beneficiaries or Claimants?

As noted earlier, the role of the ‘activist’ in defining the institutionalised ‘subject of restitution’ in District Six is augmented by its relationship to tropes of ‘victimhood’ and ‘disadvantage’ that have been attached to land claimants, characterising the latter as a group that requires the outside agency and intervention. The text of the District Six Beneficiary and Redevelopment Trust Deed opens with this trope of ‘victimhood’ to identify the ‘masses’ it purports to represent (preamble paragraph 1)<sup>38</sup>. It is clear that the forced removals marked an instance of victimisation in a moral and visceral sense, accompanied by substantive material loss. In the domain of discourse, however, various writers have noted that victimhood can assume a more complex form as a social *role* or identity position, constructed and assumed pursuant to sustained confrontation and harm sustained by a person or collective. In the *International Red Cross Review*, for instance, Daniel Bar-Tal, Lily Chernyak-Hai, Noa Schori and Ayelet Gundar (2009) write that in conflict or post-conflict situations ‘self-perceived collective victimhood’ can be brought into being as ‘a state of mind... based on real experiences and on the process of social construction’ (2009: 257). As such, Bar-Tal *et al.* maintain the view that ‘to develop collective self-perception as the victim is an identity process, occurring in long and violent conflicts, in which one or both parties reconstruct their respective identity around their victimization by the other side’ (2009: 251). Political analyst Luc Huyse similarly argues that the figure of the ‘victim’ can become a forceful social identification in post-conflict situations such as South Africa, noting that, in some instances, ‘there has been a shift from the cult of the hero or victor to the cult of the victim. Suffering instead of heroism now attracts public and political consideration’ (2003: 63). Huyse acknowledges that this can help to generate restorative and reconciliatory initiatives, but is ‘not a blessing in all circumstances’, especially where victims ‘become trapped in the past, searching continually for recognition of their suffering but with no strategy for the future’ (*ibid.*). In the South African context Mamphela Ramphele (2001) notes, in her essay ‘Social Disintegration in the Black Community - Implications for Transformation’, that the ‘victim image’ encourages a sense of entitlement and ‘demoralises those on the receiving end...they begin to see society as the agent of change and not themselves’ (2001).

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<sup>38</sup> This thesis leaves aside the question of how victimhood might be distinguished from or related to claims arising from the experience of trauma.

The characterisation of claimants as ‘victims’ in District Six is therefore not unique to this case, or to restitution. However, narratives of victimhood have been identified as particularly prevalent in restitution by scholars on the topic due to the legal identification of claimants as individuals subjected to injustice. Andries Du Toit (2000), for example contends that tropes of ‘loss’, ‘pain’ and ‘victimhood’ dominate the discourse of restitution in South Africa<sup>39</sup>, while former Regional Land Claims Commissioner for KwaZulu-Natal, Cherryl Walker, has argued that a key point of departure for the political ‘master narrative that underpins the project of restitution in South Africa’ is the ‘trauma’ of loss’ (2008: 234). Both Du Toit and Walker regard this framing of claimants in discourse as negatively impacting on the agency of claimants. Du Toit, for instance, argues that the discourse of victimhood has had the (largely unintended) consequence of encouraging and entrenching the marginalization of claimants by state and other actors in the process of restitution, effectively undermining the agency of claimants:

The court-driven, litigious nature of the process thus far... makes lawyers and government officials the central actors in a process claimants can only observe from the sidelines. Claimants’ only role, it seems, is to make demands... Part of the problem is the very forms of practice and discourse that have tended to construct claimants as victims. For it has legitimized modes of argument and practice that have taken as their central point of departure the powerlessness and helplessness of claimants. (Du Toit in Cousins 2000: 84)

Walker likewise reads the identification of claimants as victims as a risk to the agency assumed by and afforded to claimants, but her concern is with the role of intermediary groups that sometimes act as ‘gatekeepers’ in the process, taking advantage of the resources made available by the state: ‘project resources, including land, are redirected to “representative beneficiaries” whose self-aggrandisement is justified in terms of the history of black dispossession and then sanctified as an expression of redress on behalf of (but presented as ‘for’) all black South Africans’ (2008: 234).

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<sup>39</sup> Du Toit argues that ‘[o]ne of the most powerful and arresting features of the land claims process... is the extent to which the experience of political and historical *pain* seems to loom large in the discourse of many claimants – the centrality in their narratives of the traumatic moment of dispossession... the predominant way in which sense has been made of these powerful processes whereby historical and political pain is experienced and re-experienced is through a discourse that constructs claimants most essentially as victims, as people essentially related to in terms of their *powerlessness* and their experience of *loss*’ (Du Toit in Cousins 2000: 81).

In the case of District Six, assumptions have been at work that both state and non-state modes of control were needed over claimants. As we have seen, by establishing a trust and agreeing to a single integrated redevelopment of District Six under the ROU and Section 42D Framework Agreements, both state and Trustees appear to have agreed that claimants needed to be managed as a collective, without direct access to the redevelopment. The assumptions about claimants supporting this paternalistic arrangement developed as a set of social identifications over several decades, and gained increasing ideological weight as the site became a 'symbol' for forced removals across South Africa.<sup>40</sup> Indeed, victimhood has been a critical trope in discursive 'condensations' of the site into a metonym for forced removals in South Africa, and, although it is not possible to recount all of its instances here, several particularly overt linkages between the discourse of the Trust Deed and dominant context-discourses in District Six serve to demonstrate the influential role that this characterisation has had on the institutional identification of claimants as passive beneficiaries in the District Six Trust Deed.

One of the most significant expressions of the discourse of victimhood in District Six emanates from the Hands Off District Six committee, which, according to Jeppie and Soudien (1990) demanded that 'the people of District Six, having once before been the victims of callous bureaucratic and politically-inspired diktats, make their own decisions about the fate of the area' (Jeppie and Soudien 1990: 5). While this reading calls for the return of agency to claimants, it supports a familiar refrain that re-appeared in the Section 34 Court Case, namely, that the victims of forced removal should be led by their own 'leaders' and not by the state. Restoration of agency is therefore an imperative for the HODS campaign, but this is to be done through the activist structure, rather than left to claimants to carry out as an individual enterprise.

The District Six Trust Deed's reliance on configurations of the 'victim' as it has figured in representations of District Six is particularly well illustrated in the Trust Deed's reference to the former persecutor of its beneficiary community as the 'heerenvolk government'. This

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<sup>40</sup> The development of District Six into a metonym for forced removals has been noted by various commentators, for instance, historian Henry Trotter recently wrote, in an essay on District Six for *Burdened by Race: Coloured Identities* (2009), that 'District Six has become symbolic of Group Areas trauma generally' (Trotter 2009: 64). Similarly, Shaun Field's *Lost Communities* argues that 'the suffering of ex-District Six residents has been publicized through various popular mediums such as books and musicals...it is the District Six story that has symbolically come to represent the plight of all people who were forcibly removed in Cape Town' (Field 2001: 12). The reading of District Six as a metonym for forced removals is also found in Beyers 2007, Beyers 2008, Field 2001, Erasmus 2001, Rassool 2001, Field, Meyer and Swanson 2007 and others.

characterisation recalls Richard Rive's language of 'untermenschen' in his novel *Buckingham Palace District Six* (1988) to describe the forcibly removed people in District Six. The apartheid regime and its race-based social engineering are paralleled in Rive's novel with the Nazi enterprise by Jewish landlord of Buckingham Palace, Katzen, during his interactions with his tenant, Zoot. At the end of the novel, Katzen takes up the cause of his tenants by delaying the government's efforts to destroy Buckingham Palace, citing his previous persecution and flight from Germany as his reason for standing up to South Africa's fascist regime (see 1996: 149-152). Beyers observes that this aspect of Rive's novel gives the impression that 'residents' sense of solidarity as victims of racial injustice' is one of the most important unifying traits of the 'imagined community' it seeks to invoke (in Adhikari 2009: 87-88).

The District Six Museum has contributed further to the 'universal' status of District Six as a symbol of persecution. Ciraj Rassool and Jos Thorne's essay in the Museum's publication *Recalling Community in Cape Town* (2001), for instance, states that 'almost thirty years after its destruction the District continues to retain its referential status, like Auschwitz and Buchenwald as one of South Africa's foremost examples of the inhumanity of the apartheid system.' (Rassool and Thorne 2001: 98). The parallel that these various writers, and the Trust Deed, draw between the apartheid government and the Nazi regime (as near-universal signifier of evil) simultaneously invokes the holocaust's victims, projecting this archetype onto claimants.

With the development of these historical scripts of victimhood in the discourse of activists, historians, the Museum, and the former residents of District Six, the popular press in Cape Town has served as a 'simplifying force' in Balibar's sense to forge these discourses into an easily understood identity position in the public domain (2002: 76). This process began from the early 1980s<sup>41</sup> as the last of District Six's residents departed, with 'victim' as a keyword becoming increasingly common in the mid-1990s with the introduction of restitution, not only in the journalists and headline editors, but also in public statements of activists, the state, and claimants. With the end of the Section 34 Court encounter in 1998, for

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<sup>41</sup> Newspaper reports became particularly focused on the suffering and hardship induced by the forced removals in the early 1980s, for instance, the *Cape Argus* reported that: 'After 16 Years, R55-million and the uprooting of 40 000 people, District Six has little to show what it cost in time, money and human suffering to implement the Group Areas policy' ('District Six: Time Money and Suffering', *Cape Argus*, 11 February 1982). Similarly, in June of 1982, the *Cape Argus* reported that: 'The tensions, trauma and uncertainty for the last residents in District Six appear to be unrelenting. They have now finally been given homes to which they can move, but they are unhappy' (*Cape Argus*, 18 June 1982, 'End of the Line for District Six').

instance, a number of claimants interviewed in the media emphasised their collective sense of victimhood and solidarity with others harmed by apartheid: ‘we all suffered substantial losses when our land was stolen... This will be a victory for the victims of apartheid... But we believe restitution must also be about restoring the dignity of our suffering’<sup>42</sup>. Others expressed uncertainty over ‘whether the spirit of District Six can be recreated after so much pain and suffering’, and called on government to ‘carry out its moral duty to the victims of forced removal’<sup>43</sup>. In the years following the onset of restitution the emphasis on the pain of loss continues: ‘I once lived here on the corner of Blythe and Springfield streets. We were chucked out of here and we had to go and squat. It just hurts’<sup>44</sup>.

Key state role-players involved in restitution took up this discourse in public statements, and it became something of a shorthand to define the primary role of claimants in the process. At the outset of the restitution process the Chief Land Claims Commissioner emphasised the ‘severe personal grief and hardship of the victims, who could never be adequately compensated’<sup>45</sup>. When the first of the houses were handed over in District Six, then President Thabo Mbeki vividly described how ‘the savage hand of racism’ had ‘destroyed the laughter and joy of many people and replaced it with a funeral dirge’<sup>46</sup>. With ensuing delays on the project, the media began to emphasise the new plight of claimants as victims of unnecessary delays, including cases of elderly claimants dying before being able to claim their homes:

The shame of District Six used to refer to the bulldozing of houses and the forced removal of 60 000 people to the Cape Flats in the 60s and 70s. Today it is the fact that the people desperate to return to their roots are still waiting. At least five have died and just 24 homes have been built on the land in the past six years<sup>47</sup>.

There are, of course, many more instances where the trope of victimhood is developed in representations of District Six in a manner that affirms social identifications of claimants as passive recipients of state and/or trustee interventions. However, these examples sufficiently illustrate a common thread that supports the hypotheses of both Du Toit and Walker, namely, that construal of claimants primarily as victims in need of outside intervention has had the

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<sup>42</sup> Abdul Gaffoor Ebrahim in ‘Putting District Six Together Again’, *Cape Argus*, 12 September 1998.

<sup>43</sup> Abdul Ahmed in ‘Putting District Six Together Again’, *Cape Argus*, 12 September 1998.

<sup>44</sup> Rose Claassen in ‘The District is Alive in Shangri-Lah Collection’, *Plainsman*, 7 December 2005.

<sup>45</sup> ‘Race Act Victims Promised Redress’, *Cape Times*, 26 April 1999.

<sup>46</sup> ‘Music and Laughter Return to District Six’, *Cape Argus*, 27 November 2000.

<sup>47</sup> ‘District Six’s New Pain: An Endless Wait’, *Weekend Argus*, 4 November 2006.

unintended consequence of subjecting them to new institutions and systems that have tended to limit agency and the exercise of citizenship.

## **5. Conclusions**

Reading the contractual documents of the District Six restitution process has shown that the 'subject' of restitution in this instance is more than (or perhaps less than) the 'land claimant' as inscribed in South Africa's constitutional order of discourse. The legal subject has been appropriated and transformed into an institution, in the form of the District Six Beneficiary and Redevelopment Trust, comprising legally identified trustees and beneficiaries. Although the trust comprises forcibly removed former residents of District Six, I have observed that this legal re-casting of claimants in an organisational arrangement has not acted as a neutral conduit through which these legal subjects can exercise their rights to claim property against the state. The trust is a legal body that, by its very structure in law, allocates significant levels of control over the management and use of a property to trustees, while the actual property rights-holders are designated as passive beneficiaries with little or no power or function in the work of the Trust.

Observing that this legal arrangement has not been the only, or the optimal choice of institution for restitution, I have further argued that the particular choice of a Trust and the power differential it introduced has been generated by restitution's encounter with two major factors at work in District Six. The first is the paternalistic discourse employed by the state to justify and constitute its Section 34 application to have a Cape Town Community Land Trust redevelop the site. The second is a historical 'status quo' referred to in the District Six Redevelopment and Beneficiary Trust Deed wherein the forcibly removed are construed first and foremost as a people victimised, while their 'natural' leaders are identified as 'those who struggled' against apartheid, or at least, those who successfully claimed this identity by asserting their place in a historical narrative of liberation struggle in District Six. This 'status quo' of leadership for a persecuted people did not derive its definition or its legitimacy within the constitutional 'order of discourse'. It is an institutional and legalistic expression of what Balibar terms a set of 'uneven, unfinished' and 'hazardous constructions' of identity that have been inscribed through historical, museum, literary and mass media texts in District Six (2002: 27-28). The institutionalization of these historic and legal identifications into a new hybrid form of governance, has, paradoxically, led to the continued marginalization of the

constitutional subjects of restitution within the terms of this same historic 'status quo', leaving claimants to be 'uplifted' by the Trustees (paragraph 13.2), rather than accessing their property rights.

University of Cape Town

# Chapter Five: District Six's Object of Restoration – Integration or Exclusion?

## 1. Introduction

For all its complexity, the analysis of restitution's inscription in District Six thus far has been aided by the fact that restitution's legislative 'object of dispossession', and its 'subjects' (claimants), are relatively clearly delineated within the terms of South African property law. To recall, the object of dispossession is described in the *Constitution* (section 25) and the *Restitution of Land Rights Act* as a 'right in land' dispossessed under racially discriminatory laws after 19 June 1913 (leasehold, ownership, or trading rights, for example), while restitution's subject is any legal person dispossessed of the aforementioned rights. In contrast, restitution's 'object of restoration' is a more open-ended concept within the constitutional order of discourse. It can be a 'right in land' or an alternative mode of compensation, as long as the award is 'just and equitable'<sup>1</sup>. The conceptual slipperiness that legislation's open-ended provision for reparations introduces to the restitution process, and the space it creates for interpretation, substitution and even manipulation, makes a critical analysis of its specific iteration in District Six more complex, but no less urgent.

The current chapter is therefore directed at reading the inscription of an 'integrated redevelopment' that has been conceptualised and partially implemented in the District Six case as a means to restore properties to returning claimants in District Six<sup>2</sup>. The chapter opens with an analysis this redevelopment's specifications within the contractual documents of the restitution process, and argues that it has arisen as an appropriation of claimants' legal objects of restoration into a broader political project, namely, the creation of a physically and socially integrated community in service of a range of broader political 'ends', from 'healing racial divisions' in Cape Town, to the production of a paradigmatic post-apartheid community.

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<sup>1</sup> The Interim Constitution describes the object of restoration as the 'right in land' of which a person was dispossessed under racially discriminatory laws after 19 June 1913 (Section 121 (1)) or, if this is either 'not feasible' or if 'alternative relief is preferred, the state may provide 'an appropriate right in available alternative state-owned land', 'pay the claimant compensation', or 'grant the claimant any alternative relief' (Section 123(3)) as long as it is 'just and equitable (section 123(4)). The Final Constitution's Section 25 (7) similarly states that a person dispossessed of a property after 19 June 1913 is entitled 'either to restitution of that property or to equitable redress'.

<sup>2</sup> Financial awards as 'compensation' in District Six are based on a single formula applied to claims across South Africa. To recall the discussion on financial awards in Chapter 2, the terms for financial compensation are stipulated in the Commission on Restitution of Land Rights' 'Standard Settlement Offer Policy'. A total of 1200 claimants have taken financial compensation in District Six (Commission on Restitution of Land Rights 2012).

The chapter goes on to argue that philosopher Henri Lefebvre's well-known principle, expounded in his seminal works *The Production of Space* (1991) and *The Urban Revolution* (2003) that 'space harbours an ideology', and that 'urbanism incorporates a class strategy (a particular logic)' (2003: 157) remains an applicable and necessary critique for the envisaged District Six redevelopment, in spite of the latter's stated efforts to transcend the social stratification which was the original target of Lefebvre's work. This analysis will suggest that the discourses of socially and physically integrative urban planning, and the related aspirations for national identity formation, simultaneously mask and generate renewed modes of segregation and exclusion. It therefore closes by unpacking some of the ways in which individual property rights and the physical space of District Six have become hyper-regulated and controlled under a 'contractual community' for the site. In the process, a central paradox arises: the contractual devices called upon to engineer social 'integration' have limited claimants' access to property rights to a greater degree than typical for the open property market in South Africa, and have prevented the majority of claimants returning at all by blocking direct claimant access to the land. Fifteen years into the restitution process, only 56 of the units have been completed and occupied (Commission on Restitution of Land Rights 2012). The resulting ownership and land use constraints on District Six, moreover, have no end point, allowing them to remain in place past the point where claimants have gone.

It remains to be seen whether the symbolic, intangible aspects of the object of restoration (community, a new positive political identity) will prove 'compensation' enough to offset the lasting implications of this project, and its indeterminate deferral of the object of restoration for the majority of claimants.

## **2. Land Right or Political Project?**

The discursive object of restoration for District Six claimants has been produced in a series of legal texts beginning with the District Six Record of Understanding<sup>3</sup> (ROU), whose 'vision' describes an 'integrated redevelopment' within which claimants' rights will be restored<sup>4</sup>. The Section 42D Framework Agreement for former tenant claimants (signed in November 2000) applied the ROU's 'vision' of an 'integrated redevelopment' as the basis for

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<sup>3</sup> Signed by the District Six Trust (as voluntary association), the local government and the National Minister of Land Affairs (represented by a Provincial Director) on 13 September 1998

<sup>4</sup> The ROU leaves the parties to 'agree to a process whereby an appropriate institutional framework and model for redevelopment will be identified' (paragraph 1.4), and establish a 'public landholding' arrangement (paragraph 1.7).

settling the restitution claim. Claimants opting to return (including former owners) then individually settled their claims with the state in Section 42D Settlement Agreements, which recorded their agreement to receive their restored right via the ‘integrated redevelopment’. With the District Six Redevelopment and Beneficiary Trust positioned as ‘developer’ of the redevelopment, claimants were required to contract with the Trust to gain their restored right (by signing individual Memoranda of Agreement (MOA) with the Trust).

The ROU’s integrated redevelopment is not, however, only produced in service of restoring land rights to claimants. It has the further task of creating ‘a vibrant multicultural community whose dignity has been restored in a developmental environment, grounded in, and meeting the social and economic needs of the claimants and broader community that will contribute towards the building of a new nation’ (ROU ‘Vision’). A set of ‘principles’ that will promote this outcome are listed in the ROU as ‘tolerance toward all religious denominations’ (paragraph 20.11), ‘tolerance of all educational institutions in the surrounds’ (paragraph 20.12), and ‘racial tolerance’ (paragraph 20.13). Similar desired outcomes are echoed in the District Six Redevelopment and Beneficiary Trust Deed, which commits the Trust to trying generally ‘to heal the divisions of the past’ (preamble) and promote the principles of ‘non-discrimination’ (paragraph 13.3).

This broader symbolic project for District Six has developed its specific meanings and its legitimacy within the discourse of the state, local government and the ‘community leaders’ of the District Six Trust since the early 1990s, when a fundamental assumption gathered momentum in the public domain that restitution in District Six should be used for a political purpose over and above restoring land rights to claimants. The purpose in question is variously construed as a ‘reversal’ of group areas segregation, the construction of a new political community that can serve as an exemplar of ‘developmental’ urbanism, and even lead post-apartheid South African identity formation. In practice, however, this project has succeeded, first and foremost, in preventing the realisation of a physical or symbolic community in District Six.

The imperative to use this restitution site for a particular ideological project can be traced back to the Hands Off District Six campaign’s insistence that the land in question remain ‘salted earth’ until apartheid laws had been repealed, after which it could become a ‘model’ for post-apartheid governance:

The present struggle in and for District Six is more than simply one about housing for needy and displaced persons. It is that but it is also part of the struggle for political hegemony. District Six offers the opportunity to pilot through models for the way in which a future South Africa will conduct its local government affairs (Jeppie and Soudien 1990: 14).

This position set the terms for the nature of the redevelopment in the Section 34 Land Claims Court encounter in 1997. Even though the case became an acrimonious exchange, both parties agreed on the broad principle that an ‘integrated redevelopment’ in District Six would be necessary to ensure it could be centrally planned and steered toward a particular end. Davidson’s founding affidavit on behalf of the state, and its appended ‘Motivation for the Integrated Redevelopment of District Six’ (originally formulated by the Cape Town Community Land Trust in May 1996) argued for the state’s application on the basis of urban planning principles and a broader socio-political project of ‘healing’ apartheid spatial divisions. On the one hand, Davidson maintained that an ‘integrated redevelopment’ would be the only ‘rational’ option for rebuilding District Six in terms of urban design principles, proposing to use the work of urbanists Dewar and Uytendogaardt (1995) to create ‘the kind of place District Six could become’ (page 31). On the other hand, the application for a state-led integrated redevelopment is described as a means to ‘heal the wounds of Apartheid policies wrought upon the city and promote urban restructuring in line with Government and local authority policies’ (page 1). On these grounds, the application sought to exclude individual claimant access to the site and the ‘piecemeal’ redevelopment that would result (paragraph 68.3, table 2), describing the latter as a risk to both public and claimant interests (an eight point argument is offered against piecemeal development on pages 23-25 of the motivation, particularly citing the history of earlier failed efforts to redevelop District Six on this basis)<sup>5</sup>.

In spite of their rejection of the state’s application, the opponents embraced the centralised planning and control aspects of the state’s proposal. Their concern was not with

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<sup>5</sup> This includes details of the 1965 Community for the Rehabilitation of Depressed Areas (CORDA) plan (which led to the construction of the unsuccessful Oriental Plaza in 1979 and some new roads), the 1979 Cape Technikon announcement and subsequent development, the 1986 BP initiative, and the 1990 District Six Steering Committee’s ‘Concepts for the Redevelopment of District Six’, which set out tentative diagrams and plans for redevelopment. Instead, the application sought to have District Six constructed within the constraints of the ‘Metropolitan Spatial Development Framework’, citing the success and sustainability of other projects incorporated into state-planning in this manner, such as Pageview and Cato Manor on (page 32 of the motivation).

the form of the proposed redevelopment, but, as we have seen, with *who* controlled and benefited from it. The opposing affidavit by Anwah Nagia thus recorded that ‘we also support an integrated development, but will not accept that Land Claimants who previously owned property in the area should be deprived of their right of restitution to a similar property in a similar area’ (paragraph 38).

The ROU, (and later, the District Six Trust Deed) reflects this relative consensus between state and Trust on the principle of an ‘integrated redevelopment’, and on the principle that the latter should be ‘used’ for a political project over and above that of returning an object of restoration to claimants. Particularly telling is the ROU’s description of the project as ‘an *opportunity* to set in motion a visionary process’ for an ‘integrated and sustainable, transformed post-apartheid city’ (ROU preamble, my emphasis). This ‘opportunity’ was subsequently publicised by the District Six Trust as a ‘higher’ purpose for the site. Following the signing of the Section 42D Framework Agreement in November 2000, for instance, Nagia stated that ‘We will plan the development on an integrated model. We’re going to have to look at the city and what it needs. We will not only be serving the interests of the claimants, but of the rest of the city as well’ (*Cape Argus*, ‘Foreign Aid Sought for District Six Renewal’, 23 November 2000).

In the years following the court case, the dimensions of the new ‘hegemony’ (to recall Soudien and Jeppie 1990: 14) District Six was to cement for South Africa were articulated in increasing detail by the Trustees and the District Six Museum. Primarily District Six’s new ‘community’ is imagined as a reinterpretation of the historic District Six, with particular emphasis on its ‘tolerance’ and ‘integration’ across class and race lines. The historic community, and the multicultural urban identifications associated with it, are thus (quite consciously) appropriated as potential markers of post-apartheid national identity in South Africa. For example, Museum board member Crain Soudien (2001)<sup>6</sup> argued early in the restitution process that District Six has become ‘a site for the production of a South African identity’ which is ‘understood to embody the qualities of tolerance, mutual respect, and respect for difference which, by contrast, “South Africa”, as a counter-signifier, was, and might still be, presumed to be without’ (in Erasmus 2001: 115). For Soudien this binarism explains how District Six became ‘an enclave within the wider national context of class

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<sup>6</sup> In his chapter ‘District Six and its Uses in the Discussion about Non-Racialism’ for Zimitri Erasmus’s 2001 volume on ‘coloured’ racial identity in South Africa, *Coloured by History, Shaped by Place*.

oppression and exploitation, racial segregation, religious differentiation and ethnic chauvinism and, indeed xenophobia' (ibid). Soudien argues that in line with this history of being a space that existed as the 'opposite' of apartheid South Africa, it can now serve as a 're-embodiment and the continuation of the foundation moment of South Africa', which, together with other sites of forced removals, is 'the legitimate South Africa', while its residents are 'the true inheritors of the new South African' (Soudien in Erasmus 2001: 123). Soudien is self-conscious about the ideological project upon which he and his fellow activists in the Museum and Trust are embarking when foregrounding historic readings of District Six in service of a new national identity:

I am, as some would say, participating in the mythologizing of the district. This I recognize. I am, however, profoundly conscious of the import and power of the imaginative reappropriation of the past. South African history is a panorama of rich imaginaries – creation discourses. In District Six can be found a potent retelling of the South African experience. Recent retellings include a series of exhibitions and publications which have emerged from the District Six Museum. What this work has done, building on the discursive features I describe above, is to construct a District Six which is insistently integrative. The value of this text, as has become apparent in the high-profile attempt by the state to use District Six as the model for its urban land restitution efforts, is at once metaphorical, in the sense that it offers a language rich in extravagant imagery, and also, more critically, political. It offers South Africans a way of imagining, if not retrieving, its past in ways which speak against dispersal and forced removal. It brings a coherence to identities (particularly the racial) fractured in an apartheid world, and restores lost memories. The restoration of District Six is the reconnection of a divided past. (Soudien in Erasmus 2001: 125)

The hegemonic aspirations for District Six in the field of national identity formation are articulated by a number of other key figures involved in the Museum and the Trust. In his work with Soudien, Prosalendis and Marot for the Museum's publication, *Recalling Community in Cape Town* (2001), Trust Chair Anwah Nagia states that 'the story of District Six is not just about District Six. It has been used and will continue to be used as symbol of wider issues of civil justice and a unique instance of 'multicultural' living' (Prosalendis, Marot, Soudien and Nagia in Rassool and Prosalendis 2001: 78). In the same volume, Board Member, Ciraj Rassool states that the museum's 'mission of support for the land-restitution

process' has a particular political agenda in relation to 'community' and 'identity' formation, read in terms of South Africa's broader liberation narrative (Rassool 2006: 16):

While the museum's existence parallels the prosecution of a land claim by a claimant community, primarily of tenants, the notions of community belonging that it works with are not determined by descent, mere historical claim or spatial presence. Instead, the District Six Museum's idea of community is strategic, and expresses a desire for particular forms of social reconstruction. Community itself is an imagined identity of commonality and interest. Its parameters are the very essence of contestation. Through its exhibitions, programmes and forums, and in its internal processes of negotiation, the District Six Museum is constantly involved in redefining and reframing its notions of community. It continues to be a site where post-apartheid identities are being self-fashioned and contested, and not simply imbibed passively by those that apartheid produced. (Rassool 2006: 17-18)

Other members of the Museum board have put forward similar views of the Museum's work with and alongside the restitution project<sup>7</sup>, a commonality of purpose in the sphere of national political discourse that has been subsequently been observed by academic studies on the Museum<sup>8</sup>.

As in the case of the principles of 'integration' and central urban planning for District Six, there seems to have been broad consensus between the District Six Trust and the state on the new political identifications that the redevelopment should generate and encourage. Shortly after the founding of the District Six Museum, for example, leading ANC figure and then government Minister Kader Asmal delivered a speech arguing that the new site could

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<sup>7</sup> For example, Irwin Combrinck's essay argues that 'it is not only a function of the Centre to recall and record, but to contribute positively to a free democratic society' by helping to reconstruct the memory and, in time, the community, of District Six (Combrinck in Rassool and Prosalendis 2001: 10). Prosalendis, Marot, Soudien and Nagia state that the Museum 'has played an important role in the many struggles around the social, cultural and civic renewal that are taking place in the City. It has provided a forum for the discussion and debate of the future of the city of Cape Town. It has emerged as one of the few sites and structures in the city with the legitimacy to talk to and about the future of all its citizens. It is one of a handful of institutions able to speak about Cape Town and its people in terms that include the entire spectrum of its social makeup. It has also created the space for ordinary people to intervene in the bigger politics of urban renewal and to express their views about the future of the city. It has facilitated several cultural events, mainly in the form of exhibitions, which have drawn heavily on the input of ordinary District Sixers. These events have been path-breaking in so far as ordinary people have been able to describe themselves as they wish to be seen' (Prosalendis, Marot, Soudien and Nagia in Rassool and Prosalendis 2001: 83).

<sup>8</sup> For instance, Naomi Koseff (2007) argues that: 'The District Six Museum has played an enormous role in, not only facilitating the beginning of the long journey of making civility possible in South Africa, but also defining what "civility" actually is' (2007:86). She even goes as far as to suggest that 'redevelopment could not have materialised without the District Museum as a heritage institution guiding it' since 'District Six has physically and symbolically lived in the Museum since it was destroyed. The "idea" of it that is being used in redevelopment could not exist without a space for it to be nurtured and to grow in' (ibid: 87).

serve to embody Nobel Laureate Desmond Tutu's 'Rainbow Nation' in circulation at the time:

In District Six, a variety of people of different classes, different religions, different ideologies lived side by side in a spirit of tolerance, a shared sense of belonging. This, I believe, on a national scale, is what President Mandela was envisaging when he coined the phrase, 'the new patriotism'. It is what Archbishop Tutu has in mind when he speaks about the Rainbow People... The potential now lies before us to reclaim District Six, to rebuild it... What we can do is try to recapture the essence of District Six. We need to put together a plan that allows for a confirmed sense of place, a plan that allows for the kind of mixed use that previously characterised District Six, and which contributed so strongly to its sense of community. But we must also put a plan in place that enables the community of Cape Town to reclaim the city for all its people. (District Six Museum Newsletter, June 1997)

Asmal's vision is congruent with the contents of the ROU, not only in terms of the specific characteristics of 'tolerance' and 'integration' that he argues should be 'resurrected' in the new District Six, but also in the assumption that District Six should be used as a 'model' or flagship for a bigger political project of 'nation-building' and political identification for South Africans. Similar views have been reproduced by a range of state leaders ever since. For example, a year after Asmal's speech, at the signing ceremony for the ROU, then Cape Town Mayor Nomaindia Mfeketo told those present that 'the redevelopment process should serve as a model for the rest of South Africa' (cited in 'District 6 ... the joy of Returning Home', *Cape Times*, 14 September 1998). At the signing ceremony for the Section 42D Framework Agreement, former State President Thabo Mbeki stated that giving back the land represented a renewal of the district, its people and the nation at large: 'District Six must once again show us the way about what we need to do to create our peaceful, prosperous and non-racial cities of the future' (cited in 'Music and laughter return to District Six', *Cape Argus*, 27 November 2000).

The practical realisation of this ideological project has, however, entailed considerable planning, intervention and control over the redevelopment. It has fallen to the District Six Trust to execute the political vision for the redevelopment, using methods of governance described by Trust Chair Anwah Nagia as new practices for urbanism and 'development':

We are changing the whole process of social development housing. We will not deliver shacks and low-cost homes, but dignified homes where people can leave a family legacy...creating a working-class community in the city centre which has been denied to ordinary people. They are coming back in their thousands and will help to depolarise Cape Town. But it is not going to be a dormitory town or a place with religious and class divisions. (*Cape Times* 'Developer's role making the rise of new District 6 possible' 3 November 2004)

As we have seen in earlier chapters, however, during this process, tensions over limited access to the redevelopment escalated among claimants. Frustration at the curtailment of claimant rights has been most apparent in the public pronouncements of the District Six Concerned Claimants Committee and the court application of the District Six Advocacy Committee, but was also identified among individual claimants in a series of interviews conducted by anthropologist Christiaan Beyers' in his study 'The Will-to-Community: Between Loss and Reclamation in Cape Town' (2008). Beyers' research found considerable disparities between the views and desires of the Trust and state on the one hand and claimants on the other. While the Trustees saw the new District Six as 'infused with the egalitarian, nonracial, and cosmopolitan ethos of the old District Six' (Beyers 2008: 154), wishing 'to revive the 'nonracial social experiment that District Six is thought to have represented' (ibid), claimants' aspirations were more closely aligned to suburban freehold property ownership, without any additional specific obligations or restrictions:

many claimants appear to imagine the planning of the new district in terms that are roughly consonant with suburban design...This perhaps suggests an imminent shift in the conception of the nature of the social order from a (remembered) "loving community" based in very intimate family-like relations, towards something more in line with Weber's version of rationalized society, where relationships between individuals tend to be mediated by contracts, and are thus more narrow and purposive' (Beyers 2008: 156).

Beyers' research thus found that during the course of the restitution process claimants' conceptualization of the new 'community' moved 'from signifying a context of memory, healing and sometimes transformative vision, to signifying a space where property relations

are respected and where new relations between neighbours may be inspired by the district's former ethos, to be sure, but can nevertheless be negotiated according to individual preference' (Beyers 2008: 157). Beyers' research findings similarly point to a divergence between the social compact's emphasis on racial, class and religious tolerance and the views expressed by the claimants that reveal 'considerable apprehension about the extent to which different racial groups will be able to coexist' and similar sentiments about the integration of different class groups (ibid: 158). Among some claimants, the 'social compact' even 'raised concerns about continuities with social engineering practices under apartheid' (ibid: 155).

Discontent among claimants and from some quarters of the state (such as the City of Cape Town and officials of the Commission on Restitution of Land Rights) has generally been met with stronger emphasis on the ideological rationale for the project by the Trust and National government leaders, usually taking the form of 'greater good' arguments situated within South Africa's binary moral universe of apartheid/post-apartheid described earlier by Soudien. In 2006, for example, with the pilot projects facing public criticism, Nagia published a newspaper opinion article seeking to justify the Trust's approach in terms of the broader struggle against apartheid. His analysis defined the intersection of race, class and capital as a key social ill in Cape Town, posing the District Six redevelopment as a project that could help bring liberation from this legacy:

The Trust sees the redevelopment of District Six as the single most important opportunity Cape Town has for breaking the racial and class rigidity that was physically imposed on the city...If the process of the redevelopment is not managed with the clear non-racial and pro-poor approach that the Beneficiary Trust is fighting for, it will, moreover, make the district vulnerable to the kinds of forces market in the main, but not only which seek to turn the area into a gentrified and intolerant playground. The physical presence of the poor in the city is its announcement that it seeks to turn its face away from the apartheid legacy it has inherited. It is its acknowledgement that it has a moral responsibility to poor people and that this responsibility has to be managed. (*Cape Argus* 'District Six can cement ideals for a new city' 24 November 2006)

The language used by the Trust, particularly its use of the terms 'struggle' and 'fighting' to describe its work, illustrate an interpretation of the redevelopment as a continued site of

political activism for ‘hegemony’ and reversal of apartheid policy, rather than as a constitutional process primarily directed at restoring claimant rights. The political purpose of the project likewise features in the terms of sustained ‘struggle’ in the discourse of the Commission on Restitution of Land Rights. In 2008 the National Land Claims Commissioner published a letter in the media describing the purpose of restitution in District Six as a move to ‘transform Cape Town’ and entrench racial ‘integration’ as a ‘categorical imperative’ (presumably in the Kantian sense):

We are saying integration is no longer an option, but a categorical imperative, and District Six will lead the way on how it is done so that the mayor and everyone else who doubted our intentions as a national commission, can be provided with an easy to follow guide on how to achieve the objectives of transformation and integrated development. (*Cape Times* ‘Mayor should stick to providing services, stay out of restitution’ 20 August 2008).

### **3. Urban Space and Ideology, Lefebvre Revisited**

Fifteen years after the ‘vision’ for District Six was articulated in the ROU, with little sign of physical or social redevelopment in District Six, it is hard to avoid reading this project of urban planning as a strangely inverted instance of what Henri Lefebvre has previously described as the ‘mythology’ of the urban planner, which:

exaggerates the importance of the so-called planned activities it sanctions. It gives the impression, to those who use these representations, of managing people and things in innovative and positive ways. With considerable naïveté (genuine or otherwise), many people believe they are determining and creating social life and social relations (human). (Lefebvre 2003: 156)

For Lefebvre, urbanism’s ‘visionary’ discourses have, for much of the 20<sup>th</sup> century, served to mask the workings of power and capital, mostly for the purpose of making profits from land. He states that:

Beneath [urban ideology’s] benign exterior, humanist and technological, it masks capitalist strategy: the control of space, the struggle against the trend toward lower

profits, and so on. This strategy overwhelms the “user”, the “participant”, the simple “inhabitant”. He is reduced not only to merely functioning as an inhabitant (habitat as function) but to being a buyer of space, one who realizes surplus value. (Lefebvre 2003: 155).

In the case of District Six, the technical discourse of urbanism is married to a series of ‘higher’ political aspirations which have, whether by accident or design, created a unique subterfuge, ostensibly regulating the site in the name of ‘community’, ‘integration’ and post-apartheid identity formation. However, irrespective of the potential issues that the appropriation of urban space in the service of identity might raise in its own right, it cannot, in any event, be taken at face-value. Closer scrutiny of the legal provisions made for the integrated redevelopment reveals a troubling paradox regarding the object of restoration for District Six: the stated project of ‘inclusion’ has called upon the introduction of controls, limitations and *exclusions*, primarily at the expense of claimants themselves. The constraints placed on claimant rights are extensive, and complicate the object of restoration on a number of levels, even raising concerns among some of the Museum board members. The District Six Museum’s Zayd Minty, for example, acknowledges that using the District Six redevelopment to ‘depolarise’ Cape Town and drive social integration has involved active social regulation and intervention in claimant rights via contractual requirements in order to achieve the ‘envisioned’ model of community. Minty states there has been ‘some criticism of the document[s] from inside the museum, which feels it is too heavy on what returnees cannot do rather than what they could’ (Minty 2006: 9).

This is not to suggest that there can be an ideologically ‘neutral’ or ‘non-engineered’ property ownership arrangement or urban plan. Indeed, Belgian urban theorist Lieven De Cauter goes as far as to state, in *The Capsular Civilization* (1991), that all urban spaces are socially engineered to a greater or lesser degree: ‘if society were not engineerable, it would be a natural process, or an accidental coincidence, or destiny. No politics can be conducted on this basis, and there is not a single historian who cannot demonstrate that society is engineered...by a complex process of decisions’ (1991: 14). However, the set of constraints placed on land use and ownership extend beyond the land use controls applicable in the open property market, and beyond any existing provision in restitution legislation. It appears, therefore, that egalitarian discourse has become, in this case, a new form of urbanist discourse in Lefebvre’s sense, masking innovative forms of symbolic and capital

accumulation. This becomes clearer when we examine the nature of the contractual basis of the hybrid object of restoration in this case.

#### 4. 'Contractual Community'

Taken as a whole, the set of legal provisions and contractual mechanisms claimants are compelled to accept in order to access restored property rights produce and shape the object of restoration for claimants within a 'freehold contractual community', described by urban theorists Stefano Moroni and Grazia Brunetta's term in *Contractual Communities in the Self-Organising City: Freedom, Creativity, Subsidiary* (2012) as a relatively new legal property holding arrangement whereby 'a group of citizens individually own various parts of a complex, and other parts with some form of collective arrangement' (2012: xi). It involves 'a set of living units (apartments) individually owned, and a range of common areas owned collectively... managed by a body specifically appointed to the task by the community members' (ibid). Members of a 'freehold contractual community' usually 'automatically enter the association at the time of purchase, accepting thereby a set of certain rules concerning the use of the spaces and buildings' (ibid). In the case of District Six, claimants contractually agree to the specific shape and size of their property, the uses to which they can put it, and rules for their conduct, all of which are governed and 'policed' by the District Six Redevelopment and Beneficiary Trust (which functions as a type of homeowners association for claimants).

A growing body of critical works of urban geography have observed that such land-holding arrangements tend to generate particular social and political outcomes by virtue of constituting various types of 'zones of exclusion'. One of the chief critiques aimed at contractual communities in the urban context has focused on how they have tended to serve the interests of capital by protecting property values, pushing the urban poor to the periphery of the city (gentrification). The mushrooming of 'lifestyle estates' and gated communities in the past 40 years have been the particular focus of debates in this regard, taking a step further Lefebvre's analysis of the new 'global and total production of social space' (Lefebvre 2003: 155) whereby capital engages in the 'struggle against the trend toward lower profits' (ibid: 156). More recently Edward Blakely and Mary Snyder's well-known text *Fortress America: Gated Communities in the United States* (1997) argues that such arrangements have consequences for the broader patterns of socialisation by 'allow[ing] some citizens to secede

from public contact, excluding others from sharing in their economic and social privilege' (1997: 3). Similarly, Paul Knox in *Metroburbia, USA* notes that exclusive residential developments offer 'secession and congregation of self-selected and narrowly defined class, income and lifestyle groups', reinforcing status through identification with 'theming and branding' and elements of 'neotraditional' urban design (2008: 99). Yet there have been instances where contractual communities have sought to engineer the opposite outcome, creating socially inclusive and heterogeneous spaces. Author Evan Mckenzie, for example, has described efforts 'to realize a form of socialism by contract' in New York City and Chicago developed by Ebenezer Howard's Garden City Movement, and Alexander' Bing's City Housing Corporation. (Mckenzie 2003: 222). Dutch urbanist Wouter Vanstiphout has documented similar developments in the Bijlmer near Amsterdam in Holland, where developers aimed to promote racial and class diversification, allowing people 'to live together in high densities and establish a new collectivity in the common spaces and routes where they would encounter one another' (2008: 76).

As we have seen, the principles and objectives for District Six appear to be in diametric opposition to the exclusion, cultural homogenisation and gentrification that characterise 'elite' contractual communities of *Fortress America*. Instead of 'gentrification' the contractual documents aim to create a socially 'integrated' community that can settle claims and establish a new community identity for South Africa. However, a closer look at the mechanisms used to engineer this 'contractual community' shows that, among other possibly unintended consequences, they have drastically complicated claimants' objects of restoration. This is particularly true of the urban plans for the project.

#### **4.1 Integration and Identity through Spatial Heritage**

The Land Development Agreement and MOA for District Six seek to translate the ROU's political project of creating a new 'socially integrated' community into the spatial domain of urban planning by prescribing an appended set of architectural and urban designs for the redevelopment to claimants (including the specific shape, size, densities and elevations of residential properties). These designs are derived from a 2005 *Draft Development Framework for District Six* completed in consultation with claimants (via public meetings) by former HODS member and District Six Museum co-founder Lucien le

Grange, together with Nisa Mammon and Associates Planners & Designers<sup>9</sup>. The MOA contractually binds individual claimants to accept these designs as the basis for their restored physical property.

The stated aim behind the particular urban and architectural designs is to invoke the morphology of the demolished District Six, for two main ends. Firstly, to draw on the lost District Six's 'place making' qualities, particularly the role of key landmarks in giving its residents a sense of familiarity and belonging, in order to support the Trust and state's broader political project for District Six (a 'flagship' community for the new South Africa). In an article for the District Six Museum's publication, *The Last Days of District Six* (1996), Lucien Le Grange provides a particular reading of how the physical built environment of District Six contributed to this sense of a 'people' and its place:

District Six imbued its inhabitants with a deep sense of place and belonging. This is made manifest in popular mythology about the area and in the current work of the District Six Museum... The dialectic of people and places needs to be recognized because there is a sense in which society can be the mirror of space... The area contained all the place-making qualities such as the colonnaded walkways, the sidewalks, the steps, school-yards, neighbourhood parks and aged buildings associated with urban life' (in Greshoff 1996: 7)

Le Grange further ties 'urban place' (ibid) to the question of community identity in his contribution to *Recalling Community in Cape Town*, arguing that restoring some of the key structural elements of the demolished District Six would help 'those who were displaced to reclaim their identities.' (2001: 106). This view is brought into the 2003 'Draft Heritage Impact Assessment' for District Six compiled by Le Grange and Mammon in preparation for the urban plans<sup>10</sup>, where the authors argue that the 'design principles that informed the old area resonate with relevant meaning and should be considered, at least in principle, in planning for the reconstruction of the area' (2003: 10). Le Grange and Mammon specifically

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<sup>9</sup> The 2005 *Framework* has subsequently been updated with a newer iteration in 2010, although, by 2012, the design work in the new *Framework* had not yet been utilized in any redevelopment work on the site.

<sup>10</sup> Le Grange introduces the *Heritage Impact Assessment* with a strong emphasis on how the memory of the lost community should inform the redeveloped physical environment: '[i]n a context where much of the physical fabric of District Six has been destroyed by previous actions and legislation, the idea of considering the impact of new development on a largely blighted landscape poses a difficult task... Thus the task of framing a conservation policy for the area is one that has to draw on the memories and associations that people have of the former areas as well as on the latent urban qualities that exist. Faced with this dilemma, this Heritage Impact Assessment (HIA) is intended to be a design informant for the imminent redevelopment of District Six (Le Grange 2003: 5).

point to features such as the ‘patent and latent physical and urban elements that constituted the historic area’, ranging from the ‘distinct fine grained urban fabric of the former District Six’, which was determined by the street lay out and urban block scale, the limited height and size of buildings, public landmarks, such as places of worship, schools, community halls, markets and so forth (ibid). Le Grange and Mammon refer to these features collectively as the site’s ‘heritage and cultural landscape’, made up of both ‘tangible and intangible’ elements (especially ‘memory’ and personal meanings attached to the site by claimants). They argue that these markers of identity and place should be used to ‘inform the framework for development to ensure there is continuity between the past and future urban landscape’ (ibid: 5). Through these aspects of design, therefore, Le Grange and Mammon aim to contribute to the broader political project envisaged for the site by the Trust and state.

The second intended end behind the urban and architectural specifics prescribed for claimant properties is to restore structural ‘community-making’ properties that the demolished District Six is said to have had, again, in service of the broader ‘vision’ of a ‘socially integrated’ community that can lead the way for urban South Africa. In this case, ‘community’ can be read in terms of German Sociologist Ferdinand Tönnies’ famous notion of ‘*Gemeinschaft*’, that is, an ‘organic’ social group characterised by interaction, building of reciprocal relations and orientation toward a common purpose, as opposed to mere proximal habitation or utilitarian relations<sup>11</sup>. Le Grange had earlier argued that District Six contained ‘all the necessary varying qualities associated with urban life. The heterogeneous and dense concentration of people, the high degree of social tolerance ... and the mix of primary land-uses were all qualities which could support urban safety, public contact and a sharing of uses’ (Le Grange 1996:8). The medium density development with wide streets created ‘an enabling structure which made a number of social and economic opportunities possible, such as a mix of land-uses, where residential, commercial and light industrial activities could co-exist comfortably’ and also created a ‘a legible structure that permitted a choice of pedestrian routes through the neighbourhood’ (1996: 9). Another community-making feature that Le

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<sup>11</sup>In his *Community and Association* (translated from the original *Gemeinschaft und Gesellschaft* of 1887) Tönnies describes *Gemeinschaft* as a type of social group underpinned by the ‘unity of human wills as an original or natural condition that is preserved in spite of actual separation’, a condition that ‘is found in manifold forms’, from familial relations to ‘neighborhoods’ (1974: 42). *Gemeinschaft* at ‘neighborhood’ level resembles ‘natural’ familial relations, although at a less intimate level: ‘Neighborhood describes the general character of living together in the rural village. The proximity of dwellings, the communal fields, and even the mere contiguity of holdings necessitate many contacts of human beings and cause inurement to and intimate knowledge of one another. They also necessitate co-operation in labor, order, and management... Although essentially based upon proximity of habitation, this neighborhood type of *Gemeinschaft* can nevertheless persist during separation from the locality, but it then needs to be supported still more than before by well-defined habits of reunion and sacred customs’ (49). In contrast, *Gesellschaft* is the society of ‘contractual relations’ governing individuals which has come to dominate growing urban environments in particular: ‘the movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account’ (ibid: 211).

Grange points to is the schools which were ‘an integral part of the community’ and ‘major public space-making element’ for use as playgrounds, and community halls’ (ibid: 10). A similar role is ascribed to religious buildings which ‘were not only places of refuge from the profanities of urban life, but assumed a civic status themselves. They helped generate the rituals and cultural expressions that were so much part of the daily lives of the local people. Together with the church halls, bathhouses, bakeries, libraries and community halls, they constituted a range of shared facilities that made urban life easier and richer’ (ibid). For Le Grange, restoring these features of the old District Six’s urban design would help to restore some of the socially integrative features of District Six as a way ‘to address the wrong-doings of the past and as a way by which to heal a divided city’:

In terms of the physical form of future development, it would be important to draw upon the urban planning tradition discussed above. Urban design principles such as the fine-grained street network, the mixed land-use development, the street as a community space, and the population density which shaped the area should be reinterpreted and adapted to serve contemporary requirements... In order to preserve the memory of the old District Six and for it to inform the future reconstruction of the area, consideration should be given to retaining traces of the historic street patterns, to integrating new development into the remaining historic fabric and to the creation of places or sites of memory. The surviving churches and mosques could serve as nuclei from which new development could selectively occur – new development of a public space network as well as of communities. Within such redevelopment a range of housing tenure forms and a mix of housing types needs to be considered to accommodate all income groups in order to ensure a social heterogeneity. (ibid: 11-13)

The properties earmarked for claimants in the District Six ‘integrated redevelopment’ (appended to the MOAs) bear evidence of both the ‘heritage’ and ‘socialising’ priorities expressed by Le Grange and Mammon. The plans for the first and second pilot project are for low rise blocks of flats. The plans contain wide street spaces, maintain existing streets, and the precincts are designed for specific street sections surviving from the old District Six.

Although the intentions behind the stipulated urban and architectural designs for District Six have a clear rationale, and a historical legitimacy that is hard to challenge, they have in

practice had the intended or unintended consequence of effectively regulating claimant access to the site in a way that few other contractual devices could have. They have enforced the conglomerate ownership scheme of the 'integrated redevelopment' in the physical domain, requiring claimants to share ownership of the buildings, and precluding ownership of whole erven on the site. As such, claimants waiting to return to the site have been entirely dependent on the completion of the full building, with no option of initiating their own construction process. Moreover, the shared ownership of the buildings via 'sectional title' ownership means that each claimant right-holder's use of his or her property is particularly closely controlled by the 'body corporate' (in this case the Trust).

The urban framework for District Six has, therefore, constrained the activities of its new and future residents, but the predominantly empty lot that remains in District Six thus far shows little evidence of a returning *Gemeinschaft*. Instead, the outcome thus far would, seem to confirm Lefebvre's observation that the ideology of urban planning (in this instance, even a self-proclaimed egalitarian ideology), has tended to exaggerate the ability of architecture to determine 'social life' (Lefebvre 2003: 156).

#### **4.2 Social Integration: Reversals of Segregation and 'Gentrification'**

In parallel to the physical specifications for the object of restoration in District Six, land use constraints are introduced by a 'Social Compact' forming part of the MOA that each claimant is compelled to sign with the District Six Redevelopment and Beneficiary Trust (paragraph 20). The primary purpose of this contractual device is to enforce social integration, variously by undoing gentrification, racial segregation and any other forms of identity-based 'intolerance'. Claimants are required to 'exercise tolerance towards all religious denominations including but not limited to Islam, Christianity, and Judaism' (20.11), to 'exercise tolerance all educational institutions within the surrounds area' (20.12) and to 'exercise racial tolerance towards all racial groups' (20.13). In order to pre-empt any effort by 'outsiders' to buy claimant properties and on-sell for profits, the Trust retains indefinite 'first right of refusal' on any resale of the property<sup>12</sup>, and further prohibits

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<sup>12</sup> For example, when claimants moved into the first houses completed in District Six under the restitution process, Igshaan Higgins, legal adviser to the District Six Beneficiary, and Redevelopment Trust stated that: 'There will be a moratorium on selling the houses for 15 years...the trust would not allow the houses to be sold willy-nilly. It must be a family member or heir living in the house and we will be monitoring that...the 15-year moratorium was part of a social contract, or legally binding agreement that all claimants would have to agree to... It stipulated that no prostitution, shebeens, drug merchants or gambling would be allowed and this would be strictly monitored by the trust.' ('District Six prepares for new life' *Saturday Weekend Argus*, 13 January 2007)

‘exploitation of high rentals’ (paragraph 20.9), renovations and other alterations (paragraph 20.10).

The Social Compact’s limitations placed on claimant property rights appear aimed at restoring the ‘cosmopolitanism’ and social integration of the old District Six, and the prevention of downmarket raiding. At the signing ceremony for the District Six Section 42D Framework Agreement, Trust Chair Anwah Nagia described the rationale behind this decision as follows: ‘any development which took place in the area would be integrated, and there would be no place "for triple-storey castles’ (cited in ‘Foreign aid sought for District Six Renewal’, *Cape Argus*, 23 November 2000). The District Six Beneficiary and Redevelopment Trust Deed’s ‘Guiding principles’ similarly state that: ‘Through the development process the Trustees shall seek to create an environment in District Six which...counters the trend of displacing poorer communities to the periphery of urban areas’ (13.4 and 13.4.2). As we have seen in previous chapters, the same rationale was used the District Six Redevelopment Trust to justify its efforts at limiting access to the District Six land to a single redevelopment (via the non-alienation condition imposed on the current land owner, the City of Cape Town, in the ‘Land Development Agreement’, paragraph 3.2.5).

The restrictions on ownership rights for claimants create a unique property ownership arrangement for 40 hectares of land in the centre of Cape Town. The ‘first right of refusal’ provisions on the properties and their conglomeration into a single physical redevelopment potentially place the site under the perpetual control of the Trust, whose Trustees will one day have only a distant connection with the forced removals and restitution. While the redevelopment may purport to serve the reversal of social stratification, there is no indication thus far that this will indeed be achieved. Urbanist Andrew Kirby, has noted, for example<sup>13</sup> that in practice, the specific rules and restrictions imposed on property owners under ‘contractual community’ arrangements can lead to new power differentials for property owners without the knowledge of law or the resources to engage on an equal footing with the homeowner association or similar controlling body. Such spaces, he argues, create new forms of domination, introducing ‘new forms of governance’ in which ‘private property relations are replaced by very detailed rules of social engagement, which are overseen via surveillance technologies and enforced via the courts...Indeed, the success of the HOA concept lies

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<sup>13</sup>In Colin Flint’s *Spaces of Hate: Geographies of Discrimination and Intolerance in the U.S.A.* (2004).

exactly in its totality and complicated legal coding' (2004: 222). A similar argument is made by Dutch urban theorist Marc Schuilenberg, who argues that in such spaces,

specific social arrangements are in force alongside the laws and rules of jurisprudence of the national state. These mark the transition to rules and prescriptions different from those in the rest of society. When a house in a gated community is bought, the buyer signs a detailed contract that sums up the locally applicable rights and rules connected with the lifestyle and culture of the community in question. These rules can vary from a ban on drinking alcohol to the approved place to hang laundry. The contract, in other words, expresses the locally applicable, communal values and standards. Adam Crawford therefore speaks of a "contractual governance", whereby local agreements function as instruments of social control. In the shadow of the law, these contracts produce their own normality or local jurisprudence. (2008: 32)

At the very least, the restriction of claimants directly accessing their land right, or from reselling it in future, have foreclosed on their ability to build their own houses instead of waiting for the Trust and/or the state to find the funds to build it for them. If we are to take *time* into consideration in defining the object of restoration (a crucial dimension in this instance, given that land rights are often qualified by time constraints, for example, in the case of fixed-term leasehold), then the object of restitution in District Six has, for all but 24 claimants, thus far been an indefinitely *deferred* right.

#### **4.3 Social Integration through 'Local Citizenship'**

A more subtle project becomes evident in the further set of constraints placed on District Six claimant land rights in the Social Compact's moral codes for individual conduct and land use, which include proscriptions on operating a bar or 'shebeen' (paragraph 20.4), drug dealing (paragraph 20.5), brothels (paragraph 20.6), gambling facilities (paragraph 20.7), or shops (20.8) on the properties. As in the case of the provisions for 'social integration', contractual requirements bear little relation to restitution legislation. The bulk of these provisions appeal to a fundamentally normative conceptualization of 'community' and 'moral behaviour' of citizens within a community, particularly when read together with the ROU's reference to a 'developmental environment' that will meet 'claimants' needs' (vision) and the District Six Beneficiary and Redevelopment Trust Deed's commitment to carry on activities

‘connected with the planning and redevelopment of District Six, including the provisions of community facilities and the establishment and carrying on of community programs aimed at the furtherance of the community life, creation of employment and wealth, health and general welfare of the community’ (paragraph 3.3.9).

These codes of conduct, situated within the broader programme of promoting a ‘developmental environment’ and ‘community life’, appear to partake in the same post-apartheid South African state discourses of ‘developmentalism’ which Public Affairs Research Institute Director Ivor Chipkin describes, in his essay, ““Functional” and “Dysfunctional” Communities: The Making of Ethical Citizens’, as a means of making citizens ‘governable’ members of a moral ‘community’:

the notion of “development” is haunted by a certain imprecision concerning the citizen... citizenship implies a certain norm of social conduct, and therefore, implies a certain good way of living together in community. The development of the citizen means, therefore, capturing and holding residents in relations deemed to be conducive to ethical conduct so that they may live “properly”...It is about making ethical beings.’ (Chipkin 2005: 154)

By ‘capturing and holding’ claimants to ‘community life’ within the constraints of the ‘contractual community’, the legal texts of the District Six restitution process add a further layer of controls to the ‘object of restoration’ in District Six, generating a *de facto* zoning scheme where social and economic activities for claimants are constrained and controlled by the Trust. This mode of control is consistent with the positioning of claimants as passive beneficiaries within the institutional arrangement of the Trust, promoting a continued identification for claimants as ‘governed’ subjects first and foremost, rather than as active agents and participants in the use of their restored properties. Within this scheme of localised governance, ‘community life’, social integration, and the post-apartheid community identity these are intended to serve, are coaxed from claimants via central planning and social engineering, rather than being left to chance or ‘spontaneity’.

## 5. Conclusion

The current chapter has argued that restitution's object of restoration in District Six has been appropriated into an 'integrated redevelopment' for the site within the texts of the legal instruments under scrutiny. The legislative provision for return of claimant has thereby mutated into a higher political end stemming from the aspirations of the state and the trustees, namely, the engineering of a new socially integrated 'community', based on imaginings of the historic District Six, that will serve as an exemplar for a post-apartheid national identity. The District Six Museum has particularly invoked these traits of the former 'community' as markers for a new, authentic post-apartheid South African identity, a position embraced by key state leaders. District Six's spatial 'heritage' is appropriated in support of this goal by the urban planners involved in designing the new 'integrated redevelopment', and both its 'place-making' qualities, as markers of a local identity, and its integrative, community-making morphology, are reproduced in the final designs for the site.

Given the questionable outcomes of the project thus far, I applied Henri Lefebvre's critique of ideology and urban planning to this effort at moulding urban space, arguing that if the letter of the contracts governing the site's 'contractual community' is closely examined, together with the actual practices on the site, the project does indeed betray an ideological inclination toward social exclusion, stratification, and, at the very least, symbolic accumulation (although there is, no doubt, scope for future capital accumulation as well). This outcome in District Six does not necessarily need to be understood as intentional. I would contend that it is a testimony to the forcefulness of historical constructions of District Six in masking quite possibly unintended outcomes. The project of recovering 'cosmopolitanism' and social integration of the kind District Six is said to have embodied prior to forced removals may well be a worthy aim. However, it seems that the development of an 'organic' community or *Gemeinschaft* of the kind described by Tönnies may not be something that is easily 'engineered' under a centralised planning process. Instead, such objectives easily become what Foucault terms 'screen discourses', concealing the very thing they purport to dispel<sup>14</sup>.

The Trust and the State's ideological aspirations for the site, and the mechanisms of control they rationalise, have, in practice, restricted, complicated and, for the most part,

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<sup>14</sup> In *The History of Sexuality* Foucault argues that sexual literature and analysis is 'a screen-discourse, a dispersion-avoidance' (1978: 53). In this regard he poses the question: '[d]id the critical discourse that addresses itself to repression come to act as a roadblock to a power mechanism that had operated unchallenged up to that point, or is it not in fact part of the same historical network as the thing it denounces (and doubtless misrepresents) by calling it "repression"?' (ibid:10)

deferred, restitution's object of restoration in District Six. Claimant property rights have been imbricated within a 'contractual community' that prescribes the physical form of residential properties, property ownership patterns, land use and even claimant behaviour. The historical discourses of the site have therefore succeeded in creating a new 'hegemony', as envisaged by the HODS campaign in 1989, but it is a hegemony that obscures a growing contradiction between the social and political aims of the project on the one hand (integration, reversal of 'gentrification', new modes of 'development'), and the actual outcomes on the other (hyper-regulated, exclusionary space that, fifteen years after restitution commenced, remains virtually empty). We are left, therefore, with an 'exclusion zone' in multiple senses, formed in the name of 'integration'.

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# **Chapter Six: Administration in District Six - Organisational Identity and an Impasse of Governance**

## **1. Introduction**

This chapter examines how the legislative rules for the administration of restitution have been inscribed in the legal instruments of the District Six case. To recall, the subjects and objects of restitution defined in South Africa's constitutional and parliamentary legislation are regulated, governed and 'processed' by administrative organs of state with designated responsibilities under the constitutional order (the Commission on Restitution of Land Rights, Land Claims Court, Ministry of Land Affairs, with the assistance of other organs of state, variously regulate the reception of claims, their verification, determination of awards, and execution of settlements).

However, through a reading of the deployment of this set of administrative prescripts in the District Six case, the current chapter argues that restitution law has run up against a fundamental legitimacy deficit weighing on key organs and laws of the state involved in the case (the City of Cape Town, the Western Cape Provincial Administration and the Commission on Restitution of Land Rights), leading to the latter's progressive withdrawal from the space of restitution<sup>1</sup>.

Several analysts have found that weak exertions of state authority are common in restitution projects in South Africa. Derrick Fay and Deborah James have noted, for example, that some of the 'communities' created by restitution may even 'remain separate from the broader body politic' and generate 'alternative forms of governance' (2010: 41) that tend to

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<sup>1</sup> Although the functioning of many different agencies across different national, provincial and local levels may make the state a less coherent entity.

‘preclude... integration in matters of authority, law and order, and the provision of services.’ (ibid: 50)<sup>2</sup>.

In the District Six case, I argue that the administrative mode of authority has been particularly compromised by its encounter with historically entrenched institutional identifications of the apartheid state that, while dating back several decades in some cases, have been routinely re-invoked and attached to post-apartheid organs, officials and laws over the course of the restitution process. The chapter provides a basis for this analysis by examining some of the ‘faces’ of the apartheid state constructed in literary, media, museum and academic texts, demonstrating some of the critical continuities between these earlier representations and the uses to which they are put in the complex negotiations and power struggles that have accompanied the restitution process. These characterisations range from monolithic constructions of the state as an inhuman ‘machinery’, to metonymic accounts of its agents in the form of state officials, usually police bullies or bungling ‘bureaucrats’ of the Community Development Department/Group Areas Board. Literary works have led the way in dramatizing these portrayals with particular emphasis on the arbitrariness of ‘the law’, underscoring its lack of moral and political justice.

In order to illustrate the specific impact that these figures have had on the function of the state in District Six, this chapter theorises the modes of administration set out in restitution legislation in terms of sociologist Max Weber’s classic concept of ‘rational-legal authority’<sup>3</sup>, wherein bureaucracy exercises power over the subjects and objects of restitution via ‘stable’ and ‘hierarchical’ ‘administrative organs’ (1987: 218), with a ‘specified sphere of competence’, ‘jurisdiction’ and ‘regulations’ (ibid). Critical to Weber’s analysis is that the bureaucratic mode of authority needs to be perceived as legitimate in the eyes of its officials and the citizens who are ‘governed’ in order to be effective (and in order to avoid having to resort to force or persuasion)<sup>4</sup>. In turn, the key to this perceived legitimacy is what Weber describes as the impersonal neutrality of officialdom (1987: 216), a point that is developed in

<sup>2</sup> Similar arguments are presented in the work of Murray (1998), James (2007) and Walker, Hall, Bohlin and Kepe (2010).

<sup>3</sup> Rational-legal authority is most extensively described by Weber in his seminal *Economy and Society* (1978), first published (posthumously) in German as *Wirtschaft und Gesellschaft* (1922). Weber defines it as one of three basic forms of ‘domination’: ‘the validity of the claims to legitimacy may be based on: 1) Rational grounds – resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority). 2) Traditional grounds – resting on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them (traditional authority); or finally, 3) Charismatic grounds – resting on devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns of order revealed or ordained by him (charismatic authority)’ (1987: 215). Although dated, Weber’s concept of rational-legal authority has proven to be an enduring one, although, as I will show below, more recent authors have elaborated on, and deepened his initial formulation, in particular, French sociologist Pierre Bourdieu (1987 and 1994).

<sup>4</sup> In this regard Max Weber observes that ‘the probability that certain specific commands (or all commands) will be obeyed by a given group of persons’ usually rests on ‘the belief in [their] *legitimacy*’ (Weber 1987: 212-213, italics in original).

this chapter with reference to Bourdieu's reading of Weberian bureaucracy. I argue, therefore, that the institutional identifications of the state developed in District Six under apartheid, and projected onto the post-apartheid state during the restitution process, have prevented the latter from occupying the ideal space of Weberian 'rational-legal' authority, which would allow officials to exert authority through their perceived 'neutrality' as agents of the law.

I conclude that this phenomenon has weighed heavily on efforts at (re)inscription of state 'authority' in District Six, resulting in an impasse of governance (in the narrow sense)<sup>5</sup> that can be expressed as follows: restitution, as a constitutional project, is aimed at bolstering the perceived legitimacy of the state and its laws in a context where 'the law' and the state have historically been used as tools of oppression by an elite white minority against the 'non-white' majority of the country (this view has been widely articulated in the work of Bohlin (2002), Roux (2009), Fay and James (2010) and others<sup>6</sup>. However, the systems of state authority set up under restitution discourse, as rational-legal systems, need to enjoy a certain basic level of legitimacy in order to function at all, and thereby work on establishing the desired legitimacy for 'the law' and the state. In District Six, restitution's desired 'virtuous cycle' of legitimacy-building for the post-apartheid state has been undermined by the entrenchment of historic textual constructions of state authority. State officials have retreated from decisive management and resourcing of the project (including funding), while claimants have been left to new forms of 'governmentality' (in Foucault's broader sense)<sup>7</sup> which have been all the more resilient for their ostensive egalitarianism and anti-authoritarian rhetoric.

## **2. The State's Legitimacy Deficit in District Six**

The instances of supplementation and even displacement of constitutional restitution discourse that I have analysed thus far in the legal instruments of the District Six redevelopment process imply a concomitant displacement of legal and administrative

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<sup>5</sup> That is, as it pertains to state and legal mechanisms of authority.

<sup>6</sup> Fay and James find that restitution has been used for a similar purpose in nations undergoing political transition around the world: 'The contexts of land restitution policies have some typical features world-wide. First, restitution appears in contexts of disjuncture and social change that provide space for demands to redress past injustices, often themselves the product of moments of social rupture... Second, restitution claims acquire a moral weight from the experience of being wronged and the gravity of things long past' (Fay and James in Walker et al. 2010: 43). Bohlin (2002), Beyers (2007a), Walker (2008), Roux (2009) and others notes that restitution also offers claimants the opportunity to participate in the construction of the new, post-transition nation, on symbolic and material levels. For example, Bohlin states that restitution allows claimants to 'play an active role in the process of nation building' and the 'construction and enactment of an "imagined community" of equal, reconciled citizens who share a common understanding of the past' (Bohlin 2002: 4).

<sup>7</sup> To return to Foucault's description in 'Security, Territory, Population', this term refers to a broad 'ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics' that structure and regulate 'populations' (2003: 34).

*authority* in the restitution process. Yet this shortfall of legal authority is not exclusively the result of legitimacy asserted by the historic community and its land activist leaders. It owes as much to a specific legitimacy *deficit* haunting ‘the law’ and state organs in the restitution process, limiting and even precluding state efforts to exercise Weberian ‘rational-legal authority’<sup>8</sup> over the restitution and redevelopment process. As we will see, this legitimacy deficit has become a distinct legacy left by District Six’s demolition under the National Party Government. Before analysing the textual dimensions of this legitimacy deficit, I will provide a brief overview of its historical development.

A number of writers have noted that a general lack of support for the state’s actions hampered its ability to redevelop the area before forced removals were even complete. Historian Naomi Barnett, in her contribution to a 1994 volume of *Studies in the History of Cape Town* entitled ‘The Planned Destruction of District Six in 1940’ argues that ‘the Nationalist Government has had relatively little satisfaction from its conquest of District’ since the first housing schemes planned by the National Party floundered due to popular protest (Barnett 1994: 180)<sup>9</sup>. Alongside the element of protest noted by Barnett, Deborah Hart<sup>10</sup> argues that the National Party’s plans were undermined by a lack of willingness from the market to participate in the project. Hart writes that the National Party Government’s plans to redevelop District Six as an exclusive white suburb called ‘Zonnebloem’ failed when public auctions of the properties in 1974 yielded no sales (1990: 80). The reason for this lack of market appetite is attributed by Hart to the public’s ‘general reluctance to be party to any perceived whitewash of the district’ (ibid). As a result, by 1979 the state resorted to constructing apartments for military and police employees and an ‘Oriental shopping plaza’ aimed at formerly displaced Indian traders (ibid). However, without market support, these efforts have required heavy subsidisation by the state, constituting ‘yet another example of official blundering’ (ibid)<sup>11</sup>. Since that time, the only state project to establish itself on the

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<sup>8</sup> Weber describes ‘rational-legal authority’ as one of three ideal forms of ‘domination’ in his *Economy and Society*: ‘there are three pure types of legitimate domination. The validity of the claims to legitimacy may be based on: 1) Rational grounds – resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority). 2) Traditional grounds – resting on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them (traditional authority); or finally, 3) Charismatic grounds – resting on devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns of order revealed or ordained by him (charismatic authority)’ (1987: 215).

<sup>9</sup> Barnett states that with the forced removals at an advanced stage in the early 1970s, ‘government plans for a multi-million rand luxury suburb for whites had to be abandoned because of massive public protest. At least two large oil companies had to abandon plans to open service stations in the District. By the mid-1980s only houses for policemen’s families and other civil servants had been erected in District Six’ (Barnett 1994: 180).

<sup>10</sup> In her conference paper for the Hands off District Six Campaign entitled ‘Political Manipulation of Urban Space: The Razing of District Six, Cape Town’, published in Jeppie and Soudien’s *The Struggle for District Six: Past and Present* (1990).

<sup>11</sup> In this regard Hart notes that the few homes that have been built in District Six ‘were advertised and marketed at prices below their value and at heavily subsidised interest rate. Prices were well within the means of middle-income coloured families. This outcome belied repeated assertions that the major rationale for not returning Zonnebloem to coloured people was their inability to afford the standard of homes

site has been the Department of National Education's initially whites-only technicon campus, which was met with vigorous resistance from religious and civic organisations (ibid: 81). Further efforts to redevelop the site prior to the end of apartheid met escalating resistance, including the Hands off District Six campaign (Soudien and Jeppie 1990: 5).

Post 1994, questions of state authority to administer redevelopment in District Six first appear in relation to the 1996 Land Claims Court contestation over the Provincial and Local Government Section 34 Application (whose purpose, as we have seen, was to have individual restitution cases set aside in favour of a state-led redevelopment). One of the primary assumptions informing the opposition to the case was that the local council and provincial government-led Cape Town Community Land Trust did not have moral or political authority to administer the planning and management of the redevelopment: 'the Land Claimants do not regard it in their interest that the application be granted and they are certainly the best judges as to what is in their best interest rather than bureaucratic authorities that clearly have no consideration for the wishes and feelings of the dispossessed Land Claimants' (opposing application, paragraph 6). The opponents' objections to state governance of the redevelopment include the belief that it would 'deprive the Land Claimants of the meaningful opportunity to participate in the shaping of the area', or to be 'actively involved in the allocation of development contracts to individuals or groups which have the necessary expertise and have been and remain economically deprived due to the forced removals' (paragraph 4.5.4.2). The redevelopment is therefore seen as an opportunity for an alternative form of governance driven by the 'community'.

Even the legislation on which the court application was based became a subject of critique in the case. The opposing application argued that Section 34 of the Restitution of Land Rights Act had 'no moral basis for existence in a democratic South Africa and is certainly just as draconian in its effect as the old Apartheid legislation' (Opposing Affidavit by Anwah Nagia, paragraph 50.2). Davidson's rebuttal of the opposing application on each point, citing the state's legitimacy by virtue of its election under a constitutional democracy<sup>12</sup>,

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befitting redevelopment of the area. Cynics smiled with the disclosure in parliament – concurrent with the advertising of Zonnebloem housing for whites – that the deficit of homes for coloured people in the Cape was in the region of 33500... in October 1982 the first white people settled somewhat cautiously and sometimes guiltily into the coveted space... By 1985 Zonnebloem comprised some 3000-4000 people, predominantly lower-middle-class Afrikaans speakers and overwhelmingly state employees' (1990: 85).

<sup>12</sup> Davidson responds to Nagia's critique of Section 34 of the Restitution of Land Rights Act by asserting its legitimacy as national legislation is derived from its construction by a democratically elected parliament: 'The fact of the matter is that s 34 was passed by a democratically-elected Parliament and is consistent with the provisions of the interim Constitution...' (In paragraph 67). Likewise, Davidson asserts, in response to Nagia's attack on the legitimacy of the National Party-controlled Provincial Government, that 'the second applicant is bringing this application jointly with the first applicant in terms of an Act passed by a democratically-elected Parliament'

the struggle credentials of the ANC government leaders<sup>13</sup>, and even his assertions of the technical capacity of the state bureaucracy to execute the project<sup>14</sup>, appear to have had little impact in changing the position of the opponents or the outcome. The facilitators asked by the court to resolve the conflict reported that: ‘the Cape Town Community Land Trust, in spite of its acknowledged valuable preparatory professional planning and advocacy role is not seen as being sufficiently representative and credible in the eyes of most of the victims of the forced removal’ (par 2.7).

It might be argued that the construal of state authority in the opposing affidavits of the 1996 Land Claims Court case is a fleeting or contingent reaction to the perceived threat to claimants’ material and symbolic interests posed by the Section 34 application. However, even with the case reaching an amicable resolution, state authority continued to be called into question in the texts of the District Six Museum and the activists that later formed the Trust. For example, in 1999, Nagia offered a lengthy critique of Government’s handling of the restitution process via the District Six Museum’s quarterly journal (1999), describing the slow pace of restitution, poor resourcing of Commission on Restitution of Land Rights offices, and the legislation’s 1913 cut-off date for claims<sup>15</sup> as ‘the Government of National Unity’s conspiracy’ to limit the number of claims and reduce costs to the state (cited in District Six Museum 1999: 6). Nagia argued that the land activists of District Six had become ‘more effective than the state’ in mobilising claimants for restitution (ibid). Similar sentiments are expressed in the District Six Museum’s *Recalling Community in Cape Town* where board members Sandra Prosalendis, and others argued that: ‘the Council and Government must join the community rather than the other way around’. (Prosalendis, Marot, Soudien and Nagia in Rassool and Prosalendis 2001: 87).

Continued mistrust of state administration is reflected in the legal instruments from the signing of the 1998 Record of Understanding onward. The outcome of the Section 34 Court Case is cited in the preamble to the Record of Understanding in order to enforce the standing that the District Six Trust had gained in the process, while the preamble to the 2001 Deed of

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(paragraph 17.2), that ‘both the first and the second applicants are the products of free and fair elections’ (paragraph 22.2) and that ‘The applicants were democratically elected and in that sense they represent the wishes of the broader community in the Cape Town Metropolitan area and in the Western Cape Province’ (paragraph 31.2).

<sup>13</sup> Davidson refers to the City’s ANC leadership at the time as being involved in negotiating the original moratorium on development in District Six and points to the fact that they ‘were also at the forefront of the liberation movement’ (Paragraphs 47.2 and 47.3).

<sup>14</sup> The ‘exclusive’ technical capacity of the state to execute the project is offered as a further rationale for the granting of a Section 34 order (paragraph 68.8 of Davidson’s founding affidavit).

<sup>15</sup> Nagia rejects the 1913 cut-off date, demanding that restitution fully address the ‘systematic process of land dispossession which occurred before 1913, and which led to the unequal concentration of wealth in the hands of a few in the South African economy’ (1999:6).

the District Six Beneficiary and Redevelopment Trust, chides the work of ‘callous officials’ acting in the name of ‘the law’. As we have already seen, the ensuing Memoranda of Agreements signed between the Trust and Claimants, and the Land Development Agreement of 2005, curtail state discretion over use of the land and establish new administrative organs and processes to manage the redevelopment outside of the state’s control (and without formal accountability mechanisms for the claimant constituency). These include, on the one hand, the positioning of the District Six Trust as developer, administrator<sup>16</sup>, selection authority for claimants to be included in the new homes<sup>17</sup>, and, on the other, the introduction of a ‘contractual community’ within which returnee claimant ownership is produced and constrained (described in depth in the previous chapter). The state obliged this process by limiting its powers and functions in the redevelopment to a bare minimum in the S42D Settlement Agreements signed between the Commission on Restitution of Land Rights and individual claimants as a ‘full and final settlement’ of the claim (paragraph 10).

When the extensive concession of authority over the governance of restitution and redevelopment in District Six was challenged in the Land Claims Court in 2007 by the District Six Advocacy Committee, the state respondents, including the Commission on Restitution of Land Rights and the City of Cape Town, did not oppose the application. The application to have the District Six restitution halted cited as its motivation the post-facto efforts of the Commission to have former land owner claimants mandate the Trust to deliver their restitution claims as Developer of the land (founding affidavit by Mogamat Majiet, paragraph 43). The Advocacy Committee denied that the S42 Framework Agreement of 2000 carried legal weight, and argued that the Commission had failed to execute its mandate by engaging claimants directly (paragraph 40.3). In its responding affidavit, the local government conceded that the Trust had sought to ‘usurp powers’ of the local, provincial and

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<sup>16</sup> For instance, the Trust is granted the right to take transfer of R4 500 000 from the City of Cape Town for services and infrastructure, and takes on the power of attorney (in terms of a ‘Power of Attorney’ certificate annexed to the Land Development Agreement dated 28 October 2005 and signed by the City Manager at the time, Dr Wallace Mgoqi) to transfer title deeds from the City of Cape Town to the claimant (a role reserved for the Director General of Land Affairs in Restitution legislation). As mentioned before, the Trust also takes on first right of refusal on resale of the property, a role reserved for the Minister of Land Affairs in Restitution policy.

<sup>17</sup> The Land Development Agreement grants the Trust authority to select beneficiaries for the redevelopment (paragraph 6.1.6), thereby endorsing a role that the Trust had earlier envisaged for itself in its Deed of Trust, which provides for the ‘formerly disadvantaged community’ to ‘select’ members to benefit from the work of the Trust (paragraph 1.2.3.2). These provisions put the state in a very difficult situation. In terms of the constitutional order of discourse, the authority to verify claimants and make awards to claimants rests with the state (i.e. the Commission on Restitution of Land Rights and the Land Claims Court in terms of the Restitution of Land Rights Act). In terms of housing provision, the authority to select beneficiaries of state-subsidised housing projects vests with the Department of Housing in terms of the Housing Act (Section 4 of the *Housing Act 107 of 1997* requires government to develop and publish a National Housing Code of administrative guidelines, including selection criteria for beneficiaries of state subsidized housing. The authority for approving subsidies rests with Provincial and Local Governments, and they must use fixed criteria for choosing qualifying beneficiaries. Developers can be mandated to hand over houses to beneficiaries, but have to follow these criteria in selecting beneficiaries).

national government administrations<sup>18</sup>, and defended the decision on the basis that the local government had sought to ‘avoid further delays’ to the administration of the redevelopment process<sup>19</sup>.

It appears, therefore, that key state role-players have been less than certain about the legitimacy of the state to drive restitution. Although this may partially reflect the limited commitment to the South African state’s role in restitution from higher ranks of government<sup>20</sup>, in District Six, the legitimacy deficit of constitutional administrative organs and processes of restitution has, at the very least, been deepened by an equivalence drawn in the public domain between pre- and post-apartheid exercise of state authority. This, in turn, is underpinned by tacit assumptions that the organs of state in question, particularly the provincial and local governments, have had an essentially ‘continuous’ identity through the various stages of the site’s history, from the 1940s through to the first decade of the 21<sup>st</sup> century.

### **3. Continuity of the State Organ identities – ‘Identity of State Organs’ - failure of rational authority**

The assertion of essential continuities between the state’s historical role in the forced removals and the post-apartheid states administrative actions serves as a key strategy in the discourse of District Six’s land activists. This strategy is at its most apparent in the opposing application in the Section 34 Land Claims Court Case, which constructs a narrative linking the apartheid state’s destruction of District Six, its subsequent efforts to redevelop the site against the will of displaced residents, and the Section 34 bid. This narrativisation is more than a simple rhetorical analogy. It asserts a fundamental continuity of *organisational identity* between the political leaders and organs of state existing at the time of the forced removals,

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<sup>18</sup>Molapo states in his affidavit on behalf of the City of Cape Town that the ‘[t]rustees of the D6 Trust...appear to be determined to usurp the powers of the City and of the Department of Land Affairs and the Land Claims Commissioners in relation to the development of District Six’ (paragraph 67).

<sup>19</sup>He states that while the City was ‘distinctly uneasy with the role that the D6 Trust was assuming in the process, i.e. that of Developer; Landlord and the implementer of the restitution award, the City also felt under pressure to demonstrate progress with the re-development of District Six. It accordingly went along with the pilot project and hence contributed R4.5 million towards the construction of those homes. I reiterate that it was not the City’s function to determine the appropriateness of the D6 Trust as the vehicle for the land restitution process. That function resorts in the Land claims Commission’ (paragraph 38).

<sup>20</sup>This limited prioritization of land restitution has been noted particularly by Cheryl Walker in her essay for the Human Sciences Research Council’s *State of the Nation 2005-2006* entitled ‘Delivery and Disarray: The Multiple Meanings of Land Restitution’ (2006). Walker argues that ‘the particular symbolic significance of land restitution in national political debate...has not been matched by its consistently low ranking in terms of the ANC’s developmental priorities. Restitution in practice, as opposed to restitution as an ideal, has found itself competing for budgets, attention, even legitimacy on occasion, in relation to other public goals’ (2006: 87).

and the organs of state attempting to redevelop District Six via the Land Claims Court process:

It is noteworthy that it is the self-same Nationalist Party, albeit in a different guise, that is the majority party in power in the Western Cape and acting as the second Applicant, that engineered the “Apartheid” policy, the forceful dispossession of the Respondents’ rights and the utter destruction of District Six. (Opposing Affidavit by Anwah Nagia, paragraph 4.2)

The assertion that the second applicant is the ‘self-same’ National Party in a ‘different guise’ rests on the assumption that the post-apartheid elected Provincial Government is in its ‘essence’ identical with the apartheid state, and is merely parading as post-authoritarian and democratic (an argument that took much of its weight from the historic continuities between the former National Party and the New National Party in power at the time). Nagia extends this logic to the local government (municipality) when he claims that the latter had plans to carry out forced removals of its own under the pretence of ‘slum’ removal plans<sup>21</sup>, and, furthermore, colluded with the apartheid government by assisting in the provision of alternative housing and allowing the development of the technicon<sup>22</sup>. Nagia singles out Basil Davidson as the ‘motivative (sic) force’ behind efforts to redevelop District Six ‘without consultation with the true victims of District Six’ (Nagia affidavit par 4.4.16).

Although the responding affidavit in the case lodged by Davidson vigorously rejects Nagia’s arguments, it tacitly accepts this logic of continued institutional identity of the local and provincial government administrations when it seeks to absolve the first applicant of involvement in the forced removals. Instead of rejecting the link made by Nagia between the state in two different eras as invalid due to the time lapse involved, he defends the municipality’s plans to upgrade District Six in the early and mid-20<sup>th</sup> century. He argues that the municipality intended only to ‘demolish and re-plan a large part of the area without removing and displacing residents’ (paragraph 29). Furthermore he points out that ‘in March 1966, the first applicant called upon the government of the day to repeal the proclamation of

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<sup>21</sup> He states that ‘the First Applicant had already had blueprints in the late 1950s to have District Six declared as a slum area and to have the community removed’ (paragraph 22.1).

<sup>22</sup> Although it was not historically involved in the execution of forced removals (this was done under the auspices of the national government at the time), in paragraph 22.1 he asserts that the City was passive in the face of forced removals, and even complicit in the removals by providing alternative housing for the removed residents (paragraph 22.2). A similar strategy is utilized to link the City and Province to other ‘illegitimate’ actions in District Six, including the technicon and the BP development (paragraph 22).

District Six as a white area but this call and subsequent appeals went unheeded' (paragraph 38).

Perceived continuity of organisational identity for organs of state is not unusual in its own right. Indeed, public perception of state institutions and laws as identifiable and self-same over time can be crucial to the recognition of their legitimacy. Political theorist David Beetham, for example, in *The Legitimation of Power* (1991), argues that the three critical components of legitimacy for liberal democratic regimes include 'the performance of institutions; their conformity to democratic values of consent, representation and accountability; and political identity, without which citizens may question the right of a particular collectivity to make decisions on their behalf' (1991: 5).

Yet, in the case of District Six, and post-apartheid South Africa generally, state institutions and laws are burdened by meanings that weaken the ideological edifice of legal and official 'neutrality', in turn, loosening the grip of rational-legal authority in Max Weber's sense. In his extensive analysis of rational-legal authority in *Economy and Society*, Weber describes bureaucratic authority as a form of legal-rational authority (the 'purest form')<sup>23</sup> that operates 'by virtue of the formal legality of their commands and only within the scope of authority of the office' (1987: 215). As one of three 'pure forms of authority' operating in modern society, alongside charismatic and traditional forms of authority, rational-legal authority is distinct in that it relies on belief in the law, rather than in a sovereign individual. For Weber, the success of rational-legal authority is largely reliant on the apparent disinterestedness of those wielding it (officials, organs): 'members of the administrative staff should be completely separated from ownership of the means of production of administration. Officials, employees, and workers attached to the administrative staff do not themselves own the non-human means of production and administration' (ibid: 219). 'Charismatic' or 'traditional' modes of authority, in contrast, rely on the status of the individual leader, and sovereignty is vested in their person<sup>24</sup>.

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<sup>23</sup>He states that '[t]he purest type of exercise of legal authority is that which employs a bureaucratic administrative staff' (ibid: 220).

<sup>24</sup>For Weber, 'in the case of traditional authority, obedience is owed to the person of the chief who occupies the traditionally sanctioned position of authority and who is (within its sphere) bound by tradition. But here the obligation of obedience is a matter of personal loyalty within the area of accustomed obligations. In the case of charismatic authority, it is the charismatically qualified leader as such who is obeyed by virtue of personal trust in his revelation, his heroism or his exemplary qualities so far as they fall within the scope of the individual's belief in his charisma' (1987: 215-216).

Social theorist Pierre Bourdieu, in his essay 'The Force of Law', provides us with a valuable entry point into theorising how Weber's rational-legal authority encodes its legitimacy in discourse. Bourdieu argues that 'the law can exercise its specific power only to the extent that it attains recognition in the eyes of the governed' which requires that it be accepted as the 'quintessential form of legitimized discourse' (1987: 844). To achieve this, legal discourse 'bears all the marks of a rhetoric of impersonality and of neutrality', designed 'to express the generality or omnitemporality of the rule of law' and assert 'transsubjective values presupposing the existence of an ethical consensus' (ibid 819-820). In his essay 'Rethinking the State: Genesis and Structure of the Bureaucratic Field' (1994), Bourdieu examines how this universalizing and naturalising 'effect' functions in relation to 'administrative law' and its role in constituting state organs in particular: 'officials constantly have to labour, if not to sacrifice their particular point of view on behalf of the "point of view of society"', at least to constitute their point of view into a legitimate one, i.e., as universal, especially through the use of the rhetoric of the official' (1994: 17). Administrative law aspires to enforcing this ideal of the bureaucracy in practice by 'establishing a universe of dedication to the general interest' and taking 'the obligation of neutrality as its fundamental law' (ibid). Through its laws the state therefore:

incarnates itself simultaneously in objectivity, in the form of specified organisational structures and mechanisms, and in subjectivity in the form of mental structures and categories of perception and thought. By realising itself in social structures and in the mental structures adapted to them, the instituted institution makes us forget that it issues out of a long series of acts of *institution* (in the active sense) and hence has all the appearances of the *natural*. (3).

If we adopt Bourdieu's reading of how Weberian legal-rational authority operates in language, it follows that the projection of a distinct, non-universal 'organisational identity' onto state organs that successfully defies the administrative 'appearance of the natural' or 'neutral' will cost the state its monopoly on authority. In the case of District Six the logic of a continued identity between the organs of the apartheid and post-apartheid state has opened the ideological space for such a projection of a negative organisational identity. As we will see, the discourses that have 'opened' this space, and subsequently occupied it, have

developed in historical and literary texts, alongside the Cape's long history of social activism whose discourses have been well documented by the District Six Museum and other archives.

#### **4. Callous Officials, Dummy Organisations and Police Brutality: the 'Faces' of State Authority in District Six Literature**

The literary works of La Guma, Rive, Kramer and Petersen, together with historic and media accounts of District Six, share common depictions of officialdom that serve as facets, or even 'faces', of state authority under apartheid. These faces in literary and historical representations of state activity in District Six offer subversive and counter-hegemonic identifications of the state, forming conceptual prototypes for the Trust Deed's 'callous officials', 'Herrenvolk government' and the Section 34 opponents' 'bureaucratic authorities that clearly have no consideration for the wishes and feelings of the dispossessed Land Claimants' (paragraph 6).

In his novella *A Walk in the Night* (first published in 1962)<sup>25</sup> La Guma uses police characters to depict the exercise of state power over 'non-white' residents of the suburb under white rule. The denizens of District Six are subjected throughout the novel to ongoing incidents of harassment and violence by the police, culminating in the shooting of a young 'coloured' street urchin (Willieboy) wrongly accused of murdering an old white man (Mr Doughty). The injured Willieboy is taken to the police station but dies in the back of the police van while the constable goes to buy cigarettes. The real murderer, protagonist Michael Adonis, goes on to join a gang of criminals. Thus, in his literary analysis *Alex La Guma: Politics and Resistance* (2001) Nahem Yousaf describes the novel as a portrayal of the rule of law under apartheid bereft of 'truth, honesty and justice' (2001: 33), whose police 'are not interested in the safety or wellbeing of their black constituency' (ibid).

The physical descriptions of the police characters serve in the novel as incarnations of state authority, revealing it as, above all, 'hard' and forceful. The first encounter between Michael and 'the law' cements this impression. Shortly after being fired from his job at the factory, Michael heads into the centre of District Six and is accosted by two officers. They are described with 'hard, frozen faces as if carved out of pink ice, and hard dispassionate

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<sup>25</sup> This text was published as part of an anthology of short stories whose full title is *A Walk in the night: Seven Stories from the Streets of Cape Town*. It is La Guma's first long work of prose fiction.

eyes, hard and bright as pieces of blue glass', while their movements cut 'a path through the stream on the pavement like destroyers at sea' and their voices are 'hard and flat as the snap of a steel spring' (La Guma 2006: 7). Michael engages with the policemen in a form of rehearsed submission to 'the law', keeping his eyes averted and his answers respectful and monosyllabic:

You learned from experience to gaze at some spot on their uniforms, the button of a pocket, or the bright smoothness of their Sam Browne belts, but never into their eyes, for that would be taken as an affront to them. It was only the very brave, or the very stupid, who dared look straight into the law's eyes to challenge them or to question their authority.' (La Guma 2006: 7-8).

The subjects of the law dare not challenge its authority. They experience the 'hard' faces of the police as intimidating and impenetrable, constantly watching and surveying their actions. At the murder scene of Mr Doughty, the main police character Constable Raalt's 'hard grey eyes swung over the crowd from face to face like the expressionless lenses of a camera' (2006: 40), searching for a culprit to punish. The hard and unforgiving edifice of the law is, however, portrayed by La Guma as a convenient front for more arbitrary and brutal exertions of power. Raalt, for example, is quietly consumed with anger at his wife over suspected infidelity, and finds the non-white subjects of District Six to be easy targets for his rage. Prior to arriving on the scene of Doughty's murder, he tells his driver: "I wish something would happen. I'd like to lay my hands on one of those bushman bastards and wring his bloody neck" (ibid). Although he 'found little relief in transferring his rage to some other unknown victim', he nonetheless takes 'pleasure in the vindictiveness' (ibid). Raalt's later attack on Willieboy is deliberately paralleled by La Guma with Willieboy's beatings at the hands of his mother, reading 'the law' as a form of abuse. Willieboy hears her voice over and over in his head saying "You naughty little bogger" (ibid), which he knew was 'vengeance upon him for the beatings she received from his father' (2006: 58). Michael similarly articulates this state of affairs when reflecting on what to do about the death of Doughty: 'What's the law for? To kick us poor brown bastards around' (2006: 30).

The face of state authority in Rive's *Buckingham Palace: District Six* is no less arbitrary than La Guma's characterisation, but Rive introduces an element of absurdity as a further subversive strategy in the early chapters of the book. The individual faces of the state include

a 'small, officious white man' who works as an inspector for the Group Areas 'Board' (inspector Engelbrecht), an overzealous 'beach constable' who tries to chase some of the District Six characters off the 'whites only' beach, and a 'bored railway police sergeant' (1986: 94). In each case the characters lack gravitas. Inspector Engelbrecht is mistaken for a customer at the Buckingham Palace brothel by one of the ladies: "A bit early aren't you? You must be desperate," (ibid: 135), while his subsequent attempts to categorise Oubaas next door are frustrated by the latter's buffoonery. The beach constable is virtually ignored by the characters he tries to chase from the beach, and appears to have irritated the railway sergeant with his pettiness: "I don't understand you people. You have your own beaches. Why must you come here to swim? White people don't go to your part" (ibid: 95).

While Rive's unflattering portrayal of the state's agents is designed to weaken their credibility, the state's anonymous administrative machinery, referred to as 'Pretoria' or simply 'them' in the novel is an arbitrary and inhuman machinery. Apart from Buckingham palace landlord Katzen's comparison of the Apartheid state to Nazi Germany (examined in chapter four of this thesis), Rive's other characters establish a variety of critiques of the apartheid state's actions. With Buckingham Palace facing demolition, for example, Oubaas asks his friends:

Who is this Pretoria you are always speaking about? Pretoria says this and Pretoria says that. Pretoria says we must give our names and our race. Pretoria says we must report to that office in Barrack Street. Now, someone tell me, who then is Pretoria? What right has Pretoria to do what it does? Can anyone answer me?" (146-147).

With the destruction of District Six complete, the first-person narrator of the novel asks himself (and, it would seem, the reader): "What men have the moral or political right to take away a people's past? How will they answer on that day when they have to account for this? For the past will not be forgotten" (1986: 128).

Rive's use of comic subversions of state authority and repudiations of state authority by sympathetic characters, finds an analogue in Kramer and Petersen's depictions of Group Areas Inspector Vosloo's struggles to register characters in *District Six: The Play*. In the second scene of the play, Vosloo is shown in a comical scene trying to register the addresses of all District Six residents, including the blind homeless man Damaka, for the purpose of

removals. Like Rive's Inspector Engelbrecht, he personifies the heavy hand of the apartheid state, reappearing repeatedly in the story in the build up to the demolitions, as letters from 'the Board' are distributed to residents informing them of the move. In Act I Scene 6 Vosloo is seen bullying the street hawker Henry Afrika, demanding to see his permit and hawker's coat required by 'the law', and referring to himself as 'the baas' (Kramer and Petersen 2005: 32), later describing the residents of District Six as 'Die blerrie mense' (these bloody people) (ibid: 31).

As in Rive and La Guma's work, the central, sympathetic characters of the story are used to verbalise the injustice of the state. Following his encounter with Vosloo, Henry Africa remarks angrily to himself 'Ek 'ettie di lô gemaakie. Hoekom moet ekkit respek?' ...he's jus' one of those inspectors from the Group. Thinks he can control me! Sy ma se moer, man. Ek is gatvol virrie lô!' [*I did not make this law. Why should I respect it, he is just one of those inspectors from the Group Areas Board. He thinks he can control me! Fuck him. I have had enough of this law*'] (2005: 33). Henry's rejection of 'the law' as not of his making, and his use of highly localised colloquialisms renders Vosloo's discourse alien and invalid in the social milieu of the District. This reading is underscored when, in Act 2 Scene 1, Vosloo returns during preparations for a minstrel parade with forms for Henry Afrika to fill out for 'alternative accommodation' (ibid: 45), and he is ridiculed and chased away by the troop:

DAMAKA: Do you what is this day, Mister...uh...Vosloo?

VOSLOO: A day I shouldn't have to be working

DAMAKA: That's right. But do you know what this day means to us? Do you know what we celebrate here?

VOSLOO: We all know it's the start of a new year, jong. Just another excuse for you all to get drunk.

DAMAKA: Drunk? Ja, some of us will get drunk. But there is a reason for that, because today we celebrate. We celebrate freedom! You know why? 'Cos today is the day that the slaves, our forefathers, were freed. More than a hundred years ago.

VOSLOO: Jong, now you're talking history. That's got nothing to do with me. I just need you to fill in the forms, all right.

DAMAKA: And when they, the slaves, were free Mister Vosloo, d'you know where they went to live? Some went to the Bo-Kaap and some came here. Ja, right here where we are standing in District Six

HENRY: And you wanna tell me that, I, Henry Afrika don' belong here? Naai meneer, uh-uh. (ibid: 46).

Henry Africa enacts a symbolic victory over the apartheid officialdom and the 'lô' when his assertion of the historic belonging of District Six's residents puts Vosloo on display for the audience as both ignorant (through his description of District Sixers as degenerate revellers without any real culture or tradition: 'just another excuse for you all to get drunk') and disingenuous in his assertion of a bureaucratic 'universality' that is above history: 'now you're talking history...just fill in the forms'.

These literary projections of organisational identity onto the apartheid state and its functionaries have proliferated in ensuing years in historical and media discourse. Yusuf Rassool's *District Six: Lest we Forget* (2000), for instance, portrays the apartheid regime as a 'juggernaut...confidently grinding onwards, ploughing under the few remaining rights of the non-White oppressed' (2000: 143), ensuring 'Herrenvolkism would be firmly ensconced for a further 300 hundred years' (2000: 192). This machine is served by parliament's 'legal conveyor belt', whose 'Big Bertha' is the Group Areas Act, (ibid: 143) as well as 'the old-fashioned crudities of the sjambok and the jackboot' (2000: 192), the Coloured Affairs Department, and an assortment of bureaucrats and coloured 'sell-outs', labelled 'quisslings' by the activists of the struggle.

At the Hands off District Six conference, a range of speakers adopted a similar tactic of alienating and discrediting the apartheid state, citing its ideological bankruptcy and its sheer bureaucratic ineptitude. NEF leader, Richard Dudley, for example, describes the state as 'vandals' unable to create anything other than 'monument[s] to herrenvolkism':

All around us is evidence of their inability to build a civilisation...they the rulers, have created here a divided city, a many-times divided population, the world's most violent city with the highest murder rate anywhere, a city where more than one-third of its people do not live in houses, where illiteracy, lack of skills, hunger and unemployment, fear and uncertainty stalk people's lives every minute of the

day....The creators of such cities must indeed keep their “hands off District Six”.  
(Dudley 1990: 102).

Even Deborah Hart’s more formal academic contribution to the conference emphasised the administrative blunders of the state during the forced removals, arguing that this in turn bred corruption and abuse by officials:

By 1971...the authorities had begun to face more intractable difficulties in rehousing “affected” families, a reality which urged the City Council and various critics to strengthen opposition to the zoning of District Six as a white group area. To cope with the discouraging slowdown and the embarrassment of a Council housing waiting list of 24000, the government resorted to expediency. Adherence to promises of “suitable” accommodation was discontinued as the last 10 000-odd residents were intimidated into accepting inappropriate dwellings (often unaffordable, too small, or substandard). There were repeated incidents of bribery, threat, and corruption. These, combined with the issuing of illegal eviction notices unaccompanied by legitimate offers of accommodation, heightened confusion, alarm and often acquiescence among members of the community’ (ibid: 80).

In the realm of the mainstream print media, damning portrayals of the apartheid administration began to appear in the late 1970s. For example, in 1978 *The Cape Argus* published a piece on the government’s continued failure to redevelop the site, entitled, ‘District Six Refuses to Die’, in which it describes the demolitions as ‘the product of a cocooned ideology incapable of coming to terms with reality’ (*Cape Argus*, 30 August 1978). The article notes that ‘no act has caused more misery, heartbreak and bad feelings than the proclamation of District Six’, which has created ‘a dying monument which will haunt the Nationalist Government for many years to come’ (ibid). In the same year the *Cape Times* published a story of the death of a 92 year old District Six resident in the face of the ‘mechanical rape of the area’ by ‘giant machines devoid of compassion’, while ‘bulldozer kids join gangs of embittered youngsters who know only hatred for the authorities and a strong urge to get their own back on an unjust society’ (‘Old Lady of District Six Beats the

Bulldozers' (*Cape Times*, 4 November 1978). Such commentaries become increasingly frequent into the 1980s<sup>26</sup>.

In the late 1970s the print media became a platform for similar critiques by public commentators. One of the earliest instances occurred in 1979 with the announcement that subsidies would be made available to white people willing to move into District Six as a face-saving measure by the National Party Government. Progressive Party opposition Member of Parliament Colin Eglin reacted in a public statement referring to 'the basic immorality of the Group Areas Act' whose disgrace was 'compounded' by the use of public funds to subsidise its occupation (in *Cape Argus*, 24 April 1979). Similar critiques followed at the time from prominent academics and political figures, including the United Democratic Front's Allan Boesak (*ibid*), Professor Johan Maree of the University of Cape Town ('The Dust Settles on District Six', *Cape Times*, 11 February 1981) and Dr Oscar Wollheim of the South African Institute of Race Relations ('600 000 People Moved for Law', *Cape Times*, 22 May 1981). In the post-apartheid context, the print media itself began to editorialise on the acts of the past government. Shortly after the opening of the District Six Museum, for example, the *Cape Times* carried an article on its latest exhibition entitled 'Delving into the City's Dark Past' (16 December 1998), in which the journalist states that '[i]t is chilling to read the cold language of government spelling out in detail, with the appropriate map references, which areas in Cape Town would henceforth be for whites only, and to contrast this with the pictures, filled with life, of the residents of District Six'. The journalist finds that there is 'much to invoke the tragedy in the madness of social engineering and political evil in the museum'.

The instances of subversive portrayals of 'the law' and state officials which occur in the resistance literature of La Guma, Rive, Kramer and Petersen do of course resonate with a much bigger canon of works that subvert the instruments of modern rational-legal authority (particular those of Orwell or Kafka). In both instances, subversive representations undercut the 'universalizing' function of the language of rational-legal authority described by Bourdieu, to the extent that the terms 'authorities', 'bureaucrat', 'official', 'administration' and 'the law' have become widely used 'keywords' (returning to Raymond Williams' use of the term examined in Chapter 3 of this thesis) loaded with negative pejorative connotations.

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<sup>26</sup>In articles such as 'Back to the Beginning' (*Weekend Argus*, 19 September 1981) 'District Six: Time Money and Suffering' (*Cape Argus* 11 February 1982), 'End of the Line for District Six' (*Cape Argus*, 18 June 1982) and a number of others.

The characterisations of officialdom in District Six have, however, given these literary archetypes specific, localised connotations that have endured into the present.

## 5. The 'Baas' State

What meanings do these 'faces' of the state impart on its organs? If we return to the examples above, it is apparent that the organs and officials of the apartheid state are constructed, first and foremost, as proxies for white economic and symbolic interests. Any alternative explanations are dismissed as rationalisations. As one editorial column of the *Weekend Argus Newspaper* put it (following the launch of a second pilot project in District Six),

The apartheid government tried to claim the removals were in the people's best interests because District Six was degenerating into a slum. But that was a whopper beyond belief, even for the Nationalists. No one bought the story; it was just so obvious they had other plans for the prime land close to the city centre, plans that did not include anyone but the chosen white race. (*Weekend Argus*, 2 October 2005, 'City Losing its Soul in District Six').

The complicity of the law in this agenda is elegantly portrayed in La Guma's text through the contrast he draws between the attitudes of Constable Raalt and his partner. Raalt enjoys bullying District Six's residents and occasionally extorts money, while his partner prefers a more sophisticated system of instilling 'respect' for the white ruling elite among their 'non-white' subjects, thus ensuring the latter's labour can be effectively used to further white enterprise:

You've got to set an example with these people. Train them like dogs to have respect for you. If you whip them they'll turn on you. You've got to know how to handle these people. Pa knew how to handle these people. I wonder how he's getting on out there on the farm. He's got a lot of these hotnots working out in the orchards and the vineyards and he's never had any trouble with them. Give them some wine and drive them into town on Saturday nights and they're all right. (2006: 55)

Raalt's partner therefore displays a more sophisticated but no less disturbing motivation for enforcing racial domination. He fears that Raalt's indulgence of his visceral impulses will compromise the privileged position of white racial identity: 'he is one of those who will disgrace us whites. In his scorn for the hottentots and kaffirs he is exposing the whole race to shame. He will do something violent to one of those black bastards and as a result our superiority will suffer' (2006: 26-27). La Guma therefore uses the two characters to illustrate different facets of the same abusive agenda, with apartheid order simply a more sophisticated but no less exploitative means of 'handling' the non-whites. For Yousaf, these modes of abuse constitute 'the macrocosmic capitalist-sponsored apartheid state's ill treatment of its majority population in microcosmic detail' (2001:25), a set of forces that ultimately crush the characters of the novel (see also Chandramohan's account of *A Walk in the Night* in *A Study in Trans-Ethnicity in Modern South Africa: The Writings of Alex la Guma*, 1992: 32).

Rive's *Buckingham Palace: District Six* extends the same exploitative motive to the state's destruction of District Six, with his first-person narrator describing the forced removals as an act of greed: 'they had done all this for their own selfish and arrogant reasons' (1986: 127). Such readings dominate the HODS conference (at which Rive was one of the speakers), for instance, Deborah Hart dismisses the governments' effort to 'disguis[e] its motives for the removal scheme', arguing instead that the removal was motivated by desire to appropriate 'some of the most potentially valuable land in the Republic' and to drive out the 'perceived threat posed by the encroachment of a sizable "non-white" populace upon Cape Town's "white space"' (1990: 78). The HODS campaign and its activists therefore regarded efforts at redevelopment of the site by the National Party government from 1979 to 1989 as 'the old, and if not the old, then much more definitely new, versions of the old baaskap' in which 'the old rules of domination are being rewritten...by the very people who, in earlier times, connived in its demise' (1990: v-vi). Similar readings have continued into the post-apartheid era<sup>27</sup>.

During the restitution process readings of the state administration serving white elite interests are recycled and projected onto the post-apartheid local, provincial state organs, primarily by District Six's land activists, but also by public and even other state commentators. In the Section 34 Court encounter, Nagia contends that the state's actions are

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<sup>27</sup> For instance, Sean Field and Felicity Swanson, in *Imagining the City: Memories and Cultures in Cape Town* (2007), argue that 'officials called these forced removals "resettlements" and "community development": Living separately, they said, would benefit the people; in reality, the whites were the only beneficiaries' (2007: 38). See also Field 2001, Erasmus 2001, and Adhikari 2005 and 2009.

an attempt at a second ‘dispossession’ that will serve the economic interests of the state administration (echoing the ‘conspiracy’ attributed to the Government of National Unity by Nagia to limit the number of land claims (1999)):

the true reason behind the launching of this application is that once the Land Claimants rights have been confirmed the Applicants or other bodies will only be able to expropriate their rights if it is truly in the interest of the public and payment of adequate compensations to them according to the true value of their rights in such land. This will obviously be an expensive exercise. (paragraph 4.5.1.2)

Consistent with historical accounts of the apartheid state’s strategies to ‘disguise’ its true machinations in the work of the HODS conference, and the discourse of the Anti-CAD campaigners (described by Rassool 2000), Nagia accuses the state of using ‘dummy institutions’ to monopolise District Six land by stealth (paragraphs 37, 39 and 41.2). The state’s proposed redevelopment is read as continuous with former apartheid president P.W. Botha’s efforts, in 1984, to ‘attract the “Coloured” vote’ and ‘vindicate the presence of the Labour Party in the tri-cameral Government’ by declaring a small section of District Six “Coloured” (paragraph 4.4.9). Like the pre-1990 efforts at redevelopment, state administrative action in District Six is thus seen as a tool in service of the ‘old baaskap’, and any representations to the contrary are dismissed as instances of bad faith. Nagia has continued to articulate this position ever since. In 2006, for example, with the District Six pilot projects suffering delays, one of Nagia’s many media publications refers to the local government as ‘a city without an understanding of its complicity in reproducing the racial and class divisions of the city’ (*Cape Argus* ‘District Six can cement ideals for a new city’ 24 November 2006), a critique he repeats on the radio in the following year, using the metaphor of the ‘dinosaur’ to draw continuity between the ‘old’, possibly fossilised apartheid officials still inhabiting the post-apartheid administrative environment:

We want to remind Mayor Helen Zille and all the dinosaurs she has in her department, some of them are white, and some of them are either pseudo-white, or are trying to be dinosaurs in this process, apartheid dinosaurs, which I think they must actually desist from that particular strategy. The other day Hans Smit, also a dinosaur, has said to us that the land is the City’s land...I then had to make the conclusion that this is a dinosaur speaking, an apartheid person who has not understood that the land belongs

to the people. (interview transcript, originally broadcast on *Good Hope FM Radio*, 24 August 2007).

Indeed, the Good Hope FM radio station's presenter, Nigel Pierce offered a similar view in an article published in the local tabloid, *The Daily Voice*, earlier that month: 'developers and the city are concerned that gam [vulgar term for 'coloured' persons] are going to invade their precious land ...the way I see it, the mayor likes the gam and the darkies to live in separate areas, as per apartheid legislation' (*Daily Voice*, 17 August 2007).

With increasing tension between the two different political parties in office at local government (Democratic Alliance) and national government (African National Congress), the discourse of continuity between apartheid and post-apartheid administrative action was taken up by both opposing camps in the public domain. In 2008, for example, Mayor, Helen Zille, argued that the national ANC government's concession of control over the site had led to a further 'injustice' against the dispossessed: 'the ANC ignored the law and simply compounded the historical injustice of dispossession with another injustice by handing control over restitution - and the prospect of massive contracts through the redevelopment - to a group of their cronies' ('Approach in District Six flawed from the start' *Cape Times*, 24 July 2008). The Chief Land Claims Commissioner responded in the media arguing that Zille's local government continued to harbor a 'vision of apartheid legacy' (in *Cape Times*, 20 August 2008, 'Mayor Should Stick to Providing Services, Stay Out of Restitution'). In spite of these political exchanges, no major shifts in the administrative mechanisms of the restitution process have occurred. The pilot projects have continued under the same contractual conditions, and by the time of writing this thesis (August 2012), only 56 claimants have received possession of rebuilt homes (office of the Regional Land Claims Commissioner, 2012).

The projection of apartheid organisational identifications onto post-apartheid administrative organs has therefore eroded, on various fronts, the efforts of local, provincial and national state administrative organs to assert rational-legal authority through the 'universalizing' rhetoric of administrative law. Even into the first decade of the 21<sup>st</sup> century this set of identifications has continued to be reproduced, metastasising into new political struggles between the local and national governments over questions of governance in District Six.

## 6. Administration and the wrong Side of Revolutionary Legitimacy

These shifting reproductions of apartheid organisational identifications attached to the state organs involved in administering restitution give rise to a particular impasse of governance in District Six. The site's land activists, even the state itself, have routinely positioned the state's administrative organs on the wrong side of a moral dichotomy between apartheid and democracy, a dichotomy that is essential to configurations of political legitimacy in post-apartheid South Africa. This has been observed recently by social anthropologist Michele Ruiters in her contribution to Mohamed Adhikari's collection of essays on race, *Burdened by Race: Coloured Identities* (2009): 'In post-apartheid South Africa, all identities are in the process of being reconstructed particularly in opposition to their apartheid-era incarnations, presenting themselves, among other things, as not racist, not divisive and not isolated' (Ruiters 2009: 104-105)

The development and circulation in popular discourses on District Six that assert continuities of state identity bearing the 'mark' of apartheid have thus made any decisive exercise of state-administration all too easy to equate with apartheid modes of oppression. Returning to Bourdieu's point, law and bureaucracy need to be seen as legitimate in the eyes of the governed if they are to be effective. Restitution is intended to restore this legitimacy, build the authority of the state, and even promote identification with the new South African nation-state, but, as the paralysis of governance in District Six has shown, it cannot initiate a 'virtuous cycle' of renewed belief in state authority as long as its credibility continues to be undercut.

Indeed, the discursive constructions of an alternative, *illegitimate* set of identifications for the state analysed above, renders the state outside of, and even in opposition to, what South African political theorist Ivor Chipkin terms, in his 2007 work *Do South Africans Exist?*, 'the national subject'. Chipkin argues that citizenship of the new South African nation, read as a 'political community', is reliant on the notion of liberation struggle, more particularly the ANC's notion of a National Democratic Revolution: 'African peoples emerged primarily in and through the process of nationalist resistance to colonialism...the South African people came to be defined and produced in and through the politics and culture of nationalist struggle'. (2007: 2). Chipkin observes in the course of his analysis that the

exact meaning of the South African ‘national subject’ remains unstable and less than clearly defined in its ‘essence’. However, in the arena of District Six we can surmise from the analysis above, that the organs of state positioned as they are in continuity with apartheid, are at the very least ‘outside’ of this subject position, whose major political frontier positions it as at least *not-apartheid*.

From this perspective, the historic discourses of District Six have generated something of an inversion of the ‘counternational identities’ that Fay and James and others have found at work among claimants in South African restitution sites where ‘neotraditional forms of subjection’ or ‘ethnic sovereignty’ prevail (2010: 42). Readings of how localised identity struggles impact on various other spheres of state ‘service delivery’ occur in the work of a range of authors, including Alexander (2002), Comaroff and Comaroff (2005), Von Lieres (2005), Ruiters (2009), among others<sup>28</sup>. In contrast, as we have seen in Chapter 5, certain officials of the City, National Government, Commission on Restitution of Land Rights, the District Six Museum and the Trust have expressed views of the returning District Six community as a prototype for a post-apartheid national identity<sup>29</sup>. In District Six, therefore, it is the organs of state (particularly the City, Provincial Government and, less frequently, the Commission on Restitution of Land Rights) rather than the local District Six ‘community’, that continues to find itself positioned on the wrong side of popular imaginings of who belongs as a ‘national subject’ in post-apartheid South Africa.

## 7. Conclusions

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<sup>28</sup> For example, in *South Africa: An Ordinary Country* Neville Alexander argues that the post-apartheid project of creating buy-in for a ‘rainbow nation’ identity in South Africa has floundered on the forces of localized identity politics and economic inequalities: ‘I have no doubt that, at present, much of the multicultural (‘rainbow’) imagery is no more than ornamental. This view is certainly substantiated when we consider the (cultural) software of identity politics. At this level of “building the nation”, things are clearly moving at a glacial tempo’ (2002: 82). Comaroff and Comaroff (2005) in Robins’ collection of sociological essays on South African politics, *Limits to Liberation After Apartheid* (2005), describe an ‘explosion of identity politics after 1989’ in South Africa which has become increasingly difficult for the state to reconcile with its laws and procedures. The identity politics they have identified are multi-faceted and premised on a range of social discourses and markers, such as ‘gender, sexuality, race, religion, lifestyle and social class, and in constellations of these things, sometimes deployed in highly contingent, strategic ways’ (ibid). Like Fay and James, they particularly emphasise increasing assertions of ‘natural’ rights and moral connectedness that arise from rootedness in a place of birth’ as ‘an ever more significant mode of exclusion within national politics’ (2005: 43). In the same volume Bettina Von Lieres describes a ‘collision’ between ‘political rights, legal proceduralism and social justice’ on the one hand, and ‘cultural rights and customary politics’ on the other in South Africa. For Von Lieres, ‘far from resulting in a smooth blend of consensual politics... post-apartheid politics can be seen to represent a volatile and complex configuration of liberal and non-liberal elements... post-apartheid liberalism is continuously undercut by non-liberal discourses which are the effects of identity/difference struggles articulated and attempting to find resonance in contexts other than the ones provided by liberal constitutionalism’ (2005: 22-23).

<sup>29</sup> For example, see Crain Soudien’s description of District Six as a ‘site for the production of a South African identity... understood to embody the qualities of tolerance, mutual respect, and respect for difference which, by contrast, “South Africa”, as a counter-signifier, was, and might still be, presumed to be without’ (in Erasmus 2001: 115).

The current chapter has argued that the constitutional discourse of restitution's administration has featured sufficiently in the District Six restitution process to provide the latter with the structure and appearance of procedural legitimacy. However, the political identifications constructed for the apartheid state by literary and other forms of public discourse on forced removals in District Six have 'haunted' this process, stopping the organs of state involved short of a full structuration of the redevelopment under Weberian rational-legal authority. Indeed, I argued that for such a form of authority to assert itself would require acceptance, in the domain of discourse, of the legitimacy of this mode of authority, an acceptance that is eroded, and perhaps even pre-empted, by the historic legitimacy deficit of 'the law', 'bureaucracy' and 'the authorities' in the context of the former site of forced removals.

Instead of being able to assert rational-legal authority using what Bourdieu terms the 'universalising' rhetoric of the law, the administrative organs of state involved in the project have been singled out and assigned specific, pejorative identifications in popular discourse. These identifications, rooted in historical imaginings of the oppressive and exploitative apartheid state, have situated the state on the negative side of a fundamental binarism in South African political discourse, rendering any administrative action not aligned to the 'will' of District Six's new 'community' easily continuous with apartheid oppression. As such, in this instance of restitution, the state finds itself at odds with the 'authentic' national subject, as an 'outsider' in its 'own' borders.

## Conclusions: District Six's Hybrid Forms of Governmentality

The preceding chapters have argued that the legal instruments used to negotiate and contractually fix restitution in District Six are constituted by a complex interweaving of legal discourse and a range of other, heterogeneous social meanings and identities. While the *Interim* and *Final Constitutions*, together with the *Restitution of Land Rights Act*, seek to define and fix a domain of restitution praxis, it is these transformations and appropriations of legislative discourse which have had the final word in the space of restitution in District Six. Neither the legal nor the cultural meanings emerge unchanged, however. Instead, the new discourses are hybrid identifications and meanings, what I have termed in each chapter, 'alternative' objects, subjects, and administrative rules of restitution. The fact that restitution's legislative subjects, objects and rules have been so profoundly altered by their encounter with historical, literary and other political discourses speaks to the latter's considerable force in this context. Restitution is envisaged, after all, as a project defined and structured by legislation and state authority.

Returning to Michel Foucault's key premise that discourse is 'not simply that which translates struggles or systems of domination, but is the thing for which and by which there is struggle'<sup>1</sup>, the new, hybrid terms of restitution in District Six can be understood as emergent mechanisms of power within the broader reality of 'governmentality' in the post-apartheid context. To recall, Foucault's 'governmentality' describes the manifold ways in which populations are structured and regulated, not only by 'the legal' or the state (although these feature among other 'tactics' (2003: 39)), but by the full 'ensemble' of strategies, norms, morality, knowledge, disciplines, micro- and macro-political narratives and social identifications that 'designates the way in which the conduct of individuals or states might be directed' (1982: 221). In light of the outcomes of the

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<sup>1</sup>In his 1970 lecture, 'the Order of Discourse' (1984: 110).

textual analysis carried out in this thesis, it is apparent that, perhaps even more so than the societies on which Foucault based his work, restitution's legislative project has, at least in the case of District Six been a limited mechanism that operates in shifting relation to a bigger field of social forces, including knowledge and disciplines (the current thesis has only been able to examine some of these, including the discourses of history, museum, media, and literature). The law's vulnerability to appropriation and transformation by heterogeneous discourses, and the entrenchment of national identifications that valorize 'struggle' as a primary mode of social engagement, weigh heavily upon efforts to entrench Weberian 'rational-legal' modes of authority.

Although the enunciation of restitution in District Six has been couched in post-authoritarian rhetoric, it has, nevertheless, established new relations of domination and subordination, inclusion and exclusion, governance and citizenship within the administration of the project. This discursive edifice, and some of its key material outcomes, has been analysed by focusing on the appropriation and transformation of four key terms from restitution's constitutional 'order of discourse'. These terms were delineated (in chapter two) as restitution's objects of dispossession (rights in land); its subjects (land claimants); its objects of restoration (rights in land or financial compensation), and finally, its administrative rules.

In the case of restitution's 'object of dispossession', chapter three examined the encounter between restitution's property law-based conception of lost rights (variously tenancy, ownership and trading rights) on the one hand, and, on the other, historic representations of the site's 'lost community' in literary, media, academic and museum texts. The chapter argued that the latter texts have constituted 'community' as a powerful keyword in Raymond Williams' sense, loading it with positive notions of social cohesion, tolerance and organic unity. The authority of this keyword shifted the terms of restitution in District Six away from individual property rights toward a 'single redevelopment' solution designed to 'restore' the lost 'community'. Although this 'unified front' initially appeared to offer claimants increased political leverage in their dealings with the state, it was noted that this inscription of 'community' has since created a limited point of access

to restitution, fueling conflict over control, resources and the right to speak on behalf of the 'authentic' community.

With District Six established as a unified claim, the subject of restitution legislation, namely 'the claimant' has undergone a transformation of its own, largely in dialogue with a historically constructed set of identifications that have tended to define dispossessed residents of District Six as either passive 'victims' of forced removals or heroic 'activist 'community leaders' in the resistance against apartheid (a set of identification that resonate in turn with national narratives of victimhood and liberation struggle). As such, Chapter 4 argued, following Étienne Balibar's conceptualization of social identity formation and transformation, that the encounter between the legislative subject of restitution and these historical identifications has ideologically facilitated the subordination of claimants under the District Six Trust. Although the Trust is positioned in the legal instruments variously as the direct 'voice' of the returning community, or its democratic 'representative', the trust draws on the historical 'struggle credentials' of its leaders, as well as the historical 'victimhood' associated with claimants, to superimpose a new set of institutional identities on the legal subjects of restitution. These institutional identities reproduce the historic passive/active positioning of dispossessed residents as either victims or activists within the trust law categories of beneficiaries and trustees. While 'trustees' take on an active role of controlling all material aspects of the physical restitution process, including access to the land itself, the beneficiaries have little role other than to wait for the 'benefits'. Although this move offered a convenient, single point through which the state could engage with the District Six 'community', following Balibar's observation that identity tends to entrench congruent behavior patterns, I have argued that the trust arrangement has helped to entrench the 'passivity' and marginalization of the bulk of claimants in the restitution process..

While the bulk of claimants have remained in the background of the restitution process, both the Trustees and key protagonists in the post-apartheid state (including officials of the City of Cape Town, Commission on Restitution of Land Rights and National Government Ministers) have viewed the District Six site as an opportunity to

create a paradigmatic post-apartheid community ideologically rooted in District Six's historically represented social integration. Chapter 5 examined how this ideological project for a new District Six informed the conceptualization and execution of an 'integrated redevelopment' on the site designed to go beyond restitution alone. With District Six's restitution process primarily driven under a unified redevelopment, and the site's former activist leaders situated at its helm, restitution's legislative 'object of restoration' is transformed by its interpretation through a set of specialized technologies of urban planning, property contract, and social engineering. The result has been a hybrid of restitution's object of restoration (property rights, compensation, or both) and the (attempted) development of an exemplary post-apartheid community that is contractually and physically geared toward social integration. Adapting Henri Lefebvre's notion that space can and usually does encode ideology, I have argued that in spite of the project's appeal to principles of social integration, it has served to mask its opposite. The practical outcome has, paradoxically, been the exclusion of the majority of claimants from the physical space of District Six, while its more rigid systems of control under a 'contractual community' create the potential for massive accumulation of property rights and capital value under the trustees of the District Six Trust.

As noted earlier, the hybridized forms of governance introduced by the appropriation of restitution's legislative subjects and objects in District Six have, in their own right, reduced the reach of state organs and procedures in this restitution process. However, in the final chapter of this thesis, I argued that the legislative inscription of rules for restitution, which call upon rational-legal modes of authority in Max Weber's sense, has itself been directly transformed and deflected through its encounter with identifications attached to organs of state, and the 'law' itself in the historical discourses on District Six. Drawing on Bourdieu's argument that the law needs to generate the appearance of 'universality' in order to enjoy its force, and following Weber's understanding of administrative authority as essentially 'anonymous', the chapter argued that the historic identifications imposed on the state during apartheid have weakened state authority, pre-empting its anonymity and 'universalizing' rhetoric. With the District Six's community so closely identified with South Africa's post-liberation 'National Subject' (via the site's

symbolic role under apartheid), and the state positioned on the ‘wrong’ side of history, the exercise of administrative authority has continued to be delegitimized in District Six wherever it is perceived to be contrary to the will of the ‘community’. As a result, this restitution project, which was intended to boost the legitimacy of the state and its laws, has been unable to proceed precisely because the state lacked the legitimacy it needed to administer the project.

What, in the final analysis, do these encounters and subsequent appropriations mean for restitution’s prospects of achieving its legislative and policy objectives, and for its greater aspirations of building the legitimacy for South Africa’s post-apartheid constitutional regime? To return to where this thesis began, the broad consensus in analyses of restitution in South Africa is that the legislation was prioritized by the drafters of the constitution and the first democratic parliament in an effort to deliver on popular expectations of socio-economic redress for apartheid dispossessions, build popular legitimacy for the new political regime, and protect the country’s system of property rights. Hence the 1996 Government *Green Paper on Land Policy* describes a successful outcome for restitution in the following terms:

The programme will be judged to be successful: if substantial numbers of claimants who were dispossessed of land after 1913 under racially discriminatory laws and processes receive restitution in the form of land or other appropriate and acceptable remedies; if the restitution process does not itself lead to major disputes or conflict which cannot be resolved within the framework of the Act; if land restitution is achieved while maintaining public confidence in the land market; and if satisfactory frameworks and procedures are found for claims and demands which fall outside the Act. (1996: 35)

With so little delivered in 17 years, it seems that Ruth Hall is correct to argue that ‘the opportunity to use the land claims process to bring about both far-reaching economic transformation and reconciliation among the perpetrators, victims, and beneficiaries of the massive property theft that underpinned apartheid may have been missed’ (2010: 38).

However, the impasse of governance and restitution in the District Six case further suggests that the predictions of restitution analysts like Hall (2003, 2010), Bernstein (2005), Ntsebeza (2007), and Walker (2008), that restitution may ultimately undermine the perceived legitimacy of the state if it is not well implemented, are becoming a reality. As Walker points out, in both government and the public domain, there appears to have been a 'naïve hope that through this act of reversal our society will indeed reach its promised land and thereby overcome the entrenched poverty; suffering, alienation, ignorance and conflict we see all around us' (Walker 2008: 17). Anne Bernstein concurs with Walker that by 'loading' the concept of land restitution and reform as a central pillar for reversing historical socio-economic imbalances, the 'country is asking it to perform a job that no single department, however powerful its mandate, or how dedicated and skilful its staff, should be asked to perform' (2005: 6).

With the failure of legislative mechanisms like restitution to reduce historical injustices and structural economic imbalances, the pressure on the state to 'deliver' on restitution and redistribution are likely to increase. As Hein Marais notes in *Limits to Change: The Political Economy of Transition* (2001) South Africa is 'one of the most unequal societies on earth' (Marais 2001: 7), creating a breeding ground for the hardening of racial identity politics couched in historical narratives of colonialism. With this have come increasing calls for more radical or 'political' solutions. For instance, Lungisile Ntsebeza argues that the challenge of addressing the history of apartheid and colonialism is so great that it 'can only be resolved through political processes' (2007: 13):

The history of colonial conquest and land dispossession...lies at the heart of the land question in South Africa, and no land policies that fail to address this can hope to gain legitimacy, in particular in the eyes of those who were robbed of their land' (Ntsebeza 2007: 124).

Ntsebeza's argument is seductive in its appeal to a popular revolutionary impulse, an impulse which has proven particularly decisive in the District Six case. However, as I

hope to have shown in this thesis, even the most ostensibly egalitarian discourses can generate new modes of domination and accumulation, particularly when they become interwoven with struggles for access to state and other resources. Moreover, calls for more radical methods of ‘reversing’ apartheid have tended to remain trapped in a redundant cycle of threats of expropriation and nationalization from the economic left, and scaremongering over capital flight from the economic right. As such, any effort at revisiting the policies and laws of restitution and land reform needs, as its point of departure, to take seriously the lessons learned from individual instances of restitution praxis such as District Six. What is needed is a clearer understanding of the strengths and limitations of the law, the organs of state and the resources of the specific ‘communities’ involved. Walker in particular has correctly stressed the ‘analytical importance of engaging not only with national debates and high-level data on restitution and land reform, but also with the specificities of individual claims and the local histories in which they are embedded’ (2008: 11). We can add to her recommendation that the specific textual enunciations of restitution be read in each instance, since it would appear that these hybrid forms may easily become the *de facto* instruments of governmentality in restitution’s multiple sites of praxis, whether intentionally or otherwise.

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### **List of Legal Instruments**

'Agreement for the Settlement of the District Six Ownership Land Claims in Terms of Section 42D of the Restitution of Land Rights Act No.22 of 1994'

'Application to the Land Claims Court in terms of Section 34 of the Restitution of Land Rights Act by Basil Davidson, CEO of the Cape Town Community Land Trust on behalf of the Cape Town Central Substructure and Provincial Government of the Western Cape'. 1996. Cape Town.

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