



Empowerment through Mine Community Development:

How the politics of development perpetuate poverty in mining areas – A legal theoretical analysis

By

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Abstract

The Mineral and Petroleum Resources Development Act (“MPRDA”) and the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (“Mining Charter”), created in terms of the MPRDA, aim to address the exploitative legacies of past discriminatory practices in the mining industry. Impoverished mining communities stand to benefit from empowerment under the Mining Charter in the form of mine community development – one of the elements that constitute a mining right holder’s commitment under the Mining Charter. Despite this legislative intervention and the relative wealth generated by the extraction of mineral resources, poverty and conflict have become the stereotypical images associated with mining areas.

This project aims to determine why the empowerment of mining communities through mine community development perpetuates poverty from the past and creates new inequalities. To answer this main question, it is considered how the historical context within which the relevant policy and legislation were created, affected legislative drafting. Second, the effects of promoting development and empowerment in legislative provisions are explored to determine which worldviews and underlying values are being promoted by the legislative instruments under discussion. Furthermore, it is considered how these worldviews and underlying values affect how mining communities, subjected to harsh socio-economic living conditions, are depicted in legislative provisions. Here, it is specifically considered what the notion of “community” signifies in a development context and how “community” is represented in legislation.

The thesis is a theoretical exposition of the ideological assumptions underlying the concepts “development”, “empowerment”, “community” and “poverty”. It is shown that “mine community development” is an inherently contradictory notion in South African law. The development paradigm implies the universalisation of values, effectively creating “the poor”, and causing vagueness and paradoxes. It results not only in a perpetuation of poverty and inequality from the past but also in the creation of new inequalities, as is evident in the differentiation drawn by the Mining Charter between different types of communities in mining areas. Measures currently being enforced by the legislation under discussion, are in desperate need of reconsideration.

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Table of Abbreviations

ANC	African National Congress
Art	Article
B-BBEE	Broad-Based Black Economic Empowerment
BEE	Black Economic Empowerment
CALS	Centre for Applied Legal Studies
CDD	Community-Driven Development
CDF	Comprehensive Development Framework
CPAA	Communal Property Association Act 28 of 1996
DMR	Department of Mineral Resources
DTI	Department of Trade and Industry
GDP	Gross Domestic Product
GEAR	Growth, Employment and Redistribution
GG	Government Gazette
GN	Government Notice
GNR	Government Notice Regulations
GNU	Government of National Unity
IDP	Integrated Development Plan
IMF	International Monetary Fund
IPLRA	Interim Protection of Information Land Rights Act 31 of 1996
IRR	Institute for Race Relations
LED	Local Economic Development
MDG	Millennium Development Goals
MOI	Memorandum of Incorporation
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NDP	National Development Plan
OECD	Organisation for Economic Cooperation and Development
Para	Paragraph
RDP	Reconstruction and Development Programme
Reg	Regulation
S	Section
SAHRC	South African Human Rights Commission
SDG	Sustainable Development Goals

SLP	Social and Labour Plan
Ss	Sections
Subs	Subsection
Subss	Subsections
TLGFA	Traditional Leadership Governance Framework Act 41 of 2003
TRC	Truth and Reconciliation Commission of South Africa
UN	United Nations
UN GA RES	United Nations General Assembly Resolution
UNDP	United Nations Development Programme
VOC	Vereenigde Oost-Indische Compagnie

CHAPTER 1: Introduction

1. Research Context

Poverty and inequality are ubiquitous in South Africa, especially in rural areas,¹ and areas where mining takes place. Despite the relative wealth generated by the extraction of mineral resources,² poverty and conflict have become the stereotypical images associated with mining areas. These images attest to the harsh socio-economic conditions to which persons in mining areas are exposed.³

¹ According to Stats SA in its publication *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 & 2015* (2017) the residents of rural areas are amongst those who are the most vulnerable to poverty. See also Omarjee L “More than 50% of SA’s population is living in poverty” *Fin 24* 22 August 2017 available at <<https://www.fin24.com/Economy/more-than-50-of-sas-population-is-living-in-poverty-20170822>> accessed on 13 January 2020 & Stats SA *Poverty Mapping in South Africa: Applying small area estimation techniques using IES 2010/11 and Census 2011* (2018) and Stats SA *Subjective Poverty in South Africa: Findings from the Living Conditions Surveys, 2008/2009-2014/2015* (2018).

² Despite the decline in the contribution of the mining industry to the Gross Domestic Product (“GDP”) of the country over the last two decades, it remains important to South Africa’s economy. The mining industry until recently contributed 8% to South Africa’s GDP and employs 5% of the formal workforce - Stats SA *Gross Domestic Product, 4th Quarter 2015* (2016); Stats SA *Statistical Release P0277: Quarterly Employment Statistics – December 2015* (2016). The contribution of the industry to the GDP, however, has decreased even more during 2019. See “South Africa GDP From Mining” *Trading Economics* available at <<https://tradingeconomics.com/south-africa/gdp-from-mining>> accessed on 13 January 2020 & Stats SA “Key Findings: P0441 – Gross Domestic Product (GDP), 3rd Quarter 2019” available at <http://www.statssa.gov.za/?page_id=1856&PPN=P0441&SCH=7648> accessed on 13 January 2020.

³ Curtis M *Precious Metal: The Impact of Anglo Platinum on Poor Mining Communities in Limpopo, South Africa* Action Aid (2008) 5 & 6 (“Action Aid (2008)”); Action Aid, South Africa “Mining in South Africa 2018: Whose Benefit and Whose Burden” *Social Audit Baseline Report* (2018) 16, 18, 75 (“Action Aid Baseline Report (2018)”); CALS *The Social and Labour Plan Series: Phase 1: System Design - Trends Analysis Report* (2016) (“CALS (2016)”); CALS *The Social and Labour Plan Series: Phase 2: Implementation Operation Analysis Report* (2017) (“CALS (2017)”) and CALS *The Social and Labour Plan Series: Phase 3: Alternative Models for Mineral-Based Social Benefit* (2018) (“CALS (2018)”); South African Human Rights Commission *Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo* (2008) (“SAHRC (2008)”); South African Human Rights Commission *South African Human Rights Commission National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa* (2018) (“SAHRC (2018)”); IRR *Digging for Development* (2014) 13 (“IRR (2014)”); The Editor “The Impact of Mining on the South African Economy and Living Standards” *Politics Web* 10 February 2018 available at <<http://fse.org.za/index.php/item/593-the-impact-of-mining-on-the-south-african-economy-and-living->> accessed on 14 February 2020. These reports are considered in section 2 of Chapter 2.

Mining areas are not merely geographically demarcated areas in which mining occurs. Literature,⁴ legislation⁵ and the media⁶ emphasise the “community” that live in mining areas. The emphasis on “community” promotes a narrative of persons living together, relating to, and relying on one another in some way, sharing more than just the same territory, or mere living space.⁷ The commonality may be personal, such as familial ties and custom, but sharing a dependency on resources and infrastructure also constitutes communal living.⁸

Mining communities furthermore share in the negative effects of mining, which, in many instances, translate into poverty and inequality.⁹ This may explain why, often, poverty and inequality are the characteristics most closely associated with mining communities.¹⁰ It has

⁴ See for example: Kapelus P “Mining, Corporate Social Responsibility and the ‘Community’: The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi” 2002 (39) *Journal of Business Ethics*; Mbatha P & Wynberg R “Mining and the Myth of Benefits in South African Rural Coastal Communities” in R Wynberg and M Hauck (eds) *Sharing the Benefits from the Coast* (2014).

⁵ The law provides for “community” in the following instances: the Constitution of the Republic of South Africa, 1996 (“the Constitution”); Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”), the broad-based socio-economic empowerment charter issued in terms of s 100(2) of the MPRDA (“Mining Charter”), the Social and Labour Plan (“SLP”) to be created in terms of ss 22 and 23 of the MPRDA; Regulations 40-46 of the Regulations in terms of section 107(1) of the MPRDA (GNR 527 GG 26275 of 23 April 2004) (“Regs”) and the Integrated Development Plan (“IDP”) to be created in terms of the Local Government: Municipal Systems Act 32 of 2000. The following legislation is also considered to the extent that it provides for “community” that will also qualify as mining communities: The Restitution of Land Rights Act 22 of 1994, the Traditional Leadership and Governance Framework Act 41 of 2003 (“TLGFA”); the Interim Protection of Informal Land Rights Act 31 of 1996 (“IPILRA”) and the Communal Property Association Act 28 of 1996 (“CPAA”).

⁶ See for example: Parker F “Lonmin mining communities: A powder keg of inequality” *Mail & Guardian* 27 August 2012 available at <<https://mg.co.za/article/2012-08-27-lonmin-mining-communities-a-powder-keg-of-inequality>> accessed on 14 February 2020; Rutledge C “OPINION: The systemic inequality of mining affected communities” *Business Report* 19 February 2018 available at <<https://www.iol.co.za/business-report/opinion/opinion-the-systemic-inequality-of-mining-affected-communities-13363840>> accessed on 14 February 2020; Leonard L “How mining companies’ relationship with Government affects communities” *IOL News* 8 February 2019 available at <<https://www.iol.co.za/news/opinion/how-mining-companies-relationship-with-government-affects-communities-19197357>> accessed on 14 February 2020.

⁷ A communitarian view of the political structuring of society emphasises the co-dependency of persons living together, having a common purpose and pursuing a common good. See Tönnies F & Harris J *Gemeinschaft und Gesellschaft* (2001); MacIntyre A *After Virtue* (2013); Sandel M *Liberalism and the Limits of Justice* (1998); Taylor C *Sources of the Self* (1989); Walzer M *Spheres of Justice* (1983).

⁸ Here, distinction is drawn between a traditional community, typically structured around communal values dictated by custom or religion and other communities. This distinction is considered in Chapters 4 and 5.

⁹ The socio-economic conditions in mining areas are discussed in section 2 of Chapter 2. Typically, mining translates into loss of land and consequently livelihoods dependent on land and environmental degradation. Basic infrastructure and services are either absent or provided without due consideration of the needs of the communities.

¹⁰ In 2009 and in 2015, the then Department of Mineral Resources (“DMR”) (now the Department of Mineral Resources and Energy) completed assessments of the impact of the 2004 (Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (GN 1639 GG 26661 of 13 August 2004)) and 2010 (Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838 GG 33573 of 20 September 2010)) Mining Charters. The findings made in both these reports pertaining to mining communities emphasised the poverty faced by mining communities. See the preambles of Department of Mineral Resources “Mining Charter Impact Assessment Report” (2009) (“DMR (2009)”) and Department of Mineral Resources “Assessment of the Broad-Based Socio-Economic

become usual to contrast mining communities, often poor, ill and destitute, with wealthy mining companies to expose the unequal relations still pervasive in mining areas today.¹¹

As is the case with poverty and inequality in South Africa in general, the unequal relations and the harsh socio-economic conditions to which mining communities are exposed are largely the results of the mining industry's role in colonial and apartheid rule.¹² Legislative intervention in the form of the Mineral and Petroleum Resources Development Act ("MPRDA")¹³ and the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry ("Mining Charter")¹⁴ was introduced in 2004 to address the exploitative legacies of past discriminatory practices in the mining industry.¹⁵

The MPRDA's transformative nature is evident from its preamble, which acknowledges that South Africa's mineral and petroleum resources belong to the nation.¹⁶ Section 3 specifically states that the state holds the mineral and petroleum resources in custody "for the benefit of all South Africans". The preamble, furthermore, recognises the importance of promoting local and rural development, as well as of the social upliftment of communities affected by mining. It re-establishes the state's commitment to reform South Africa's mineral and petroleum resources industry to provide equal access to the resources. Furthermore, one of the objectives of the MPRDA is to promote the participation of historically disadvantaged persons in the mineral and petroleum industries.¹⁷

To achieve the objective mentioned above, the MPRDA¹⁸ mandates the creation of a Mining Charter to promote the participation of historically disadvantaged South Africans in the mining

Empowerment Charter for the South African Mining Industry" May 2015 ("DMR (2015)"). The narrative of mining communities is considered in section 2.1 of Chapter 2.

¹¹ For an example of reporting that follows this trend, see Rutledge (2018) *Business Report* reporting on the decision of the Pretoria High Court allowing mining communities to take part in the court action by the Minerals Council (previously the Chamber of Mines) against the DMR pertaining to the 2017 Mining Charter.

¹² The historic creation of mining communities is considered in section 3 of Chapter 2. The Chapter sets out the oppressive land and labour practices instituted by colonial and apartheid authorities and the effects of these practices for black, indigenous people.

¹³ Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA").

¹⁴ The Broad-Based Socio-Economic Empowerment Charter is created by the Minister of Mineral Resources in terms of s 100 of the MPRDA.

¹⁵ See the Preamble, s 2 (objects) and s 100 (transformation of minerals industry) of the MPRDA.

¹⁶ S 3 of the MPRDA specifically deals with the custodianship of the nation's mineral and petroleum resources. Before the enactment of the MPRDA the owner of the land on which the resources were situated owned mineral resources. The MPRDA therefore brought about a very significant change to the way in which mineral resources are regulated. A detailed discussion regarding this matter, however, falls outside of the scope of the thesis. See Van der Schyff E "Who 'owns' the Country's Mineral Resources? The Possible Incorporation of the Public Trust Doctrine through the Mineral and Petroleum Resources Development Act" 2008 (4) *TSAR* 757-768 in this regard.

¹⁷ S 2(d).

¹⁸ S 100.

industry by providing targets and timetables to measure transformation. The industry stakeholders¹⁹ concluded the first Mining Charter in 2004.²⁰

For the benefit of mining communities specifically, the Mining Charter directs the holder of a mining right to contribute to “mine community development”.²¹ The first, 2004 Mining Charter, described “mine community and rural development” as the duty of the mining company, together with other stakeholders and government, to cooperate in creating integrated development plans for the areas where mining takes place.²² The 2004 Mining Charter emphasised the need for the development of infrastructure in mining areas.²³ The current 2018 Mining Charter depicts “mine community development” as compliance with the development duties of a mining company, as included in its social and labour plan (“SLP”).²⁴ The SLP system mandates mining companies to contribute to the social and economic welfare of mining areas by promoting local economic development.²⁵

The MPRDA, together with the Mining Charter, was enacted to promote transformation and black economic empowerment (“BEE”) as espoused by the Broad-Based Black Economic Empowerment Act,²⁶ in the mining industry.²⁷ Through the promotion of BEE, the MPRDA and the Mining Charter aim to address the legacies of the past as they manifest in the mining industry by giving effect to the right to equality as set out in the Constitution.²⁸ By implementing BEE, the new (post-1994) government also gave effect to the Freedom Charter,²⁹

¹⁹ The stakeholders include the Minerals Council of South Africa, formerly known as the Chamber of Mines, South African Mining Development Association and the National Union of Mine Workers. DMR (2009).

²⁰ The first, 2004 Mining Charter was amended by the 2010 Mining Charter.

²¹ The Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (GN 1002 GG 41934 of 27 September 2018) (“2018 Mining Charter”), para 2.5.

²² 2004 Mining Charter para 4.4. In terms of the Local Government: Municipal Systems Act 32 of 2000, every municipality must promote the social and economic development of local communities through integrated development plans (“IDP’s”). As planning tools, IDP’s ensures that municipal planning is directed towards local economic development. IDP’s are discussed in section 3.3. of Chapter 3.

²³ 2004 Mining Charter para 4.4.

²⁴ 2018 Mining Charter para 2.5. The MPRDA together with its regulations (regs 40-46) render it compulsory for mining right applicants to compile and submit a SLP.

²⁵ Reg 41(c). The objectives of the SLP are to “promote employment and advance the social and economic welfare of all South Africans; contribute to the transformation of the mining industry; and ensure that the holders of mining rights contribute towards the socio-economic development of areas in which they are operating”. The content of a SLP entails measures promoting employee and local economic development.

²⁶ Act 53 of 2003.

²⁷ Mitchell G “Making Sense of Transformation Claims in the South African Mining Industry” 2013 (113) *Journal of the Southern African Institute of Mining and Metallurgy* 39.

²⁸ DMR (2009) 2. S 9 of the Constitution protects the right of every person to equality. Seekings J & Natrass N *Class, Race and Inequality in South Africa* (2005) 344 & 345.

²⁹ The Freedom Charter was adopted on 26 June 1955 at the Congress of the People in Kliptown. The charter sets out certain core principles or “freedom demands” agreed upon by the African National Congress and its allies. It includes the statement that “(T)he national wealth of our country, the heritage of South Africans, shall

which makes specific mention of the mining industry because of the role it played in maintaining apartheid.³⁰

To say, however, that the legislative intervention has thus far succeeded in alleviating poverty and inequality in mining areas or in mending the relationship between mining communities and mining companies, would be an overstatement. Labour disputes and other forms of unrest occurring at mines, the magnitude of which was so tragically exposed by the events at the Marikana mine in 2012, are common.³¹ There is still a perception that the wealth generated by mining is not shared sufficiently with those affected by mining.³²

A recent report of the Human Rights Commission confirms the deplorable conditions mining communities face.³³ Whether communities affected by mining demand better wages, living conditions³⁴ or actual ownership of mines,³⁵ their disenchantment is palpable and worrisome.

be restored to the people; The mineral wealth beneath the soil...shall be transferred to the ownership of the people as a whole”.

³⁰ Cawood FT, Minnitt RCA & Rungan SV “Incorporating BEE into the New Mineral Law Framework for the South African Mining Industry” (2005) 105 *Journal of the Southern African Institute of Mining and Metallurgy* 736.

³¹ During August 2012, mineworkers engaged in unprotected labour action regarding wage increases, at Marikana, the site of Lonmin Plc’s platinum mining operations in the North West province of South Africa. On 16 August, the labour action culminated into a violent and tragic confrontation between the South African Police Services (“SAPS”) and striking mineworkers, leaving 34 mineworkers dead and various injured. During the build-up to the events that unfolded on the 16th of August, conflict between different trade unions and acts of intimidation and violence caused the death of ten persons, including mineworkers and policemen. On 23 August 2012, the Marikana Commission of Inquiry was appointed by then President Zuma in terms of section 84(2) of the Constitution of South Africa, 1996, to ascertain the role played by Lonmin, the SAPS, the relevant trade unions and the Department of Mineral Resources in the events that occurred during this time (“The Marikana Commission”). The Marikana Commission found that the lack of implementation by Lonmin of its SLP contributed to the conflict that took place during August 2012. See Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province (GG 38978 GN 699 of 2015). The Marikana shootings in 2012 sent shock waves globally: Thomas Piketty a French economics scholar, in *Capital in the 21st Century* introduced the chapter on income and output by referring to the Marikana shootings to illustrate the continuous debate surrounding the percentage of output to be allocated to wages. Piketty (2014) 39.

³² Even though mining is one of the largest contributors to black economic empowerment in value, it has created a visible black elite. Benefits have trickled down to communities, but the visibility of the black elite perpetuates the perception under communities that the benefits of mining are not shared with them. Horne R “Patterns of Ownership and Labour Unrest within the South African Mining Sector” 2015 (40) 27; Mbatha & Wynberg (2014) 87.

³³ The South African Human Rights Commission “National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa” (2016).

³⁴ De Waal M “Analysis: Mining’s unholy trinity and current impasse” *Daily Maverick South Africa* 11 October 2012 (copy with author) ascribes the 2012 unrest in the mining sector to an “unholy trinity”: “an increasingly militant working force” claiming better wages and living conditions; mining companies and shareholders reacting harshly to the demands of workers, and trade unions with alliances with government and mining companies.

³⁵ Leftist political parties such as the Economic Freedom Fighters (EFF) have consistently been calling for the nationalisation of mines. “Declaration of the Economic Freedom Fighters National Assembly on what is to be done” 27 July 2013; EFF Founding Manifesto (2013).

The assessments of the implementation of the Mining Charter done by the Department of Mineral Resources (“DMR”) indicate that mine community development projects are not sufficiently implemented by mining companies.³⁶ Other institutions have emphasised the problems of the SLP system: the vague structuring of the legislation providing for the SLP system, the lack of implementation of SLP’s by mining companies and the DMR’s deficient monitoring of mining companies’ implementation, have all been noted as problematic.³⁷ The overarching message, however, is that the unchanging living conditions of mining communities are the result of mining companies not sufficiently sharing the wealth generated by mining.³⁸

The DMR has responded by proposing amendments to the Mining Charter in general, but also to the provisions on mining communities specifically. The various drafts of proposed amendments each reflected slightly different definitions of “community” and “mine community” and formulations of the empowerment measures aimed at mining communities.³⁹ However, the general substance of the provisions, as well as the ambiguous terms in which the provisions have been framed, have remained in place. The underlying ideological sentiments of the provisions have not changed, despite the proposed amendments.

This thesis argues that the failure of the Mining Charter and other legal instruments such as the SLP and the IDP to make substantial changes to the living conditions of mining communities is not necessarily only the result of insufficient implementation by mining companies. The argument here is that current attempts at the empowerment and development of mining communities are unsuccessful because the theoretical foundations of empowerment are embedded in a development paradigm.

Despite the legislative interventions introduced to cure the ills faced by mining communities, the living conditions of mining communities remain poor, aggravating an already volatile relationship with mining companies and other entities affected by mining. This factual problem results from a legal problem: various legislative provisions frame “community”, “mine community” and “mine community development” in very ambiguous terms.⁴⁰ The consequence of the ambiguity is that actors in the mining industry find it very difficult to determine who should benefit from development initiatives and how they should benefit. The introduction of equity ownership to the “host community” in the newest 2018 version of the

³⁶ DMR (2015) 39.

³⁷ See CALS (2016), CALS (2017) & CALS (2018).

³⁸ See section 2 of Chapter 2.

³⁹ Four different draft Mining Charters were issued between 2016 and 2018 to amend the 2010 Mining Charter.

⁴⁰ See section 3.2 of Chapter 3 and section 2 of Chapter 4 for a discussion of the different definitions.

Mining Charter confirms the uncertainty and ambiguity.⁴¹ The result of this uncertainty is an inability on the part of mining companies to manage the expectations of mining communities, which mining communities perceive as a lack of commitment on the part of mining companies to share the benefits of mining. The uncertainty also creates loopholes, open for exploitation to the detriment of poor mining communities.

2. Research Aim, Objectives and Questions

This thesis aims to determine why the empowerment of mining communities through mine community development perpetuates poverty and inequality from the past and creates new inequalities. To answer this main question, the following issues are addressed. For one, it is considered how the historical context within which the relevant policy and legislation were created, affected legislative drafting. Second, the effects of promoting development and empowerment in legislative provisions are explored to determine which worldviews and underlying values are being promoted by the legislative instruments under discussion. Furthermore, it is considered how these worldviews and underlying values affect how mining communities, subjected to harsh socio-economic living conditions, are depicted in legislative provisions. Here, it is specifically considered what the notion of “community” signifies in a development context and how “community” is represented in legislation.

The thesis is a theoretical exposition of the ideological assumptions underlying the concepts “development”, “empowerment”, “community” and “poverty”. The impact of these ideological assumptions on legislative drafting is examined. The values promoted by the ideological assumptions are not necessarily rejected in this thesis. Rather, it is shown that these values may not relate to the context within which development measures are currently being enforced by the legislation under discussion, causing vagueness and paradoxes.

3. Research Method

The study performed in this thesis is a desktop literature study, aimed specifically at teasing out the conceptual and theoretical inconsistencies underlying the legislation that should be forming an enabling framework for mine communities to benefit from extractive activity. Mining legislation, policy and regulations such as the MPRDA, the Mining Charter, and the SLP system are considered. General legislation relevant for the development of mining

⁴¹ 2018 Mining Charter para 2.1.4.

communities, such as the Local Government: Municipal Systems Act⁴² that provides for the IDP, as well as legislation providing for the “community”, are also analysed to the extent that it deals with mining communities specifically.⁴³

The analysis will be done first to determine how this legislative system provides for mining communities and how mining communities are configured or defined in terms of the legislative system. Second, the legislative system is analysed theoretically by considering the underlying theoretical implications of promoting the notions empowerment and development. The relevance of focusing on “community”, rather than individuals living in the mining areas, is also considered from a theoretical point of view.

The notion of empowerment, as promoted in terms of BEE and the Mining Charter, is considered as a component of the global development project.⁴⁴ The analysis of the legislative system⁴⁵ is performed to show that the developing and empowering of mining communities in terms of the legislative system operate in the global development paradigm. The work of law and development scholars⁴⁶ and post-development scholars⁴⁷ is used to identifying the main attributes of this global development paradigm. A post-development critique of the idea of development is engaged with to expose the subjective nature of development and the effects this has for developing nations, and other entities deemed to require development, and policy formulation.⁴⁸

⁴² Act 32 of 2000.

⁴³ The following legislation is also considered to the extent that it provides for “community” that will also qualify as a mining community: The Restitution of Land Rights Act 22 of 1994, the Traditional Leadership and Governance Framework Act 41 of 2003 (“TLGFA”); the Interim Protection of Informal Land Rights Act 31 of 1996 (“IPILRA”) and the Communal Property Association Act 28 of 1996 (“CPAA”) and international law instruments such as the Charter of the United Nations (1945); UNGA Res 128 (1987) A/RES/41/128 “Declaration on the Rights to Development”; UNGA Res 295 (2007) A/RES/61/295 “Declaration on the Rights of Indigenous Peoples”; UNGA Res 1803 (XVII) (14 December 1962) “Permanent Sovereignty over Natural Resources”.

⁴⁴ Parpart J “Lessons from the Field: Rethinking Empowerment, Gender and Development from a post- (post-?) Development Perspective” K Saunders *Feminist Post-Development Thought* (2002) 44 & 45 discusses the conception of empowerment as part of the World Bank’s development project.

⁴⁵ See footnote 5 above.

⁴⁶ Santos A and Trubek D (eds) *The New Law and Economic Development: A Critical Appraisal* (2006); Davis K & Trebilcock M “The Relationship between Law and Development: Optimists versus Skeptics” 2008 (56) *The American Journal of Comparative Law*; Thomas C “Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism” 2011 (96) *Cornell Law Review*; Lee Y “General Theory of Law and Development” 2017 (50) *Cornell International Law Journal*.

⁴⁷ See for example Gordon RE & Sylvester JH “Deconstructing Development” 2004 (22) *Wisconsin International Law Journal*.

⁴⁸ See in general Kothari U & Minogue M (eds) *Development Theory and Practice: Critical Perspectives* (2002); Gordon & Sylvester (2004) *Wisconsin International Law Journal*; Escobar A *Encountering Development: The Making and Unmaking of the Third World* (2012) & Esteva G, Babones SJ & Babcicky P *The Future of Development: A Radical Manifesto* (2013).

Development initiatives in the Mining Charter are created for the benefit of communities facing the effects of mining and not necessarily only for geographically demarcated areas or individuals. The concept “community” is therefore considered from a theoretical perspective. The thesis engages with the work of the sociologist Tönnies⁴⁹ on “community” to show the inherent contradiction brought about by the concept “community development”. The individualised nature of a neoliberal legal system promoting an ideal such as development, and the effect hereof for a system trying to protect communities, is also considered.⁵⁰

4. Conceptual and Theoretical Challenges

As a theoretical exposition of the development and empowerment of South African mining communities, this thesis focuses on certain conceptual issues. Development is interrogated as an ideology, and a critical perspective is provided as to the effects of pursuing the development ideal. The contradictory nature of “mine community development” is exposed as an effect of the politics of development. Accordingly, the presentation of “community”, “poverty” and “empowerment” in legislative provisions suffer the consequences of the contradiction.

4.1. Development as an Ideology

Development is considered in this thesis as an ideology that is imposed on developing countries or entities by development organisations.⁵¹ As has been the case elsewhere in the world,⁵² poverty is addressed in mining areas by focusing on development.⁵³ Whereas there certainly are different theoretical and practical approaches to the idea of development,⁵⁴ all of these approaches promote the idea of “progress” from one state or stage to another.⁵⁵ The link with

⁴⁹ Tönnies (2001).

⁵⁰ Neoliberalism is understood as “a peculiar form of reason that configures all aspects of existence in economic terms” - Brown W *Undoing the Demos: Neoliberalism’s Stealth Revolution* (2015) 17. Neoliberal thinking takes on liberalist principles but focuses more on the functioning of economic markets, not to be interfered with by government unnecessarily. Williams P & Taylor I “Neoliberalism and the Political Economy of the ‘New’ South Africa” 2000 (5) *New Political Economy* 22.

⁵¹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 8, 72.

⁵² The World Bank has been promoting development as poverty alleviation measure since the end of the Second World War, as discussed in section 2.1. of Chapter 3. See Escobar A *Encountering Development: The Making and Unmaking of the Third World* (2012) 21 & 22.

⁵³ The Mining Charter follows the structure of the generic scorecard measuring the compliance of businesses with Broad Based Black Economic Empowerment in terms of the Broad Based Black Economic Empowerment Act. Whereas the generic scorecard provides that a business must promote “socio-economic development”, the Mining Charter determines that a mining right holder must empower the mining communities in which the mining operations are situated, by promoting “mine community development”. See sections 2.2.2 and 3.2 of Chapter 3 for a detailed discussion of these provisions.

⁵⁴ Traditionally, development is conceived in economic terms as economic growth, but a broader understanding, incorporating both social and economic development is also pursued. Lee (2017) *Cornell International Law Journal* 19. See the discussion at section 2.1.2 of Chapter 5.

⁵⁵ See discussion of modernisation at section 2.1.2.1 of Chapter 5.

modernisation is evident.⁵⁶ It is thus implied that the initial state or stage of being is less worthy than the stage to be pursued.

The development paradigm is described as one that promotes neoliberal ideals, because of the historical context within which empowerment became part of South Africa's socio-economic policy landscape.⁵⁷ In this paradigm, legal systems promote and protect these neoliberal ideals.⁵⁸ Whereas this thesis does not reject neoliberalism outright, the effects of neoliberalism for legal drafting are considered and critiqued.

4.2. Critical Responses to Development Theory

It is specifically considered how poor and vulnerable legal subjects, such as mining communities, are affected if legislative provisions promote the underlying values of the development paradigm. The effects and the underlying ideological assumptions, on which the idea of development is based, are referred to as the politics of development in this thesis. The politics of development highlight that the idea of development and the promotion thereof is not ideologically neutral and objective. Pursuing development in many instances means enforcing development - and its underlying values - upon those regarded as “under”-developed.⁵⁹

The politics of development cause conceptual issues when notions such as “community”, “development” and “empowerment” are included in legislation. These conceptual issues translate into framing and drafting issues, which are clearly present if the various attempts at formulating the provisions of the Mining Charter are considered.

4.3. The Conundrum with Mine Community Development

The focus of this thesis is mainly on “mine community development” as provided for in the Mining Charter.⁶⁰ The “mine community development” element of the Mining Charter mandates a mining company to contribute to the development of a mine community, as defined

⁵⁶ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 16. Modernisation is “the process by which a society comes to be characterized by a belief in the rational and scientific control of man’s physical and social environment and the application of technology to that end” as defined by Sardar Z “Development and the Locations of Eurocentrism” in R Munck and D O’Hearn (eds) *Critical Development Theory: Contributions to a New Paradigm* (1999) 53. See discussion at section 2.1.2.1 of Chapter 5.

⁵⁷ Black economic empowerment was conceived during the 1990s – a decade characterised by the popularity of neoliberal economic policy. See section 2 of Chapter 3.

⁵⁸ The law affords rights to legal subjects, allowing the subjects to participate in the neoliberal market to obtain resources. See section 2.1.2 of Chapter 5 and sections 2 and 3.2 of Chapter 6.

⁵⁹ Chapter 6 explains the politics of development in more detail.

⁶⁰ 2018 Mining Charter, para 2.5.

in the Mining Charter.⁶¹ This thesis argues that “mine community development” is an inherently contradictory notion in South African law, in desperate need of reconsideration: It results not only in a perpetuation of poverty and inequality from the past but also in the creation of new inequalities.

“Mine community development” required in terms of the Mining Charter, however, is not the only legislative mechanism mandating the development of mining communities. The SLP also places an obligation on mining companies to contribute to the socio-economic and local economic development of mining areas.⁶² The SLP must be drafted to align with the IDP of the local municipality in which the mining area is situated.⁶³ The IDP sets out the relevant municipality’s five-year plan for the local economic development of the area governed by the municipality.⁶⁴ The SLP and IDP frameworks are therefore also considered.

4.4. Theoretical Assumptions and Limitations

To make the argument that the empowerment and development of mining communities operate in the development paradigm, this thesis analyses the concepts “community”, “development” and “empowerment” as they are employed in the Mining Charter and other relevant legislation. Initially, a historical approach is taken to understand the factual context surrounding the creation of mining communities and their exposure to exploitative practices under previous regimes. The policy that introduced the notions of “development” and “empowerment” in post-apartheid South Africa is also considered.

This thesis focuses only on how the legislative framework provides for the empowerment of mining communities by mining companies to alleviate the poverty faced by mining communities. The concern is specifically with the rhetoric employed by the legislative system, which speaks to the uncritical acceptance of the underlying values of a specific theoretical paradigm. Therefore, consideration is not given to how the legislative system provides for consultation with mining communities in implementing mine community development initiatives and the SLP.

⁶¹ 2018 Mining Charter para 2.5. The definitions of “community” and “mine community” are considered in Chapter 4.

⁶² The regulations setting out the content of the SLP refer to both “socio-economic development” (reg 41 (c)) and “local economic development” (reg 46 (c)). Both notions of development will be considered in this thesis.

⁶³ Reg 46 (c) (iii).

⁶⁴ Ss 23 & 25 of the Local Government: Municipal Systems Act.

Furthermore, it is accepted that the empowerment of mining communities in terms of the Mining Charter forms part of the larger corporate social responsibility (“CSR”) programme in the mining industry.⁶⁵ CSR as a concept and how it is implemented, however, will not be considered in this thesis since the focus is specifically on the concepts “development” and “empowerment”.

It is also acknowledged that the benefits of mining are shared in terms of the legislative system under discussion.⁶⁶ The theory on benefit-sharing will however not be discussed as the focus is on development theory. It is maintained, however, that CSR and benefit-sharing form part of the larger neoliberal development paradigm within which empowerment, as provided for in the Mining Charter, operates.⁶⁷

The conclusion provides some impetus for further scrutiny of alternative angles from which mining communities can be approached in legislative drafting.

5. Thesis Structure

Chapters 2 and 3 set out the context of the problem of underdevelopment and poverty in mining communities in South Africa. In Chapter 2, the current factual context is considered by describing the socio-economic conditions prevalent in mining communities. Chapter 2 introduces the different actors in the mining area.⁶⁸

A further aspect illustrated in Chapter 2 is how mining communities represent the effects of mining operations. The creation of these communities is the result of oppressive labour practices and the displacement of persons. These practices took place under colonial and apartheid rule to ensure that mining operations had access to cheap black labour.⁶⁹ The practices affected communities living together in terms of custom, or traditional communities.⁷⁰ Arrangements between traditional leaders in homeland areas and government further

⁶⁵ Howard J “Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry” 2014 (131) *The South African Law Journal* 12.

⁶⁶ Preamble and objects (s 2) of MPRDA.

⁶⁷ Wynberg & Hauck (2014) 6.

⁶⁸ “Mining area” in this context refers to the geographical area where mining takes place as stipulated in s 1 of the MPRDA.

⁶⁹ Terreblanche S *A History of Inequality in South Africa* (2002) 12, 59, 66-68; Ntsebeza L “The more things change, the more they remain the same” in FT Hendricks, L Ntsebeza L and K Helliker (eds) *The Promise of Land: Undoing a Century of Dispossession in South Africa* (2013) 59; TRC *Truth and Reconciliation Commission of South Africa Report* (2003) volume 6, section 2 chapter 5 “Report of the Reparation & Rehabilitation Committee: Reparations and the Business Sector” (hereinafter “TRC Report”) 151 available at <<http://www.justice.gov.za/trc/report/>> accessed on 14 February 2020. See section 3.2 of Chapter 2.

⁷⁰ See section 3.3 of Chapter 2 for a discussion of the interference with indigenous traditional lifestyles by colonial and apartheid authorities.

complicated interests in land.⁷¹ The relationship between black persons affected by mining, government, and mining companies also suffered.⁷²

The important point here is that the ideology underlying these patterns and relationships was entrenched before the mining sector became a major role player in the South African economy. Thus, when considering the creation of mining communities, the effects of mining for these communities and how these effects should be addressed, this broader historical and ideological context must inform an investigation into the legislative measures provided to address mining communities. By considering the broader context, it becomes apparent that various relationships are at stake when it comes to understanding the living conditions of mining communities. Furthermore, even though the mining industry has been heavily complicit in maintaining apartheid, it should be considered whether the Mining Charter could encompass the solution to all legacies of the past and whether it should not rather speak more clearly to other legislative measures put in place for this purpose.

Chapter 2 thus sets out the factual and historic context to describe the creation of mining communities as one of the effects of mining operations. The chapter also considers how these effects translate into the harsh living conditions of mining communities. Chapter 3 continues with a focus on context, but whereas Chapter 2 focused on the factual context, Chapter 3 focuses on the legal context. The relevant policy and legislative context are set out with the aim of describing the legal problem addressed in this thesis.

Before the MPRDA, Mining Charter and other legislation⁷³ relevant to the empowerment and development of mining communities are discussed, Chapter 3 first sets out the policy context within which the notion of empowerment was accepted into South African discourse as BEE.⁷⁴ Policy documents such as the Freedom Charter,⁷⁵ the different versions of the Reconstruction

⁷¹ See section 3.3 of Chapter 2 for a discussion of the interference with indigenous traditional lifestyles by colonial and apartheid authorities.

⁷² See section 3.3 of Chapter 2.

⁷³ Local Government Municipal Systems, the Restitution of Land Rights Act, the TLGFA, the IPILRA and the CPAA.

⁷⁴ Black Economic Empowerment (“BEE”) was introduced in South Africa to deracialise business ownership and to create a black middle class. Black Economic Empowerment Commission *Black Economic Empowerment Commission Report* (2001) 1; Seekings & Natrass (2005) 341 & 343; African National Congress *The Reconstruction and Development Programme: A Policy Framework* (1994) (“Base Document”) Section 4.4.6.3. See section 2.2.2 of Chapter 3.

⁷⁵ See footnote 29 above.

and Development Programme,⁷⁶ and GEAR⁷⁷ are considered as the idea of BEE was conceived in these documents. These documents also set out the first democratic government of South Africa's approach to socio-economic development.⁷⁸

Chapter 3 inspects how the notion BEE was implemented initially with a single focus on the ownership of businesses and how it transformed into Broad-Based Black Economic Empowerment ("B-BBEE").⁷⁹ The neoliberal development rhetoric employed by the BEE Commission report, which introduced the notion of B-BBEE, is investigated to expose the underlying ideology promoted by the proposal for B-BBEE.⁸⁰ The Broad-Based Black Economic Empowerment Act that provides for the implementation of B-BBEE across all business sectors in South Africa is briefly considered to explain how the different elements of B-BBEE are formulated in the generic scorecard.

To contextualise this study further, the rhetoric employed in the 2012 National Development Plan⁸¹ and the notion of "radical economic transformation"⁸² are considered in Chapter 3. These policies all address the socio-economic legacies of apartheid to which mining areas are also exposed.

The second part of Chapter 3 firstly explores the provisions of the Constitution that provide for the development of communities such as mining communities. Thereafter the objectives of the MPRDA and the Mining Charter are scrutinised to the extent that the focus is on mining communities and local economic development. The chapter exposes how B-BBEE finds its way into the Mining Charter and how different stakeholders in the mining context benefit from B-BBEE. A brief consideration of the controversies surrounding the Mining Charter and the

⁷⁶ As South Africa's "blueprint for transformation", the Reconstruction and Development Programme ("RDP") promoted meeting basic needs, developing human resources, building the economy and democratising the state and society. Base Document (1994) Section 1.4; White Paper on Reconstruction and Development (GG 16085 GN 1994) Section 1.4. See section 2.2.1 of Chapter 3.

⁷⁷ The Growth Employment and Redistribution ("GEAR") strategy replaced RDP and addressed similar issues. See section 2.2.1 of Chapter 3.

⁷⁸ See section 2.2.1 of Chapter 3.

⁷⁹ See section 2.2.2 of Chapter 3.

⁸⁰ BEE Commission (2001) The BEE commission was established under the Black Business Council, an umbrella body representing major black business organisations, in May 1998 and chaired by Cyril Ramaphosa, the current president of South Africa. The Commission issued a report that provided the strategy for the implementation of BEE in SA.

⁸¹ National Planning Commission *National Development Plan: Vision for 2030* (2011).

⁸² Government has in its 2017 Budget put forward its "radical economic transformation for inclusive growth" strategy - National Treasury *2017 Budget: People's Guide* (2017). Radical economic transformation includes, amongst other things, increasing black ownership of industry and the economy and turning South Africa into a "democratic development state" - Davies M "7 Things you need to know about Radical Economic Transformation" *Huffpost* 29 June 2017 available at <https://www.huffingtonpost.co.za/2017/06/29/7-things-you-need-to-know-about-radical-economic-transformation_a_23007474/> accessed on 9 February 2020.

different iterations thereof is undertaken to introduce the problematic nature of the Mining Charter.⁸³

Legislation that does not deal specifically with mining but that is also applicable in the mining context is furthermore explored. The IDP, to be created by municipalities in terms of the Local Government: Municipal Systems Act provides for the local economic development of municipal areas. The IDP will apply to a mining area to the extent that it forms part of a municipal area.⁸⁴ Due to the link between the creation of mining communities and the land dispossession and displacement of black people under colonial and apartheid rule, legislation such as the Traditional Leadership Governance Framework Act, the Interim Protection of Informal Land Rights Act and Restitution of Land Rights Act are also considered.⁸⁵

The analysis in Chapter 4 shows the interpretational challenges of the legislation set out in Chapter 3. The different legislative definitions of “community” in a development context are considered. Forthcoming from the analysis is that the different drafts of the Mining Charter have increasingly differentiated between “community” or “host community”, as a community the law sets out to preserve, and “mine community” as a community the law sets out to transform.⁸⁶

Chapter 4 furthermore examines the relevant legislative provisions that provide specifically for the empowerment of the “host community” through equity ownership and the “mine community” through development. Different means of empowering the two types of

⁸³ As discussed in section 3 of Chapter 4, four draft Mining Charters were issued by the Department of Mineral Resources and Energy before the 2018 version was finalised. The 2016 Draft Mining Charter (Draft Reviewed Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 450 GG 39933 of 15 April 2016)) provided for ownership requirements, which requirements were still contested by the Minerals Council SA (Chamber of Mines, as it was known then) - Seccombe A “Department blindsides miners with the new charter” *Business Day Live* 15 April 2016 available at <<http://sa-monitor.com/departments-blindsides-miners-new-charter-bd-live-15-april-2016/>> accessed on 14 February 2020; “Minister to meet mines on black-ownership rules” *Fin24* 19 April 2016 available at <<https://www.fin24.com/Companies/Mining/minister-to-meet-mines-on-black-ownership-rules-20160419>> accessed on 14 February 2020. The final 2018 Mining Charter (Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (GN 1002 GG 41934 of 27 September 2018)) increases the target for black ownership of mining companies to 30% from 26%. The Minerals Council SA still maintains that B-BBEE ownership deals entered into in terms of earlier Mining Charters and based on the 26%-requirement, must be acknowledged in terms of the 2018 Mining Charter. The council has accordingly applied to court for a judicial review of the 2018 Mining Charter in March 2019 - Seccombe A “Mineral Council takes Mining Charter to court” *Business Day* 27 March 2019 available at <<https://www.businesslive.co.za/bd/companies/mining/2019-03-27-minerals-council-takes-mining-charter-to-court/>> accessed on 14 February 2020. Court documents available at <<https://www.mineralscouncil.org.za/special-features/724-court-documents>> accessed on 2 January 2020.

⁸⁴ Reg 46 (c) (iii) read together with ss 23 & 25 of the Local Government: Municipal Systems Act.

⁸⁵ The relevant legislation is considered in section 3.3 of Chapter 3.

⁸⁶ See section 2.3 of Chapter 4.

communities, which in reality often overlap, are thus proposed by the Mining Charter. The effect of this differentiation is considered in Chapter 7.

Chapters 5 and 6 consider the theoretical underpinnings of the legislative system put in place to address the poverty and socio-economic inequalities faced by mining communities in South Africa. Chapter 5 provides a theoretical description of the development paradigm in which the legislative system operates, as is argued in this thesis. The concepts “development”, “empowerment”, “community” and “poverty” are considered to show the assumptions accompanying the use of these concepts. It is, for instance, assumed that development can only take place if a modernised legal system protecting rights, specifically property rights, is in place in a developing country.⁸⁷

Empowerment, or Black Economic Empowerment, is located in the larger, global and neoliberal development paradigm.⁸⁸ “Empowerment” is considered to understand the philosophy underpinning the notion.⁸⁹ The development rhetoric in which empowerment is framed is exposed to show that empowerment operates on the same assumptions and worldviews as development.

By analysing the concept “community”, it becomes clear that in the narrow sense of the word, “community” signifies some kind of essence or fixed identity. This understanding of “community” is used in contrast with modernised understandings of society. Where “community” has been disregarded, such as the case of indigenous communities under colonialism, the recognition and preservation of these communities are being promoted to address injustices of the past.⁹⁰

The notion “poverty” is analysed to show that the concept is laden with assumptions about the lifestyles and livelihoods of persons regarded as poor.⁹¹ The link between characterising someone as poor and prescribing measures aimed at the redistribution of resources is

⁸⁷ See section 2.1 of Chapter 5.

⁸⁸ See section 2.2 of Chapter 5.

⁸⁹ Parpart (2002) 45, 52. The World Bank *World Bank Participation Source Book* (1996); The World Bank Group *A Proposal for a Comprehensive Development Framework* (A Discussion Draft) (1999) 153; The World Bank *World Development Report 2000/2001: Attacking Poverty* (2000/2001) v. See section 2.2 of Chapter 5.

⁹⁰ Juul S “The Discussion of the Good versus the Just” in S Juul *Solidarity in Individualized Societies - Recognition, Justice and Good Judgment* (2013) 75. The right to self-determination (Charter of the United Nations (1945), Article 1(2)), the right to sovereignty over resources (UNGA Res 1803 (XVII) (14 December 1962)) and the rights of indigenous peoples (UNGA Res 295 (2007) A/RES/61/295) acknowledged by the UN all serve as an example of instances where recognition entailed awarding rights. See section 3.1 of Chapter 5.

⁹¹ See section 3.2 of Chapter 5.

established. A link is furthermore drawn between “poverty” and communities that are not recognisable by an essence or fixed identity, such as mining communities. Here, the law attempts to transform the community, as opposed to preserving it, as in the case of a community of fixed identity, such as a host community or a traditional community.

Chapter 6 continues the theoretical approach to the empowerment of mining communities through development. Here, the significance of operating in a development paradigm is explained by describing the politics of development. By using the works of post-developmental scholars, the idea of development is exposed for promoting a specific worldview and accordingly, the values of a specific group of people.⁹²

Since development is often associated with the universalisation of Western worldviews, Chapter 6 analyses what a Western worldview entails in the context of development.⁹³ The link with modernisation and neoliberal economic policy and ideology is examined and considered to the extent that these notions manifest in legal systems. Points of criticism of a Western worldview are explored to expose the effects that the imposition of these views has on poverty alleviation.⁹⁴ By universalising certain values, the development paradigm, and the law operating in such a paradigm, effectively creates “the poor” by emphasising the extent to which the impoverished person or group of persons deviates from the characteristics of those regarded as developed. General observations are made about how the development problem and beneficiary are framed in a neoliberal development paradigm. It is considered how a legal subject, specifically an impoverished legal subject, is characterised in a neoliberal centred legal system before it can hold and enforce rights

Chapter 7 reflects on the effects of the politics of development, as set out in Chapter 6, for the legislative drafting of development solutions that must benefit mining communities. The differential treatment in the Mining Charter of different communities in the mining area, the “host community” and “mine community”, is analysed as an effect of the politics of development. It is argued that the recognition of a “host community” for its fixed and predetermined identity will place such a community in a better position in a neoliberal

⁹² Gordon & Sylvester (2004) *Wisconsin International Law Journal* 73.

⁹³ See section 2 of Chapter 6. The Westernisation and modernisation of South African mining communities is not explicitly advocated for in the Mining Charter and other relevant legislation. It is, however, maintained in this thesis that these notions inform development theory and are also visible when the role of the law in development is considered.

⁹⁴ See section 2 of Chapter 6.

development paradigm when compared with a “mine community”, only acknowledged for its poverty. This type of differential treatment perpetuates inequality in mining areas.⁹⁵

Chapter 7 furthermore shows the inherent paradox presented by the notion of “community development”. “Community” gestures preservation and “development” transformation, begging the question of whether community development is possible, theoretically.⁹⁶

Chapter 8 concludes the thesis by providing recommendations for approaching legal formulation in a development paradigm. More than arbitrary changes to the definitions included in the Mining Charter is required.

⁹⁵ See section 2 of Chapter 7.

⁹⁶ See section 3 of Chapter 7.

CHAPTER 2: The Creation of Mining Communities

1. Introduction

This thesis critically considers the legislative system that provides for the empowerment and development of mining communities in South Africa.¹ Chapter 2 sets out the relevant present-day and historical context within which mining communities exist. The chapter aims to address two main points. First, the socio-economic conditions faced by present-day mining communities are described to establish the ills that legislation such as the Mineral and Petroleum Resources Development Act, Mining Charter and other relevant legislation² (“the legislative system”) must address. Second, these socio-economic conditions are traced back to the injustices of past discriminatory practices, before and after the discovery of mineral resources. Certain oppressive labour practices and land dispossession in South Africa since the arrival of Europeans in Southern Africa in 1652 are briefly considered.

The two main points addressed in this chapter are presented by focusing on four themes: rhetoric, ideology, labour and land and the effects for indigenous black people. Section 2 discusses the conditions faced by mining communities by focusing on the first theme, the rhetoric generally employed when mining communities are described. “Rhetoric” is used to denote a way of speaking about a topic in very persuasive and emotive terms, while lacking real substance and concrete manifestation.³ The aim here is to show that certain perceptions are created that influence legislative formulation, as pointed out throughout the rest of the thesis.

The historical context is described in section 3 by focusing on the remaining three themes: the ideological motivations at play during a given era; discriminatory practices employed to obtain and control labour and land; and the effects the former two aspects had for indigenous

¹ The law under consideration includes the Constitution of the Republic of South Africa, 1996 (“the Constitution”); Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”), the broad-based socio-economic empowerment charter issued in terms of s 100(2) of the MPRDA (“Mining Charter”), the Social and Labour Plan (“SLP”) to be created in terms of ss 22 and 23 of the MPRDA; Regulations 40-46 of the Regulations in terms of section 107(1) of the MPRDA (GNR 527 GG 26275 of 23 April 2004) (“reg/s”) and the Integrated Development Plan (“IDP”) to be created in terms of the Local Government: Municipal Systems Act 32 of 2000. The following legislation is also considered to the extent that it provides for “community” that will also qualify as mining communities: The Restitution of Land Rights Act 22 of 1994, the Traditional Leadership and Governance Framework Act 41 of 2003; the Interim Protection of Informal Land Rights Act 31 of 1996 and the Communal Property Association Act 28 of 1996 (“CPAA”).

² Footnote 1 above sets out the relevant legislation. See Chapter 3 for a discussion of the relevant legislation.

³ See Mickelson K “Rhetoric and Rage: Third World Voices in International Legal Discourse” 1997 (16) *Wisconsin International Law Journal* 353-420 for a discussion of poverty and third world rhetoric in a global context.

communities.⁴ “Community” here is used in a broad sense to include the traditional communities of black persons in Southern Africa centred on shared custom and land use, but also to groups of black persons in Southern Africa, not necessarily forming a traditional community. “Mining community” refers to black persons sharing in the effects of mining, irrespective of their affiliation with a traditional community. The legislature’s definition of “community”, “host community” and “mine community” and the theoretical conception of “community” are considered in detail in Chapters 3 and 4. The terminology “black persons” is used as defined in legislation providing for Broad-Based Black Economic Empowerment (“B-BBEE”) in South Africa.⁵

It is shown how the creation of mining communities is the result of the discriminatory practices discussed. It is also shown that the ideological motivations underlying the discriminatory practices, which caused the creation of mining communities, were entrenched before the mining sector became a major role player in the South African economy.

As a result of the historical context, the current context allows for the type of rhetoric employed when dealing with mining communities, as illustrated in section 2.

2. Present-Day Context: Mining Communities, Rhetoric and the Effects of Mining

This section describes the conditions in mining areas to be addressed by the legislative system by focusing on how the media and reports of government and civil society depict mining communities and their challenges. A consideration of the effects of labour migration and certain significant relationships in the mining area, shows that the present-day context is constructed in media and other reports to allow for policy interventions formulated in a very specific way, which policy interventions are described in Chapter 3.

⁴ Ideology is viewed as the universalisation of the values of a group of persons. In the context of colonialism, the universalisation disregards the values of the colonised peoples. Gordon RE & Sylvester JH “Deconstructing Development” 2004 (22) *Wisconsin International Law* 72 footnote 315 referring to Kohl H *From Archetype to Zeitgeist: Powerful Ideas for Powerful Thinking* (1992).

⁵ In terms of the Broad-Based Black Economic Empowerment Act 53 of 2004, a “black person” in this context is defined as an African, Coloured or Indian person, that is a citizen of South Africa by birth, descent or naturalisation. A person that would have been entitled to acquire citizenship by naturalisation before 27 April 1994 (date of first democratic election in South Africa), but were not able to do so, will also qualify. Chinese persons complying with the latter mentioned requirements are also included in the definition in terms of High Court ruling in 2008 *Chinese Association of South Africa v Minister of Labour* (PHC) unreported case no 59521/2007.

2.1. The Narrative of Mining Communities

The media, civil society and government often report on the poverty faced by mining communities.⁶ The “proliferation of communities living in abject poverty”⁷ in mining areas has been noted in many instances. Legal battles between mining communities and the industry are typified as “the poor and the marginalised coming up against the rich and the powerful”.⁸ Mining operations are blamed for the loss of land and livelihoods and exposure to health hazards, which loss causes unemployment and ultimately poverty and conflict in mining areas.⁹

⁶ Parker F “Lonmin mining communities: A powder keg of inequality” *Mail & Guardian* 27 August 2012 available at <<https://mg.co.za/article/2012-08-27-lonmin-mining-communities-a-powder-keg-of-inequality>> accessed on 14 February 2020; Rutledge C “OPINION: The systemic inequality of mining affected communities” *Business Report* 19 February 2018 available at <<https://www.iol.co.za/business-report/opinion/opinion-the-systemic-inequality-of-mining-affected-communities-13363840>> accessed on 14 February 2020; Leonard L “How mining companies’ relationship with Government affects communities” *IOL News* 8 February 2019 available at <<https://www.iol.co.za/news/opinion/how-mining-companies-relationship-with-government-affects-communities-19197357>> accessed on 14 February 2020; The Bench Marks Foundation *The Policy Gap Series: Corporate Social Responsibility and the Mining Sector in Southern Africa: A Focus on Mining in Malawi, South Africa and Zambia* (2008); The South African Human Rights Commission *National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa* (2016); Curtis M *Precious Metal: The Impact of Anglo Platinum on Poor Mining Communities in Limpopo, South Africa - Action Aid* (2008); South African Human Rights Commission *Mining-related Observations and Recommendations: Anglo Platinum, Affected Communities and other Stakeholders, in and around the PPL Mine, Limpopo* (2008); Action Aid South Africa “Mining in South Africa 2018: Whose benefit and whose burden?” *Social Audit Baseline Report* (2018); The Editor “The Impact of Mining on the South African Economy and Living Standards” *Politics Web* 10 February 2018 available at <<http://fse.org.za/index.php/item/593-the-impact-of-mining-on-the-south-african-economy-and-living->> accessed on 14 February 2020.

⁷ In 2009 and in 2015, the then Department of Mineral Resources (“DMR”) (now the Department of Mineral Resources and Energy) completed assessments of the impact of the 2004 (Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (GN 1639 GG 26661 of 13 August 2004)) and 2010 (Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838 GG 33573 of 20 September 2010)) Mining Charters. The findings made in both these reports pertaining to mining communities emphasised the poverty faced by mining communities. See the preambles of Department of Mineral Resources “Mining Charter Impact Assessment Report” (2009) and Department of Mineral Resources “Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry” (May 2015).

⁸ Rutledge (2018) *Business Report* reports in such a manner on the decision of the Pretoria High Court allowing mining communities to take part in the court action by the Minerals Council (previously the Chamber of Mines) against the DMR pertaining to the 2017 Mining Charter.

⁹ In the keynote address at the 2016 Annual Conference of the Bench Marks Foundation, Bishop Jo Seoka stated that because of mining operations

“...hundreds of thousands of poor people live in abject poverty because of loss of arable land, livelihoods, aggravating health conditions, cultural and social upheaval, all of which manifest itself [*sic*] in unemployment and pushes [*sic*] poor communities to the margins of society.”

Bench Marks Foundation *Bench Marks Foundation 2016 Annual Report* (2016) 6. The statements made by Bishop Seoka are based on studies done by the foundation and reported in its Policy Gap Series that shows the discrepancies between mining companies’ policies for community development and reality available at <<http://www.bench-marks.org.za/>> accessed on 11 January 2019. See also Steyn L “What’s really fuelling SA mine protests?” *Business Live* 21 November 2019 available at <<https://www.businesslive.co.za/fm/features/2019-11-21-whats-really-fuelling-sa-mine-protests/>> accessed

As characters in a narrative, mining communities and their relationship with government and the industry are depicted in a very specific way. This narrative maintains the perception that mining communities are not benefitting from mining operations as expected in the light of the mining industry's history of oppression and exploitation.¹⁰ Reports by institutions such as Action Aid South Africa,¹¹ the Centre of Applied Legal Studies ("CALs"),¹² the Human Rights Commission¹³ and the Institute for Race Relations ("IRR")¹⁴ place this failure at the doorstep of mining companies and the legislative system that seemingly favours corporate interests above the interests of communities affected by mining.¹⁵ Government is also criticised for not monitoring legislative compliance sufficiently.¹⁶

on 20 February 2020 – Mining communities cite their exclusion from the benefits of their own resources as cause of protest action.

¹⁰ See in general Action Aid SA *Precious Metals II: A Systemic Inequality* (2016) as an example of such a viewpoint.

¹¹ The report released by Action Aid, a global institution working towards achieving social justice, gender equality and poverty eradication (<<https://south-africa.actionaid.org/>>), on Anglo Platinum's operations at its Potgietersrus, Twickenham and Modikwa mines shows the effects of mining operations on local communities, which include damages to the immediate environment and housing structures, poor service delivery and displacement. The report argues that these effects amount to human rights infringements perpetrated by Anglo Platinum. See Curtis M *Precious Metal: The Impact of Anglo Platinum on Poor Mining Communities in Limpopo, South Africa - Action Aid* (2008) 5 & 6 ("Action Aid (2008)"). See also Action Aid, South Africa "Mining in South Africa 2018: Whose Benefit and Whose Burden" *Social Audit Baseline Report* (2018) 16, 18, ("Action Aid Baseline Report (2018)").

¹² CALS issued three reports on the problematic nature of the social and labour plan system, both regarding the implementation thereof by mining companies and the legislative design. See CALS *The Social and Labour Plan Series: Phase 1: System Design - Trends Analysis Report* (2016) ("CALs (2016)"); CALS *The Social and Labour Plan Series: Phase 2: Implementation - Operation Analysis Report* (2017) ("CALs (2017)") and CALS *The Social and Labour Plan Series: Phase 3: Alternative Models for Mineral-Based Social Benefit* (2018) ("CALs (2018)"). Mining companies are criticised for not engaging with communities sufficiently, not implementing SLP's, not providing access to SLP's to communities and for insufficient planning for local economic development. The structure of the SLP system is also found to be lacking and a lack of cooperative governance is noted. See CALS (2018) 10-14.

¹³ As a result of the Action Aid (2008) report, the South African Human Rights Commission also investigated the operations of Anglo Platinum. See in general: South African Human Rights Commission *Mining-Related Observations and Recommendations: Anglo Platinum, Affected Communities and other Stakeholders, in and around the PPL Mine, Limpopo* (2008) ("SAHRC (2008)"). The report does not provide a definite conclusion on whether human rights violations are taking place but highlights the impacts of mining on communities' access to water and certain services. The sensitive relationship with traditional authorities and possible conflict with individual interests, are also highlighted. The findings of the South African Human Rights Commission on the socio-economic conditions in communities affected by mining also confirm that there is a lack of legal compliance by mining companies and gaps in the legal system, which contributes to the challenges faced by these communities. The findings are based on site visits made by the Commission to Sekhukhune, Limpopo, Highveld, Mpumalanga and Somkhale in Kwazulu-Natal, which areas have suffered unrest and problems as a result of mining operations. Representatives of these areas testified at hearings held on 13-14 September, 26 and 28 September and 3 November 2016 before the Commission. See South African Human Rights Commission *South African Human Rights Commission National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa* (2018) ("SAHRC (2018)").

¹⁴ A report by the Institute of Race Relations confirms the negative perceptions of the mining industry held by civil society. See IRR *Digging for Development* (2014) 13 ("IRR (2014)").

¹⁵ See also *Politics Web* (2018) 18.

¹⁶ Action Aid Baseline Report (2018) 79.

For many, this failure manifested in the tragic events that took place at Lonmin's Marikana mining operations in August 2012.¹⁷ Different views are held as to the causes of the Marikana events, but a prominent view is that the events are the inevitable consequences of the socio-economic conditions in the mining area, manifesting in severe inequality between mining communities and "the historical and new black elite."¹⁸ New emphasis has since been placed on the socio-economic conditions in mining areas.

The socio-economic conditions mining communities experience must be identified to analyse claims that the legislative system has failed in this respect.¹⁹ The consequences of perpetuating the type of narrative or rhetoric often used to describe poor mining communities, without critical reflection, should also be considered. Whereas the effect of the promotion of this narrative is one of the underlying contemplations of the thesis, section 3 of this chapter specifically considers how the history of the mining industry created the conditions that allow for this narrative to exist. The remainder of section 2 considers some of the prominent challenges associated with mining communities in terms of various reports compiled on the socio-economic conditions experienced by mining communities.²⁰

2.2. Socio-Economic Conditions in Mining Areas

A few general characteristics of mining areas can be identified from the reports considered here.²¹ These characteristics all translate into a general perception that mining communities are

¹⁷ During August 2012, mineworkers engaged in unprotected labour action regarding wage increases, at Marikana, the site of Lonmin Plc's platinum mining operations in the North West province of South Africa. On 16 August, the labour action culminated into a violent and tragic confrontation between the South African Police Services ("SAPS") and striking mineworkers, leaving 34 mineworkers dead and various injured. During the build-up to the events that unfolded on the 16th of August, conflict between the different trade unions and acts of intimidation and violence caused the death of ten persons, including mineworkers and policemen. On 23 August 2012, the Marikana Commission of Inquiry was appointed by then President Zuma in terms of section 84(2) of the Constitution of South Africa, 1996, to ascertain the role played by Lonmin, the SAPS, the relevant trade unions and the Department of Mineral Resources in the events that occurred during this time ("The Marikana Commission"). The Marikana Commission found that the lack of implementation by Lonmin of its SLP contributed to the conflict that took place during August 2012. See Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province (GG 38978 GN 699 of 2015) ("Marikana Commission Report (2015)").

¹⁸ IRR (2014) 1. The IRR compiled this report in direct response to the events that took place at Marikana. The Marikana shootings also sent shock waves globally: Thomas Piketty a French economics scholar refers to the Marikana shootings to illustrate the continuous debate surrounding the percentage of output to be allocated to wages. Piketty T *Capital in the Twenty-First Century* (2014) 39.

¹⁹ See the following reports proposing legislative amendment: Action Aid (2008); Action Aid Baseline Report (2018); CALS (2016); CALS (2017); CALS (2018); SAHRC (2008); SAHRC (2018); IRR (2014).

²⁰ See in general Action Aid (2008); Action Aid Baseline Report (2018); SAHRC (2008); SAHRC (2018); *Politics Web* (2018); IRR (2014) and the Bench Marks Foundation Policy Gaps series available at <<http://www.bench-marks.org.za/>> accessed 20 February 2020.

²¹ See footnote 20 above.

not receiving enough benefit from the mining operations invading their living space. For land-occupying and traditional communities, mining means relocation and interference with livelihoods and agricultural activities – a loss for which these communities are not sufficiently compensated.²² Mining also has detrimental effects on the environment, meaning that communities must deal with pollution.²³ Houses situated close to mining sites are furthermore damaged by blasting.²⁴

Mining communities, however, also depend on the mining operations for their livelihoods and basic services and infrastructure.²⁵ The provision of ill-suited infrastructure or the lack of basic infrastructure is highlighted in the reports under consideration as a major obstacle for mining communities (land-owning and other communities).²⁶ Mining companies often build schools, hospitals and roads as flagship development programmes, but these amenities hide the otherwise harsh conditions to which mining communities are exposed.²⁷ The amenities may not address the actual needs of the community, or they are self-serving: Roads, for instance, are used by the mining company for its operations.²⁸

Poor service delivery by non-functioning local authorities is another persistent problem in mining areas.²⁹ Dissatisfaction amongst community members leads to protests, often accompanied by violence that adds to deplorable conditions in mining areas and the strained relationship with mining companies.³⁰

Lack of or inadequate housing for mineworkers and their families is another oft-cited challenge experienced in mining areas.³¹ Mining companies operating in South Africa are compelled by

²² Action Aid (2008) 5, 23; SAHRC (2008) ii-iv, ix; 29; SAHRC (2018) 3, 16-22.

²³ Action Aid (2008) 6; SAHRC (2008) viii, 38, 39. SAHRC (2018) 5, 42, 46-48; Action Aid Baseline Report (2018) 54.

²⁴ Action Aid Baseline Report (2018) 54-63.

²⁵ The SLP system and the Mining Charter determine that a mining right holder must contribute to the socio-economic development of mining areas, which development often translates into infrastructure development. See section 3 of Chapter 3 for a discussion of the SLP system, the Mining Charter and other relevant legislation.

²⁶ Action Aid (2008) 41; IRR (2014) 13.

²⁷ IRR (2014) 13.

²⁸ A Heyns & G Mudimu “Aligning Social and Labour Plans with Integrated Development Plans” in L van Schalkwyk (ed) *Co-Ordinating Governance for Mining: Streamlining Systems for Improved Intergovernmental Relations* (2019) 56.

²⁹ Action Aid (2008) 6; SAHRC (2008) 29-32; IRR (2014) 25; SAHRC (2018) 40 – the report acknowledges that aging infrastructure is a problem, and, thus, the responsibility of the local authorities, but adds that mining operations place additional strain on the infrastructure.

³⁰ Action Aid (2008) 40; IRR (2014) 25. The events that unfolded at Marikana in August 2012 (see footnote 17 above) is partially ascribed to the living conditions in mining areas - IRR (2014) 1.

³¹ IRR (2014) 22, 24. The Marikana Commission found that Lonmin’s non-compliance with its housing obligations attributed to the creation of conflict and tension in the area - Marikana Commission Report (2015) 522-542. See also SAHRC (2018) 31.

law to have housing programmes, which programmes generally are in place.³² However, the types of housing offered vary significantly and the amount of housing offered does not keep up with the demand.³³ The result is that many mineworkers are still excluded from housing programmes.³⁴

Mining communities are depicted as shack settlements in photographs used in the media and reports as illustrated in Figure 1 below.³⁵ According to the Department of Human Settlements, unserviced informal settlements are characteristic of mining towns where mining communities are subjected to harsh living conditions.³⁶ The erection of shacks in mining areas is attributed to a lack of decent housing available and affordable to mineworkers.³⁷ However, many mineworkers choose not to use living-out allowances to acquire proper accommodation.³⁸ Rather, they stay in informal housing (“shacks”) while sending allowances and wages to their families living in their hometowns (referred to as “labour-sending areas”).³⁹ Despite the

³² IRR (2014) 25. The Mining Charter sets out the housing and living conditions a mining right holder must uphold to promote the broad-based socio-economic empowerment of black persons in the mining industry, as mandated in terms of s 100 of the MPRDA. The Housing and Living Conditions Standard for the Minerals Industry issued in 2009 in terms of section 100 of the MPRDA (GN 445 GG 32166 of 29 April 2009) sets out further guidelines for mining companies in this regard. The SLP to be submitted by a mining company when applying for a mining right in terms of the MPRDA must set out how the mining company will be addressing the housing and living conditions of mining employees. The Mining Charter and the SLP are discussed in more detail in Chapter 3.

³³ IRR (2014) 22-25. The IRR found that the family units offered by Lonmin to its employees are significantly better than the single-sex hostel-type accommodation also offered, even though the hostel options have improved greatly in comparison to hostels pre-1994.

³⁴ IRR (2014) 23.

³⁵ This was especially the case with reporting on the Marikana events - IRR (2014) 8. The following images are included in Figure 1. In the top left hand corner: Tolsi N (photography, Botes P) “Marikana: One year after the massacre” *Mail and Guardian* August 2013 available at <<https://marikana.mg.co.za/>> accessed on 6 January 2020; in the top right hand corner: Manyane M “Miners still calling shacks home” *IOL* 19 August 2018 available at <<https://www.iol.co.za/sundayindependent/news/miners-still-calling-shacks-home-16634249>> accessed on 23 February 2020; in the bottom left hand corner: Schneider V “The heavy toll of coal mining in South Africa” *Al Jazeera* 2 April 2015 available at <<https://www.aljazeera.com/indepth/features/2015/03/heavy-toll-coal-mining-south-africa-150329123518557.html>> accessed on 23 February 2020; and in the bottom right hand corner: Amnesty International “Smoke and Mirrors: Lonmin’s failure to address housing conditions at Marikana, South Africa” 15 August 2016 available at <<https://www.amnesty.org.nz/smoke-and-mirrors-lonmin%E2%80%99s-failure-address-housing-conditions-marikana-south-africa>> accessed on 23 February 2020.

³⁶ Department of Human Settlements, Department of Mineral Resources and the Presidency “Inter-Ministerial Committee on Eradicating Informal Settlements in Mining Areas: Department of Human Settlements Update; Limpopo Oversight Report” 10 March 2015 available at <<https://pmg.org.za/committee-meeting/20461/>> accessed on 20 February 2020.

³⁷ IRR (2014) 15, 25.

³⁸ Mining companies make use of living-out allowances in instances where it cannot provide accommodation to mineworkers. IRR (2014) 9; Minerals Council South Africa *Housing and Accommodation in the South African Mining Industry – Fact Sheet* (2019).

³⁹ IRR (2014) 32 & 33. The Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (GN 1002 GG 41934 of 27 September 2018) (“2018 Mining Charter”) defines “labour-sending areas” as the area, situated in South Africa, from which a right holder (the mining company that have acquired a right to mine in terms of the MPRDA) sources most of its employees. The sourcing of labour here refers to sourcing historically and currently. See the discussion on labour migration at section 2.3 below.

unappealing appearance of shack settlements, general conclusions cannot be drawn about the shack dwellers since the shack content and income levels of the shack owners are said to vary widely.⁴⁰ Mineworkers may be homeowners in the labour-sending areas.⁴¹ Images of impoverished shack settlements in mining areas, therefore, do not paint a complete picture of socio-economic conditions faced by mining communities.



Figure 1: Mining communities as depicted by the media

Low wages were commonly regarded as a motivation for the unrest that swept through the South African platinum belt during August 2012 – the same time when the Marikana events took place.⁴² However, according to some reports, mineworkers earn better wages than similarly skilled workers do in other industries.⁴³ The problem is that mineworkers who send the greater part of the wages back home opt for cheaper forms of accommodation in the mining areas, such as shacks, the sight of which cause mining areas to be regarded as poor.⁴⁴

⁴⁰ IRR (2014) 26.

⁴¹ *Politics Web* (2018) 16; IRR (2014) 11.

⁴² Stoddard E “‘Miner Spring’ may lead to more unrest” *Mail & Guardian* 6 September 2012 available at <<http://mg.co.za/article/2012-09-06-miner-spring-may-lead-to-more-unrest>> accessed on 7 January 2020 and Kane P “Could we be about to see a Miners Spring?” *Huffington Post* 25 June 2012 available at <http://www.huffingtonpost.com/patrick-kane/south-africa-mine_b_1967275.html> accessed on 7 January 2020. The platinum mining industry was embroiled in tough wage negotiations during this time. See footnote 17 above.

⁴³ IRR (2014) 11; *Politics Web* (2018) 2, 14.

⁴⁴ IRR (2014) 11, 32.

2.3. Labour Migration

Closely linked to the issues mentioned thus far, is that of the continuing migration of labourers to mining areas, as is highlighted in the reports considered here.⁴⁵ Without the labour of black persons, travelling long distances to serve (at times under duress) in the mines, the South African mining industry would not have become the booming industry it once was.⁴⁶ The migration system has undergone substantial changes to disassociate itself from its apartheid and colonial past, but problems persist.⁴⁷

The migration system causes conflict in mining areas.⁴⁸ Local land-owning and traditional communities in mining areas are reluctant to allocate land or other benefits trickling down from mining operations to migrants. Migrants and other persons moving to mine areas in the hope of somehow benefiting from the activities of the mine are not regarded as forming part of the mining community.⁴⁹ Even though migrant mineworkers return home at times, they are still dependent on development initiatives such as housing, healthcare, schooling (if their families travel with them) and other infrastructure in mining areas. It can thus be expected that exclusion from the benefits of mining will cause conflict.

The calls to dismantle the migrant labour system have become more prominent, especially after the events at Marikana in 2012.⁵⁰ Dismantling this system could mean that mining companies would be forced to source local labour exclusively, but this would have devastating effects for migrant workers and their families.⁵¹ Labour migration is still a means of spreading the benefits of mining to some of the poorest areas in Southern Africa.⁵² An alternative option would be to relocate migrant labourers and their families to mining areas.⁵³ By all indications, however, local communities will not accept migrant labourers and their families into mining areas because of ethnic differences.⁵⁴ Relocation will also be detrimental to poor labour-sending

⁴⁵ *Politics Web* (2018) 15 & 16; IRR (2014) 28-30.

⁴⁶ See section 3.2 below.

⁴⁷ *Politics Web* (2018) 13; IRR (2014) 7, 27, 28. See section 3 below.

⁴⁸ Steyn L “Measuring the waves of migration” *Mail & Guardian* 11 January 2013 available at <<https://mg.co.za/article/2013-01-11-measuring-the-waves-of-migration>> accessed on 20 February 2020; IRR (2014) 8, 28; *Politics Web* (2018) 15.

⁴⁹ Heyns & Mudimu (2019) 56; Malope L “Ethnic tensions brewing” *City Press* 22 October 2017 available at <<https://www.fin24.com/Economy/South-Africa/ethnic-tensions-brewing-20171020>> accessed on 20 February 2020. Ethnic tension in mining areas, because of the migration of labourers from different ethnical backgrounds to mining areas, have caused conflicts as far back as the 1970s – IRR (2014) 25.

⁵⁰ IRR (2014) 8, 27, 28; Steyn (2013) referring to a statement made by former deputy president Kgalema Motlanthe.

⁵¹ IRR (2014) 29.

⁵² IRR (2014) 28-30; *Politics Web* (2018) 16.

⁵³ IRR (2014) 30.

⁵⁴ IRR (2014) 30, Rutledge (2018).

areas that will lose the income and investment of mineworkers.⁵⁵ Thus, it seems that measures addressing the socio-economic conditions in mining areas will have to acknowledge that different types of communities will continue to occupy mining areas. As this thesis shows,⁵⁶ the legislative system currently does not acknowledge the complexities involved in providing for the empowerment and development of communities.

2.4. Stakeholder Relations in Mining Areas

Any attempt at exposing the socio-economic conditions faced by mining communities will be incomplete without briefly considering the relationship between government, mining companies and traditional authorities. The socio-economic development of mining areas is dependent on cooperation between these entities.⁵⁷

Civil society holds the view that mining areas and mineworkers do not benefit from mining, because of the “unhealthy cooperation” between mining companies and government.⁵⁸ Organisations representing civil society have accused the industry and government of colluding to the detriment of mineworkers and communities.⁵⁹ The government is specifically blamed for maintaining rhetoric that favours the inclusion of and consultation with mining communities while promoting policies that favour the interests of mining companies, justified by the assumption that the benefits of mining will trickle down to mining communities.⁶⁰

That is not to say that mining companies and government always agree on how development roles should be allocated between them.⁶¹ Mining companies argue that by providing certain infrastructure and basic services in mining areas, they are effectively performing the functions of local government.⁶² Local government, in turn, argues that infrastructure required by the

⁵⁵ IRR (2014) 30. One of the biggest labour-sending areas for mines in South Africa, the Eastern Cape, was the province most vulnerable to poverty in 2015. Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 & 2015* (2017).

⁵⁶ See Chapter 7 of this thesis.

⁵⁷ See section 3 of Chapter 3 of this thesis.

⁵⁸ IRR (2014) 14. Due to the political sensitivity of the comments made in the report, the report does not reveal the identities of the organisations interviewed as part of “civil society”.

⁵⁹ IRR (2014) 14. The example of offering mining companies electricity at a discounted rate is provided by the IRR report.

⁶⁰ Action Aid Baseline Report (2018) 16.

⁶¹ Mining companies complain that government is not performing its own developmental duties regarding mining communities - IRR (2014) 27. See section 3.3 of Chapter 3 for a discussion of the development duties of local government.

⁶² IRR (2014) 27. Before the Marikana massacre had taken place, Lonmin had for instance initiated a refuse service collection in one of the nearby shack settlements. Northam Platinum constructed homes for mining workers and built a powerline that was handed over to Eskom. The houses, however, remained without electricity for a further three and a half years. In section 3 of Chapter 3 of this thesis, the provisions of the Local Government: Municipal Systems Act and the creation of the Integrated Development Plan are

mining operations must be provided by the mining company.⁶³ Such disagreements can cause further deprivation for mining communities if neither the mining company nor the municipality takes responsibility for addressing infrastructure needs.⁶⁴

Another prominent authority in many mining areas is the traditional authority.⁶⁵ The legitimacy of traditional authorities is often contested by community members, resulting in conflict between different factions.⁶⁶ Contestation notwithstanding, mining companies tend to enter into agreements on the development of mining areas with traditional authorities.⁶⁷ Migrant labourers that regard themselves as members of the mining community that should benefit from development initiatives, may be excluded by the relevant traditional community from receiving any benefits.⁶⁸

considered together with the relevant provisions of the MRPDA and the Mining Charter. It is illustrated that alignment of the different instruments is problematic.

⁶³ Heyns & Mudimu (2019) 56. Local municipalities for example argue that roads in mining areas should be the responsibility of the mining company, since the mining operations make use of these roads.

⁶⁴ IRR (2014) 27. The instance of mineworkers receiving houses from Northam Platinum, but without electricity, is a good example of such deprivation. See footnote 62 above.

⁶⁵ “Traditional authorities” refers to the authorities governing traditional communities created around custom as acknowledged in terms of the Traditional Leadership and Governance Framework Act 41 of 2003. See Chapter 3 for a discussion on traditional communities.

⁶⁶ A consideration of the legitimacy of traditional authorities in post-apartheid South Africa falls outside the scope of this thesis. For more information, see Ntsebeza L *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (2005). The following case law serves as examples of instances where the legitimacy of traditional authorities or their powers to perform certain actions were contested: *The Traditional Authority of the Bapo Ba Mogale Community v Kenoshi* 2010 JDR 0863 (GN) – contestation of the recognition and establishment of traditional authority; *Mogale v Maakane* 2010 JDR 1091 (NWM) – constitution of traditional authority; *Bengwenyama-ya-Maswasi Community and others v Genorah Resources (Pty) Ltd and Others* 2014 4 All SA 673 (SCA) – standing of traditional community to claim prospecting rights; *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* 2015 3 BCLR 268 (CC) – contestation of kingship for purposes of Traditional Leadership and Governance Framework Act; *Bafokeng Private Land Buyers Association v Royal Bafokeng Nation* 2016 JDR 1108 (NWM) – consideration of the powers of the traditional authority to bring court application.

⁶⁷ Kapelus P “Mining, Corporate Social Responsibility and the ‘Community’: The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi” 2002 (39) *Journal of Business Ethics* & Mbatha P & Wynberg R “Mining and the Myth of Benefits in South African Rural Coastal Communities” in R Wynberg and M Hauck (eds) *Sharing the Benefits from the Coast* (2014) show that mining companies approach the implementation of benefit sharing in very pragmatic ways – it is often easier to deal with the clearly defined traditional authorities in mining areas as opposed to other community structures that are less clearly acknowledged by the law. The different definitions of “community” for the purposes of development programmes in mining areas are considered in section 2 of Chapter 4.

⁶⁸ For an example of the type of challenges caused, the benefit-sharing mechanism of Richards Bay Minerals (“RBM”) should be considered. RBM is a subsidiary of Rio Tinto. RBM operates in the jurisdiction of the Mbonambi traditional authority. Accordingly, the Mbonambi was identified to benefit in terms of RBM’s development programmes. The Mbonambi, however, occupies only a small part of the Imfolozi sub-district - 16 other traditional authorities are also staying in the sub-district. RBM’s development programme generated significant benefits for the Mbonambi, such as infrastructure for education and health care and employment opportunities. RBM also created vehicles that provided the community with the opportunity to hold equity in RBM. Despite these positive outcomes, the benefits received by Mbonambi created tension between Mbonambi and the other traditional authorities who maintained that they were also entitled to receive benefits - Kapelus (2002) *JBE* 289 and 290. Furthermore, the Mbonambi traditional authority was not regarded as being representative of the community at large. Scepticism about the direct relationship between RBM and the

2.5. Observations Regarding Reporting on Mining Communities

The following observations are made regarding the reporting on mining communities, which observations describe the contentious context to which the legislative system under consideration in this thesis, applies. The thesis makes these observations, noting that the reports considered in section 2.4 above must be approached with caution. Each issuing institution has a different agenda or mandate in undertaking the necessary research and distributing the report.⁶⁹

Two main observations are made in this regard. The first observation pertains to the meaning of “community”. Except in the instance of traditional communities, very little is said either about who exactly the communities under discussion are or how they experience poverty and inequality.⁷⁰ Scant attention is paid to comparisons made with other rural communities or areas exposed to the effects of other types of industry.⁷¹ The socio-economic conditions in mining

traditional authority caused further friction - Mbatha & Wynberg (2014) 84. Community members also contested the transfer of benefits to the traditional authority directly, since community members had to be affiliated with the traditional authority to benefit -Mbatha & Wynberg (2014) 86. See in general Mbatha & Wynberg (2014) & Kapelus (2002) *JBE*.

⁶⁹ At a global level, the Federation of Action Aid International focuses on social justice, gender equality and poverty eradication. As part of this global movement, Action Aid South Africa specifically works with poor communities to educate these communities on their rights. The organisation is depended on donations from the public. See Action Aid Baseline Report (2018). Further information on funding available at <<https://south-africa.actionaid.org/>> accessed on 20 February 2020. The South African Institute of Race Relations (“IRR”) promotes, amongst other things, reconciliation and social justice, economic empowerment, access to property rights, healthcare and education. The organisation protects the principles of liberalism to address poverty. Ideals such as a market economy, private enterprise, freedom of speech, individual liberty, property rights and the rule of law are therefore pursued. The institute receives funding from, amongst others, the Anglo-American Chairman’s Fund, the First Rand Foundation and the Oppenheimer Memorial Trust. Information on funding available at <<https://irr.org.za/>>, <<https://irr.org.za/about-us/about-us>> and <<https://irr.org.za/about-us/sponsors-and-donors>> accessed on 20 February 2020. The Bench Marks Foundation measures the corporate sector’s promotion of corporate social responsibility and good governance. The institution is openly critical of the mining industry – IRR (2014) 2. For more information, see <<http://www.bench-marks.org.za/>> accessed on 20 February 2020. The Centre of Applied Legal Studies (“CALs”) aims to link academia and social justice and focuses on the following areas: basic services, business and human rights, environmental justice, gender and the rule of law. CALs receives funding from the Wits School of Law and the Open Society Human Rights Initiative. For more information see <<https://www.wits.ac.za/cals/about-us/donors--funding/>> accessed on 20 February 2020. The South African Human Rights Commission is established in terms of the Human Rights Commission Act 54 of 1994 as provided for in the (Interim) Constitution of the Republic of South Africa, Act 200 of 1993 and the mandate of the commission is set out in the Constitution of the Republic of South Africa, 1996 in section 184 as the promotion and protection of human rights.

⁷⁰ The problems identified in the reports show a distinction between traditional communities settled on the land where mining takes place or on land near the mining operations, and communities created, it is deduced, because of labour migration. These communities do not exist around shared custom or interests in land, as in the case of traditional communities. These communities are formed by migrants from rural areas in Southern Africa flocking to mining areas for work. The migrant workers typically return to their homes in rural areas for short periods, but they remain dependent on infrastructure and housing in mining areas. IRR (2014) 28,29. Labour migration and its role in mining is discussed in more detail in section 2.3 and section 3.2.

⁷¹ Some comparisons are done – see IRR (2014) and *Politics Web* (2018).

areas are described primarily in terms of how mining companies and government deliver or fail to deliver, on the promises made to mining communities.⁷²

Nonetheless, the description of the socio-economic challenges faced by residents of mining areas in South Africa, as provided for in these reports, raises two issues pertinent to the research question of this thesis. First, the institutions reporting on these challenges depict mine-affected communities in one of two ways. The one depiction focuses on land-owning and traditional communities. In this instance, the effects described relate to the dispossession of land, relocation of people and interference with subsistence-type livelihoods.⁷³ The other depiction of the challenges experienced, such as housing, infrastructure and wages, relate to the effects of practices in the mining industry for labourers, specifically migrant labourers.⁷⁴ Community in this instance lacks the cohesiveness represented by a land-owning or traditional community.⁷⁵

The definition of “mine community” in the context of mine community development is defined in legislation in broad terms to include land-owning communities, labourers and labour-sending areas, and other groups of persons affected by mining.⁷⁶ Poverty-relieving mechanisms mandated by the legislative system, such as mine community development and the provision of basic infrastructure, go beyond land-owning communities and labourers.⁷⁷ Thus, this thesis does not address issues experienced specifically by land-owning communities and mineworkers. However, as shown below, historic oppressive and discriminatory practices pertaining to the land and labour of black persons in South Africa provided the perfect context for the mining industry to flourish after the discovery of mineral resources.⁷⁸ The implementation of these practices also led to the creation of mining communities.⁷⁹

The second observation made here is that all the reports consulted and other media reports on mining communities are drafted on the assumption that persons living in mining areas are

⁷² Many of the reports recommend new or revised legislation to deal with the challenges faced by mining communities, which legislation should provide for improved mechanisms to facilitate community agency and consolidation. Measures are also suggested to improve implementation of the legislation. See for instance Action Aid Baseline Report (2018) 88; SAHRC (2018).

⁷³ See SAHRC (2008); Action Aid (2008) & SAHRC (2018) in general.

⁷⁴ IRR (2014) 21-24; *Politics Web* (2018) 15, 17, 23.

⁷⁵ See section 2.3 of Chapter 4 where this dichotomy is expanded upon.

⁷⁶ The 2018 Mining Charter defines “mine community” under para 2.5 - Mine Community Development, as “communities where mining takes place, major labour sending areas, adjacent communities within a local municipality, metropolitan municipality and/or district municipality”. The definitions of “community” and “mine community” are analysed in section 2 of Chapter 4.

⁷⁷ See footnote 76 above.

⁷⁸ See section 3 of this Chapter.

⁷⁹ See section 3 of this Chapter where this argument is made.

poor.⁸⁰ It is not denied that persons living in mining areas are deprived of certain basic amenities. As claimed in one report, it is difficult to comment on the socio-economic conditions of mineworkers because of the varying conditions to which mineworkers are exposed.⁸¹ However, the rhetoric employed must be scrutinised, since it influences how both the problem and its solutions are crafted.⁸² Poverty rhetoric is accompanied by development rhetoric and neither of these notions is ideologically neutral.⁸³ As is explained in the remainder of the thesis, because of the underlying ideology promoted, development rhetoric may have unintended consequences for legal reform with the aim of addressing inequalities in mining areas.⁸⁴

The question arises how the challenges faced in mining areas differ from the challenges experienced by other rural and marginalised communities in South Africa.⁸⁵ Poverty and inequality are major problems in South Africa. Despite the transformative efforts that have been put in place after the abolition of apartheid, the majority of persons suffering from poverty and inequality are previously disadvantaged and black.⁸⁶ High rates of unemployment in rural areas result in labour migration and urbanisation.⁸⁷ The erection of shack settlements, therefore, is a common sight near industry and urban areas.⁸⁸ Poor service delivery and a lack of infrastructure are obstacles for many rural communities in South Africa.⁸⁹ None of these challenges is unique to mining areas.

However, the mining industry's complicity in the enforcement of oppressive and racist practices during colonial and apartheid times⁹⁰ may justify the focus on the challenges faced in mining communities. In the following section, the historical practices are considered as they were implemented since the arrival in South Africa of the first Europeans. The ideology that informed the practices is set out to show the progression in thinking that eventually led to the creation of current policies dealing with communities previously oppressed.⁹¹ The nature of the oppressive practices is described in terms of how it interfered with black people's relations with other black people, the land they occupied and their livelihoods, ultimately forcing them

⁸⁰ Action Aid (2008) 9, 39; IRR (2014) 8; CALS (2016) 6, 8 & SAHRC (2018) 1.

⁸¹ IRR (2014) 23. The report refers to the differences in the single-sex units and family units made available to mineworkers working for Lonmin.

⁸² See Chapter 6 of this thesis.

⁸³ See in general Gordon & Sylvester (2004) and Chapter 6.

⁸⁴ See Chapters 5 and 6 of this thesis.

⁸⁵ IRR (2014) 25-29; *Politics Web* (2018) 17.

⁸⁶ In 2015, nine out of every ten poor persons were black. Stats SA (2017).

⁸⁷ IRR (2014) 29.

⁸⁸ IRR (2014) 25.

⁸⁹ IRR (2014) 25.

⁹⁰ See section 3.2 of this chapter.

⁹¹ See Chapter 3 of this thesis.

to offer their labour to the European settlers and their descendants. Furthermore, it is considered how these practices caused the creation of communities of labourers, and eventually, mining communities.

3. Historical Context: The Creation of Mining Communities

An image of the present-day mining community has been provided. This section 3, considers the displacement of black people caused by the European pursuit of commercial interests in Southern Africa, which displacement, it is argued, culminated in the creation of mining communities.⁹² The pursuit manifested initially in the Cape of Good Hope or Cape Colony,⁹³ but after the discovery of mineral resources, also in the northern parts of what is today known as South Africa.⁹⁴

The effects of the pursuit of European commercial interests on black people are discussed in this section by focusing on three themes: ideology, labour and land and the effects for black communities. The three themes are also visible in the present-day factual context set out in section 2 of this Chapter. The themes are used to establish continuity between the era before and after the discovery of mineral resources. Oppressive labour practices and land dispossession were not new occurrences at that stage of South Africa's history. These practices were a continuation of patterns of exploitation and attitudes of racial and cultural superiority, which manifested first during the colonisation of the Cape and subsequently in the northern parts of the country.⁹⁵

Underlying the policies that provided for land dispossession and labour control was the objective to impose European values on black people, which imposition, together with

⁹² "European" and "Western" are used to denote a value system or outlook, which originated in Europe, and was implanted by colonial authorities in Southern Africa. Certain characteristics of this system or outlook are highlighted in this section, not to define the system or outlook in absolute terms, but to show the contrasts with systems in place in Southern Africa at that stage. It is also emphasised that this system or outlook was enforced upon indigenous black people. In Chapter 5, a theoretical analysis of "European" and "Western" is provided to the extent that the concepts are associated with the development idea.

⁹³ The Dutch settlers referred to the Cape of Good Hope, but after British occupation and colonialisation, the area was referred to as the Cape Colony. Giliomee H *Die Afrikaners* (2004) 1.

⁹⁴ Terreblanche S *A History of Inequality in South Africa* (2002) 15 and chapter 8: 242- 244. See the discussion under section 3.2 below.

⁹⁵ Terreblanche (2002) 251-256, 298-301; Ngcukaitobi T *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (2018) 47. Giliomee (2004) 4, 5, 28 argues that the racial distinction was emphasised by the society structure in the Cape of Good Hope during Dutch and VOC occupation. Distinction was made between the officials of the VOC, the free burghers, formerly Dutch soldiers serving in the Cape of Good Hope and imported slaves. Local indigenous peoples such as the Khoi-Khoi were not regarded as forming part of society (see discussion below on the VOC, free burghers, slavery and indigenous peoples). "Race" was initially used to describe different nations and only became a characteristic on which differentiation was based by the end of the nineteenth century.

oppressive labour and land control practices, caused the breakdown of traditional communal structures of black people. By exposing these practices, it is explained how these unjust practices under colonial and apartheid rule caused the creation of mining communities.⁹⁶

The argument in this thesis is that the use of empowerment and development rhetoric⁹⁷ in the legislation and policies aimed at alleviating poverty in mining communities continues to impose European or Western values.⁹⁸ This argument is anticipated by focusing on ideology in the following sections.

3.1. Ideology: From Mercantilism, Feudalism and Patriarchy to Racial Capitalism

Initially serving as provision station, the Cape of Good Hope⁹⁹ was not a colony of the Netherlands, but rather a commercial asset of a multinational company: the Vereenigde Oost-Indische Compagnie (“VOC”).¹⁰⁰ The VOC operated in the Cape from 1652¹⁰¹ and promoted mercantilism, the economic system that was prevalent in Europe between 1500-1880.¹⁰² During

⁹⁶ It falls outside the scope of this thesis to provide a detailed consideration of the effect of European value systems on black people in Southern Africa. The discussion is limited to the effects that can be traced in the creation of mining communities.

⁹⁷ “Development rhetoric” in this context refers to rhetoric promoting the idea of development, and promoted by institutions such as the World Bank, to address poverty and inequality. The concept is discussed in section 2 of Chapter 5.

⁹⁸ See footnote 1 above for a list of the legislation analysed in this thesis. The relevant legislative provisions are discussed in section 3 of Chapter 3.

⁹⁹ The Cape of Good Hope can roughly be described as the Cape Peninsula and later became known as Cape Town. Giliomee (2004) 1.

¹⁰⁰ Terreblanche (2002) 153, 155, 173, 174 endnote 3; Giliomee (2004) 1-5; Irwin DA “Mercantilism as Strategic Trade Policy: The Anglo-Dutch Rivalry for the East India Trade” (1991) *Journal of Political Economy* 1300. The VOC was the product of the unification of several Dutch commercial endeavours, which unification took place in 1602 with the help and finance of the States General – the Dutch governing body. It acquired exclusive rights to trade in Asia. With significant government backing, it dominated trade during this time. As one of the world’s first multinational companies with, as Terreblanche describes it, its “tentacles in international trade, piracy, slave trade, and colonialism”, the VOC was also one of the most profitable companies of its time. Giliomee compares the influence of the VOC with that of Henry Ford and Bill Gates in the twentieth century.

¹⁰¹ Jan van Riebeeck established the refreshment station at the Cape on behalf of the VOC in 1652. The Cape was governed by the VOC until its demise around 1795. The VOC did not have the intention to create a colony. Terreblanche (2002) 154; Giliomee (2004) 1, 53; Fourie J, Jansen A & Siebrits K “Public Finances under Private Company Rule: The Dutch Cape Colony (1652-1795)” *New Contree* (2013) 55; Schutte G “Company and Colonists at the Cape, 1652-1795” in R Elphick and H Giliomee (eds) *The Shaping of South African Society* (1989) 288.

¹⁰² The system was based on policies favourable to the country's balance of trade (the difference in a country’s imports and exports) by ensuring the inflow of gold and prioritising the development of its manufacturing and agriculture industries. Mercantile theory held that colonies serve the colonist (mostly European) country by creating economic benefit for such a country by providing raw materials. It is a form of economic nationalism that avoids competition for domestic markets. The pursuit of control over foreign trade routes is also an important element of mercantilism. Commercial policy shaped by mercantilist thought allowed for significant government intervention in international trade. Smith A *An Inquiry into the Nature and Causes of the Wealth of the Nations* (1776) 397; LaHaye L “Mercantilism” in Palgrave Macmillan (eds) *The New Palgrave Dictionary of Economics* (2008); Irwin (1991) *Journal of Political Economy* 1296.

its occupation of the Cape, the VOC also implemented practices based on feudalism and patriarchy.¹⁰³ The discussion of the practices implemented under VOC rule under section 3.2 illustrates how these ideologies manifested in VOC practices.

The VOC officially ceded the Cape to the British in 1814.¹⁰⁴ British rule in South Africa coincided with the discovery of gold in South Africa.¹⁰⁵ With its sights set on leading the first industrial revolution, Britain replaced Dutch mercantilism with capitalism.¹⁰⁶

These new notions caused significant disruption in the lives of black people, the Khoisan¹⁰⁷ and the Xhosas,¹⁰⁸ still organised communally at that time. Suddenly they were confronted with the idea of private property and the promotion of individual self-interest.¹⁰⁹ For a group of free citizens called the Trekboere, farming on the frontier areas of the Cape colony,¹¹⁰ the introduction of capitalism was also not necessarily favourable. The patriarchal nature of the societal structures of the Trekboere regarded the father-headed family unit as the locus of

¹⁰³ Terreblanche (2002) 160, 161, 225. Feudalism implies that land owned by nobility and royalty can be occupied by a person and its family in exchange for its labour. Feudalism in Western Europe entailed a linkage between land holding and the rights of government. Goody J “Feudalism in Africa?” *Journal of African History* (1963) 3. A patriarchal system is based on government by fathers, be it the government of a family, a church or a society. Blackburn S *The Oxford Dictionary of Philosophy* (2005) 270.

¹⁰⁴ Terreblanche (2002) 179; Giliomee (2002) 53. In 1795 the Netherlands became a satellite for France during the Napoleonic wars and Britain took over the Cape to safeguard its trade with India. The Dutch were again in control of the Cape during the Batavian period (1803-1806) but the transitional period ended in 1814.

¹⁰⁵ Terreblanche (2002) 179, 239. The period from 1800-1890 is associated with British colonialism and the period from 1890-1948 coincides with British imperialism. Gold was discovered in 1886.

¹⁰⁶ Terreblanche (2002) 179 & 180. Capitalism in this sense entails promoting economic liberalism and self-regulating markets to enable the autonomous individual to own and enforce property and contractual rights. The idea of capitalism is based on the argument of Smith (1776) that a human being will be prosperous if it is allowed to promote its self-interest and to produce goods and take part in trade. Markets should be opened to competition and government regulation should be limited. The basis upon which the free market operates is what Smith refers to as the invisible hand. Terreblanche (2002) 179 & 180; Giliomee (2004) 63.

¹⁰⁷ Terreblanche (2002) 181. “Khoisan” or “Khoesan” refers to two groups of indigenous peoples resided mainly in the Cape colony during this time: the hunter-gatherer San to which the VOC referred as “the Bushmen” and the nomadic, pastoral Khoi/Khoikhoi/Khoe identified by the VOC as the “Hottentots”. Upon arrival by the Europeans, many San peoples were acting as servants to the Khoi. Even though the two groups were not ethnically entirely distinct, the Europeans distinguished between the two groups based on their socioeconomic systems. Fourie J & Green E “The Missing People: Accounting for the Productivity of Indigenous Populations in Cape Colonial History” *Journal of African History* (2015) 198, 199.

¹⁰⁸ Terreblanche (2002) 191; Giliomee (2004) 49. During the eighteenth century, when the Trekboere moved to the frontier areas of the Cape Colony, the Eastern Cape, they encountered the indigenous Xhosas.

¹⁰⁹ Terreblanche (2002) 180. See Ngcukaitobi (2018) 11-22 for a description of how the British introduced the Xhosas to the “civilised” ideas of the British. For more on the development of the ownership concept in colonial South Africa and the Eurocentric principles on which the concept is based see Van der Walt AJ “Gedagtes oor die Herkoms en Ontwikkeling van die Suid-Afrikaanse Eiendomsbegrip (Vervolg)” *De Jure* (1988) 306-325 and Van der Walt AJ “The South African Law of Ownership: A Historical and Political Perspective” *De Jure* (1992) 446-457.

¹¹⁰ Terreblanche (2002) 156, 157 & 165; Giliomee (2004) 7, 21 & 59. European contract workers in the Cape became free citizens (free burghers) of the Cape. A group of free citizens were later on afforded the opportunity to farm on the frontier areas of the Cape Colony and became known as the Trekboere.

control and authority.¹¹¹ Capitalist policies transferred such authority to the industrialist (or the company).¹¹² Labour and land could now only be acquired on the free market.¹¹³ The practices implemented by the British during this time are discussed in section 3.2.

The dissonance of the Trekboere with the political and ideological beliefs of the British resulted in the Great Trek during which 15 000 Trekboere left the Eastern Cape behind in pursuit of independence from the British.¹¹⁴ It is however also argued that the Great Trek was mainly motivated by economic reasons.¹¹⁵ The significance hereof is that by recreating the feudal and patriarchal systems introduced by the VOC in the northern parts of the country, the Great Trek also represented the pursuit of European commercial interests.¹¹⁶ Even though the Voortrekkers, as the Trekboere became known, regarded themselves as Afrikaners,¹¹⁷ their value system originated in the European imagination.¹¹⁸

European imagination, however, did not remain static. British humanitarian values that arose in the second half of the 18th century¹¹⁹ found their way into the Cape colony through the

¹¹¹ See footnote 103 above.

¹¹² Terreblanche (2002) 180; Giliomee (2004) 63-66.

¹¹³ Terreblanche (2002) 180, 181; Giliomee (2004) 63-74. Resources, such as land and labour, had to be obtained on the free market, and could no longer be obtained by means of dispossession. Slavery and other oppressive labour practices are discussed in more detail under section 3.2 below.

¹¹⁴ Terreblanche (2002) 219, 220; Giliomee (2004) 108.

¹¹⁵ A shortage of land, labour and security for the Trekboere is cited at the reasons behind the Great Trek, along with their perceived political marginalisation. Terreblanche (2002) 220; Giliomee (2004) 108.

¹¹⁶ Terreblanche (2002) 208, 219 & 225; Giliomee (2004) 136. In terms of the Sand River Convention, signed in 1852, the British afforded the Voortrekkers the right to self-government. The Voortrekkers, as the Trekboere became known, established the independent Boer Republics: The Zuid Afrikaansche Republiek ("ZAR") was established in 1852 and the Orange Freestate in 1854. The Sand River Convention prohibited the Voortrekkers from taking part in slave raiding or slavery. However, according to the British humanitarian movement, slave raiding of African children and "native apprenticeships" continued once the Voortrekkers were outside of the British controlled areas. This entailed the employment of children subject to registration and certain conditions, such as providing food, shelter and clothing to the child as well as training.

¹¹⁷ Giliomee (2004) 19, 20; Breytenbach B "The Afrikaner as African" in B Breytenbach *Notes from the Middle World* (2009) 74 & 75. In 1707 Hendrik Bibault appeared before court after refusing to obey the authority of the VOC in Stellenbosch. In protest against the VOC, Bibault uttered the cry: "Ik ben een Africaander!" (I am an Afrikaner!) thereby confirming his status as coming from Africa, and no longer from the European continent. This is the first recorded instance of someone referring to itself as an Afrikaner.

¹¹⁸ Terreblanche (2002) 219-221; Giliomee (2004) 26, 28, 32-35, 113, 121. The Trekboere on the Eastern Frontiers were isolated geographically and ideologically from the colonial authorities and other free burghers in the Cape. To survive in these lands, they took on some practices of the local Khoisan. However, their religion, Christianity, remained a cornerstone of their outlook and interactions with others. At that point in history, being a Christian implied being white and of European descent. For the Trekboere or Voortrekkers, the apparent non-racial approach of the British conflicted with their beliefs as Christians. Upon embarking on the Great Trek, the Voortrekkers prepared a manifesto, which, amongst other things, emphasised their desire to reinstate the paternalistic relationship between masters and servants. Even though the manifesto was not in favour of the enslavement of black persons, the Voortrekkers intended to make use of black labour on their farms.

¹¹⁹ Terreblanche (2002) 169-173; Giliomee (2004) 26-28. Humanitarianism, in this context refers to a concern with the welfare of humankind. At its most elementary level, humanitarianism acknowledges human beings' innate ability to sympathise with others. When it first appeared in the 1800s, humanitarianism was driven by

involvement of the British evangelical missionaries.¹²⁰ The missionaries promoted the capitalist principle of a free labour market as a humanitarian ideal that would serve in transforming black people into a “Christian civilisation”.¹²¹ Underlying the involvement of the missionaries was the pursuit of progress: Rational thought, science and the free market system became a secular religion to which “progressives” were to comply.¹²² As is shown in section 3.3 below, this pursuit of progress disrupted local livelihoods with detrimental consequences.¹²³

The discovery of diamonds in the Northern Cape in 1867 and gold at the Witwatersrand in 1886 put the inhabitants and the economy of South Africa on a trajectory that would have effects that are still visible today.¹²⁴ Now, a steady provision of labour for the mining industry had to be guaranteed while also ensuring political dominance by both the British and the Afrikaners.¹²⁵ This was done by implementing segregation based on race and the notion of separate development.¹²⁶

Access to cheap and migrant labour was achieved through the implementation of the Glen Grey Act of 1894 and the Native Land Act of 1913.¹²⁷ These pieces of legislation demarcated specific

values that resembled Christian values such as love, compassion and charity, and was therefore promoted by religious institutions. However, secular motives such as charity and philanthropy also underlie humanitarianism. By the seventeenth century, Britain was a global leader in philanthropy that focused on indigenous peoples. Advances in technology and global travel at the time brought persons living on different continents in contact with one another. The humanitarian missions therefore assisted those in need outside of their own borders and cultivated governance structures to enhance the welfare of all humanity. The notion that all humans possess over certain natural, inalienable rights, countering the exclusion of some from society, became prominent. British humanitarianism also played a significant role in the abolishment of slavery, in South Africa and elsewhere. Pavlakis D “The Development of British Overseas Humanitarianism and the Congo Reform Campaign” *Journal of Colonialism and Colonial History* (2010); Barnett M *Empire of Humanity: A History of Humanitarianism* (2011) 10 & 51.

¹²⁰ Terreblanche (2002) 186 & 187; Giliomee (2004) 63 & 64. The Trekboere on the frontiers were isolated from these developments and still maintained the position that persons of European descent were superior to locals.

¹²¹ Terreblanche (2002) 186 & 187; Giliomee (2004) 63 & 64. The arrival in Cape Town of British missionary, John Philip, in 1819, had a big influence on the anti-slavery movement. Philip was deeply influenced by Adam Smith’s work, *Wealth of the Nations* (1776) and advocated for the liberation of Khoikhoi slaves and the institution of the free market in the Cape Colony. By liberating the slaves, they could voluntarily offer their labour on the free market, thereby also addressing farmers’ demand for labour.

¹²² Giliomee (2004) 65. During this period, the notion of the autonomous, rational individual able to make moral judgments, became prominent - Barnett (2011) 51.

¹²³ The missionaries, however, successfully contributed to the abolishment of slavery in the Cape Colony. Ordinance 50 of 1828, a product of the missionary work done by John Philip and Andries Stockenström, finally liberated the Khoisan from slavery practices in the Cape Colony. Giliomee (2004) 66.

¹²⁴ Giliomee (2004) 194; Terreblanche (2002) 15, 241, 242. See in general Davenport J *Digging Deep: A History of Mining in South Africa* (2013); Crush J, Jeeves A and Yudelman D *South Africa’s Labour Empire: A History of Black Migrancy to the Gold Mines* (1991).

¹²⁵ Giliomee (2004) 243. The measures created also ensured enough labour for the agricultural sector, the other booming industry at the time.

¹²⁶ Giliomee (2004) 242-245; Terreblanche (2002) 11.

¹²⁷ Terreblanche (2002) 11, 12, 68, 251.

areas (called “native reserves”) where black persons (called “natives” at this time) were to live, and created mechanisms forcing Africans into the employment of industries, such as the gold mining industry.¹²⁸ The Glen Grey Act applied only to the Glen Grey district but later served as a blueprint for the distribution of land between the different races.¹²⁹ Not only was the Glen Grey Act aimed at ensuring the migration of labour, but it also set out to limit the franchise of black persons to the reserves, thereby ensuring the resilience of the white vote.¹³⁰ The native reserves were divided into pieces, each to be allocated to black families. Communal land tenure was replaced with individual land tenure.¹³¹ The notion of “white areas” and “black areas” came into being. A labour tax was furthermore created, compelling Xhosa men to offer their labour to the mining industry.¹³² Whereas different motivations were offered for racial segregation, the underlying sentiment was clear: the British government and Afrikaner leaders of the time regarded black persons as inferior.¹³³

Before the outbreak of the South African War, the British promised black people strengthened political rights.¹³⁴ These promises were seemingly forgotten after the British won the war:¹³⁵ South Africa was to become a “white man’s land”.¹³⁶ By 1907, segregation and the separate

¹²⁸ Terreblanche (2002) 12, 254, 260-264; Giliomee (2004) 243; Ntsebeza L “The more things change, the more they remain the same” in FT Hendricks, L Ntsebeza L and K Helliker (eds) *The Promise of Land: Undoing a Century of Dispossession in South Africa* (2013) 55. See in general Crush et al (1991).

¹²⁹ Giliomee (2004) 243-245; 253; Terreblanche (2002) 258, 259. The Glen Grey district formed part of the Thembuland traditional kingdom and was situated in the area east of Queenstown. It later became a part of Transkei, a homeland/Bantustan created in terms of the Bantustan Authorities Act 68 of 1951.

¹³⁰ Giliomee (2004) 243-245.

¹³¹ Giliomee (2004) 244.

¹³² Giliomee (2004) 244. The tax also served in compelling Xhosa men to offer their labour to the agricultural industry.

¹³³ Giliomee (2004) 243-245.

¹³⁴ Giliomee (2004) 203, 231. The war took place between 1899 and 1902. Giliomee is cautious to claim that the discovery of gold in the ZAR was the main reason for the outbreak of the war, but does admit that it certainly was a factor. Some argue that the desire of the British to obtain greater control over the burgeoning industry motivated their war efforts; others say that mining companies had more faith in a British government to regulate their industry than in the ZAR government, therefore supporting the British in their war efforts. Terreblanche (2002) 241-244 notes that Britain was suffering a “long depression” at the time. Since the gold standard was followed globally, promoting gold production in South Africa would have been to Britain’s advantage. The President of the ZAR, Paul Kruger, was unsympathetic towards the gold mines’ need for labour, causing tension between Afrikaners and the British. Terreblanche however notes that the causes of the Anglo-Boer war should be viewed in the global capitalist framework at the time: Britain, as the world power at the time in a descend, wished to promote its capitalist endeavours in an environment where the feudalist practices of both the Afrikaners and the Africans resisted the forces of the capitalist market, consequently leading to friction and eventually, war. Atmore A & Marks S “The Imperial Factor in South Africa in the Nineteenth Century: Towards a Reassessment” (1974) 3 *Journal of Imperial and Commonwealth History*.

¹³⁵ Giliomee (2004) 216, 217, 231. Before the war it was planned to consider the demands of black people for franchise once the war was concluded. The war was ended in terms of the Treaty of Vereeniging, which determined that South Africa was to form part of the United Kingdom. The Treaty made no mention of voting rights for black people and land was restored to whites.

¹³⁶ Giliomee (2004) 249, 251.

development¹³⁷ of black people had become a favoured policy¹³⁸ to ensure that the labour and other demands of big industry, such as mining companies, were met.¹³⁹ The government's response to the 1907 wage protests by white, English speaking miners working on the Witwatersrand goldfields, signified the newly formed relationship between an Afrikaner government and British mine owners.¹⁴⁰ This "alliance of gold and maize"¹⁴¹ represented a coalition between the Afrikaner and English-speaking elite, which would lead to the unification of the four British colonies to create the Union of South Africa, based on the maintenance of white political power.¹⁴²

Following the blueprint created by the Glen Grey Act, the Native (Black) Land Act was introduced to set aside land for black people in 1913.¹⁴³ Black land ownership, the leasing of land and sharecropping by black persons were limited to these areas.¹⁴⁴ The native reserves initially served the purpose of creating a class of black farmers.¹⁴⁵ On the assumption that black labourers could still perform subsistence farming, the payment of low wages by the mining industry was justified.¹⁴⁶ Subsistence farming, however, was put under strain because of the limited amount of land and infrastructure made available to black people.¹⁴⁷

Racial segregation and separate development set in motion by the Glen Grey Act and the Native (Black) Land Act were well maintained until officially incorporated into apartheid policy in 1948.¹⁴⁸ The native reserves were transformed into vigorously regulated homelands that

¹³⁷ The official implementation of the Separate Development Policy only took place after 1948, when apartheid was officially implemented, but racial segregation at the stage described here also entailed the principles of separate development – that is that different ethnic nations should live and development in their own designated areas. Legassick M "Legislation, Ideology and Economy in post-1948 South Africa" 1974 (1) *Journal of Southern African Studies* 5.

¹³⁸ Giliomee (2004) 259.

¹³⁹ Giliomee (2004) 253.

¹⁴⁰ Terreblanche (2002) 246, 247, referring to Yudelman D *The Emergence of Modern South Africa: State, Capital and the Incorporation of Organised Labour on the South African Gold Fields* (1983) 70-76. General Jan Smuts in his capacity as a minister in the government, obtained the assistance of the British imperial troops present in Transvaal after the Anglo Boer War, to resolve protests. See also Giliomee (2004) 280-281.

¹⁴¹ The term "alliance of gold and maize" was borrowed from the German phrase "alliance of iron and rye". Yudelman (1983) 70-76; Terreblanche (2002) 246, 247.

¹⁴² Terreblanche (2002) 247.

¹⁴³ Act 27 of 1913. 13% of the territory was allocated to black people.

¹⁴⁴ Giliomee (2004) 261.

¹⁴⁵ Hendricks FT, Ntsebeza L and Helliker K "Colonial Pasts and Democratic Futures in South Africa" in FT Hendricks, L Ntsebeza and K Helliker (eds) *The Promise of Land: Undoing a Century of Dispossession in South Africa* (2013) 347.

¹⁴⁶ Hendricks et al (2013) 347.

¹⁴⁷ Hendricks et al (2013) 347.

¹⁴⁸ Legassick (1974) 5.

provided the labour reserves required by the burgeoning mining industry, as set out in section 3.2 below.¹⁴⁹

The gold mining industry directed the initial phase of capital production in South Africa.¹⁵⁰ The dominance of mining in the South African economy decreased somewhat during the forty years of apartheid, but as part of the South African corporate sector, the industry operated in the well-protected environment of the capitalist West.¹⁵¹ The protected position of the mining company stands in stark contrast with the oppressed position of black South Africans during this time, who were deprived of basic rights that should have been protected in a capitalist system.¹⁵²

3.2. The Demand for Labour and Land

To further its commercial interests while administering the Cape of Good Hope, the VOC required land and labour.¹⁵³ When these requirements could not be met without resistance from the indigenous, black people, plundering and exploitation followed.¹⁵⁴ Due to the unwillingness of the indigenous Khoikhoi people to give up their land, labour and cattle, these resources were acquired employing military offensives.¹⁵⁵ Such offensives broke down the socio-economic and political structures of the Khoikhoi.¹⁵⁶

The labour requirements of the VOC were furthermore met by importing slaves.¹⁵⁷ Slavery was crucial in the development of the Cape economy; it created and maintained an elite class of

¹⁴⁹ Native (Urban Areas) Act 21 of 1923; Native Affairs Act of 1920; Native Administration Act of 1927. The Native (Urban Areas) Act determined that a resident of the homelands had to obtain permission from white authorities if it wished to work in the “white” cities.

¹⁵⁰ This first phase is regarded as the period after the South African war ended and apartheid was officially implemented in 1948. Legassick (1974) 5.

¹⁵¹ Terreblanche (2002) 51. Despite the decline in the contribution of the mining industry to the Gross Domestic Product (“GDP”) of the country over the last two decades, it remains important to South Africa’s economy. The mining industry until recently contributed 8% to South Africa’s GDP and employed 5% of the formal workforce - Stats SA *Gross Domestic Product, 4th Quarter 2015* (2016); Stats SA *Statistical Release P0277: Quarterly Employment Statistics – December 2015* (2016). The contribution of the industry to the GDP, however, has decreased even more during 2019. See “South Africa GDP From Mining” *Trading Economics* available at <<https://tradingeconomics.com/south-africa/gdp-from-mining>> accessed on 13 January 2020 & Stats SA “Key Findings: P0441 – Gross Domestic Product (GDP), 3rd Quarter 2019” available at <http://www.statssa.gov.za/?page_id=1856&PPN=P0441&SCH=7648> accessed on 13 January 2020.

¹⁵² Terreblanche (2002) 51.

¹⁵³ Terreblanche (2002) 154 & 155. The VOC also required cattle.

¹⁵⁴ Terreblanche (2002) 154 & 155. The VOC had the political support of the Dutch government in its endeavours to obtain the necessary resources it required.

¹⁵⁵ Terreblanche (2002) 164, 165. See footnote 107 above.

¹⁵⁶ Terreblanche (2002) 164.

¹⁵⁷ Terreblanche (2002) 156-158. Between 1652 and 1808 slaves were imported from Angola, the Indonesian archipelago, India, Madagascar and Mozambique.

landowners and merchants for nearly two centuries.¹⁵⁸ Slavery divided society in the Cape according to race and class.¹⁵⁹ The maintenance of the slavery system required violent tactics and authoritarian structures to manage and control slaves.¹⁶⁰ The stage was set for the skewed relationship between the black labourer and European employer.

Initially, it was not the policy of the VOC to enslave the Khoisan in the Cape and similarly, the Trekboere did not enslave the Khoikhoi in the frontier areas.¹⁶¹ A small group of Khoikhoi offered their land, cattle and knowledge to the Trekboere, allowing the Trekboere to become self-sufficient in unfamiliar territory.¹⁶² The initially amicable relationship between the Trekboere and the Khoikhoi, however, turned sour.¹⁶³ The Trekboere required less of the Khoikhoi's knowledge and more of their land, cattle and accordingly more labour.¹⁶⁴ Khoikhoi children provided labour in terms of the indenture system and suffered worse than slaves in the Cape, which were afforded some measure of legal protection due to their commercial value.¹⁶⁵

The Trekboere were farmers seeking land, livestock and labour, not companies in pursuit of profit. The exploitative means employed by the Trekboere to obtain these necessities, however, were initially created by a multinational company (the VOC) in pursuit of the protection of its business interests. These practices distinguished between black communities and the European settler, thereby initiating the stratification of what would become South African society.¹⁶⁶ By conquering the frontiers, the Trekboere furthered these patterns in the eastern parts of the country and, as the Voortrekkers, later replicated the patterns in the Boer Republics. These patterns remained in place to a certain extent when mineral extraction took place, under British rule.

¹⁵⁸ Terreblanche (2002) 159. Initially, all slaves in the Cape were owned by the VOC. Within 40 years most of the slaves were privately owned.

¹⁵⁹ Terreblanche (2002) 159. Class differentiation occurred amongst European settlers. Unlike the wealthy landowners and merchants, the farmers outside of Cape Town were generally poorer and could not afford slaves.

¹⁶⁰ Terreblanche (2002) 160. Slaves were integrated into patriarchal families in accordance with the Roman Dutch law applicable in the Cape at that time.

¹⁶¹ Terreblanche (2002) 158, 159.

¹⁶² Terreblanche (2002) 165. In 1713, the smallpox epidemic broke down the structures and resistance of the KhoiKhoi, making them more vulnerable to the presence of the Trekboere.

¹⁶³ Terreblanche (2002) 164.

¹⁶⁴ Terreblanche (2002) 166 & 167.

¹⁶⁵ Terreblanche (2002) 167. The system was established when the children of slave and Khoikhoi unions were illegally placed in servitude of the master of the slave until they reached the age of 25 - Terreblanche (2002) 158. It is not clear whether inboekeling were regarded as serfs or slaves. The concept of a serf is associated with the feudal system and refers to an agricultural labourer tied to working on a particular estate.

¹⁶⁶ Terreblanche (2002) 253. See also Ferrante J & Chagonda T "Social Stratification" in M Seedat-Khan, Z Jansen & R Smith (eds) *Sociology: A South African Perspective* (2016) 82-92.

Upon their arrival in the Cape, the British wished to maintain relations with the freeburghers and Trekboere, and therefore initially legalised the indenture of the Khoisan in terms of the “inboekeling” system in 1809.¹⁶⁷ This practice was however abolished in 1828 and slavery was abolished in 1838.¹⁶⁸

In theory, the Trekboere and the Khoisan were now on equal footing, but in practice, the racial distinction remained.¹⁶⁹ “Coloured people”, as the Khoi became known, were increasingly associated with poverty.¹⁷⁰ Even the British missionaries eventually subscribed to the idea that black people were inferior because of their race and therefore had to be coerced into providing useful and disciplined labour.¹⁷¹

The abolition of slavery coincided with an economic boom in the Cape lasting until the 1860s. The demand for labour, therefore, was high.¹⁷² The British responded by introducing the Masters and Servants Ordinance of 1841, the first of many such laws, which bound the Khoisan, former slaves and Xhosas to their employers and instituting serious sanctions for those who did not conform.¹⁷³ The Masters and Servants Ordinances¹⁷⁴ entrenched the values

¹⁶⁷ Terreblanche (2002) 181. The indenture system was established under Dutch/VOC rule, but it was not legalised at the time.

¹⁶⁸ Terreblanche (2002) 186 & 187. Giliomee (2004) 66-74.

¹⁶⁹ Giliomee (2004) 69.

¹⁷⁰ Giliomee (2004) 69.

¹⁷¹ Terreblanche (2002) 203. See footnote 119 above on humanitarianism. The change in the outlook is the result of the transition of evangelical humanitarianism into liberal utilitarianism, which provided legitimacy for racially driven policies on economics and the acquisition of labour. Terreblanche refers to Crais C *The Making of the Colonial Order: White Supremacy and Black Resistance in the Eastern Cape, 1770-1865* (1992) chapter 7; Mostert N *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People* (1992) chapter 22.

¹⁷² Terreblanche (2002) 195 & 196. The boom was the result of an increase in the volume of capital in the Cape because of compensation paid to slave holders after abolishing slavery and the increase in trade in ivory and wool. In the Western Cape, former slaves generally remained in their occupations as alternative opportunities were limited. The situation in the Eastern Cape, however, was different. Many Khoisan moved to areas not under white control and previous slaves returned to the Western Cape.

¹⁷³ Terreblanche (2002) 11 & 12, 194-201.

¹⁷⁴ Terreblanche (2002) 11 & 12, 194-201. These laws remained effective until 1974 and were accompanied by other repressive measures such as wars, land dispossession, anti-squatter and anti-vagrancy laws and the abolition of coloured settlements.

underlying British racial capitalism¹⁷⁵ by proletarianising¹⁷⁶ the Khoisan, former slaves and the Xhosas.¹⁷⁷

The introduction of the Masters and Servants Ordinances and other legislation binding indigenous peoples to provide labour, however, did not restore the lifestyle the Trekboere acquired through feudalist and patriarchal practices.¹⁷⁸ The Great Trek, discussed under section 3.1 above, signified the unhappiness of the Trekboere with these changes.¹⁷⁹

Another migration of people took place at this time. To consolidate the Zulu empire, Shaka and Dingiswayo orchestrated a series of genocidal attacks against other African tribes west of the Drakensberg.¹⁸⁰ The Mfecane or Difagane, as these attacks are referred to, caused African tribes to vacate land, creating the opportunity for the Voortrekkers to acquire land beyond the frontier areas with relative ease, enabling them to establish the Boer republics.¹⁸¹

¹⁷⁵ Terreblanche (2002) 195 & 196, 203, 251. The ordinance of 1841 was drafted in a classist and not racist nature by applying to those “who may be inclined to lead an idle and vagabondising life”. The intention of the British liberalists to target black persons, however, was clear as the legislation had a racist result. The rise of racial ideology underlying the capitalist system promoted by the British, is the result of the type of the inherent contradictions presented by the type of liberalism that was promoted in the Cape at the time according to Worden and Crais *Breaking the Chains: Slavery and its Legacy in the Nineteenth Century Cape Colony* (1994) 6, 23; Legassick M “The State, Racism, and the Rise of Capitalism in the Nineteenth-Century Cape Colony” 1993 *South African Historical Journal* 329-268. Whereas slavery was ended, labour legislation was enacted based on race to force indigenous people to offer their labour. Watson RL *The Slave Question: Liberty and Property in South Africa* (1990) 5 argues that the two founding values of liberalism, the protection of freedom and the protection of property, came into conflict in South Africa. Liberals valued property more than freedom, requiring the enslavement of indigenous people to assist white European settlers to increase their property.

¹⁷⁶ Terreblanche (2002) 194-201 uses this term throughout his work on the history of inequality in South Africa to refer to the process of depriving those proletarianised of their economic independence. In Marxist tradition, the proletariat refers to the working class whose means of production are owned by the bourgeoisie or class of capitalists. Blackburn (2005) 46; Piketty (2014) 7.

¹⁷⁷ Terreblanche (2002) 181. By 1840 and after the sixth frontier war, the British managed to defeat the Xhosas and were able to proletarianise and convert the Xhosas into unfree labour.

¹⁷⁸ Terreblanche (2002) 219-221, 224, 183-185. Laws such as the Caledon Proclamation of 1809, issued before the Master and Servants Ordinances, limited the freedom of movement of the Khoisan to a great extent. It determined that labour contracts had to be put in place that determined the areas where the Khoisan person were to stay and work. To provide the masters with more control over their servants, but also to afford servants a measure of protection against exploitation, the British Cape government obtained powers to intervene in the relationship between the master and its servant. The Trekboere/Afrikaners did not approve of this development, since a relationship they regarded as private was now turned into a public relationship. The Trekboere regarded this intervention as a violation of their political independence. Terreblanche regards this as one of the motivations for the Great Trek. The Trekboere/Afrikaners/Voortrekkers were accompanied by a large number of black servants on the Great Trek, enabling them to continue with their patriarchal lifestyles.

¹⁷⁹ Terreblanche (2002) 219-222.

¹⁸⁰ Terreblanche (2002) 221 & 222. Ntsebeza (2013) 58. See however criticism of the Mfecane or Difagane theory as used by the apartheid state to emphasise black-on-black violence in South Africa: Cobbing J “The Mfecane as Alibi: Thoughts on Dithakong and Mbolompo” 1988 (29) *Journal of African History*.

¹⁸¹ Terreblanche (2002) 221 & 222. Ntsebeza (2013) 58.

The Mfecane and the Great Trek changed the face of Southern Africa.¹⁸² Black persons were not allowed to own land in either of the Boer republics¹⁸³ and became tenants of white-owned farms, but subject to various restrictions and exploitative practices, which characterised the relationship between the white owner and the black tenant.¹⁸⁴

The model of racial segregation that evolved set in motion the migration of labour that would eventually serve the mining industry and create mining communities.¹⁸⁵ Black persons could no longer depend on the land for survival. Employment in the gold mines and manufacturing industries became a last resort, requiring black persons to migrate to mining areas from rural areas.¹⁸⁶ Had it not been for this supply of cheap black labour, mining companies might have never endeavoured to extract deep-lying, poor quality gold ore from the Witwatersrand reef.¹⁸⁷

The Chamber of Mines¹⁸⁸ kept the migrant labour system in place.¹⁸⁹ Agencies recruited black labour in far-off rural areas, in South Africa, but also in neighbouring countries.¹⁹⁰ The survival

¹⁸² Terreblanche (2002) 221 & 222.

¹⁸³ Terreblanche (2002) 221 & 222; Ntsebeza (2013) 58. The Royal Bafokeng could buy land in the ZAR but the land was administered on their behalf by bodies such as missionaries, the Transvaal Location Commission and thereafter the Union of South Africa. It can be asked whether this “privilege” granted to the Royal Bafokeng is connected to the relative financial success it experiences currently.

¹⁸⁴ Ntsebeza (2013) 58; Terreblanche (2002) 228. Many Africans, however, escaped the control of the Boer Republics, maintaining their independence and living in their own areas.

¹⁸⁵ Martin B “Living in a Theoretical Interregnum: Capital Lessons from Southern African Rural History” in Hendricks et al (eds) (2013) 169. Terreblanche (2002) 12, 251-256, 260-264; Hendricks F “Rhetoric and Reality of Restitution and Redistribution: Ongoing Land and Agrarian Questions in South Africa” in Hendricks et al (eds) (2013) 31, 42. One of the original objectives of the Native Land Act of 1913 was to “reshape the labour context on farms”. Pienaar J *Land Reform* (2014) 82.

¹⁸⁶ Terreblanche 12, 13, 260-264; Hendricks (2013) 31, 42. Racial segregation entailed influx control measures institutionalised as part of the “native” laws implemented by Dr Hendrik Verwoerd in the heyday of apartheid.

¹⁸⁷ Crush et al (1991) 1.

¹⁸⁸ The concept behind the Minerals Council South Africa, formerly known as the Chamber of Mines, was first conceived in 1887. The institution underwent various iterations before the Chamber of Mines of the South African Republic was formed in 1897. The purpose of the Chamber at the time of its formation was to distribute information of mining activities, validate prospectuses, and the general promotion of the interests of the industry such as the creation of favourable legislation. The Chamber’s name changed to the Minerals Council South Africa in May 2018. History available at <<https://www.mineralscouncil.org.za/about/history>> accessed on 20 February 2020. Along with the name change, the institution wishes to embrace a new vision for the institution and to, with time, dissociate with the institution’s part in racial discrimination in the past. Khumalo S “Chamber of Mines announces name change to align with future vision” *Fin24* (23 May 2018) available at <<https://www.fin24.com/Companies/Mining/chamber-of-mines-announces-name-change-to-align-with-future-vision-20180523>> accessed 20 February 2019.

¹⁸⁹ Terreblanche (2002) 12, 59, 66-68; Ntsebeza (2013) 59; TRC *Truth and Reconciliation Commission of South Africa Report* (2003) volume 6, section 2 chapter 5 “Report of the Reparation & Rehabilitation Committee: Reparations and the Business Sector” (hereinafter “TRC Report”) 151 available at <<http://www.justice.gov.za/trc/report/>> accessed on 20 February 2020. The Chamber of Mines, through its Native Labour Department, drafted migration control regulations that served as an example for the pass laws that were later enforced by the apartheid government.

¹⁹⁰ TRC Report 151; Crush et al (1991) 1, 5, 6, 33-41. In the 1890s, the Chamber of Mines itself acted as a recruitment agency, but independent agencies also came into being. By 1910, an industry-regulated system for recruitment was implemented to put an end to independent recruiters’ operations. The Native Recruitment

of the migrant labour system was also dependent on the collaboration of the tribal chiefs. Tribal chiefs received financial motivation to support mining by motivating their subjects to work in the mines while remaining loyal to tribal leadership. In this manner, the mining industry used tribalism to promote oppressive labour practices.¹⁹¹

Migrant labourers required accommodation in mining areas. An important aspect of the migrant labour system was the compound system - a controversial system in terms whereof mineworkers were provided accommodation on the mines in compounds or hostels.¹⁹² The system caused significant harm to black mineworkers, by eroding family structures:¹⁹³ The accommodation provided took the form of single-sex hostels, which hostels may not be occupied by the wives and children of mineworkers.¹⁹⁴ The system also caused the creation of a new group of people in the mining area with a separate identity, in conflict with permanent residents in mining areas.¹⁹⁵ Thus the modern mining community came into being.

The continuing proletarianisation and subsequent urbanisation of rural black workers decreased the supply of labour for mines.¹⁹⁶ Workers opted for higher wage-earning activities elsewhere, pressing the mining industry for wages increases, but the industry resisted.¹⁹⁷

The opening of new gold mines in the Free State in the 1940s provided the opportunity for the industry to reconsider its labour recruitment model, but the migratory and compound system model was simply duplicated.¹⁹⁸ After the official implementation of apartheid in 1948, the labour recruitment model remained untouched.¹⁹⁹

Despite the challenges in sourcing labour during the 1970s, the practices of the past continued unchanged.²⁰⁰ The majority of black mineworkers were still migrant, the compound system

Corporation (NRC) and the Witwatersrand Native Labour Association served as branches of the Chamber in this regard. Labour was also sourced from Mozambique and Malawi.

¹⁹¹ Terreblanche (2002) 12; Ntsebeza (2013) 59; TRC Report 152; Crush et al (1991) 6.

¹⁹² Terreblanche (2002) 12; Ntsebeza (2013) 59; TRC Report 151.

¹⁹³ TRC Report 152; Terreblanche (2002) 12; Ntsebeza (2013) 59; TRC Report 151.

¹⁹⁴ TRC Report 152.

¹⁹⁵ TRC Report 152.

¹⁹⁶ Crush et al (1991) 12.

¹⁹⁷ Crush et al (1991) 12.

¹⁹⁸ Crush et al (1991) 12.

¹⁹⁹ Crush et al (1991) 12.

²⁰⁰ Crush et al (1991) 13; Martin (2013) 171. A shortage in the supply of labour from neighbouring countries occurred as a result of political developments in the region. Countries such as Tanzania, Zambia and Zimbabwe became independent during this time and prevented the flow of labour migrants in protest against apartheid. It was however also the case that the liberated governments often continued to support labour migrancy for self-interest, therefore continuing the practices of its colonial predecessors.

persisted and the racist hierarchy and relationships on the mines remained in place.²⁰¹ The migrant system only started disintegrating by the early 1990s.²⁰² The effects of the system, however, are still evident today. The creation of mining communities, for which mining legislation provides for today, is the result of the recruitment of black workers from rural areas.²⁰³

Acting as an interventionist government in the creation of the modern South African state, government implemented segregationist land and labour policies and practices to regulate the provision of labour to the burgeoning industries.²⁰⁴ These policies were implemented with the great support of and guidance by the mining industry.²⁰⁵ Once again, the powerful corporate entity, in this case, the mining company, occupied a protected role in the country's political and economic context, much as in the case with the VOC in the Cape.

3.3. The Creation of New Communities of Black Labourers

The oppressive practices systematically altered the local livelihoods and communal living structures of black communities. In the British colonies situated in the Eastern Cape and Natal, the imposition of European or Western values through missionary work and education created distinction and division amongst black people.²⁰⁶ Legislation enforced by colonial settlers of southern Africa also impinged upon the understanding of property held by black people.²⁰⁷ By introducing the notion of individual property ownership, a cardinal principle of capitalism, the colonial authorities formalised the dispossession of land occupied by black people.²⁰⁸

²⁰¹ Crush et al (1991) 13.

²⁰² Crush et al (1991) 15.

²⁰³ The relevant legislation mentioned in footnote 1 above, is analysed in Chapter 3.

²⁰⁴ Crush et al makes the point that the phenomenon of the interventionist government was not unique to South Africa at the time. The provision of labour, however, was not the government's or other stakeholders' main concern. The segregationist policies also served to oppress the growing black population. Crush et al argue that this is where South Africa differed from other modern states where the distinction based on race, ethnicity and class was not as evident. Crush et al (1991) 8.

²⁰⁵ Crush et al (1991) 8.

²⁰⁶ Ntsebeza (2002) 204. The Xhalinga district in the Eastern Cape is an example of an instance where schooling provided by missionaries created division. The amaMfengu were regarded as the "school" people for partially accepting Western influences, but the amaXhosa and abaThembu were regarded as the "red" people who were still chiefly subjects and who rejected the Western influences.

²⁰⁷ Terreblanche (2002) 179, 180, 203-205. At the time when the VOC controlled the Cape, indigenous people were organised communally, not acknowledging individual property rights. The liberalist policies enforced by the British in the 19th century operated on the basis that all able-bodied persons should offer their labour on the labour market. Terreblanche notes that South African liberalism at the time valued the protection of property rights more than the other principle of liberalism: liberty of all. The effect for black farmers was that their communal system of land ownership disintegrated.

²⁰⁸ Hendricks (2013) 43. See also Du Plessis W & Pienaar J "The More Things Change, the More They Stay the Same: The Story of Communal Land Tenure in South Africa" 2010 (16:1) *Fundamina* 76; Van der Walt A

Colonial authorities used tribal chiefs to establish control by either incorporating them into colonial authority structures or by undermining their authority and alienating them from their followers.²⁰⁹ These interventions ultimately provided the colonial authorities with the ability to control the allocation of land to indigenous black persons.²¹⁰

Despite the measures providing them with control, the colonial authorities could not prevent the development of a class of black farmers in the Cape and Natal in the 19th century.²¹¹ The discovery of gold, however, increased the demand for labour. Colonial authorities thus put in place measures to deprive black persons of access to land for farming, preventing subsistence farming activities, thereby leaving them with no choice but to offer their labour to the mines.²¹²

Historians regard the 19th century as one of the most determinative phases of South African history.²¹³ It saw the establishment of colonial and racial supremacy in southern Africa that has continued well into the 20th century.²¹⁴ Despite the Boer Republics' rejection thereof, this period is also typified by the dawn of capitalism in southern Africa as part of the larger drive for industrialisation by the British. The scene was set in the 19th century for the way the colonial authorities dealt with the challenges arising from the discovery of mineral resources.

Underlying British imperialism was the ideology of free trade and progress.²¹⁵ The way in which black people related to land and means of survival reflected values that stood in stark contrast with those proposed by the notion of development.²¹⁶ In principle, development was promoted for the benefit of all, but in fact, it served as concealment of the promotion of the interests of a specific group of people, necessitating the promotion also of segregation.²¹⁷ Segregation caused labour migration, which led to the creation of mining communities.

“Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa” 1999 (64:2 & 3) *Koers* 261-264.

²⁰⁹ Ntsebeza (2005) 46.

²¹⁰ Ntsebeza (2005) 43 & 51. In the Xhalanga district, for instance, “school people” or people accepting Western values, were granted access to farms whereas the “red” people were denied this opportunity. See footnote 206 above.

²¹¹ Ntsebeza (2005) 43; Ntsebeza (2013) 55; Terreblanche (2002) 204-210.

²¹² Ntsebeza (2013) 55.

²¹³ Terreblanche (2002) 194, 195, referring to Crais (1992) chapter 7; Keegan T *Colonial South Africa and the Origin of the Racial Order* (1996) chapter 9; Worden & Crais (1994) Introduction & Mostert (1992) chapter 21.

²¹⁴ The system continued with some modifications. Terreblanche (2002) 194.

²¹⁵ Giliomee (2004) 185. The concept “development” will be discussed in more details in Chapters 5 and 6, but for current purposes, it signifies the advancement from one state of being to another state of being, on the assumption that the state being advanced to, is better. Progress, as a notion, is incorporated into the development concept, as will be expanded on in Chapter 5.

²¹⁶ See section 3.1 and footnote 109 above.

²¹⁷ Giliomee (2004) 185.

The simultaneous promotion of racial segregation and development had a significant impact on existing black communities still pursuing traditional values and lifestyles. The Glen Grey Act for instance, as discussed in section 3.2, racialised property ownership and excluded black areas from the capitalist economy.²¹⁸ The operation of the Act interfered with the traditional communal structures to a significant extent. It abolished communal land tenure by introducing the foreign idea of individual property ownership. It also instituted local councils to govern the native areas on behalf of the British government.²¹⁹ The councils were constituted by British representatives, but also provided the opportunity for progressive black farmers to have political influence.²²⁰ Traditional leaders, however, contested the authority of the black farmers.²²¹ By following this “divide and rule” strategy, the British government caused division between members of local black communities and contributed to the systematic breakdown of local structures.²²²

Segregation furthermore required differentiation between Western or European and local value systems.²²³ Nineteenth-century British evangelism in the Cape Colony pursued the conversion of black people to accept Western or European religious values through missionary work and education.²²⁴ By the twentieth century, however, segregation required an over-emphasis of nationalism and tribalism.²²⁵ Under the Afrikaner government, the separate development²²⁶ of

²¹⁸ Legassick (1974) 7. Black areas, however, were not self-sufficient, forcing black residents to provide labour to white areas, requiring migration. Reference is made here specifically to the effects of the Glen Grey Act on the Themba traditional community.

²¹⁹ Giliomee (2004) 244; Terreblanche (2002) 251, 254, 258, 386, 403.

²²⁰ Giliomee (2004) 245.

²²¹ Giliomee (2004) 245.

²²² The “divide and rule” strategy entailed a system where the traditional authority structures of black people were used by colonial authorities to control black people. The impression was created that the traditional authority structures were kept intact, while the leaders appointed by colonial authorities represented their interests. In this manner, black people were also introduced to Western/European ideas and values, causing some to abandon their traditional way of life. Division was thereby created amongst black people, thus corroding the power of black people, making it easier to control them. Ntsebeza (2005) 46, 55 - Terreblanche (2002) 208. Sir Shepstone, regarded as the architect of indirect rule in Natal, created the first native reserves in 1830. The colonial government acted as trustees of these reserves, which were ruled indirectly by compliant chiefs. The situation in the Eastern Cape was different, however, where the powers of chiefs were consciously limited. black people in the Eastern Cape were not as unified as the amaZulu in Natal and the authority of the chiefs therefore had to be undermined to take control over their subjects.

²²³ Legassick (1974) 7.

²²⁴ Ntsebeza (2005) 51; Giliomee (2004) 63.

²²⁵ Giliomee (2004) 420.

²²⁶ As Legassick (1974) 6 puts it: “Indeed, at one level apartheid, or separate development, or multi-national development, is an ideology essentially cloaking the realities of domination and inequality”.

the white nation and the different black nations in South Africa was promoted, seemingly to preserve the local black traditions.²²⁷

Such preservation, however, maintained the powerlessness of black people in South Africa, making them vulnerable to the oppressive labour practices as described in section 3.2.²²⁸ The colonial interference with tribal authorities since the 19th century²²⁹ and the homelands created²³⁰ and maintained by segregationist legislation²³¹ served to divide black people into various artificial “tribes”.²³² The apartheid government appointed tribal leaders in the homelands as a means to control these areas and did not acknowledge the up-and-coming black urban elite.²³³

Furthermore, underlying the promotion of nationalism and tribalism was the deep-seated belief that non-Western cultural and social systems were inferior to Western systems and unable to develop in the same manner as Western systems.²³⁴ Labour reservation for black persons in the white economy remained limited to non-professional jobs, typically required by industries such as mining, agriculture and manufacturing.²³⁵

The liberalist pursuit of individual freedom, dignity and rights was still present under nationalism.²³⁶ Nationalists often adopted liberalist rhetoric to create a modernised image for the apartheid regime.²³⁷ As mentioned earlier, progress for or development of black persons was promoted, but rights and freedoms were to be exercised only in the demarcated areas.²³⁸ Liberalists blamed the unjust nature of apartheid on the fact that the foundations of apartheid conflicted with that of liberalism and capitalism.²³⁹ Critics of liberalist and capitalist policies,

²²⁷ Giliomee (2004) 420-422; Legassick (1974) 16, 21 referring to Jansen EG *Native Policy in the Union of South Africa* (1950).

²²⁸ Legassick (1974) 13, 26. The detribalisation of blacks was a threat for white rule.

²²⁹ In terms of the divide and rule / indirect rule principle. See footnote 222 above.

²³⁰ Ten Bantustans were acknowledged as separate and independent nations: Transkei, Ciskei, Venda, Gazankulu, Bophuthatswana, Kangwane, Lebowa, KwaZulu, Basotho-Qwaqwa and KwaNdebele.

²³¹ For instance: the Glen Grey Act; the Native Land Act, the Native (Urban Areas) Act; the Native Affairs Act; and the Native Administration Act.

²³² Ntsebeza (2013) 54. The legitimacy of current day traditional authorities is often questioned based on colonial interference with these authority systems. See in general Ntsebeza (2005). See footnote 66 above for reference to examples of contestations that came before court.

²³³ Giliomee (2004) 452.

²³⁴ Legassick (1974) 22.

²³⁵ Legassick (1974) 11, 7. Legassick refers to the General Circular no 25 of 1967 that labelled “(P)rofessional Bantu such as doctors, attorneys, agents, traders, industrialists etc.” as non-essential for the Western labour market.

²³⁶ Giliomee (2004) 420.

²³⁷ Giliomee (2004) 420.

²³⁸ Giliomee (2004) 420.

²³⁹ Legassick (1974) 29.

however, maintained that the mantra promoting free markets and economic growth provided the perfect breeding ground for apartheid's discriminatory policies.²⁴⁰

The pursuit of capitalism and progress (or development), on the one hand, and nationalism and tribalism, on the other, created a paradoxical effect for black communities: The notion of tribal authorities was superficially maintained under the pretence of a desire to promote the different nations living in South Africa and providing for separate development. There was interference with authority structures that lead to the breakdown of the traditional communities, but not the disappearance.²⁴¹ Simultaneously, new black communities were created, but lacking the formal cohesiveness represented by traditional communities.

4. Conclusion

In this chapter, the present-day and historical context within which the present-day empowerment and development of mining communities are prescribed is provided. By considering the present-day context, it becomes clear that mining communities face certain socio-economic challenges, also suffered by other rural communities in South Africa. Mining communities, however, are characters in a very specific narrative, which depicts their status and relationship with government and the industry in a very specific way. This narrative confirms the perception that mining communities are not benefitting from mining operations as expected in the light of the mining industry's history of oppression and exploitation. As is expanded upon in the thesis, this narrative, which limits the ability to address the poor conditions experienced in mining areas, fits into the development paradigm.

This chapter argues that both the creation of and the injustices experienced by present-day mining communities are the result of ideologies pursued and practices implemented long before the discovery of mineral resources. Through the pursuit of Western or European commercial interests, which later became intertwined with the political interests of the descendants of European colonial authorities, the black people of Southern Africa lost land and the autonomy over their bodies as providers of labour. Together with the imposition of Western or European values systems, these displacements and dispossessions caused the systematic breakdown of the traditional value systems, families and livelihoods of black persons. To survive, black

²⁴⁰ Legassick (1974) 29.

²⁴¹ See footnotes 228-233 above.

people had to relocate and offer their labour to work on farms and in industries, such as the mining industry.

Thus, a new type of community was created, albeit a community in a different sense than the traditional community. This community is not centred on custom or permanent occupation of specific land. At most, the members of this community share in the effects of the pursuit of the commercial interests of the mining industry. Mining communities currently provided for in mining legislation²⁴² as discussed in Chapter 3, have their roots in these communities of displaced black persons. These communities are the focus of this thesis.

As is shown in this chapter, traditional communities were affected by the oppressive practices promoted before and after the discovery of mineral resources. The injustices inflicted upon traditional communities are intricately linked with the creation of mining communities, but still, there is a distinction between the two communities. Accordingly, transformative legislation²⁴³ provides in different ways for these different communities, as discussed in Chapter 3 and 4.

The historical narrative also paints a picture of the skewed relationship between the state, protected corporate entities, such as mining companies, and black people that is still visible in current-day mining areas, as the factual context confirms.

Finally, this chapter highlights the anomalies created when progress or development is promoted alongside nationalism and tribalism as a way to preserve traditional identities. This anomaly is expanded on in Chapter 7 where the notion “community” is considered, theoretically.

The following chapters illustrate how the ideological motivations and rhetoric have shaped the paradigm within which legislative measures that empower mining communities, operate. The argument in this thesis is that the failure of these legislative measures, and the failure of mining companies to give effect to the legislation, is evidence of the operation of this paradigm.²⁴⁴ The paradigm only allows for specific approaches to alleviating poverty and inequality, which

²⁴² See footnote 1 above.

²⁴³ See footnote 1 above.

²⁴⁴ As explained in Chapter 1, the thesis takes a theoretical approach to the poverty faced by South African mining communities. No empirical work is done to determine the effectiveness of the legislation in practice. The reference to the failure of the legislative system and of mining companies is based on the poor socio-economic conditions still faced by mining communities, as depicted in reports by various institutions, discussed under section 2.

approaches are unable to address the problems as they are framed in this paradigm. Accordingly, poor socio-economic conditions persist in mining areas.

CHAPTER 3: Policy and Legislative Context

1. Introduction

This thesis is driven by the question of why legislation providing for the empowerment and development of mining communities has been so ineffective in addressing the socio-economic conditions of mining communities. Chapter 2 and 3 discuss the context from which the research question originates. In Chapter 2, the current conditions faced by mining communities are placed in the broad historical perspective of colonialism and apartheid.

Chapter 3 focuses on the policy and legislative context informing the same question. The policy context is described by considering the global economic climate within which the first policies aimed at development and empowerment in the new, democratic South Africa came into being. It is shown how this global climate played a significant role in the formulation of policies that would show the way for the introduction of Black Economic Empowerment and later, Broad-Based Black Economic Empowerment in South Africa and the mining industry. The ideological link between the global climate considered here and the development paradigm within which the empowerment and development of South African mining communities take place, is anticipated here, and further explained and analysed in Chapters 5 and 6.

The legislation relevant to the empowerment and development of mining communities is also set out in this chapter. The provisions of the Mineral and Petroleum Resources Development Act (“MPRDA”),¹ the Mining Charter² and the Social and Labour Plan³ created in terms of the MPRDA are explained to show how mining communities are supposed to benefit from development and empowerment. This chapter also describes the Local Government: Municipal Systems Act⁴ in terms whereof the integrated development plan for a municipality is created, to the extent applicable to mining communities.

¹ Mineral and Petroleum Resources Development 28 of 2002 (hereinafter the “MPRDA”).

² The Broad-Based Socio-Economic Empowerment Charter created in terms of the s 100(2) of the MPRDA (“the Mining Charter”).

³ The Social and Labour Plan drafted and submitted by a mining right holder in terms of ss 22 and 23 of the MPRDA and regulations 40-46 of the Regulations in terms of section 107(1) of the MPRDA (GNR 527 GG 26275 of 23 April 2004).

⁴ Act 32 of 2000.

2. Policy Context: Addressing the Legacies of the Past

The accord that resulted in South Africa's transition from an apartheid state to constitutional democracy has been depicted as a "negotiated settlement"⁵ or "negotiated revolution" entailing a "historic compromise",⁶ and "elite compromise" or "elite transition" that preserved white economic power in exchange for black political power.⁷ For many, this compromise represented a manifestation of the ideology underlying global socio-economic policy during the 1990s when the new South Africa entered the environment in the 1990s.⁸

In this section, the global economic climate prevailing during the 1990s is firstly considered to the extent that it impacted on policy creation in South Africa. Secondly, the relevant policies are set out to show the thinking evoked to address the unjust legacies of apartheid. Policies, such as the Reconstruction and Development Programme ("RDP"),⁹ and Growth, Employment and Redistribution ("GEAR")¹⁰ are considered since broad-based black economic empowerment ("B-BBEE"), was conceived in these policies.¹¹ Another notion that was brought into the South African policy landscape, is local economic development ("LED"). Both B-BBEE and LED are relevant to the empowerment and development of mining communities.¹²

Before the provisions of the legislative system relevant to the wellbeing of mining communities are considered in section 3 of this chapter, the way the legislative system provides for B-BBEE in the mining industry, is considered. The basic tenets of B-BBEE as applicable in general, but

⁵ Southall R "Political Change and the Black Middle Class in Democratic South Africa" in A Jeeves & G Cuthbertson (eds) *Fragile Freedom: South African Democracy 1994-2004* (2008) 46.

⁶ Froneman J "The (Constitutional) Problem of Property" lecture presented as part of the Prestige Lecture Series of the Faculty of Law, University of Pretoria 21 May 2014 available at <https://www.up.ac.za/faculty-of-law/news/post_2193499-the-constitutional-problem-of-property-prestige-lecture-by-justice-johan-froneman> accessed on 9 February 2020; Hendricks FT "Rhetoric and Reality in Restitution and Redistribution: Ongoing Land and Agrarian Questions in South Africa" in FT Hendricks, L Ntsebeza & K Helliker (eds) *The Promise of Land: Undoing a Century of Dispossession in South Africa* (2013) 30, 36. For Hendricks, the compromise entailed the protection of existing property rights of the white minority to the detriment of the black majority's access to land.

⁷ Bond P *Elite Transition: From Apartheid to Neoliberalism in South Africa* (2000) 42-44; Terreblanche S *A History of Inequality in South Africa* (2002) 51, 96, 423 argues that white domination and racial capitalism in South Africa was replaced with "African elite democracy cum capitalism enclavity" since the African National Congress ("ANC") elite obtained significant ideological power - see in general Chapter 11 Terreblanche (2002).

⁸ See in general Bond (2000); Terreblanche (2002), Hendricks et al (2013).

⁹ African Nation Congress *The Reconstruction and Development Programme: A Policy Framework* (1994) (hereinafter "the ANC RDP Policy framework/Base Document"); *White Paper on Reconstruction and Development* (GG 16085 GN 1994) ("White Paper").

¹⁰ Department of Finance *Growth, Employment and Redistribution: A Macroeconomic Strategy* (1996) (hereinafter "GEAR").

¹¹ See section 2.2.1 below.

¹² See section 3 below for a discussion of the MPRDA, Mining Charter and other legislation relevant to the development and empowerment of mining communities.

also in the Mining Charter specifically, are explained. The link between B-BBEE and the idea of development is anticipated, but is only elaborated on in Chapter 5.

Lastly, this section provides a brief overview of current trends in development and other policies intending to address the legacies of apartheid. The purpose here is to consider the rhetoric employed currently when addressing issues of poverty and inequality, as experienced by poor South African in general and mining communities specifically.

2.1. Global Economic Climate and Role-Players

A “redefining” of the world occurred during the 1990s as a result of the end of the Cold War and the subsequent breakdown of the Soviet Union, causing global power shifts.¹³ The globalisation of lifestyles and ideologies followed.¹⁴ These changes sounded the death knell for socialism, which failure created the opportunity for the institutionalisation of Western capitalism and neoliberal macroeconomic policy in the new South Africa.¹⁵

When the African National Congress (“ANC”) was unbanned in 1990, it committed to nationalisation and the redistribution of resources: The Freedom Charter¹⁶ served as guidance for the creation of economic policy.¹⁷ As the party transformed from a struggle and liberation movement to a ruling party, it had to contend with many voices eager to advise the ANC on

¹³ Nelson Mandela, during a speech at the UN World Summit for Social Development, Copenhagen, 12 March 1995, noted “the irony of democratic South Africa’s late entry into international affairs” as the fact that South Africa “can reap the fruits of a world redefining itself” - *Foreign Policy for South Africa: Discussion Document* issued by the South African government on 1 June 1996, available at <https://www.gov.za/documents/green-papers?order=field_gcisdoc_document_date&sort=asc> accessed on 19 November 2019, para 3.3. This “New World Order” saw changes to NATO, the establishment of democracy in Eastern Europe and thus more competition for foreign investment.

¹⁴ In his address of the United States Congress on 6 October 1994, Nelson Mandela stated that “(T)he new age will surely demand that democracy must also mean a life of plenty. As the images of life lived anywhere on our globe become available to all, so will the contrast between the rich and the poor, within and across frontiers and within and across the continents become a motive force impelling the deprived to demand a better life from the powers that be, whatever their location.” *Foreign Policy* (1996) para 3.3.

¹⁵ Williams P & Taylor I “Neoliberalism and the Political Economy of the ‘New’ South Africa” 2000 (5) *New Political Economy* 23, 26; Terreblanche (2002) 106. Socialism is understood as “that organization of society in which the means of production are controlled, and the decisions on how and what to produce and on who is to get what, are made by public authority instead of by privately-owned and privately managed firms” - Schumpeter J A “The March into Socialism” delivered on 30 December 1949 to the American Economic Association in New York on 30 December 1949. The notion of neoliberalism is unpacked in more detail in Chapter 5. As stated by Brown W *Undoing the Demos: Neoliberalism’s Stealth Revolution* (2015) 20, the term “neoliberalism” is mainly used by those critical of neoliberalism. For current purposes neoliberalism is used, as employed by Brown (2015) 17, to denote “a peculiar form of reason that configures all aspects of existence in economic terms”. Neoliberal policy affirms the necessity and efficiency of free markets and minimal state interference.

¹⁶ See footnote 29 at section 1 of Chapter 1.

¹⁷ Williams & Taylor (2000) *New Political Economy* 24.

the way forward.¹⁸ Many commentators noted the ANC's ideological shift during these transition years from a leftist policy perspective to a more neoliberal perspective.¹⁹

The acceptance of neoliberalist policies has been interpreted as an attempt to retain international investment and to make the most of the economic climate of the time.²⁰ The rationale was that as an "oasis in an African desert", South Africa's "first-world economy" had to be protected during transformation.²¹

Furthermore, the ideological diversity amongst the ANC's members meant that the party could not speak with one voice.²² Consequently, policies were created that proclaimed redistribution and nationalisation in very unclear terms, as is shown in section 2.2.1 below.²³ Policy uncertainty provided the dominant role players of the time, such as the South African corporate sector, the voices of the previous regime and the international financial institutions such as the International Monetary Fund ("IMF") and the World Bank, with leeway to push for neoliberal policy.²⁴

¹⁸ The way forward proposed by the local corporate sector and international institutions such as the World Bank was based on free market capitalism. Terreblanche (2002) 56-65, 107; Williams & Taylor (2000) 24; Bond (2000) Chapters 1 & 5; Bond P *Against Global Apartheid: South Africa meets the World Bank, IMF and International Finance* (2001) 68.

¹⁹ Terreblanche (2002) 107; Williams & Taylor (2000) 25-27; Bond (2000) Chapter 1; Bond (2001) 68.

²⁰ Terreblanche (2002) 102, 106; Seekings J & Nattrass N *Class, Race and Inequality in South Africa* (2005) 346; Bond (2001) 68. See in general Bond (2000) for a critique of the effect that neoliberalism has had on policy formation in the new South Africa.

²¹ Terreblanche (2002) 54-57. Terreblanche, however, is of the opinion that the notion that South Africa had a liberal capitalist economy at that stage, was inaccurate, if considered to which extent the largest part of the population was excluded from this economy.

²² Williams & Taylor (2000) *New Political Economy* 24, 35.

²³ Williams & Taylor (2000) *New Political Economy* 24. The Bretton Woods institutions, the IMF and the World Bank, were created in July 1944 at Bretton Woods, New Hampshire. The World Bank Group is divided into five organisational units: The International Bank for Reconstruction and Development ("IBRD"), the International Development Association ("IDA"), the International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes. Together, the IBRD and IDA form the World Bank, which grants loans to low- and middle-income countries. "About the World Bank" available at <<https://www.worldbank.org/en/about>> accessed on 9 February 2020. The mandate of the IMF is to encourage international cooperation on monetary matters and general financial stability. The IMF also provides loans to countries. International Monetary Fund "The IMF at a glance" 22 March 2019 available at <<https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance>> accessed on 9 February 2020.

²⁴ Terreblanche (2002) 56-65, 107; Williams & Taylor (2000) *New Political Economy* 24, 35; Bond (2000) Chapters 1&5. Indeed, it would have taken quite a concerted effort, and a disregard of very powerful entities, on the part of the ANC to pursue strictly socialist policies. Terreblanche (2002) Chapter 3, 95-108; Southall (2008) 46 & 47 and Ntsebeza L "The more things change, the more they remain the same: Rural Land Tenure and Democracy in the Former Bantustans" in FT Hendricks, L Ntsebeza & K Helliker (eds) *The Promise of Land: Undoing a Century of Dispossession in South Africa* (2013) 70 maintain that the official political negotiations and drafting of the Constitution were stalled for the informal negotiations on economic matters with the (white) corporate sector to be finalised. Ntsebeza (2013) 70 describes the ANC's apparent "swing to the right" by collaborating with corporate South Africa with the words of the chief executive officer of Anglo American at the time, Zach de Beer's requesting the ANC "to save the 'the baby of free enterprise' from being 'thrown out with the bathwater of apartheid'". Williams & Taylor (2000) *New Political Economy* 26-28 and

The influence and demands of international financial institutions such as the IMF and the World Bank during this time cannot be overlooked.²⁵ Various studies and conferences that promoted neoliberalist policies were funded by these institutions.²⁶ The large presence of the World Bank in South Africa during this time has also been noted.²⁷ However, whereas the World Bank argued for neoliberal interventions, it also acknowledged that the structural inequality in South Africa could not be solved by the exclusive pursuit of market restructurings.²⁸ Neoliberal interventions had to be complemented by measures that provided historically disadvantaged persons with access to resources.²⁹ The World Bank's proposition in this regard, however, did not find favour with all involved in the discussions at the time.³⁰

After the first democratic election, the Government of National Unity ("GNU")³¹ governed the country until 3 February 1997. Before the National Party's withdrawal in 1996, the ANC and the National Party had to cooperate in formulating economic policy for the country going forward. Some have argued that this cooperation contributed to the watering down of progressive interventions.³² The impact of the factors mentioned and trade-offs made are visible in the policies created during this time.³³

Bond P "The Making of South Africa's Macro-Economic Compromise" in E Maganya (ed) *Development Strategies in South Africa* (1996) suggest that conferences, framed as consultative, consensus-seeking platforms, were funded by the corporate sector with the intention of enforcing neoliberal ideas upon the policymakers. The conferences held in this regard include the following: Nedcor/Old Mutual "Prospects for a Successful Transition" launched in 1990, Sanlam's "Platform for Investment" and the SA Chamber of Business "Economic Options for South Africa". The increase in globalisation and privatisation provided South African companies the opportunity to set up their businesses abroad. Large companies used this opportunity to avoid being held accountable by the historically disadvantaged masses for the corporate sector's contribution to exploitation under apartheid. Consequently, these entities attained additional bargaining power in the economic policy creation process in the new South Africa -Terreblanche (2002) 54-56, 122.

²⁵ Bond (2000) Chapter 5.

²⁶ Williams & Taylor (2002) *New Political Economy* 27.

²⁷ Williams & Taylor (2002) *New Political Economy* 27. By the World Bank's own account, the access afforded to the ANC was unprecedented - "Economic Trends Internal Memorandum" (1991) cited in Padayachee V "The Evolution of South Africa's International Financial Relations Policy: 1985-1995" in J Michie J & V Padayachee *The Political Economy of South Africa's Transition* (1997) 30.

²⁸ Williams & Taylor (2002) *New Political Economy* 28.

²⁹ Williams & Taylor (2002) *New Political Economy* 28.

³⁰ Williams & Taylor (2002) *New Political Economy* 28. Williams and Taylor make specific mention of the National Manpower Commission's stance that wage negotiations had to yield to the demands of the global market.

³¹ The Government of National Unity governed as from 27 April 1994. Every political party that obtained 10% or more in the democratic elections, formed part of the GNU as a measure to facilitate the transition in South Africa. The GNU oversaw the finalisation of the South African Constitution, 1996 and the establishment of the Truth and Reconciliation Commission. See South African History Online "South African Government of National Unity (GNU) – 1994-1999" available at <<https://www.sahistory.org.za/article/south-african-government-national-unity-gnu-1994-1999>> accessed on 9 February 2020.

³² Williams & Taylor (2002) *New Political Economy* 31.

³³ As reiterated by Williams & Taylor, the ANC did not stand by passively while policies were created. The multitude of voices within the organisation, the heavy presence of business and international financial institutions and the general economic climate, required that trade-offs had to be made by the ANC. The pursuit

In this section, it is shown that the new South Africa entered the global arena at a time when neoliberal economic policy was promoted by the corporate sector and Western international financial institutions as the most suitable vehicle to ensure South Africa's financial prosperity. The policies created by the new government to address the socio-economic disparities caused by apartheid discussed under section 2.2 exemplify how neoliberal economic policy was incorporated into the South African policy landscape and legislation, including policy and legislation aimed at the empowerment and development of impoverished mining communities. Commentators have noted with interest that no alternatives to neoliberal economic policy were considered.³⁴ The consideration of alternatives falls outside of the scope of this thesis; rather, the emphasis is placed on the link between neoliberal economic policy and the development and the empowerment of mining communities. In Chapter 6, the effect of the neoliberal influences underlying the legislative measures dealing with mining communities is considered to show the problematic nature of the development concept.

2.2. Policies Created

This section briefly considers some of the policies created by the first democratic government to address the heritage of apartheid through the redistribution of wealth and resources to the previously disadvantaged black population. The policies, the "Ready to Govern" policy,³⁵ Reconstruction and Development Programme ("RDP"),³⁶ and Growth, Employment and Redistribution ("GEAR")³⁷ are explained to the extent that they gave rise to B-BBEE. The principles of B-BBEE are incorporated into Mining Charter and provisions about mining communities, as is explained in section 3.2.

The section emphasises how the (neoliberal) economic policy and ideology promoted globally at the time influenced these policies and thus informed the thinking around the development of mining communities.

of more progressive policies had to be accompanied for instance by guaranteeing the protection of property rights, free movement of capital and privatisation of business. Williams & Taylor (2002) *New Political Economy* 28, 29.

³⁴ Williams & Taylor (2000) *New Political Economy* 24-26; Terreblanche (2002) 420, 424-439.

³⁵ African National Congress *Ready to Govern: ANC Policy Guidelines for a Democratic South Africa adopted at the National Conference* (1992) ("ANC (1992)").

³⁶ African National Congress *The Reconstruction and Development Programme: A Policy Framework* (1994) ("the ANC RDP Policy framework/Base Document (1994)"); RDP White Paper (1994).

³⁷ Department of Finance "Growth, Employment and Redistribution: A Macroeconomic Strategy (1996) (hereinafter "GEAR").

2.2.1. “Ready to Govern”, RDP, GEAR, Empowerment and LED

The first example of the acceptance of neoliberal economic policy is the ANC’s “Ready to Govern” (1992) policy document.³⁸ The document proposed a national economic strategy based on redistribution “to meet the basic needs of our people” and the restructuring of the South African economy by pursuing sustainable growth and development.³⁹ The introduction of the new mineral law system in terms of the MPRDA was also anticipated in this document.⁴⁰

The strategy was framed in vague terms, opening it up to conflicting interpretations: On the one hand, the strategy could promote an economy directed by an open and free market; on the other hand, the strategy could be interpreted to require major state intervention, which conflicts with aspirations to have an open and free market.⁴¹ An interpretation favouring redistribution was significantly underplayed by neoliberal analysts.⁴² The ANC consequently moved away from major state intervention and radical redistribution objectives to avoid the collapse of the economy, as foretold by the opponents of redistribution.⁴³ The Reconstruction and Development Plan served this purpose.

The Reconstruction and Development Programme (“RDP”)⁴⁴ was regarded as South Africa’s “blueprint for transformation”⁴⁵ and was the result of various conferences initiated by the ANC.⁴⁶ The RDP promoted meeting basic needs, developing human resources, building the economy and democratising the state and society.⁴⁷

Disagreement within the ANC and between the ANC and its alliance partners regarding the meaning of “reconstruction and development”, caused the creation of various drafts of the RDP.⁴⁸ The two important versions are the ANC’s policy framework, or the Base Document,⁴⁹ finalised in February of 1994 before the first democratic elections in April of that year, and the

³⁸ Williams & Taylor (2000) *New Political Economy* 25; ANC (1992).

³⁹ ANC (1992) Section D: Economic Policy Part 1.

⁴⁰ ANC (1992) Section D: Economic Policy Part 9 - Mining and Energy Policy.

⁴¹ Williams & Taylor (2000) *New Political Economy* 25. See section 2.1.2.3 of Chapter 5 where the basic tenets of liberal and neoliberal economics are discussed.

⁴² Williams & Taylor (2000) *New Political Economy* 24.

⁴³ Williams & Taylor (2000) *New Political Economy* 24.

⁴⁴ See the Base Document (1994) and the RDP White Paper. The RDP has its origins in the Freedom Charter.

⁴⁵ Black Economic Empowerment Commission *Black Economic Empowerment Commission Report* (2001) 1.

⁴⁶ Base Document (1994) Preface.

⁴⁷ Base Document (1994) Section 1.4; RDP White Paper (1994) Section 1.4.

⁴⁸ Williams & Taylor (2000) *New Political Economy* 31. Terreblanche (2002) 108. When the RDP ANC Policy Framework (Base Document) was released in February of 1994, it was preceded by six earlier versions. Base Document (1994) Preface. The alliance partners were the South African Communist Party (“SACP”) and COSATU.

⁴⁹ Base Document (1994).

official White Paper on Reconstruction and Development,⁵⁰ issued by the Government of National Unity (“GNU”) in November 1994.

The ANC policy framework (Base Document) formed part of the ANC’s election campaign before the first democratic elections.⁵¹ The Base Document constituted a compromise by the ANC to attain the support of its alliance partners for the upcoming elections.⁵² Amongst other things, the Base Document provided for the objectives and values of Black Economic Empowerment.⁵³

Whereas the Base Document was in many instances still critical of the global neoliberal path set for the South African economy,⁵⁴ (despite the concessions already made), the RDP White Paper dishonoured the erstwhile redistributive principles.⁵⁵ This resulted in the new democratic government often being criticised for “talking left” but “acting right”.⁵⁶

Policymaking under the GNU, according to some, contributed to the watering down of progressive interventions.⁵⁷ The RDP White Paper is evidence of an attempt to reconcile the diversity of opinions forming part of the GNU but within a framework created by the “mantras of globally-orientated capital”.⁵⁸ The propositions included in the RDP White Paper were broad and ambiguous.⁵⁹ The focus shifted to the promotion of privatisation.⁶⁰ Concerning the role of the state, the RDP White Paper also took a different approach than the Base Document: The

⁵⁰ GG 16085 GN 1954 of 1994 (“RDP White Paper (1994)”).

⁵¹ Williams & Taylor (2000) *New Political Economy* 31; Terreblanche (2002) 110.

⁵² Base Document (1994) Preface. The RDP drafts that preceded the Base Document caused disagreement between the ANC and its alliance partners, since the progressive aspects of RDP were increasingly weakened in each draft. Williams & Taylor (2000) *New Political Economy* 31.

⁵³ BEE Commission (2001) 1, referring to Base Document (1994) Section 4.4.6.3.

⁵⁴ It explicitly acknowledged its origins in the Freedom Charter. This is significant, since the Freedom Charter’s ideals are decisively leftist: It includes the statement that “(T)he national wealth of our country, the heritage of South Africans, shall be restored to the people; The mineral wealth beneath the soil...shall be transferred to the ownership of the people as a whole”. Base Document (1994) Preamble, Sections 1.4.17 and 6.5.16.

⁵⁵ Bond (2001) vi, 87; Adelzadeh A & Padayachee V “The RDP White Paper: Reconstruction of a Development Vision?” 1994 (25) *Transformation* 4 mention that the word “redistribution” only appears twice in the RDP White Paper: on pp 4 and 24.

⁵⁶ Bond (2001) vii. See in general Adelzadeh & Padayachee (1994) *Transformation*.

⁵⁷ Williams & Taylor (2000) *New Political Economy* 31. The GNU was predominantly made up by the NP and ANC, each trying to pursue its own, differing, ideological persuasions.

⁵⁸ Williams & Taylor (2000) *New Political Economy* 31.

⁵⁹ Williams & Taylor (2000) *New Political Economy* 31; Adelzadeh & Padayachee (1994) *Transformation* 2 describe it as “a highly incoherent and largely fragmented strategy for economic development”.

⁶⁰ Williams & Taylor (2000) *New Political Economy* 31; Adelzadeh & Padayachee (1994) *Transformation* 3 argue that the promotion of privatisation was somewhat disguised as for instance “the sale of state assets”.

RDP White Paper promoted the neoliberal understanding of the role of the state as a “neutral manager”.⁶¹

The RDP is often regarded as the cause of the South African economy’s poor performance in the second half of the 1990s.⁶² The inherent contradictions within the policy and the disjunction between the RDP as an economic programme and the wider economic context created confusion.⁶³ Furthermore, substantial implementation of the RDP never took place, showing the policy document’s impracticability.⁶⁴ Irrespective, the seeds were planted for the promotion of neoliberal-inspired development and BEE to address poverty as a legacy of the past.

In 1996, the Growth Employment and Redistribution (“GEAR”) strategy was adopted. The “long-run vision” of GEAR maintained that the principles on which the RDP were based, were to be pursued by GEAR, but the content of the GEAR document makes very little reference to the RDP.⁶⁵ A major difference between the RDP and GEAR is that GEAR approached redistribution as a mere eventuality accompanying economic growth.⁶⁶ Redistribution, a central tenet of the Freedom Charter,⁶⁷ was no longer a central part of the government’s economic strategy.⁶⁸ Rather, GEAR provided for the creation of a favourable environment for both local and foreign capital investment, seemingly as a mechanism to empower the previously disadvantaged.⁶⁹

⁶¹ The RDP White Paper (1994) section 1.5.2 states that government must manage the “fundamental transformation in our society” envisaged by RDP. Williams & Taylor (2000) *New Political Economy* 31; Adelzadeh & Padayachee (1994) *Transformation* 5 note that the Base Document (1994) sections 4.2.3 & 4.2.4 envisaged a prominent role for government to play in reconstruction and development. They also note that the RDP Whitepaper did not commit to the protection of basic welfare rights for all South Africans, as was the case under the Base Document.

⁶² Williams & Taylor (2000) *New Political Economy* 32. Terreblanche (2002) 112 & 113 describes the poor performance of the South African Rand at the time and the rise in unemployment.

⁶³ Williams & Taylor (2000) *New Political Economy* 32; Nattrass N “The RDP White Paper: A Cocktail of Confusion” 1994 (12) *Indicator SA* 36. As argued by Adelzadeh & Padayachee (1994) *Transformation* 2, an interpretation of the RDP White Paper as promoting a continuation of the economic policy under the Base Document, would be forced since the two documents differed on major themes such as nationalisation and redistribution.

⁶⁴ Williams & Taylor (2000) *New Political Economy* 32. Terreblanche (2002) 109, 112 however maintains that RDP was successful in creating “rhetorical inclusion” of the poor.

⁶⁵ Williams & Taylor (2000) *New Political Economy* 34. GEAR (1996) Section 1.1.

⁶⁶ Williams & Taylor (2000) *New Political Economy* 33, 34; GEAR (1996) section 1.3. Terreblanche (2002) 114 & 115. Whereas the RDP focused on social spending GEAR promoted export as a strategy for economic growth.

⁶⁷ The Freedom Charter provides for “the people” to “share in the country’s wealth”. See footnote 16 above.

⁶⁸ Williams & Taylor (2000) *New Political Economy* 34.

⁶⁹ Williams & Taylor (2000) *New Political Economy* 34. Terreblanche (2002) 114 notes that GEAR reassured international investors that South Africa was open for business. The South African government entered into an agreement with the World Trade Organisation to liberalise trade. Thereafter the financial rand was abolished. The models followed by GEAR all claimed that more policies inviting foreign and local investment would lead to economic growth that will create prosperity. Mechanisms that were proposed included: curbing

GEAR is representative of the pressure on the GNU from advisers and economists at the World Bank and IMF and business community to take on neoliberal development solutions for South African problems.⁷⁰ It constituted a local implementation of the Washington Consensus.⁷¹ The drafters of the GEAR policy relied on the advice of the World Bank⁷² to bring the document in line with models of the World Bank.⁷³ These models and underlying ideals, however, were never subjected to public scrutiny, causing GEAR to be regarded as an elite consensus.⁷⁴ Despite being more investor-friendly than the RDP,⁷⁵ the GEAR strategy was also not successful in achieving its goals.⁷⁶

Another notion relevant for poor mining communities, introduced to the South African policy landscape in the early days of its new democracy, is that of local economic development (“LED”). LED focusses on local (as opposed to national) economic development⁷⁷ of a specific community or group of people by promoting partnerships between the public and private sector and the involvement of other non-governmental development agencies.⁷⁸ The role of government in LED is to enable and partially fund development projects and to delegate some of its control over the area implicated to private entities, such as mining companies.⁷⁹

government expenditure as a means to address the budget deficit; lowering the inflation rate and taxes on companies; doing away with exchange controls; restraining wage demands; ensuring flexibility in the labour market and promoting the privatisation of state assets. It has been argued that in addition to favouring international interests, these measures were included to serve the interests of South Africa’s neoliberal elite.

⁷⁰ Williams & Taylor (2000) *New Political Economy* 33.

⁷¹ Bond (2001) 69, 82; Terreblanche (2002) 114. The Washington Consensus consists of 10 policies, proposed by John Williamson in 1989, which formed part of the reform package provided to developing countries by the World Bank and IMF. The policies advocate free-market and macroeconomic stability.

⁷² Bond (2001) 69, 82.

⁷³ Williams & Taylor (2000) *New Political Economy* 33, 34. GEAR aligned with models of the Development Bank of Southern Africa and the Bureau for Economic Research and the South African Reserve Bank econometric model. The World Bank was also involved in policy creation regarding aspects such as housing and infrastructure and land reform.

⁷⁴ Williams & Taylor (2000) *New Political Economy* 34. Terreblanche (2002) 72, 115 regards GEAR as a second elite compromise and argues that GEAR merely “paid lip-service to redistribution and poverty relief” while “its main concerns were the balance of payments, inflation and FDI (foreign direct investment)”.

⁷⁵ Southall R and Tangri R “The Politics of Black Economic Empowerment in South Africa” 2008 *Journal of Southern African Studies* 702.

⁷⁶ Bond (2001) 41. GEAR for instance caused job losses instead of creating jobs.

⁷⁷ Nel E & John L “The Evolution of Local Economic Development in South Africa” in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery - Urban Policy in South Africa* (2006) 209.

⁷⁸ Binns T & Nel E “Devolving Development: Integrated Development Planning and Developmental Local Government in Post-apartheid South Africa” 2002 *Regional Studies* 924; Nel & John (2006) 209.

⁷⁹ Nel E “Local Economic Development: A Review and Assessment of its Current Status in South Africa” 2001 (38) *Urban Studies* 1005. See the Department of Provincial and Local Government *National Framework for Local Economic Development in South Africa (2006-2011)* (2006).

At the municipal level, LED is provided for in the Local Government: Municipal Systems Act,⁸⁰ more specifically in the integrated development plan (“IDP”) to be created by every municipality.⁸¹ The IDP and its relevance for the development of mining communities are discussed in section 3 of this chapter, but for the purpose of this section, a few brief comments on the introduction of the notion of the IDP to the South African policy landscape, will suffice.

The post-apartheid notion of integrated development had its origins in the RDP.⁸² The IDP is regarded as a local (as opposed to national) version of the RDP.⁸³ The notion of the IDP, as provided for in the Local Government: Municipal Systems Act, is the result of influences of international development agencies on the first democratic government of South Africa.⁸⁴ In accepting the idea of the IDP into the South African policy framework, the GNU embraced a type of politics that actually moved away from an absolute belief in the efficiency and rationality of the market.⁸⁵ Whereas poverty alleviation and community strengthening and participation were embraced, the move, however, did not mean an absolute rejection of neoliberalism, since the basis of neoliberalism was accepted.⁸⁶

As is indicated in section 3 of this chapter, LED is promoted for the benefit of mining communities in terms of both the Social and Labour Plan (“SLP”) to be created by mining companies and the Integrated Development Plan (“IDP”) to be created by the local municipality.⁸⁷ LED, as a component of the global development paradigm, is discussed further

⁸⁰ Local Government: Municipal Systems Act 32 of 2000.

⁸¹ S 25 Local Government: Municipal Systems.

⁸² Harrison P “Integrated Development Plans and Third Way Politics” in Pillay et al *Democracy and Delivery - Urban Policy in South Africa* (2006) 194.

⁸³ Binns & Nel (2002) 923 referring to “LED: A Discussion Piece” 2000 *LED News* 2.

⁸⁴ Harrison (2006) 187 & 192.

⁸⁵ Harrison (2006) 188, 194 refers to the second wave of New Public Management (“NPM”), associated with Third Way politics, which influenced the creation of the IDP in South Africa. NPM promotes efficiency in governance, in line with neoliberal policy. The second wave of NPM embraced Third Way politics. Third Way politics is traditionally regarded as a third alternative to left-wing and right-wing politics. During the 1990s, sociologist Anthony Giddens, used the terminology “Third Way” to signify an alternative to the neoliberal policies adopted in Anglo-America during the 1980s by the administrations of Ronald Reagan and Margaret Thatcher. Giddens describes the Third Way as a renewal of social democracy, signifying a move away from an absolute belief in the rationality of the markets, specifically in an age of globalisation. It is usually associated with the administrations of Bill Clinton (USA-New Democrats) and Tony Blair (UK-New Labour). See Giddens A *The Third Way: The Renewal of Social Democracy* (2013).

⁸⁶ Harrison (2006) 189, 194. For Harrison, the basis of neoliberalism here includes the implementation of the strict fiscal and monetary policies, welfare-to-work programs (social assistance is provided by assisting the poor to become employable) and privatisation. Giddens (2013) acknowledges the criticism that the Third Way is “warmed-over neoliberalism”, but still advocates for the Third Way as a means to transcend both old-style social democracy and neoliberalism. An analysis of the effect of Third Way politics on LED in South Africa, falls outside of the scope of this thesis. For more information, see in general Harrison (2006).

⁸⁷ The SLP must be created by the mining right holder in terms of ss 22 and 23 of the MPRDA and the regulations 40-46 of the Regulations in terms of section 107(1) of the MPRDA (GNR 527 GG 26275 of 23 April 2004). See section 3.3 below.

in Chapter 5 of this thesis. For current purposes, it is noted that while also empowering local government and community-based structures, the initial formulation of LED in South Africa was based on Eurocentric and neoliberal ideals.⁸⁸

The GEAR and LED policies did not provide for BEE explicitly, as was the case with RDP. GEAR, however, did create the economic environment within which B-BBEE would come to play a significant role: By pursuing economic growth and industrial and infrastructure development and opening-up South Africa to global business, a firm foundation for neoliberal policies was provided.⁸⁹ As is expanded on in Chapters 5 and 6, empowerment (BEE) in general but also as it pertains to mining communities specifically, is narrowly associated with the idea of development. Development as an ideology, and LED, are based on certain assumptions about people, their needs and how they interact with one another.⁹⁰ During the time when BEE and B-BBEE were conceived in South Africa, these assumptions were based on neoliberal ideals. Some argue these assumptions still reflect these neoliberal ideals, as is set out in Chapters 5 and 6. It is shown in the next section how B-BBEE came about in the policy context described here.⁹¹

2.2.2. B-BBEE: Empowerment and Development

Black Economic Empowerment (“BEE”) was introduced in South Africa to deracialise business ownership and to create a black middle class.⁹² It is a measure introduced to give effect to the right to equality protected in section 9 of the Constitution of the Republic of South Africa.⁹³ Initially, BEE initiatives focused mainly on transferring the ownership of businesses to black persons.⁹⁴ Various transfers of shareholding in mining companies to black persons took

⁸⁸ Nel (2001) *Urban Studies* 1009; Nel & John 209; Harrison (2006) 192, 194, 197 affirms the link with international trends but also concedes that the conception of IDP in South Africa was unique and locally focused to the extent that the legacy of fragmented town planning under apartheid had to be addressed.

⁸⁹ GEAR (1996) 1 & 2.

⁹⁰ Gordon RE & Sylvester JH “Deconstructing Development” 2004 (22) *Wisconsin International Law Journal* 72.

⁹¹ Section 2.2.2 of this Chapter 3 is based on a publication by the student and her supervisor: Heyns A & Mostert H “Three Mining Charters and a Draft: How the Politics and Rhetoric of Development in the South African Mining Sector are Keeping Communities in Poverty” *Law and Development Review* 2018 (11) 801. In terms of the Memorandum of Understanding between the student and her supervisor, the student committed contractually to publish articles while completing her PhD thesis. See also the declaration regarding the inclusion of publications.

⁹² BEE Commission (2001), 1; Seekings and Natrass (2005) 341 & 343. Base Document (1994) Section 4.4.6.3. Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

⁹³ The Constitution of the Republic of South Africa, 1996. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

⁹⁴ Seekings & Natrass (2005) 344 & 345. At this point no all-encompassing legislation existed to regulate BEE and to define aspects such as “black people”, but the Broad-Based Black Economic Empowerment Act 53 of

place as part of an attempt to stimulate the growth of the South African economy, thereby eradicating poverty, in general, but also specifically in marginalised communities.⁹⁵ Unfortunately, the attempt failed: BEE ownership transactions (in the mining but also in other industries) benefitted an elite few, doing little for those living in impoverished conditions.⁹⁶

This narrow approach to BEE was also criticised by the Black Economic Empowerment Commission (“the Commission”) in 2001.⁹⁷ The Commission proposed measures for the inclusion of black persons at all levels of the economy, and not only as owners of businesses.⁹⁸ Black economic empowerment, consequently, transformed into *broad-based* black economic empowerment (“B-BBEE”).⁹⁹

As indicated in the Commission’s report, BEE responds to the disempowerment of black people as a result of policies that caused their “domination, exploitation and marginalisation” for the benefit of the South African economy.¹⁰⁰ The language of development is used: BEE is described as a means to achieve sustainable development and to break “the cycle of underdevelopment”, specifically in rural areas.¹⁰¹ The Commission proposes that low

2003 that came into force later on to regulate B-BBEE, defines “black people”. See footnote 5 at section 2 of Chapter 2. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

⁹⁵ Southall & Tangri (2008) *Journal of Southern African Studies* 703; Seekings & Natrass (2005) 343. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2. In 2003 empowerment deals across all industries were valued at R 42 billion. Major deals in the mining industry favoured individuals significantly. Business Report “Empowerment deals valued at R42bn in 2003” *IOL* 30 March 2004 available at <www.iol.co.za/business-report/economy/empowerment-deals-valued-at-r42bn-in-2003-765864> accessed on 9 February 2020. According to Mbeki, the equation formulated during CODESA for transformation in South Africa was “Parliamentary Democracy + Globalisation + BEE=Transformation” - Mbeki M *Architects of Poverty: Why African Capitalism Needs Changing* (2009) 74. The pursuit of economic growth as a means to address poverty goes hand in hand with the “trickle-down” theory. Trickle-down theory determines that the creation of a beneficial environment for businesses, by for instance lowering tax rates, will ensure that the economic benefits and growth created by the businesses will “trickle down” to the poor in the form of employment and wages. The labourers will spend their wages, which will again stimulate the economy.

⁹⁶ BEE Commission (2001) 2; Horne R “Patterns of Ownership and Labour Unrest within the South African Mining Sector” 2015 (40) 26. See Mbeki (2009), 68. Mbeki argues that it is not the ANC that invented BEE. South Africa’s economic oligarchs, which included the mining industry, created BEE as a means for these players to retain a role in economic policy formulation. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

⁹⁷ BEE Commission (2001). The BEE commission was established in May 1998 under the Black Business Council, an umbrella body representing major black business organisations. Cyril Ramaphosa, the current president of South Africa, was the chairperson. The Commission issued a report that provided the strategy for the implementation of BEE in SA. Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

⁹⁸ See the definition of “broad-based black economic empowerment” in s 1 of Broad-Based Black Economic Empowerment Act 53 of 2003. The different aspects of B-BBEE are discussed below. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

⁹⁹ BEE Commission (2001) 2. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

¹⁰⁰ BEE Commission (2001) 3; Terreblanche (2002) 106. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

¹⁰¹ BEE Commission (2001) 3 & 9. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

economic growth and poverty in South Africa can be addressed through increased investment and growth, thereby setting “a new path to development”.¹⁰²

Development language is also used to address the issue of poor rural communities. The Commission maintains that the development of rural areas will eradicate poverty in these areas.¹⁰³ Poverty is measured and the poor classified in terms of a poverty line.¹⁰⁴ The Commission’s report acknowledges that poverty is not only a lack of income but also a lack of opportunities and requires both social and economic intervention.¹⁰⁵ The recommendations made by the Commission included land reform, promoting economic opportunities and ownership by communities, and investment in rural infrastructure.¹⁰⁶

The Broad-Based Black Economic Empowerment Act¹⁰⁷ (“the B-BBEE Act”) currently regulates B-BBEE. The B-BBEE Act aims to ensure the economic empowerment of black people by providing for the meaningful participation of black people in most businesses across all sectors of the economy.¹⁰⁸ To achieve this and the other objectives provided for in the B-BBEE Act, the B-BBEE Act mandates the creation of codes of good practice that set out the criteria to be complied with by businesses.¹⁰⁹ These codes include scorecards in terms whereof

¹⁰² BEE Commission (2001) 9 & 10. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

¹⁰³ BEE Commission (2001) 47&48. “Development” includes addressing the following problems in rural areas through increased state intervention and creating a comprehensive social security system: the circumstances of women living in these areas, food insecurity, insufficient access to education and the opportunity to own productive assets, lack of support for farming and other means of earning income through land use and the lack of access to information and communication technology. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

¹⁰⁴ BEE Commission (2001) 48. The assessment was done in 1996 and a poverty line of R 800 per month was used to determine the percentage of people living in poverty. A poverty line depicts the minimum level of income required to ensure that the basic necessities to survive can be acquired. If such a level of income cannot be attained, one is classified as being poor. Merriam Webster available at <<https://www.merriam-webster.com/dictionary/poverty%20line>> accessed on 9 February 2020. See the discussion of the function of poverty lines at section 3.2 of Chapter 5 of this thesis. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

¹⁰⁵ BEE Commission (2001) 48. The report refers to the *Global Poverty Report* (July 2000) that was submitted to the G8 Okinawa Summit by the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Monetary Fund and the World Bank. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

¹⁰⁶ BEE Commission (2001) 48. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2. 53 of 2003.

¹⁰⁷ S 1 B-BBEE Act: Definition of “broad-based black economic empowerment”.

¹⁰⁹ S 9 of the B-BBEE Act provides for the creation of the codes of good practice. Depending on the annual turnover of a business, it can be regarded as an exempted micro-enterprise (“EME”), in which event it need not undergo a BEE audit. If it is an enterprise that does not qualify as an EME, it will either follow the scorecard for qualifying small enterprises (“QSE’s”) or if it is a larger business, the Generic Scorecard. Some industries have sector specific charters approved by the Department of Trade and Industry (“DTI”) and gazetted in terms of s 12 of the B-BBEE Act. For more information see the DTI website on economic empowerment available at <https://www.thedti.gov.za/economic_empowerment/bee_sector_charters.jsp> accessed on 9 February 2020. See also Scholtz BA & van Wyk C BEE *Service Empowerment* (2019) Chapter 1.

the compliance of businesses are measured annually through an auditing process performed by accredited BEE verification agencies.¹¹⁰ Businesses have to maintain a certain level of representation of black persons in the equity ownership and management of the business. Businesses should contribute to skills development and the development of black enterprises and suppliers by making use of the goods and services of these entities.¹¹¹ Furthermore, a business must promote the socio-economic development of black persons by making financial contributions to suitable projects.¹¹² Non-compliance with the basic thresholds set out in the scorecards will result in a business being unable to pursue business opportunities, which could have detrimental consequences for such a business.¹¹³ It is not yet clear whether the broad-based nature of empowerment benefits a broader spectrum of society, specifically rural communities, and not just a few individuals.¹¹⁴

This section shows that the notion of BEE or B-BBEE is firmly situated in the development paradigm. It frames the problem to be addressed as “disempowerment”, which encompasses poverty, inequality and underdevelopment as a result of past racial discrimination. Empowerment entails focusing on investment, economic growth and efficiency and vesting ownership of businesses in black people. The Mining Charter is subjected to these underlying aspirations, as discussed in section 3 of this Chapter.

To conclude the section on the policy context, the next section gives an overview of current rhetoric employed in policies aimed at addressing poverty and inequality in South Africa. Empowerment, as implemented in the mining industry, may have originated in a neoliberal context, but it should be assessed to which extent this context has evolved, if at all, and the implications of such an evolution for mining communities today.

¹¹⁰ Accreditation of verification agencies is performed by the South African National Accreditation System (SANAS) in terms of the *Framework for Accreditation and Verification by All Verification Agencies* issued in terms of the B-BBEE Act (GN 31255 18 July 2018). See the DTI website on economic empowerment available at <http://www.dti.gov.za/economic_empowerment/bee_veri.jsp> accessed on 9 February 2020. See also Scholtz & van Wyk (2019) Chapter 1.

¹¹¹ Broad-Based Economic Empowerment Act 53 of 2003: Issue of Codes of Good Practice (GG 36928 & GN 1019 of 11 October 2013) (“Generic Scorecard”).

¹¹² Generic Scorecard. See also Scholtz & van Wyk (2019) Chapters 1 & 8.

¹¹³ Being considered for government and other tenders often depends on a bidder’s level of compliance with B-BBEE since government and businesses must give preference to B-BBEE compliant companies in awarding tenders to ensure that the tender issuer complies with its own B-BBEE obligations. In certain instances, penalties can also be issued in the case of non-compliance. In certain sectors, licences to operate in the sector may be withheld in the case of non-compliance. As is explained below, the mining industry is one of these sectors. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

¹¹⁴ The mining industry still prioritises BEE ownership deals, which preference is blamed for the labour unrest that took hold of the industry in 2012. See Horne (2015) *Journal of Contemporary History*. See also Heyns & Mostert (2018) *Law and Development Review* section 2.2.2.

2.2.3. Current Policy & Rhetoric

B-BBEE has its origins in a specific policy context, but this context has changed somewhat since the early 1990s. A brief consideration of strategies and rhetoric currently put forward concerning poverty alleviation and development is provided here to ascertain if the same rhetoric is continued.

The National Development Plan (“NDP”) was released by the National Planning Commission in 2011.¹¹⁵ The National Planning Commission was appointed by the President of the Republic to explore and advise on how long-term development can be achieved in South Africa.¹¹⁶

The NDP acknowledges the commitments of the RDP and the policies created by government to give effect to the RDP.¹¹⁷ It furthermore acknowledges that progress has been made in reducing poverty and inequality, but that such progress remains insufficient.¹¹⁸ To “eliminate poverty” and “sharply reduce inequality by 2030”, the NDP proposes creating a “virtuous cycle of growth and development”.¹¹⁹ Communities are motivated to participate in their own development.¹²⁰ Increased investment in infrastructure, innovation and entrepreneurialism are promoted to increase economic growth.¹²¹ Importantly, the NDP promotes an understanding of development that centres on the creation of capabilities – necessitating a shift from “a paradigm of entitlement to a development paradigm that promotes the development of capabilities, the creation of opportunities and the participation of all citizens”.¹²²

The NDP does not focus on mining communities specifically¹²³ but does make mention of rural economies. The aim is to have rural communities participate fully in the economy of South Africa by 2030 by ensuring education, healthcare transport and other basic services.¹²⁴ Once again, the development of capabilities is emphasised.¹²⁵ To address poverty and inequality, the NDP argues for all South Africans to be involved in their own development and for the

¹¹⁵ National Planning Commission *National Development Plan: Vision for 2030* (2011) (“the NDP 2011”).

¹¹⁶ NDP (2011) Foreword.

¹¹⁷ NDP (2011) Overview 1.

¹¹⁸ NDP (2011) Overview 1.

¹¹⁹ NDP (2011) Overview 2.

¹²⁰ NDP (2011) Overview 2.

¹²¹ NDP (2011) 5.

¹²² NDP (2011) 5.

¹²³ The NDP prioritises growing the mining industry by improving regulatory certainty and access to infrastructure, but no specific mention is made of the mining industry’s role in the development of mining areas. NDP (2011) 30.

¹²⁴ NDP (2011) 15 & 16; 32 & 33; 195-213.

¹²⁵ NDP (2011) 15 & 16.

injustices of the past to be addressed adequately.¹²⁶ Emphasis is furthermore placed on economic growth, higher investment and employment.¹²⁷

A detailed discussion of the different strategies set out by the NDP for increased development in South Africa falls outside of the scope of this thesis, but it is important to note the rhetoric employed by the NDP. Scholars have commented that the NDP may employ different rhetoric, but in principle, it sets forth the neoliberal direction employed by the RDP and GEAR, at most.¹²⁸

Government has in its 2017 Budget put forward its “radical economic transformation for inclusive growth” strategy.¹²⁹ “Radical economic transformation” includes the following: re-industrialising the South African economy;¹³⁰ increasing black ownership of land but also industry and the economy;¹³¹ turning South Africa into a “democratic development state”;¹³² and giving policy continuity preference over policy change.¹³³ The notion, however, is criticised for constituting “mere political rhetoric”, changing substance depending on the environment.¹³⁴ As part of this rhetoric, neoliberal policy is contested, but commentators have noted that the ANC government’s policy remains locked in neoliberal thinking.¹³⁵

¹²⁶ NDP (2011) Overview 2.

¹²⁷ NDP (2011) Overview 2. Education, health and a “capable government” are also highlighted.

¹²⁸ Fine B “Chronicle of a Developmental Transformation Foretold: South Africa’s National Development Plan in Hindsight” 2012 (78) *Transformation: Critical Perspectives on Southern Africa* 124, 129. Fine discusses the role of the Mineral Energy Complex in the NDP and notes the rhetoric employed when referring to the needs of the masses.

¹²⁹ National Treasury *2017 Budget: People’s Guide* (2017).

¹³⁰ Davies M “7 Things you need to know about Radical Economic Transformation” *Huffpost* 29 June 2017 available at <https://www.huffingtonpost.co.za/2017/06/29/7-things-you-need-to-know-about-radical-economic-transformation_a_23007474/> accessed on 9 February 2020. Re-industrialisation includes increasing manufacturing and beneficiation.

¹³¹ Davies (2017) *Huffpost*. The B-BBEE codes have been revised and there is a renewed effort to promote land reform.

¹³² Davies (2017) *Huffpost*. The vision here is for government to drive development with the assistance of the private sector.

¹³³ Davies (2017) *Huffpost*. Effect must be given to the NDP, the New Growth Path and the Industrial Policy Action. See Department of Trade and Industry *New Growth Path: Framework* (2011) and the Department of Trade and Industry *Industrial Policy Action Plan, 2017/18 – 2019/20* (2017).

¹³⁴ Graduate School of Business, University of Cape Town “Radical Economic Transformation” panel discussion held on 19 April 2017 main article available at <<https://www.gsb.uct.ac.za/main-article/>> accessed on 9 February 2020; Schutte G “Masses shackled by neoliberalism” *Pretoria News* 25 May 2017 available at <https://www.iol.co.za/pretoria-news/masses-shackled-by-neoliberalism-9339621> accessed on 10 April 2020.

¹³⁵ Forbes D “The neoliberal ANC and its ‘Radical Economic Transformation’ hot air” *Rand Daily Mail* 21 April 2017 available at <<https://www.businesslive.co.za/rdm/politics/2017-04-21-david-forbes-the-neoliberal-anc-and-its-radical-economic-transformation-hot-air/>> accessed on 9 February 2020.

Neoliberalism and capitalism are also racialised and therefore blamed for the exclusion of black people from the formal economy. “White monopoly capital”,¹³⁶ as in the notion that the means of production in South Africa, the mining industry included, are still mostly owned by white persons, has been a recurring theme in political and economic conversations in South Africa.¹³⁷ The ruling party, the ANC, dismissed the term but does not dispute that monopoly capital is a problem in a capitalist system.¹³⁸ The attack on “white monopoly capital” therefore does not constitute official policy, but the notion still comes up in discussions on poverty and inequality, especially between groups on the opposite ends of the ideology scale.¹³⁹

To claim that the context within which B-BBEE operates has changed completely since its inception, therefore, seems to be inaccurate. The rhetoric employed by government may suggest otherwise, but the underlying ideology is still traceable.

3. The Legislative System

In this section, the legislation and policies for the empowerment and development of mining communities are set out and analysed. The pursuit of development and poverty alleviation in mining areas, however, is affected also by legislative provisions not aimed specifically at the mining industry. Other relevant legislation is therefore also considered in this section. The legislation is collectively referred to as “the legislative system”.

¹³⁶ Even though the origin of the term is disputed, there is evidence that the British public relations firm Bell Pottinger proposed the use of the term to paint the criticism of the Gupta family’s involvement in South Africa as “white monopoly capital” thereby causing racial division. Business Live “Report fingers Bell Pottinger in ‘White Monopoly Capital’ campaign” in *Times Live* 4 September 2017 available at <<https://www.timeslive.co.za/news/south-africa/2017-09-04-report-fingers-bell-pottinger-in-white-monopoly-capital-campaign/>> accessed on 9 February 2020.

¹³⁷ Mzamo P “SA mining struggles don’t originate from White Monopoly Capital” *Mining News* 4 October available at <<http://www.miningnews.co.za/2017/10/04/sa-mining-struggles-dont-originate-from-white-monopoly-capital-mkhize/#>> accessed on 9 February 2020; Kekana M “Sihle Zikalala: White Monopoly Capital in SA exists” *Eyewitness News* July 2017 available at <<http://ewn.co.za/2017/07/25/sihle-zikalala-weve-got-white-monopoly-capital-in-sa>> accessed on 9 February 2020; Patel K “Deconstructing “White Monopoly Capital” *Mail & Guardian* 27 January 2017 available at <<https://mg.co.za/article/2017-01-27-00-when-a-catchphrase-trips-you-up/>> accessed on 9 February 2020.

¹³⁸ Bendile D “White Monopoly Capital allegation finds little favour at ANC conference” *Mail & Guardian* 5 July 2017 available at <<https://mg.co.za/article/2017-07-05-white-monopoly-capital-finds-little-favour-at-anc-conference>> accessed on 9 February 2020.

¹³⁹ The Economic Freedom Front, a political party that is vocal about its leftist ideals, often refers to “white monopoly capitalism”. Daniel L “EFF blasts Ramaphosa for firing Moyane, cites ‘White Monopoly Capital’ agenda” *The South African* 2 November 2018 available at <<https://www.thesouthafrican.com/eff-tom-moyane-ramaphosa-white-monopoly-capital/>> accessed on 9 February 2020.

The Constitution of the Republic of South Africa¹⁴⁰ provides the foundation for the transformative operation of all legislation in South Africa.¹⁴¹ A failure to mention the provisions of the Constitution, cardinal for the empowerment and development of mining communities, would result in an incomplete depiction of the context within which the relevant legislation operates. An exhaustive discussion of the Constitution, however, is not provided.

3.1. Development in the Era of Constitutionalism

The Constitution sets the framework within which the legislative system discussed in this section must operate. Only a few important sections will be discussed to show that government's mandate to create legislative measures ensuring the promotion of equality and socio-economic development is firmly entrenched in the constitutional dispensation.

Section 9 protects the right of every person to equality. To be equal means to receive equal treatment under the law;¹⁴² to be able to enjoy all rights and freedoms; and, not to be discriminated against by the state or any person.¹⁴³ Legislative and other provisions must be put in place to give effect to the right to equality, specifically for persons affected by unfair discrimination.¹⁴⁴ The economic empowerment of black persons in terms of the B-BBEE Act is an example of the provision made in this regard.¹⁴⁵

Empowerment in terms of the Mining Charter entails socio-economic development, specifically of mining communities.¹⁴⁶ Section 152(1) of the Constitution determines that municipalities¹⁴⁷ must promote the socio-economic development of the areas they govern. The Local Government: Municipal Systems Act gives effect to the mentioned constitutional obligation and is of specific relevance in the context of mine community development, as is discussed below.

¹⁴⁰ The Constitution of the Republic of South Africa 1996 (hereinafter "the Constitution").

¹⁴¹ S 2 of the Constitution determines that the Constitution is the supreme law of South Africa meaning any law conflicting with the Constitution is invalid. See Klare K "Legal Culture and Transformative Constitutionalism" 1998 (14) *South African Journal on Human Rights* & Klare K & Davis DM "Transformative Constitutionalism and the Common and Customary Law" 2010 (26) *South African Journal on Human Rights* for more on how lawyers dealing with the Constitution should contribute to transformation in South Africa.

¹⁴² Ss 9(1).

¹⁴³ Ss 9(3) & (4).

¹⁴⁴ Ss 9(2) & (4).

¹⁴⁵ See section 2.2.2 of this Chapter.

¹⁴⁶ The B-BBEE Generic scorecard measures a business' contribution to the socio-economic development of black people. The Mining Charter makes this provision more relevant for the mining industry by providing that a mining right holder must contribute to "mine community development". See section 3.2 of this Chapter.

¹⁴⁷ Municipalities represent the local branch of government. In South Africa, government functions at national, provincial and local level. See Chapter 7 of the Constitution.

Socio-economic development is also mentioned in section 24 (b)(iii) of the Constitution, which section provides for the right to a healthy environment for present generations and protection of the environment for future generations – the section thus promotes sustainable development. To give effect to the right to a healthy environment, legislation must be enforced to ensure that socio-economic development takes place in a sustainable manner.

It is trite that the enactment of the Constitution and the Bill of Rights marked a break with the previous regime, showing the way for social, political and economic transformation. The Constitution is regarded by some as “post-liberal” because it does not pursue purely individualistic notions.¹⁴⁸ Others, however, regard it as being firmly located in the market economy framework, since the Bill of Rights recognises property rights and allows the accumulation and disposal of capital.¹⁴⁹

3.2. Development and Empowerment in the Mining Industry

1 May 2004 marks the implementation of a new legislative system for the mining industry in South Africa.¹⁵⁰ The Mineral and Petroleum Resources Development Act (“MPRDA”) was enacted to ensure that the economic benefits resulting from mining are shared with those affected by the history and activities of the industry, such as mining communities. The MPRDA mandates the promotion of empowerment in the mining industry. Primarily, “broad-based economic empowerment”, as provided for in the MPRDA, focuses on addressing past and present discrimination against historically disadvantaged persons, and the transformation of the minerals and petroleum industry.¹⁵¹ Two instruments created in terms of the MPRDA are cardinal for the socio-economic development of mining areas: the Mining Charter and the Social and Labour Plan (“SLP”).

¹⁴⁸ Klare (1998) *South African Journal on Human Rights* 153.

¹⁴⁹ Williams & Taylor (2000) *New Political Economy* 29. See Kistner U, Ismail Sooliman Q & Van Marle K “Poverty and Rights: Philosophical, Historical and Jurisprudential Perspectives” in C Soudien, V Reddy and I Woolard (eds) *Poverty & Inequality: Diagnosis, Prognosis, Responses – State of the Nation* (2019) and Davis DM “Is the South African Constitution an Obstacle to a Democratic Post-Colonial State?” 2018 (34) *South African Journal on Human Rights*. Davies considers arguments that the Constitution presents “an obstacle to transformation”. See also Ramose MB “Towards a post-conquest South Africa: beyond the constitution of 1996” 2018 (34:3) *South African Journal on Human Rights* 326-341.

¹⁵⁰ The MPRDA became operational on this date.

¹⁵¹ S 1 of the MPRDA. A “historically disadvantaged person” refers to a person or group of persons that was affected by unfair discrimination before the Constitution came into force and includes associations and juristic persons in certain instances.

The Mining Charter gives effect to the MPRDA's mandate to promote broad-based socio-economic empowerment¹⁵² in the mining industry.¹⁵³ Before a mining right is granted to a mining company by the Minister of Mineral Resources, the mining company must demonstrate that it complies with the Mining Charter and has provided an SLP.¹⁵⁴ Non-compliance may result in the revocation of a mining right.¹⁵⁵

The Mining Charter follows the scorecard format as provided for by the B-BBEE Act and Generic Scorecard, as discussed under section 2.2.2, but with slight adjustments to make it suitable for the mining industry. Significant focus is placed on the mining company's level of black ownership, its contribution to mine community development and its compliance with the requirements set out in the Mining Charter for housing and living conditions of mineworkers.¹⁵⁶ The mining company furthermore has to promote employment equity and human resource development and it must support black-owned enterprises and suppliers in its procurement practices.¹⁵⁷

A whole range of beneficiaries stands to benefit from empowerment in terms of the Mining Charter: mine communities, black shareholders, black business owners and mineworkers are all specifically mentioned in the Mining Charter. This thesis addresses the issue of the empowerment of mining communities. The focus is therefore mainly on the "mine community development" element and the "ownership" element (to the extent that it applies to mining communities) and the way these elements interact with one another and with other legislative initiatives aimed at the development of poor mining communities. The notion of empowerment,

¹⁵² The MPRDA speaks of "broad-based economic empowerment", but the Mining Charter refers to "broad-based *socio-economic* empowerment". The Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry June 2017 ("draft 2017 Mining Charter") referred to "broad-based *black* socio-economic empowerment", presumably to align the Mining Charter with the DTI B-BBEE Codes of Good Practice, but this reference was not accepted in the current Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (GN 1002 GG 41934 of 27 September 2018) ("2018 Mining Charter").

¹⁵³ S 100(2) of the MPRDA mandates the Minister with the creation of a broad-based socio-economic empowerment charter ("Mining Charter") to provide opportunities to historically disadvantaged persons to benefit from the mining industry.

¹⁵⁴ S 23 of the MPRDA determines that the mining right must be awarded if the objectives of ss 2(d) (promoting opportunities in the mining industry for historically disadvantaged persons and communities), 2(f) (contributing to the social and economic welfare of all South Africans), the Mining Charter and the SLP are furthered.

¹⁵⁵ S 47 of the MPRDA, para 9 of the 2018 Mining Charter.

¹⁵⁶ Previous versions of the Mining Charter scorecard determined how much weight each element carried in determining the B-BBEE accreditation level of a mining company. In terms of the 2018 Mining Charter, no such weight is allocated to the ownership, mine community development and housing and living conditions elements. Irrespective of a mining company's performance in promoting the other elements, if these three elements' compliance targets are not reached, the mining company will be regarded as non-compliant.

¹⁵⁷ See in general the 2018 Mining Charter and the scorecard included under para 13 of the charter.

however, is considered holistically in this thesis. The other elements of the Mining Charter and the beneficiaries empowered in terms of these elements can therefore not be disregarded, especially when the idea of “mine community” is nebulous, as is explained in Chapter 4. To a certain extent, all these beneficiaries will form part of the “mine community”. Empowerment in terms of the Mining Charter thus creates and maintains certain relationships in the mining area. Since inequality remains an underlying issue here, the different relationships implicated by empowerment must be acknowledged in addressing the research question in this thesis. Chapter 4 considers “mine community development” and “ownership” as set out in the Mining Charter regarding mine communities. The different definitions of “community” in the relevant legislation are also analysed. Chapter 4 emphasises the many changes to these definitions that have been proposed over the years.¹⁵⁸

The other instrument created in terms of the MPRDA that requires consideration in this thesis is the SLP. The SLP indicates how a mining company intends to address poverty through its operations in a mining area.¹⁵⁹ The objectives of the SLP system as set out in the regulations to the MPRDA are ambitious. The implementation of the SLP by a mining company should further employment opportunities and the social and economic wellbeing of all South Africans.¹⁶⁰ It should give effect to the transformative ideals of the MPRDA.¹⁶¹ Furthermore, and important for this thesis, the SLP indicates how the mining company as the holder of a mining right will contribute towards the social and local economic development of the mining area.¹⁶²

The mining company should include in the SLP a local economic development programme setting out its intended contribution towards the social and economic development of the mining area.¹⁶³ The notions “local economic development” and “socio and economic development” are used loosely and interchangeably in the regulations and the SLP Guidelines,¹⁶⁴ but as is shown in Chapters 5 and 6, these notions carry specific meanings. The SLP must provide information on the social and economic background of the area where the

¹⁵⁸ Chapter 4 focuses on the interpretational challenges presented by the law mentioned in section 3 of this Chapter 3. Section 2 of Chapter 4 considers the notion “community” as provided for in international and domestic law. Section 3 of Chapter 4 analyses the empowerment measures pertaining to mining communities.

¹⁵⁹ Department of Mineral Resources *Social and Labour Plan Guidelines for the Mining and Production Industries* 8 (“SLP Guidelines”).

¹⁶⁰ Regulations in terms of section 107(1) of the MPRDA, reg 41(a).

¹⁶¹ Reg 41 (b).

¹⁶² Reg 41(c).

¹⁶³ Reg 46(c).

¹⁶⁴ SLP Guidelines.

mine will operate, presumably to acknowledge the realities and needs of persons in the area.¹⁶⁵ Furthermore, the key economic activities that are undertaken in the mining area, as well as the impact of mining on the communities where mining takes place and areas from where labourers migrate, must be identified.¹⁶⁶

The local economic development programme should provide for infrastructure and poverty eradication projects that will be promoted by the mining company. These projects must align with the IDP, discussed in section 3.3 below, for the relevant area.¹⁶⁷ The mining company must propose how it will address the housing and living conditions and the nutritional needs of the mine's employees.¹⁶⁸ A progression plan must furthermore be established that provides for the procurement of goods and services from historically disadvantaged South Africans.¹⁶⁹ Finally, the SLP must also stipulate how the mining company will provide financially for the programmes envisioned in the SLP.¹⁷⁰

The SLP system has been criticised for failing to achieve its goals. A study performed by CALS on 50 SLPs showed that the SLP's did not provide sufficient and clear information on the background of the mining operations and the impact on the relevant communities.¹⁷¹ The SLPs do not acknowledge the disparate impacts of mining on persons of a different race, gender and socio-economic status.¹⁷² No indication is provided whether the projects indicated in the SLPs have been implemented or completed and little evidence is provided of consultation with communities to determine their needs.¹⁷³ The SLPs also lack mechanisms in terms whereof the mining communities can hold mining companies accountable for promises made in the SLPs.¹⁷⁴ Case studies, which were done in five communities standing to benefit from SLPs, show that the SLP system requires a drastic overhaul to ensure that these communities do in fact benefit from the SLP system.¹⁷⁵

¹⁶⁵ Reg 46(c)(i).

¹⁶⁶ Reg 46(c)(ii).

¹⁶⁷ Reg 46(c)(iii).

¹⁶⁸ Reg 46(c)(i) & (iv).

¹⁶⁹ Reg 46(c)(vi). See footnote 151 above for the definition of "historically disadvantaged person" in terms of the MPRDA.

¹⁷⁰ Reg 46 (e).

¹⁷¹ CALS *The Social and Labour Plan Series: Phase 1: System Design and Trends Analysis Report* (2016) 1 & 2.

¹⁷² CALS (2016) 7.

¹⁷³ CALS (2016) 7.

¹⁷⁴ CALS (2016) 7.

¹⁷⁵ CALS *The Social and Labour Plan Series: Phase 2: Implementation - Operation Analysis Report* (2017) 7.

From the discussion above, it is already clear that there are instances where the provisions of the Mining Charter and the SLP overlap. For one, both instruments provide for the development of mining areas and communities. Housing conditions and the procurement of goods and services from historically disadvantaged South Africans are mandated by both instruments. The interaction between and alignment of the two instruments is discussed in Chapter 4.¹⁷⁶

The Mining Charter and SLP also overlap with other legislation that applies to the development of mine communities. In the next section, the relevant legislation is discussed to the extent that it is applicable for this thesis. The interaction with the mining legislation is considered in sections 3.1 and 3.2 of Chapter 4.

3.3. Other Relevant Legislation

The Local Government: Municipal Systems Act¹⁷⁷ provides the mechanisms municipalities must use to promote the social and economic development of local communities.¹⁷⁸ As has been mentioned before, one of these mechanisms is the Integrated Development Plan (“IDP”). It essentially is a planning tool, but municipal planning must be directed towards achieving local economic development: The plan serves as a point of coordination for development proposals and plans for a specific municipality.¹⁷⁹ The IDP sets the foundation for the municipality’s annual budget and must be compatible with provincial and national development plans.¹⁸⁰ A municipal council adopts an IDP to be effective during its elected term.¹⁸¹

The IDP aims to overcome the heritage of apartheid planning and the impact that it has on the poor.¹⁸² In theory, drafting takes place only once the actual level of development of the municipality has been determined and communities have been identified that lack access to municipal services.¹⁸³ Provision is explicitly made for consultation with the local community and for allowing the local community to take part in the drafting of the IDP.¹⁸⁴

¹⁷⁶ See section 3.1 of Chapter 4.

¹⁷⁷ Act 32 of 2000 (“Municipal Systems Act”).

¹⁷⁸ Preamble.

¹⁷⁹ S 23 of the Municipal Systems Act.

¹⁸⁰ S 25(1) of the Municipal Systems Act.

¹⁸¹ S 25(1) of the Municipal Systems Act.

¹⁸² S 25 of the Municipal Systems Act. The IDP serves as policy framework, which framework should for instance promote the effective use of scarce resources and determine how funds can be obtained from private investors such as mining companies. The IDP is also crucial in promoting the co-ordination between local, provincial and national government.

¹⁸³ S 26(b) of the Municipal Systems Act.

¹⁸⁴ Subss 28(1), (2) & (3) and s 29 (1) of the Municipal Systems Act.

The municipality is not the only authority exercised in a mining area. In many instances, mining takes place on land occupied by traditional communities and consequently governed by traditional authorities.¹⁸⁵ The Traditional Leadership and Governance Framework Act (“TLGFA”)¹⁸⁶ recognises traditional communities and the traditional authorities governing these communities if the requirements set out in the TLGFA are met.¹⁸⁷ Neither the MPRDA nor the Mining Charter makes specific reference to the TLGFA, but it is accepted that a “community” for the purpose of the MPRDA can also be a “traditional community” in terms of the TLGFA.¹⁸⁸ The definitions in this regard are discussed in Chapter 4.

Whereas this thesis is not specifically concerned with traditional communities, land rights or community representation and consultation, it is acknowledged that all these matters, and the relevant legislation, affect the development of mining communities to some extent. Legislation such as the Restitution of Land Rights Act¹⁸⁹ and the Interim Protection of Informal Land Rights Act (“IPILRA”)¹⁹⁰ is therefore considered in Chapter 4 to the extent that “community” is defined. The Restitution of Land Rights Act provides for land restitution as a means of land reform in South Africa.¹⁹¹ IPILRA was implemented to provide temporary protection of land rights and interests until the law has been reformed to provide such protection.¹⁹²

¹⁸⁵ See section 2.2 of Chapter 4.

¹⁸⁶ Traditional Leadership and Governance Framework Act 41 of 2003 (“TLGFA”).

¹⁸⁷ Chapter 2 of the TLGFA regulates the acknowledgment of traditional communities and Chapter 3 regulates the acknowledgment of traditional authorities.

¹⁸⁸ Traditional authority rule in South Africa is controversial. Ntsebeza (2005) argues that the system has no place in a democratic dispensation. In a mining context, traditional leadership has also caused conflict. The MPRDA provides certain rights to land-owning communities, including traditional communities. Humby T “The Community-Preferent Right to Prospect or Mine: Navigating the Fault-Lines of Community, Land, Benefit and Development in Bengwenyama II” 2016 *South African Law Journal* (2016) 322-324, 336 considers the problems with the formulation of “community” in the context of s 104 of the MPRDA, which provides preferent rights for communities to obtain mining rights in on the land on which they reside. Humby refers to Claassens A “Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act” 2005 *Acta Juridica*; Claassens A “Contested Power and Apartheid Tribal Boundaries: The Implications of ‘Living Customary Law’ for Indigenous Accountability Mechanisms” 2011 *Acta Juridica* 174; Claassens A “Marriage, Land and Custom: What’s law got to do with it?” 2013 *Acta Juridica* 1. Claassens argues that traditional leadership is intertwined with “apartheid mythology” that separates “traditional” and “modern” spheres – effectively denying historical black land ownership.

¹⁸⁹ Act 22 of 1994.

¹⁹⁰ Act 31 of 1996.

¹⁹¹ The Constitution at subss 25(6) and 25(7) provide for three types of land reform to address the consequences of land dispossession under apartheid. In terms of land restitution, persons can claim back land that was taken from them in terms of discriminatory processes. Land redistribution ensures that land is made available for persons with no access to land. Land reform also includes securing tenure of land for persons working on the land. See in general Pienaar JM *Land Reform* (2014) chapters 5 and 9.

¹⁹² S 1 of IPILRA, definition of “informal right to land”. In terms of s 5 of IPILRA, the provisions were to lapse on 31 December 1997, but s 5 provides for extension of the application of the IPILRA. The most recent extension expired on 31 December 2019. Department of Rural Development and Land Reform *Extension of the Application of the Provisions of the Interim Protection of Informal Land Rights Act 31 of 1996* (GG 42111 GN 1384 of 14 December 2018).

4. Conclusion

In this chapter, the legislation relevant to the development and empowerment of mining communities in South Africa¹⁹³ and the policy context within which the legislation was created,¹⁹⁴ are set out. This chapter shows that the policy facilitating development and poverty alleviation created after the transition into a constitutional democracy was influenced by ideas on socio-economic matters held in Anglo-America and Europe at the time.¹⁹⁵ Accordingly, programmes such as RDP and GEAR favoured neoliberal principles.¹⁹⁶ It is within this framework that BEE and later B-BBEE originated.¹⁹⁷ B-BBEE, thus, is framed in development language.¹⁹⁸

B-BBEE is promoted in the mining industry in terms of the MPRDA and the Mining Charter.¹⁹⁹ Mining communities are empowered in terms of the Mining Charter through mine community development. The MPRDA also provides for the creation of the SLP – another instrument facilitating the local economic development of mining areas.²⁰⁰

The notion of local economic development was also transplanted into the South African policy environment as a result of global influences.²⁰¹ The Local Government: Municipal Systems Act is discussed in this chapter to the extent that it provides for the creation of the IDP, the instrument setting out a municipality's responsibilities and objectives regarding the socio-economic development of the area it governs.²⁰² As is shown in Chapter 4, the Mining Charter, SLP and IDP should be read together to promote the development of mining communities, but the alignment of these instruments is problematic.²⁰³

The other legislation mentioned in this chapter has an indirect effect on the development of mining communities to the extent that the legislation defines and provides for “community”.²⁰⁴ The problematic nature of the concept “community” is investigated in Chapter 4 by considering the interpretational challenges presented by the legislation set out in Chapter 3.

¹⁹³ See section 3 above.

¹⁹⁴ See section 2 above.

¹⁹⁵ See section 2.1 above.

¹⁹⁶ See section 2.2.1 above.

¹⁹⁷ See section 2.2.2 above.

¹⁹⁸ See section 2.2.2 above.

¹⁹⁹ See section 3.2 above.

²⁰⁰ See section 3.2 above.

²⁰¹ See section 2.2.1 above.

²⁰² See section 3.3 above.

²⁰³ See section 3.1 of Chapter 4.

²⁰⁴ TLGFA; the Restitution of Land Rights Act 22 of 1994 & IPILRA.

CHAPTER 4: Community and Development - Interpretational Challenges

1. Introduction

Chapter 3 describes the relevant policy environment and legislative provisions that regulate how mining communities should benefit from development and empowerment in the mining industry.¹ In this Chapter, the interpretational challenges presented by these provisions are analysed to show why it is necessary to reconsider the notions of development and empowerment in the context of mining communities in South Africa.

Section 2 sets out certain global and South African legal formulations of “community” as the beneficiary of development projects. Section 3 follows with an interrogation of the legislative provisions detailing the means of empowerment of communities in mining areas. Both sections highlight the lack of clarity in the legislative provisions as to who should be empowered as “community” and how empowerment should take place.

As is highlighted in Chapter 2, the living conditions of persons living in mining areas leave much to be desired, despite the introduction of legislation to improve these conditions. It is argued in this thesis that the vagueness and ambiguities present in the legislative provisions contribute to the lack of improvement of the living conditions in mining areas. Moreover, the problematic formulation of the legislative provisions is the result of the politics of development, that are the theoretical underpinnings of the development paradigm, but Chapters 5 and 6 elaborate on the effects of the politics of development.

¹ As set out in section 3 of Chapter 3, the law under consideration includes the Constitution of the Republic of South Africa, 1996 (“the Constitution”); Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”), the broad-based socio-economic empowerment charter issued under s 100(2) of the MPRDA (“Mining Charter”), the Social and Labour Plan (“SLP”) to be created under ss 22 and 23 of the MPRDA and the regulations 40-46 of the Regulations under section 107(1) of the MPRDA (GNR 527 GG 26275 of 23 April 2004) (“reg/s”) and the Integrated Development Plan (“IDP”) to be created under the Local Government: Municipal Systems Act 32 of 2000.

2. The Beneficiaries of Empowerment and Development: Defining “Community”

In this section, the different ways in which the law, relevant for the development and empowerment of mining communities, conceptualises “community” is considered.² Since Black Economic Empowerment has its origins in a global policy context,³ the section commences with an interrogation of certain global development policies and legal instruments. Thereafter, the focus shifts to South African law and its approach to the concept “community”.

The objective is firstly to determine what “community” means when law and policy envisage the development of communities. Secondly, this section asks why the law acknowledges communities in a development context, as opposed to individual entities. As is highlighted below, it is much harder to ascertain the meaning and ambit of “community” than it is to identify an individual entity. The relevance of this distinction is considered in Chapter 6.

It is observed that no universal legal definition of “community” exists. The law, however, attempts to acknowledge groups of persons with regards to the commonalities the persons share with one another. In this section, it is established that the legislative system acknowledges four types of commonalities. In the context of mining, shared custom and communal land rights on the one hand, and shared effects of mining, on the other hand, are regarded as commonalities around which “community” is created. A broader view shows that poverty is understood by the legislative system as a commonality on which community is centred. The legislative system furthermore acknowledges that persons living in the same geographic area can form a community.⁴

2.1. “Community”: An International Development Perspective

Development policies in South Africa were founded in the global development context.⁵ This global context must infuse the interpretation of South African law providing for development

² See footnote 1 above.

³ See section 2 of Chapter 3.

⁴ Section 2 of this Chapter 4 is based on a publication by the student: Heyns A “Mining Community Development in South Africa: A Critical Consideration of how the Law and Development approach the Concept ‘Community’” 2019 (12) *Law and Development Review* 561. In terms of the Memorandum of Understanding between the student and her supervisor, the student committed contractually to publish articles while completing her PhD thesis. See also the declaration regarding the inclusion of publications.

⁵ See section 2 of Chapter 3.

in general, and mining community development specifically. In this section, the conceptualisation of “community” as articulated in certain international instruments in the context of development, is considered to obtain more clarity on what “community” means.

The right to self-determination,⁶ the right to sovereignty over resources,⁷ and the right to development of “indigenous communities” or “peoples” are recognised under international law.⁸ “Indigenous peoples” or “indigenous community” is not defined in the instruments articulating the rights of these peoples.⁹ By scrutinising these instruments, however, certain characteristics of indigenous peoples and communities come to the fore.¹⁰ In acknowledging “indigenous peoples”, international instruments recognise specific groups of people for their unique cultural identity and close relationship with the land that they are occupying.¹¹ Although not exclusively the case, indigenous peoples make up a geographic minority group in many instances.¹²

The Working Group on Indigenous Populations¹³ defines “indigenous communities, peoples and nations” by emphasising their continuity with societies that existed before colonial occupation: The ancestral land is still occupied and the occupants share a common lineage,

⁶ Charter of the United Nations (1945) Art 1(2).

⁷ UNGA Res 1803 (XVII) (14 December 1962) “Permanent Sovereignty over Natural Resources”.

⁸ Warden-Fernandez J “Indigenous Communities’ Rights and Mineral Development” 2005 (23) *Journal of Energy & Natural Resources Law* 398; UNGA Resolution 1803 (XVII) (14 December 1962); UNGA Res 128 (1987) A/RES/41/128 “Declaration on the Right to Development”; UNGA Res 295 (2007) A/RES/61/295 “Declaration on the Rights of Indigenous Peoples”.

⁹ Warden-Fernandez (2005) *JE & NRL* 398-400.

¹⁰ Warden-Fernandez (2005) *JE & NRL* 398-400, referring to Thornberry P *Indigenous Peoples and Human Rights* (2002) 2-60, considers the definitions used by the United Nations Economics and Social Council: Commission on Human Rights (1982) as summarised by Goehring B *Indigenous Peoples of the World: An Introduction to Their Past, Present, and Future* (1993) 5. Warden-Fernandez also notes that the Working Group on Indigenous Populations, established by the UN Economic and Social Council to consider the promotion and protection of indigenous populations’ rights (see “Mandate of the Working Group on Indigenous Populations” available at <<https://www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx>> accessed on 11 February 2020), does not ascribe to one definition, but takes into consideration the definition put forward Martinez Cobo JR *Study of the Problem of Discrimination against Indigenous Populations: Final Report submitted by the Special Rapporteur, Mr Joze Martinez Cobo* (1983) 1983E/CN.4/Sub.2/1983/21 paras 259-324; 379-381 available at <<https://www.un.org/development/desa/indigenouspeoples/publications/martinez-cobo-study.html>> accessed on 11 February 2020. See also Martinez Cobo JR “A Working Definition” 8 April 2011 *IWGIA* available at <<https://www.iwgia.org/en/news-alerts/archive?view=article&id=340:a-working-definition-by-jose-martinez-cobo&catid=143>> accessed on 11 February 2020.

¹¹ Warden-Fernandez (2005) *JE & NRL* 398-400, referring to Malanczuk P *Akehurst's Modern Introduction to International Law* (1997).

¹² Warden-Fernandez (2005) *JE & NRL* 398-400, referring to Malanczuk (1997). See also Heyns (2019) *Law and Development Review* section 3.1.

¹³ See footnote 10 above. Warden-Fernandez (2005) *JE & NRL* 398-400, referring to Martinez Cobo (1983).

culture and language.¹⁴ According to these communities, they do not form part of contemporary society.¹⁵ In many instances, they also do not hold significant political power.¹⁶

In the global development policy context considered in this thesis, it is not only a group of indigenous peoples that is regarded as a “community”. The concept “community” has become closely associated with “poverty”: An example hereof is the World Bank’s Community-Driven Development (“CDD”) poverty reduction strategy.¹⁷ As indicated by the name of the strategy, it addresses poverty by focusing on communities, thus acknowledging the institutions of poor people in development processes.¹⁸ “Community” is not understood only as a group of indigenous persons. The CDD strategy enables groups of poor people, as communities, to drive the development process “as assets and partners”; they are not regarded only as the objects of poverty alleviation projects.¹⁹ The CDD implicitly impress that the commonality shared by members of a “community”, in this instance, will always be poverty.²⁰

Two understandings of “community” in the international development context have been identified thus far: community centred on shared ancestry, land, culture and custom and community centred on poverty.²¹ The question is which understanding of community underlies South African development policies aimed at communities, and specifically mining communities. The land on which mining takes place does, in certain instances, belong to traditional communities.²² These communities are acknowledged as such in terms of South

¹⁴ Warden-Fernandez (2005) *JE&NRL* 398-400, referring to Martinez Cobo (1983); Chapter 9 “Local communities and mines” in MMSD *Breaking New Ground: Mining, Minerals and Sustainable Development* (2002) 152.

¹⁵ Warden-Fernandez (2005) 398-400, referring to Martinez Cobo (1983); MMSD (2002) 152.

¹⁶ Warden-Fernandez (2005) 398-400, referring to Martinez Cobo (1983); MMSD (2002) 152. The Mining, Minerals and Sustainable Development project (“MMSD”) identifies five characteristics of indigenous communities that differentiate them from contemporary society: They possess a unique identity, occupy specific territory, maintain their own autonomy, demand the right to participate in decisions made regarding their land and demand the right to self-determination. The ILO Indigenous and Tribal Peoples Convention (ILO Convention No. 169 (5 September 1991)) at art 1(1) defines “indigenous peoples” as “tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs and traditions”. See also Heyns (2019) *Law and Development Review* section 3.1.

¹⁷ Dongier P, Van Domelen J, Ostrom E, Rizvi A, Wakeman A, Bebbington A, Alkire S, Esmail T & Polski M “Community-Driven Development” in J Klugman (ed) *A Sourcebook for Poverty Reduction Strategies* (2002) 303.

¹⁸ Dongier et al (2002) 303.

¹⁹ Dongier et al (2002) 303.

²⁰ Dongier et al (2002) 74, 304. The strategy motivates the promotion of CDD by referring to the “Voices of the Poor”-study performed in 2009. The study indicated poor communities’ desire to drive their own development processes. Community is thus associated with poverty. See also Heyns (2019) *Law and Development Review* section 3.1.

²¹ See also Heyns (2019) *Law and Development Review* section 3.1.

²² MMSD identifies three types of communities affected by mining: “occupational communities” who consist of households or families dependent on the operations of the mine for all or most of their income; “residential

African law, as discussed under section 2.2 below. Conceptually, a traditional community in the South African context shares certain characteristics with an indigenous community as recognised under international law: Traditional communities are often still dependent on land.²³ These communities strive for a measure of self-identification.²⁴ Community members share custom, culture and language.²⁵ Traditional communities also suffered under colonial and apartheid oppression.²⁶ However, if the way in which mining communities are generally depicted is considered, the effects of mining, and thus the commonality shared by members of mining communities, are equated to poverty for mining communities.²⁷ Both understandings of “community” underpinning international development policy are thus visible in the South African context.²⁸

communities” which refer to households or families living in the geographical areas of the mine, having settled in the area either before the mining activities have commenced or as a result of the mining activities and “indigenous communities” referring to households or families with relations to the land where mining takes place in terms of custom or culture. MMSD (2002) 152, 200. In a South African context, examples of traditional rule and traditional communities in mining areas include the Bapo ba Mogale hosting the mining operations of Sibanye-Stillwater, previously operated by Lonmin, at Marikana (see “Sibanye-Stillwater – Marikana” available at <<https://www.sibanyestillwater.com/business/southern-africa/pgm-operations/marikana/>> accessed on 17 September 2020; Capps G & Malindi S “Dealing with the Tribe: The Politics of the Bapo/Lonmin Royalty-to-Equity Conversion” *SWOP Working Paper 8* (May 2017)), the Royal Bafokeng hosting the mining operations of Royal Bafokeng Platinum near Rustenburg and the Pilanesberg complex in the North West province (see “Royal Bafokeng Platinum – Overview of our operations” available at <<https://www.bafokengplatinum.co.za/brpm-joint-venture.php>> accessed on 17 September 2020) and the Mapela Traditional Community that provides land to Anglo American Platinum for its Mogalakwena Mine in Limpopo (see “Anglo American Platinum signs agreement with Mapela Traditional Community to benefit surrounding communities” available at <<https://www.angloamericanplatinum.com/media/press-releases/2016/18-04-2016.aspx>> accessed on 17 September 2020).

²³ The Langa Tribe, owner of the farms Zwartfontein and Overysel in Limpopo, is an example of a traditional community affected by mining and engaged in subsistence farming. The farms are adjacent to the mining operations of Potgietersrus Platinums Ltd – South African Human Rights Commission *Mining-Related Observations and Recommendations: Anglo Platinum, Affected Communities and other Stakeholders, in and around the PPL Mine, Limpopo* (2008) 17.

²⁴ The Traditional Leadership and Governance Framework Act 41 of 2003 (“TLGFA”), discussed under section 2.2 below, provides for self-identification by recognising traditional communities.

²⁵ In terms of s 2(1) of the TLGFA, a traditional community is recognised as such if it observes customary law and is subjected to traditional leadership in terms of its customs.

²⁶ See section 3 of Chapter 2.

²⁷ The preambles of the draft 2016 (Draft Reviewed Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 450 GG 39933 of 15 April 2016)), 2017 (Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (2017)) and 2018 (Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (GN 1002 GG41934 of 27 September 2018) Mining Charters refer to mining communities only in terms of their poverty. See sections 2.1 and 2.2 of Chapter 2 for a description of the narrative of and socio-economic conditions in mining communities. See also Heyns (2019) *Law and Development Review* section 3.1.

²⁸ It is, however, acknowledged that a strict application of the characteristics of “indigenous peoples” as set out in the *Report by the African Commission’s Working Group of Experts on Indigenous Populations/Communities* (2005) 91-97 to the South African context, shows that only the Khoi and San ethnic groups qualify as indigenous communities or peoples. The *Concluding Observations of the UN Committee on the Elimination of Racial Discrimination* 19 October 2006 CERD/C/ZAF/CO/3 (para 19) found that the KhoiSan self-identify as indigenous peoples and despite the abolishment of apartheid, remains marginalised. See Humby TL, Jegede AO, Manuel L and Halm N *Review of National Laws and Policies that support or*

In section 2.2, South African law providing for communities is examined to determine the meaning of “community”. The legislation dealing specifically with the empowerment and development of mining communities are considered alongside legislation that may not directly apply to mining, but that will affect communities in mining areas in some way. The law considered includes the Constitution of the Republic of South Africa, 1996; the Local Government: Municipal Systems Act;²⁹ Local Government Municipal Structures Act;³⁰ the Mineral and Petroleum Resources Development Act (“MPRDA”);³¹ the Mining Charter;³² the Traditional Leadership and Governance Framework Act (“TLGFA”);³³ the Restitution of Land Rights Act³⁴ and the Interim Protection of Informal Land Rights Act (“IPILRA”).³⁵

2.2. “Community”: A South African Law Perspective

The Constitution, the supreme law in South Africa, creates the mandate for the promotion of socio-economic development in South Africa. Section 152(1) of the Constitution determines that municipalities³⁶ must promote the socio-economic development of the areas they govern. The Local Government: Municipal Systems Act gives effect to this constitutional obligation. Section 24 (b)(iii) of the Constitution also provides for socio-economic development in more

undermine indigenous peoples and local communities – South Africa (2014) 10 & 11. In 2016, the CERD reiterated that the KhoiSan, as indigenous peoples, remain subjected to poverty, marginalisation and discrimination. It also noted that the Traditional and Khoi-San Leadership Bill B23_2015 does not provide adequate redress for these peoples – UN Committee on the Elimination of Racial Discrimination *Concluding observations on the combined fourth to eighth periodic reports on South Africa* 5 October 2016 CERD/C/ZAF/CO/4-8 (para 24). The Traditional and Khoi-San Leadership Act 3 of 2019 has since been enacted. The Act is criticised for treating traditional leaders and KhoiSan leaders differently and for recognising unelected leaders. Kiewiet L “Contentious traditional leadership Bill passed” *Mail & Guardian* 11 January 2019 available at <<https://mg.co.za/article/2019-01-11-00-contentious-traditional-leadership-bill-passed/>> accessed on 17 September 2020; Van der Merwe M “Traditional and Khoi-San Leadership Bill: Rules of Engagement” *Daily Maverick* 15 May 2017 available at <<https://www.dailymaverick.co.za/article/2017-05-15-traditional-and-khoi-san-leadership-bill-rules-of-engagement/>> accessed on 17 September 2020.

²⁹ Local Government: Municipal Systems Act 32 of 2000.

³⁰ Local Government: Municipal Structures Act 117 of 1998.

³¹ Mineral and Petroleum Resources Development Act 28 of 2002.

³² The broad-based socio-economic empowerment charter issued in terms of s 100(2) of the MPRDA (“Mining Charter”).

³³ Traditional Leadership and Governance Framework Act 41 of 2003.

³⁴ The Restitution of Land Rights Act 22 of 1994.

³⁵ Interim Protection of Informal Land Rights 31 of 1996.

³⁶ Municipalities represent the local branch of government. The South African government functions at national, provincial and local level. See Chapter 7 of the Constitution.

general terms.³⁷ Neither of these sections of the Constitution refers to “community” in the context of development.³⁸

Section 31 of the Constitution, however, explicitly mentions “community” by protecting the rights of persons to form a cultural, religious or linguistic “community” and to take part in the activities associated with these communities. No definition is provided for “community”, but the particulars of section 31 signal that “community” in this sense centres on shared culture, religion or language. Here, however, the Constitution does not refer to “community” in the context of development.³⁹

The legislative system - the MPRDA together with the Mining Charter and the SLP - provides for two types of communities: “community” or “host community” and “mine community”.⁴⁰ The MPRDA and the Consultation Guidelines⁴¹ define “community” as the sharing of land and custom.⁴² Below it is shown that “community” can be a traditional community⁴³ in terms of the TLGFA.⁴⁴ An interpretation of “community” as a “cultural, religious or linguistic community” for the purposes of section 31 of the Constitution, is also possible.⁴⁵ The law furthermore acknowledges land as a commonality.⁴⁶ The similarity between the international law

³⁷ See section 3.1 of Chapter 3 for a discussion of these provisions of the Constitution.

³⁸ See also Heyns (2019) *Law and Development Review* section 3.2.

³⁹ See also Heyns (2019) *Law and Development Review* section 3.2.

⁴⁰ See section 3.2 of Chapter 3 for more details on the MPRDA, Mining Charter and the social and labour plan (“SLP”). See also Heyns (2019) *Law and Development Review* section 3.2.

⁴¹ *Guideline for Consultation with Communities and Interested and Affected Parties* issued by the Department of Mineral Resources (recently renamed as the Department of Mineral Resources and Energy) as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA.

⁴² The MPRDA defines “community” as

“a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community”.

⁴³ However, as Humby notes, the fact that the MPRDA definition provides for land held in terms of “an agreement, custom or law” indicates that the land and community implicated here need not always be governed by a traditional authority. Contracts between historically disadvantaged individuals in terms of the Communal Property Associations Act 28 of 1996 can also regulate the relationship between land and community members in this instance. Humby T “The Community-Preferent Right to Prospect or Mine: Navigating the Fault-Lines of Community, Land, Benefit and Development in Bengwenyama II” 2016 *South African Law Journal* 322 & 323.

⁴⁴ Traditional Leadership and Governance Framework Act 41 of 2003. See also Heyns (2019) *Law and Development Review* section 3.2.

⁴⁵ S 31 of the Constitution refers to “(p)ersons belonging to a cultural, religious or linguistic community”. See also Heyns (2019) *Law and Development Review* section 3.2.

⁴⁶ See footnote 42 above for the definition of “community” as provided for in the MPRDA. See also Heyns (2019) *Law and Development Review* section 3.2.

conception of an indigenous community and community provided for in terms of the mentioned mining legislation thus becomes evident.⁴⁷

The MPRDA only mentions “community” to protect the community’s land rights when mining permits or rights are awarded in respect of the relevant land.⁴⁸ Consultation with or notification of a community during the mining right application process, which consultation should follow the Consultation Guidelines, is also required.⁴⁹

The definition of community in the MPRDA has been amended several times.⁵⁰ The 2013 Amendment Bill set out to make further amendments, but it was withdrawn in 2018.⁵¹ Under the Bill, “community” was still defined as a group of people holding rights to land in terms of agreement or custom,⁵² but a link to the relevant metropolitan or a district municipality, as provided for in the Local Government: Municipal Structures Act, was also introduced.⁵³ By proposing the aforementioned amendment, the legislature possibly aimed to align the MPRDA’s regulation of communities with the provisions providing for the local economic

⁴⁷ See the discussion of the characteristics of indigenous communities under section 2.1 above. See also Heyns (2019) *Law and Development Review* section 3.2.

⁴⁸ A few provisions of the MPRDA deal with “community”. The Minister can stipulate conditions protecting the rights of a community if prospecting rights (s 16(4)(b)) or mining rights (s 22(4)(b)) are granted for land occupied by that community. S 104 also stipulates that the Minister must give preference to communities applying for prospecting or mining rights in respect of any land registered or to be registered in the name of such a community.

⁴⁹ Ss 10 and 23 of the MPRDA. Only if a community is an interested and affected party, a landowner, or a lawful occupier of the land to which the prospecting or mining right relates, it will be entitled to notification. The provisions do not refer to “community” as is defined in the MPRDA. The MPRDA, does not define “interested and affected parties” but in terms of the Consultation Guideline, “interested and affected parties” include a “host community”. In *Baleni v Minister of Mineral Resources and others* 2019 (2) SA 453 GP the court held that the Minister of Mineral Resources has to obtain the consent of the community holding the informal land rights before mining can take place on the relevant land. Mere consultation will not suffice. See Heyns (2019) *Law and Development Review* section 3.2. See also the discussion on the Interim Protection of Informal Land Rights 31 of 1996 below in this regard.

⁵⁰ The definition of “community” as currently provided for in the MPRDA, has been amended before. The most recent amendment was introduced in 2008 in terms of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008.

⁵¹ The Mineral and Petroleum Resources Development Amendment Bill B15D_2013 (“2013 Amendment Bill”) that was brought before the National Assembly in 2013, proposed to amend the definition of “community” once more. The controversial Amendment Bill was withdrawn in August 2018 by the Minister of Mineral Resources and Energy, Gwede Mantashe - Ensor L “Mantashe wants to axe long-delayed MPRDA Amendment Bill” *Business Day* 22 August 2018 available at <<https://www.businesslive.co.za/bd/national/2018-08-22-mantashe-wants-to-axe-mineral-and-petroleum-resources-development-amendment-bill/>> accessed on 11 February 2020.

⁵² S 1 of the 2013 Amendment Bill.

⁵³ Local Government: Municipal Structures Act 117 of 1998. S 2 of the act describes the legal nature of a municipality: It is an organ of state that constitutes local government and consists of political and administrative structures and the community living in the area governed by the municipality.

development of mining areas by municipalities.⁵⁴ The alignment of the different development instruments is discussed in section 3.1 below.

The 2018 Mining Charter distinguishes between “host community” and “mine community”.⁵⁵ The significance of this distinction becomes clear upon consideration of the different definitions of “community” proposed in the draft Mining Charters that were issued before the 2018 Mining Charter was finalised.

The 2010 Mining Charter that preceded the 2018 version defined “community” by relating it to land and custom, in a similar manner as is done in the MPRDA.⁵⁶ “Mine community” was set as the community where mining takes place and also included labour-sending areas.⁵⁷ “Labour sending areas” was defined as the areas from where the majority of mineworkers have been sourced in the past as well as presently.⁵⁸

The 2016 draft Mining Charter⁵⁹ included definitions similar to those included in the 2010 Mining Charter. The 2017 Mining Charter,⁶⁰ however, broadened the definition of “mine community” to include communities alongside the mining area that forms part of the same municipal area.⁶¹ “Labour sending areas” was limited to include areas from where the majority of *South African* mineworkers have been sourced historically.⁶² No definition was provided for “community”; it can thus be deduced that the 2017 Mining Charter only dealt with traditional communities as far as they form part of mine communities.

⁵⁴ See also Heyns (2019) *Law and Development Review* section 3.2.

⁵⁵ Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (GN 1002 GG41934 of 27 September 2018) (“2018 Mining Charter”).

⁵⁶ Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838 GG 33573 of 20 September 2010) (“2010 Mining Charter”) definitions section. “Community” was defined as “a coherent, social group of persons with interest of rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law”.

⁵⁷ 2010 Mining Charter definitions section.

⁵⁸ 2010 Mining Charter definition of “labour sending area”. The preamble to the MPRDA states that mining and production should contribute towards the socio-economic development of areas where mines are operating – no reference is made to “community”. Only in s 2 of the MPRDA is reference made to the “mine community” and “labour-sending areas”. “Local economic development” for the purposes of the SLP is aimed at the “area in which the mine operates” and the “local and sending communities”. See also Heyns (2019) *Law and Development Review* section 3.2.

⁵⁹ Draft Reviewed Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 450 GG 39933 of 15 April 2016) (“draft 2016 Mining Charter”).

⁶⁰ Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (2017) (“draft 2017 Mining Charter”).

⁶¹ Draft 2017 Mining Charter definitions section. The new definition stipulates that a “mine community” includes “communities where mining takes place, major labour sending areas, as well as adjacent communities within a local municipality, metropolitan municipality and/or district municipality”.

⁶² Draft 2017 Mining Charter definitions section.

The June 2018 draft Mining Charter changed track by including a definition for “host community” to refer to those communities located in the local municipal area or traditional authority where mining takes place.⁶³ “Community” was not defined in this draft. “Mine community” was no longer defined in the main list of definitions. “Mine community” was only defined for the purposes of mine community development as “communities where mining takes place, major labour sending areas, adjacent communities within a local municipality, metropolitan municipality and/or district municipality”.⁶⁴ The final 2018 Mining Charter retains the definition for “mine community” in the mine community development section, but once again introduces changes to the definition for “host community”. This time around, no mention is made of “traditional authority”.⁶⁵

The significance of considering the different attempts at defining “community” is that it shows how challenging it is to encapsulate the essence of a nebulous concept such as “community” in legislation. Also, it seems as if the drafters of the Mining Charter had considerable difficulty in determining who should benefit from empowerment as “community”, “host community” and “mine community” and to what extent traditional authorities should be included. As is shown under section 3.1 of this chapter, “host community” and “mine community” benefit in different ways in terms of the Mining Charter.

Together with the Mining Charter, the “socio-economic development”⁶⁶ and the “local economic development”⁶⁷ of the area in which the mining company operates are regulated by the social and labour plan (“SLP”) system created in terms of the regulations to the MPRDA.⁶⁸ “Local”, in the context of “*local* economic development”, can be interpreted as the “area in which the mine operates”⁶⁹ and the “local and sending communities” referred to in the regulations to the MPRDA.⁷⁰ The regulations do not define “community”, “mining area” or “local and sending communities”. The definitions of the MPRDA must, therefore, be

⁶³ Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry for public comment (GG 41714 GN 611 of 15 June 2018) (“draft 2018 Mining Charter”). “Host community” was defined as the communities situated in the local, district, metropolitan municipality or traditional authority within which the mining area, as defined in the MPRDA, is located.

⁶⁴ Draft 2018 Mining Charter para 2.5. See also Heyns (2019) *Law and Development Review* section 3.2.

⁶⁵ Final 2018 Mining Charter definitions section provides for “host community” as “a community within a local or metropolitan municipality adjacent to the mining area, as defined in the MPRDA”.

⁶⁶ Regulations in terms of section 107(1) of the MPRDA (GNR 527 GG 26275 of 23 April 2004), reg 41 (c).

⁶⁷ Reg 46 (c).

⁶⁸ Reg 46 (c) (ii).

⁶⁹ Regs 41 (c) and 46 (c).

⁷⁰ Reg 46 (c) (ii) specifically mentions that the local economic development programme should set out the impact of the mining activities on “local and sending communities”.

consulted.⁷¹ For the purposes of a mining right or permit issued in terms of the MPRDA, the area on which extraction has been authorised is the “mining area”.⁷² When “mining area” pertains to any environmental, health or social and labour issues, it includes land and surface adjacent to the area where extraction has been authorised.⁷³ The SLP focuses on labour issues in particular. It, therefore, can be deduced that “local and sending communities” include not only the community with rights to the land on which the mine operates as defined in the MPRDA⁷⁴ but also the communities in the areas from which labourers are sourced.⁷⁵

Whereas the 2010 Mining Charter made no explicit mention of interaction between the SLP of a mining company and its obligations under the element mine community development provided for in the Mining Charter, the 2018 Mining Charter now provides a link between the two initiatives. The 2018 Mining Charter determines that a mining right holder must promote the developmental priorities as defined in the SLP as part of mine community development in terms of the Mining Charter.⁷⁶ It, therefore, is proposed that the definitions for “mine community” and “labour-sending area” provided for in the Mining Charter should be used to interpret the provisions of the regulations in this regard.⁷⁷

In addition to the SLP and the Mining Charter, the integrated development plan (“IDP”) also provide for the development of mining areas or communities.⁷⁸ The municipality governing the mining area is constitutionally mandated to promote the local economic development of

⁷¹ “(T)his Act” is defined in s 1 of the MPRDA to include the regulations, which provides for the creation of the SLP, and the terms and conditions issued together with any right or permit under the MPRDA. The definitions of the MPRDA thus are applicable to instruments created in terms of the MPRDA, such as the SLP.

⁷² The definition of “mining area” in s 1 the MPRDA includes the land or surface where roads, railway lines, power lines, pipelines and cableways that are under the control of the mining right holder, are situated. Buildings, structures, machinery, stockpiles and other objects situated on the mining area, also form part of the mining area.

⁷³ Reg 46 sets out the requirements for the content of the SLP. The plan should consist of a human resource development programme, a local economic development programme and processes for the management of downscaling and retrenchment. The SLP should furthermore provide for sufficient financial resources for the implementation of the SLP and it should include an undertaking by the mining right holder that it will implement the SLP.

⁷⁴ “Community” is defined in s 1 of the MPRDA as

“a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community”.

⁷⁵ See also Heyns (2019) *Law and Development Review* section 3.2.

⁷⁶ Final 2018 Mining Charter para 2.5. The draft 2017 Charter, at para 2.5, was the first draft charter to draw a direct link between mine community development in terms of the Mining Charter and the SLP.

⁷⁷ See also Heyns (2019) *Law and Development Review* section 3.2.

⁷⁸ S 152(1) of the Constitution, and s 25 of the Local Government: Municipal Systems Act. See discussion above.

that area in terms of the IDP.⁷⁹ The implementation of the IDP will necessarily overlap with the implementation of mine community development according to the Mining Charter and local economic development in terms of the SLP.⁸⁰ “Local community” is defined in terms of the Local Government: Municipal Systems Act, which regulates the creation of the IDP, to include the persons residing in the municipality, the ratepayers of the municipality, organisations involved in the local affairs of the municipality, and visitors of the municipality that make use of the municipal services provided.⁸¹ The IDP aims to overcome the effects of apartheid planning, specifically for the poor,⁸² affirms the link between “local community” and shared poverty.⁸³

The “community”, “host community” and “mine community” recognised by the MPRDA and the Mining Charter form part of the IDP’s “local community” based on its geographical location and poverty. A distinction, however, should be made between “local community” and the cultural, religious or linguistic community acknowledged in the Constitution, or “community” and “host community” as provided for in the MPRDA and Mining Charter. The latter mentioned communities can qualify as traditional communities under the law.⁸⁴

A community is recognised by the TLGFA⁸⁵ as a traditional community if it is subjected to traditional leadership determined by that community’s customs, and if the community observes customary law.⁸⁶ The TLGFA does not define “customary law”. Neither the MPRDA nor the Mining Charter refers to the TLGFA. However, since a “community”, as provided for in the MPRDA also shares custom, it is accepted that a “community” for the purpose of the MPRDA can also be a “traditional community” in terms of the TLGFA.⁸⁷

⁷⁹ S 152(1) of the Constitution, and s 25 of the Local Government: Municipal Systems Act. See discussion above.

⁸⁰ The alignment of the IDP, SLP and mine community development, or lack thereof, is discussed under section 3.1 of this Chapter.

⁸¹ Definition of “local community” in s 1 of the Local Government: Municipal Systems Act.

⁸² S 25 of Local Government: Municipal Systems Act provides for the creation of the IDP. The IDP is the policy framework for the municipality’s annual budget, which should, amongst other things, promote effective use of scarce resources, attract additional funds from private investors, such as mining companies, and promote co-ordination between local, provincial and national government.

⁸³ See also Heyns (2019) *Law and Development Review* section 3.2.

⁸⁴ See also Heyns (2019) *Law and Development Review* section 3.2.

⁸⁵ The Traditional Leadership and Governance Framework Act 41 of 2003 regulates the recognition of traditional communities, traditional councils and traditional leaders and ancillary matters.

⁸⁶ S 2 of the TLGFA sets out specific requirements to be met for a community to be regarded as a traditional community.

⁸⁷ See also Heyns (2019) *Law and Development Review* section 3.2.

The frequent changes to the definitions of the MPRDA are partially the result of the uncertain status of communal land tenure under the law in South Africa.⁸⁸ The Restitution of Land Rights Act⁸⁹ provides for land restitution and land tenure security as a means of land reform in South Africa.⁹⁰ The MPRDA protects the “community’s” interests in its land when mining permits and rights are awarded on such land. Some of these communities have or are currently engaged in processes to restore their rights to the land that they occupy.⁹¹ The “community” to which the Restitution of Land Rights Act applies, may be the same “community” as provided for in the MPRDA. “Community” for the purposes of restitution, is thus relevant for this thesis and means “any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group and includes part of any such group”.⁹²

⁸⁸ See Humby T “The Bengwenyama Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land” 2012 (15) *Potchefstroom Electronic Law Journal* 185 referring to the Constitutional Court’s decision in *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC). In this decision, the Constitutional Court declared the Communal Land Rights Act 11 of 2004 to be unconstitutional in its entirety. According to Humby, the policy on communal land is all but unclear. To date, no legislation has been passed to pursue the purpose of the Communal Land Rights Act.

⁸⁹ The Restitution of Land Rights Act 22 of 1994.

⁹⁰ See footnote 191 at section 3.3 of Chapter 3 for an explanation of land reform in South Africa.

⁹¹ The “*Bengwenyama Trilogy*”, as Humby (2012) *PELJ* dubs the Bengwenyama-ya-Maswazi traditional community’s legal battle contesting the Department of Mineral Resource’s decision to award preferent prospecting rights in terms of s 104 of the MPRDA to Genorah Resources (Pty) Ltd, is a good example of a traditional community fighting for its right to take part in mining activities on land in which it has an interest. (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources* (unreported TPD decision 39808/2007); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources* 2010 3 All SA 577 (SCA); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC)). S 104 provides a preferent prospecting right to communities regarding their land. While the legal proceedings took place, the Bengwenyama was in the process of claiming the restitution of their rights in the land to which the prospecting rights relates – they first lodged their claim in 1998. In 2014, the Supreme Court of Appeal delivered its judgment regarding a further appeal in this matter. By then, the restitution process was not yet concluded. *Bengwenyama-ya-Maswazi Community v Genorah Resources (Pty) Ltd* 2014 All SA 673 (SCA) paras 21 & 22. Another example of a land claim pertaining to land on which mining takes place manifested in the case *Macassar Land Claims Committee v Maccsand CC and Others* 2017 4 SA 1. A discussion of the case falls outside the scope of this thesis, save to note the following. The Sandvlei community consists of descendants of freed slaves that worked and lived on the farm Zandvliet. After the enactment of the Group Areas Act 41 of 1950, the community was declared a Coloured Group and lost its rights to the farm Zandvliet. In 2003, the Macassar Land Claims Committee, on behalf of the Sandvlei community, applied for the restitution of the community’s land rights in Zandvliet. Maccsand CC held mining rights over the relevant land. As part of its application to the Land Claims Court, the Macassar Land Claims Committee claimed that Maccsand’s mining right be expunged. A further example is that of the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province that hosts the mining operations of Anglo American Platinum (Amplats). Tension has arisen in the area as a result of conflicting land claims. Mswana S & Capps G ““No chief ever bought a piece of land”: Struggles over Property, Community and Mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province” *SWOP Working Paper: 3* (2015) 20 available at <<https://www.swop.org.za/working-papers>> accessed on 11 February 2020.

⁹² S 1 of the Restitution of Land Rights Act. See also Heyns (2019) *Law and Development Review* section 3.2.

The Communal Property Association Act (“CPAA”)⁹³ determines that a disadvantaged community can create a legal vehicle within which property can be held.⁹⁴ “Community” in this instance refers to a group of persons that is firstly desirous of regulating its interest in property under shared rules stated in a constitution and secondly wishes to, or is required to form an association in terms of the CPAA.⁹⁵ The provisions of the act apply to a community whose land rights have been reinstated in terms of the Restitution of Land Rights Act or which is entitled to receive property or other assistance from government.⁹⁶ The Minister of Rural Development and Land Reform can also approve communities in certain instances if the Minister is satisfied that the community is disadvantaged and that it is in the public interest to approve the community as such.⁹⁷ “Disadvantaged” is not defined in the CPAA, but read in the context of the restitution of land rights, black communities disadvantaged by the dispossession of land will qualify in this regard.⁹⁸

The Interim Protection of Informal Land Rights Act (“IPILRA”) defines “community” in the same manner as the Restitution of Land Rights Act.⁹⁹ As is the case with the Restitution of Land Rights Act, IPILRA was enacted to give effect to section 25 of the Constitution, thus redressing the historic dispossession of land under colonialism and apartheid in South Africa.¹⁰⁰ IPILRA protects informal land rights, such as the use of land under custom or indigenous law, where no other protection is provided by the law.¹⁰¹ Recent case law confirms that IPILRA protects informal land rights also when an application for mining rights is considered.¹⁰²

⁹³ Communal Property Association Act 28 of 1996 (“CPAA”).

⁹⁴ S 1 of the CPAA defines “property” to include both movable and immovable property as well as any right or interest in such movable or immovable property, such as a mining right awarded in terms of the MPRDA.

⁹⁵ S 1 of the CPAA.

⁹⁶ S 2 of the CPAA.

⁹⁷ Subss 2(1)(c) & (d) read together with subs 2(2).

⁹⁸ The Minister of Agriculture, Land Reform and Rural Development refers to the impact of the Black Land Act 27 of 1913, as highlighted by President Ramaphosa in his State of the Nation Address in 2019, in the introduction to the Annual Report 2018/19 on Communal Property Associations. Department of Rural Development and Land Reform *Communal Property Associations: Annual Report 2018/19* 29 (October 2019). See section 3 of Chapter 2 of this thesis for a discussion of the Black (Native) Land Act of 1913.

⁹⁹ S 1 of the Interim Protection of Informal Land Rights Act 31 of 1996 (“IPILRA”).

¹⁰⁰ S 25(6) of the Constitution – see footnote 89 above; *Baleni v Minister of Mineral Resources and others* 2019 2 SA 453 GP para 51-56.

¹⁰¹ S 1 of IPILRA, definition of “informal right to land”.

¹⁰² In *Baleni*, the court held that both the MPRDA and IPILRA were enacted to redress injustices under colonialism and apartheid, with specific reference to the dispossession of land and resources. Accordingly, the two pieces of legislation should be read together to afford informal land rights protection by compelling the Minister of Mineral Resources to obtain the consent of the community holding the informal land rights before mining can take place on the relevant land. Mere consultation will not suffice.

In this section the thesis considers the various legislated definitions of “community” to determine who should benefit from empowerment and mine community development. In section 2.3 some observations are made regarding the definitions discussed.

2.3. Observations after Considering the Definitions

Upon consideration of different configurations of “community” in South African law on the development of mining areas, the question arises why mining and other relevant law provides for “community”, “host community” or “mine community”, as opposed to individuals in mining areas. The definitions in themselves do not necessarily provide clarity. Furthermore, an explanation for the differentiation between a “community”, “host community” and a “mine community” is required.

“Community” is acknowledged in three instances where certain commonalities are shared by people living in mining areas. Each commonality relates to a specific aspect of the history of South Africa in general, and the mining industry specifically, as set out in Chapter 2. In the first instance, the legislation under consideration acknowledges shared custom, culture and belief and communal rights to land as a commonality. “Community” in a mining context can also be a “community” for the purposes of land reform and is thus associated with addressing the dispossession of land under apartheid.¹⁰³ The law’s acknowledgement of community further recognises the effects of mining, as part of colonialism and globalism, on indigenous communities. The understanding of “community” in this first instance, represents almost fixed communal structures “untouched” by history and other external influences.¹⁰⁴

“Mine community” is recognised in the second instance to acknowledge the effects of mining on black people under apartheid. Here, the purpose is to address the effects of mining shared by those constituting the “mine community”.¹⁰⁵

The legislative system acknowledges a third kind of community: a group of persons that lives together in a specific area - either the mining area or a municipality.¹⁰⁶ Here, community exists

¹⁰³ See discussion under section 2.2 above.

¹⁰⁴ See also Heyns (2019) *Law and Development Review* section 3.2.

¹⁰⁵ See discussion under section 2.2 above of the definition of “mine community” as provided for in the Mining Charter where reference is made to labour sending communities as areas that have provided mining operations with labours, historically. See also Heyns (2019) *Law and Development Review* section 3.2.

¹⁰⁶ See discussion under section 2.2 above of the definition of “mine community” as provided for in the Mining Charter and of the definition of “local community” as provided for in the Local Government: Municipal Systems Act.

only superficially as far as people live together in the same space.¹⁰⁷ The members of the geographic community, however, will share more substantial commonalities, when such a community overlaps with the other two types of community acknowledged by the legislative system.¹⁰⁸

The MPRDA, through the Mining Charter and the SLP system created under the MPRDA, views mining and other rural communities in terms of the poor socio-economic conditions to which these communities are exposed.¹⁰⁹ Under a broader international development perspective, “community development” is also associated with poverty, as has been described in section 2.1. This thesis argues that underlying all three kinds of communities (shared custom, land and familial ties; shared effects of mining and shared geographical space) acknowledged by international and domestic law, there is the idea of community as shared poverty, inequality, and the legacy of past exploitative practices.¹¹⁰

By providing different configurations of community in the context of mine community development, the law potentially includes the broadest group of persons to benefit from development initiatives. The commonalities shared by the different communities can overlap: A group of persons sharing tradition and custom may experience the effects of mining, which effects are also experienced by other persons living near a mine, but not forming part of the traditional community.¹¹¹

This thesis also observes that the law, in the context of development, on the one hand, acknowledges a “community” to preserve it, as in the case of indigenous peoples and traditional communities.¹¹² On the other hand, the law acknowledges “community”, not as an entity that

¹⁰⁷ See discussion under section 2.2 above of the definition of “mine community” as provided for in the Mining Charter and of the definition of “local community” as provided for in the Local Government: Municipal Systems Act.

¹⁰⁸ The definition of “mine community” is capable of encompassing geographical communities and traditional communities to the extent that they are located where mining takes place. See discussion under section 2.2 above. See also Heyns (2019) *Law and Development Review* section 3.2.

¹⁰⁹ The preamble of the MPRDA affirms the state’s duty, in the context of mining, to further social and economic development and recognises the need for the “social upliftment of communities affected by mining”. The preambles of the draft 2016, 2017, and final 2018 Mining Charters all refer to the poor living conditions of mining communities.

¹¹⁰ At an international level, programmes such as CDD confirms the link between community and poverty – see discussion under section 2.1 above. In a South African context, the MPRDA, Mining Charter, the SLP system and the IDP focus on poverty alleviation and addressing the injustices of the past. See sections 3.2 and 3.3 of Chapter 3. See also Heyns (2019) *Law and Development Review* section 3.2.

¹¹¹ See footnote 68 at section 2.4 of Chapter 2 for an example of such tensions.

¹¹² See discussion of the legal protections of indigenous communities under section 2.1 above and the discussion of the legal protections of traditional communities under section 2.2 above.

must be preserved, but rather as an entity that must be “fixed” or transformed, since poverty is the only commonality that is shared. The community in the latter instance lacks any real cohesiveness, especially when compared with the community referred to in the former instance. In a South African, the two conflicting notions of community can exist in the same mining area.¹¹³

Mining legislation compels mining companies operating in South Africa to lessen the effects of mining on the communities in which mining operations take place.¹¹⁴ The negative effects of mining translate into poor socio-economic conditions to which mining communities are exposed as well as the impact of mining activities on the environment.¹¹⁵ The question for both the mining company and the surrounding community is who should be regarded as the community for development and empowerment initiatives. Irrespective of the legislative system’s objectives and attempts at defining “community”,¹¹⁶ it remains challenging to determine who exactly qualifies as a “mine community” for mine community development projects. Arbitrary exclusion from development initiatives is inevitable, causing conflict in mining areas and difficulties in managing the relationship between mining communities and mining companies.¹¹⁷

Section 2 of this chapter explains how the legislative system configures “community” as the beneficiary of development and empowerment. The remainder of the chapter considers how the development and empowerment of mining communities should take place under the legislative system. The lack of alignment of the different development and empowerment initiatives is highlighted since this misalignment negatively affects communities.

¹¹³ The Bakgatla-ba-Kgafela Traditional Authority area in the North West province hosts the mining operations of Anglo American Platinum (Amplats). A study performed by the Society Work and Development Institute shows that various residents of the area, represented by the Lesethleng Land Committee on issues pertaining to land and mining, do not accept the traditional leadership and its control of the land. Mswana & Capps (2015) 20. See also Heyns (2019) *Law and Development Review* section 3.2.

¹¹⁴ The preamble and objectives of the MPRDA, as included in s 2, include the promotion of the socio-economic development of areas affected by mining. As discussed in section 3.2 of Chapter 3 and section 2.2 of this chapter, other legislation, such as the Local Government: Municipal Systems Act supports the MPRDA in its mission.

¹¹⁵ See section 2 of Chapter 2.

¹¹⁶ See section 3 of Chapter 3 for a discussion of the legislation.

¹¹⁷ See footnote 68 at section 2.4 of Chapter 2 for an example of such conflicts. See also Heyns (2019) *Law and Development Review* section 3.2.

3. Empowerment and Development under the Legislative System

This section briefly sets out how the Mining Charter empowers the “mine community” and the “community” or “host community”, respectively. The different drafts of the Mining Charter issued since 2010, are compared with one another to show how each draft approaches the empowerment of communities differently. Furthermore, it is considered to what extent the Mining Charter provisions dealing with development are aligned with the SLP and the IDP. All three instruments will be implemented in the same mining area, thus requiring some form of alignment to be effectual. Finally, the depiction of mining communities in terms of their impoverishment is highlighted.

3.1. Development, Ownership and Alignment of Different Instruments

The Mining Charter provides for the empowerment of the “mine community” through the promotion of “mine community development”, which the holder of a mining right must promote to comply with the Mining Charter.¹¹⁸ The 2018 Mining Charter currently in place, determines that a mining company must identify the mine community’s developmental needs through consultation and these needs must be included in the mining company’s approved SLP.¹¹⁹ No example is provided of the types of developmental needs that are implicated here. For a mining company to comply with “mine community development” provided for in the Mining Charter, it must implement all of its commitments under the SLP during a specific financial year.¹²⁰

The 2018 Mining Charter empowers a “host community” as part of the ownership element.¹²¹ Five per cent of a mining company’s issued share capital must be transferred to a trust or similar vehicle to be administered for the benefit of host communities.¹²² The trust or other vehicle

¹¹⁸ See sections 2.2.2 and 3.2 of Chapter 3.

¹¹⁹ 2018 Mining Charter para 2.5. The mining company must consult with the relevant municipality, mine community, traditional authority and other affected stakeholders. A mining company’s SLP is approved by the Regional Manager for a specific area designated as such by the Director-General of the Department of Mineral Resources and Energy.

¹²⁰ 2018 Mining Charter para 2.5. The scorecard also reflects this requirement by requesting whether the projects were implemented.

¹²¹ See the discussion under section 3.2 of Chapter 3 of the B-BBEE elements provided for in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 and codes of good conduct issued in terms of the act.

¹²² 2018 Mining Charter para 2.1.4. Other than stating that trust or similar vehicle must be established and administered in terms of the applicable legislation, no further information is provided as to the type of trust. In the light of the criticisms in the preamble of the 2018 Mining Charter levelled at the administration of trusts

must utilise the returns on the shareholding to fund a “community development programme”, which must be created after the “community development needs” are identified in consultation with the relevant municipalities, host communities, traditional authorities and affected stakeholders.¹²³ The 2010 Mining Charter did not include a similar provision.¹²⁴

As a result of the new provisions included in the 2018 Mining Charter, there are now four instruments or measures regulating the development of communities in mining areas: The IDP, SLP, mine community development and the new host community development programme. How these instruments should be aligned to avoid exclusion of beneficiaries and the duplication of projects is not clear at all.

Alignment, however, has been a problem already under the first 2004 Mining Charter and subsequent draft charters. The 2004 Mining Charter stipulated that “stakeholders”¹²⁵ should cooperate with “all spheres of government” to formulate an IDP to achieve mine community development.¹²⁶ The 2010 Mining Charter placed less emphasis on the IDP, but still required alignment with the development projects set out in the relevant IDP.¹²⁷ The draft 2016 Mining Charter mentioned neither the IDP nor the SLP, but the 2017 draft Mining Charter addressed this omission. The 2017 Mining Charter required the mining company to contribute to projects that were approved in terms of the relevant IDP and SLP.¹²⁸ Mere alignment with projects identified in the IDP would not have sufficed.

Moreover, the 2017 Mining Charter was the first to link a company’s compliance with its SLP with its contribution towards mine community development.¹²⁹ Another significant amendment proposed by the 2017 Mining Charter was that examples were provided of the kind of development projects a mining company must promote. Without providing a definition, the

in this regard, it is precarious that a trust structure is still prescribed without more detailed limitations on the administration aspects.

¹²³ 2018 Mining Charter para 2.1.4.

¹²⁴ The draft 2016 Mining Charter was the first draft that contemplated provided shareholding to “community”. See paras 2.1 (b) to (e).

¹²⁵ “Stakeholders” is not defined, but it can be accepted that reference is made to the mining company and mine communities.

¹²⁶ 2004 Mining Charter para 4.4.

¹²⁷ 2010 Mining Charter para 2.6.

¹²⁸ 2017 Mining Charter para 2.5.

¹²⁹ 2017 Mining Charter para 2.5 (b).

2017 Mining Charter stated that infrastructure projects, income-generating projects and enterprise development should be pursued as part of mine community development.¹³⁰

The 2018 Mining Charter refers to the SLP and effectively collapses “mine community development” into the commitments of a mining company in terms of its SLP.¹³¹ No reference is made to alignment with the relevant IDP, but it must be noted that the regulations to the MPRDA stipulate that the SLP should be drafted to align with the relevant IDP.¹³² In practice, it is not clear how alignment should take place.¹³³

The 2018 Mining Charter states that the community development programme to be administered by the trust holding the shareholding for the benefit of the host community does not replace the mining company’s obligations in terms of the SLP and mine community development.¹³⁴ The programme’s aims will necessarily overlap with those of mine community development, the SLP and the IDP, but no indication is given how these programmes should interact. The sense in having four separate development programmes aimed at the same area is not clear.

3.2. Development, Empowerment and Poverty

The increased focus on the plight of poor mining communities in the draft Mining Charters and the final 2018 Mining Charter is anticipated in the charters’ preambles. In response to the identified shortcomings of the 2010 Mining Charter,¹³⁵ the draft 2016,¹³⁶ 2017 charters¹³⁷ and the final 2018 charter¹³⁸ emphasise the living conditions of poor mining communities.¹³⁹ In no uncertain terms, the Mining Charter frames the problem faced by mining communities as

¹³⁰ 2017 Mining Charter para 2.5. It is not clear if the element enterprise development (procurement, supplier and enterprise development) and mine community development should have operated alongside each other.

¹³¹ 2018 Mining Charter para 2.5.1.

¹³² Reg 46 (c) (iii).

¹³³ Heyns A & Mudimu G “Aligning Social and Labour Plans with Integrated Development Plans” in L Van Schalkwyk (ed) *Co-Ordinating Governance for Mining: Streamlining Systems for Improved Intergovernmental Relations* (2019).

¹³⁴ 2018 Mining Charter para 2.1.4.

¹³⁵ See in general Department of Mineral Resources *Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry* (2015).

¹³⁶ Draft 2016 Mining Charter Preamble ii.

¹³⁷ 2017 Mining Charter Preamble ii.

¹³⁸ 2018 Mining Charter Preamble 5.

¹³⁹ The draft Charters claimed to address the situation by promoting employment and the advancement of the socio-economic welfare of mining communities and major labour-sending areas. Draft 2016 Mining Charter 1; Draft 2017 Mining Charter 7. Strangely, the 2018 Mining Charter does not include a similar objective.

poverty and underdevelopment. The rhetoric employed to describe mining areas also depicts poverty as the main characteristic of these areas.¹⁴⁰

Rural areas, specifically where mining takes place, lack basic infrastructure and other resources – this is not denied. The discriminatory practices under apartheid can be traced in the poverty many black South African still face. In the case of mining communities, the exploitation that accompanied mining, as is also illustrated in Chapter 2, contributed to the poor socio-economic conditions associated with mining areas. However, framing the problem exclusively as poverty and underdevelopment has certain consequences as is set out in Chapter 6 of this thesis.

3.3. Observations after Considering the Development-Provisions

Section 2 of this chapter illustrates how the drafters of the Mining Charter struggle to define “community”. In Section 3 it becomes clear that the drafters have a similar problem in describing and demarcating the initiatives that should empower mining communities. Each draft of the Mining Charter envisaged mine community development differently.

The alignment of the empowerment initiatives with other development initiatives such as the SLP and the IDP also seems to be challenging. The result is that it is not clear who should benefit from empowerment and development and how empowerment and development should take place. This uncertainty causes interpretation and implementation problems opening-up loopholes that perpetuate the perception that poor persons are not receiving any benefits from the very activities that affect their livelihoods.

Furthermore, the fact that “community” or “host community” is empowered in a different way than the “mine community” confirms that the law, in the context of development, distinguishes between the “community” to be preserved, and the “community” to be transformed.¹⁴¹ Whereas the “community” or “host community” obtains ownership in the form of shareholding in the mining company, the “mine community” is merely the beneficiary of open-ended development initiatives. It is unclear what exactly mine community development should entail, since the interaction with other legislated local economic development initiatives, such as the SLP and the IDP, remains unclear.¹⁴²

¹⁴⁰ See section 2.1 of Chapter 2 in this regard.

¹⁴¹ See section 2.3 of this chapter.

¹⁴² See section 3.1 of this chapter.

Both entities, traditional communities and mining communities, are impacted by mining, historically and at present. These two groups represent two different but related injustices from South Africa's past, dispossession of land and forced migration of labour, which must now be addressed by legislation.¹⁴³ Both these communities are subjected to poverty and inequality, but in this context, the law approaches the communities differently. In the mining legislation, specifically, no explicit reason is provided for the differential treatment. As is considered in Chapter 6, this distinction is significant in the development paradigm under consideration in this thesis.¹⁴⁴

4. Conclusion

In this chapter, the interpretational challenges presented by the legislation catering to mining communities in the context of development are examined. The meaning of "community" in this development context, both under international and domestic laws and policies, can be interpreted in three ways: First, as a community sharing familial ties, custom, culture and communal rights in land; second, as a group of people sharing the effects of mining and third, as a group of people sharing living space.¹⁴⁵ Underlying all three understandings of community is the idea of community as shared poverty, inequality, and the legacy of past exploitative practices.¹⁴⁶ Thus, the different understandings of community can overlap, creating the possibility for including the broadest range of beneficiaries when it comes to empowerment measures. The different understandings, however, also create uncertainty as to who should be regarded as the beneficiaries of empowerment measures. The constant changes to the Mining Charter hint at the possibility that it is very challenging to configure these aspects accurately in legislation and policy.

Furthermore, upon consideration of the definitions of "community" and the empowerment provisions relevant to communities in mining areas, it becomes clear that the law approaches the empowerment and development of communities in a dualistic manner. The aim is either to preserve the community, by acknowledging it and affording it ownership in the mining company, such as in the case of a traditional community. Alternatively, "community" merely

¹⁴³ See section 3.2 of Chapter 2 where the history of these injustices is discussed.

¹⁴⁴ The development paradigm is analysed in Chapter 5.

¹⁴⁵ See section 2.3 of this chapter.

¹⁴⁶ See section 2.3 of this chapter.

represents poverty and a lack of development, requiring transformation or development, such as in the case of a mining community.

Despite the legislative interventions introduced to cure the ills faced by mining communities,¹⁴⁷ the living conditions of mining communities remain poor, aggravating an already volatile relationship with mining companies and with other entities affected by mining. In this thesis, it is argued that the interpretational challenge set out in this chapter causes policy uncertainty and an inability on the part of mining companies to manage the expectations of mining communities.

In the following chapters, the interpretational challenges are ascribed to the workings of the global development paradigm within which the development and empowerment of mining communities take place. To commence the theoretical interrogation of the interpretational problem at hand, Chapter 5 sets up the global development paradigm by considering the theoretical underpinnings of the concepts “development”, “empowerment”, “community” and “poverty”, before a critical consideration is provided in Chapter 6. Chapter 7 returns to the legislative provisions analysed in this chapter.

¹⁴⁷ See section 3 of Chapter 3 in general and sections 3.1 and 3.2 of this chapter.

CHAPTER 5: The Development Paradigm - Basic Concepts

1. Introduction

This thesis focuses on how the law provides for the development of South African mining communities in legal instruments.¹ It situates the empowerment of mining communities in terms of the Mining Charter, along with local and socio-economic development, within the global development paradigm.² The thesis argues that the underlying political and ideological assumptions of the development paradigm (herein referred to as “the politics of development”), shape how a development problem is framed and the development beneficiary is represented. Inevitably, the politics of development affect how development solutions are constructed for mining communities. Before the politics of development and the effects thereof are analysed and problematised in Chapters 6 and 7, this chapter provides a theoretical exposition of this global development paradigm.

The global development paradigm, this chapter explains, is based on certain assumptions encapsulated by the concepts, “development”, “empowerment”, “community” and “poverty”. Whereas Chapter 3 is more descriptive in its engagement with the relevant legislation and the context within which the legislation was created, and Chapter 4 sets out certain interpretational challenges regarding the mentioned legislation, this chapter engages with the concepts, “development” and “empowerment”, at a more theoretical and conceptual level. It is shown that the notion “development” has been formulated from a specific worldview and is based on certain assumptions. These assumptions are described here to give content to the concept “global development paradigm”, as used in this thesis.

Section 2 of this chapter continues by interrogating “empowerment” and “local economic development (‘LED’)” and the link between these concepts and “development”. The chapter also engages at a theoretical level, in section 3, with the concept “community” as the

¹ The law under consideration includes the Constitution of the Republic of South Africa, 1996 (“the Constitution”); Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”), the broad-based socio-economic empowerment charter issued in terms of s 100(2) of the MPRDA (“Mining Charter”), the Social and Labour Plan (“SLP”) to be created in terms of ss 22 and 23 of the MPRDA and the regulations 40-46 of the Regulations in terms of section 107(1) of the MPRDA (GNR 527 GG 26275 of 23 April 2004) and the Integrated Development Plan (“IDP”) to be created in terms of the Local Government: Municipal Systems Act 32 of 2000. The following legislation is also considered to the extent that it provides for “community” that will also qualify as a mining community: The Restitution of Land Rights Act 22 of 1994, the Traditional Leadership and Governance Framework Act 41 of 2003 and the Interim Protection of Informal Land Rights Act 31 of 1996.

² Broad-based black economic empowerment is not equated to local and socio-economic development, but it is argued in this thesis that these concepts share ideological underpinnings.

beneficiary of the legislated solutions and with “poverty” as the problem to be addressed by these solutions.

2. Describing the Development Paradigm

The purpose of this section is to show that the idea of development and the assumptions on which it is based were conceived by persons and institutions seated in America, Britain and Europe, hereinafter referred to as the West. To describe the global development paradigm, this section firstly investigates how this idea of development became part of the global conversation on poverty and the inequality between the developed or Western world and the developing or non-Western world.³ It is acknowledged that development, conceptually and in practice, has transformed since its inception. Still, in the global development paradigm, it is assumed that modernisation, legal formalisation and adherence to Western economic ideology is required for development to take place. These assumptions are discussed in this section. The role of the law, rights rhetoric and neoliberalism in this idea of development is highlighted.

Empowerment and local economic development (“LED”), as implemented in South Africa, originated in the global development paradigm described here. This section, therefore, secondly, shows how the concepts “empowerment” and “LED”, as provided for in the Mining Charter, the Social and Labour Plan (“SLP”) and the Integrated Development Plan (“IDP”),⁴ have their origins in globalised ideas about development.

2.1. Development

The way “development” is defined depends on what is perceived as leading a good life.⁵ The analysis of some characteristics of the common understandings of “development” exposes a

³ In this thesis, despite questioning the idea of development, the concept “developing”/ “underdeveloped” is used to refer to regions that stand to benefit from international development programmes. This depiction signifies a distinction from the developed, industrialised world, which is often associated with the West (the USA, the United Kingdom and Europe). On the use of terminology, see Mickelson K “Rhetoric and Rage: Third World Voices in International Legal Discourse” 1998 (16) *Wisconsin International Law Journal* and Gordon RE and Sylvester JH “Deconstructing Development” 2004 (22) *Wisconsin International Law Journal* footnote 3.

⁴ See section 3 of Chapter 3 for a discussion of these legislative instruments.

⁵ Trebilcock MJ & Mota Prado M *Advanced Introduction to Law and Development* (2014) 3-16. A “good life” here refers to a life lead in an ethical manner as prescribed by the society in which one lives. The notion dates to the works of the ancient Greek philosophers such as Aristotle and Plato. See in general MacIntyre A *A Short History of Ethics* (1998). Trebilcock and Mota Prado show that development has been equated to economic growth or gross domestic product (“GDP”) per capita; as a lack of poverty; as freedom; as sustainable development; and as quality of life or level of happiness. Some of these understandings will be elaborated on in section 2.1.2 below.

distinct worldview and ideology being promoted. It is within this development paradigm that the empowerment of mining communities occurs.

Content is given to the notion “development” by emphasising the relationship between global institutions such as the World Bank and non-Western or developing nations.⁶ The role played by the law in the pursuit of the development of non-Western nations is also considered, since this thesis focuses on how the law provides for the development of mining communities in legal instruments.⁷

The basic premise forwarded here is that irrespective of how “development” has changed in practice and policy, there is an underlying pursuit of progress and modernisation: Development practices and policies still promote the advancement of developing nations from a lesser to a more advanced condition.⁸ Necessarily, the question arises as to why one condition is to be preferred to another. In Chapter 6 it is argued that such a preference is based on underlying ideological motivations favouring a Western perspective. Such motivations and assumptions operate to the disadvantage of non-Western societies.⁹ This thesis argues that the latter mentioned motivations and assumptions underpin policy and legislation that aim to “develop” poor mining communities, but that fail to address the socio-economic conditions in mining areas in South Africa.

⁶ Section 2.1.1 of this chapter is based on a publication by the student and her supervisor: Heyns A & Mostert H “Three Mining Charters and a Draft: How the Politics and Rhetoric of Development in the South African Mining Sector are Keeping Communities in Poverty” 2018 (11) *Law and Development Review* 801 In terms of the Memorandum of Understanding between the student and her supervisor, the student committed contractually to publish articles while completing her PhD thesis. See also the declaration regarding the inclusion of publications.

⁷ When referring to “the law” in this instance, law is regarded in a broad sense to mean, as Lee Y “General Theory of Law and Development” 2017 (50) *Cornell International Law Journal* 10 describes it, a “body of rules of action or conduct prescribed by controlling authority and having binding and legal force”. Lee here refers to the dictionary definition as provided for in Black HC *Black’s Law Dictionary* 6th edition (1997) 884. Lee also refers to law as “a specific rule or a set of rules binding on the members of a society”. Informal rules or norms, such as customary law, will also be regarded as “law” for the law and development movement. The law is considered together with the relevant legal frameworks that structures the law and the institutions giving practical effect to the law. Also see Davis K and Trebilcock M “The Relationship between Law and Development: Optimists versus Skeptics” 2008 (56) *The American Journal of Comparative Law* 56.

⁸ See section 2.1.2.1 below.

⁹ See section 2.3 of Chapter 6 in this regard.

2.1.1. Development: Origins and Evolution of the Concept

Development as an idea dates to European enlightenment philosophy.¹⁰ Whereas development as enlightenment covered a broad range of aspects,¹¹ development, as employed currently, addresses poverty and inequality between poorer and wealthier nations.¹² This inequality was quite evident after the Second World War and the liberation of former colonies.¹³

The initial focus of the World Bank was on rebuilding Europe after the Second World War, while the International Monetary Fund (the “IMF”) was responsible for the regulation of the international monetary system.¹⁴ These Western institutions eventually moved their focus to the development of the non-Western world and by doing so, have been giving both content and direction to the global development project.¹⁵ As is shown in Chapter 3, the World Bank also influenced the creation of the development environment in South Africa, in which B-BBEE was created.¹⁶

The neoclassical¹⁷ development project centred on the pursuit of modernisation, an essentially Eurocentric or Western endeavour.¹⁸ During this post-war era (1950-1970), economic

¹⁰ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 76; Parpart J “Lessons from the Field: Rethinking Empowerment, Gender and Development from a post- (post-?) Development Perspective” K Saunders *Feminist Post-Development Thought* (2002) 42.

¹¹ Enlightenment depicts a period in European thinking characterised by the contemplation of different facets of the individual subject’s relationship with its fellow humans and authority structures. Religion, politics and morality were some of the aspects considered during this time. Blackburn S *The Oxford Dictionary of Philosophy* (2005) 115.

¹² Lee (2017) *Cornell International Law Journal* 15; Gordon & Sylvester (2004) *Wisconsin International Law Journal* 22; Trubek D “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future” in A Santos & D Trubek (eds) *The New Law and Economic Development: A Critical Appraisal* (2006) 75.

¹³ Escobar A *Encountering Development: The Making and Unmaking of the Third World* (2012) 21 & 22. See also Heyns & Mostert (2018) *Law and Development Review* section 2.1.1.

¹⁴ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 22 & 23; Bond P *Against Global Apartheid: South Africa meets the World Bank, IMF and International Finance* (2001) 57. The Bretton Woods institutions, the IMF and the World Bank, were created in July 1944 at Bretton Woods, New Hampshire. See section 2.1 of Chapter 3, footnote 23.

¹⁵ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 23. See section 2.1 of Chapter 3, footnote 23, on the mandate of the World Bank and the IMF.

¹⁶ See section 2.2 of Chapter 3. See also Heyns & Mostert (2018) *Law and Development Review* section 2.1.1.

¹⁷ Thomas C “Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism” 2011 (96) *Cornell Law Review* 974, 975, 976, 1005; North DC *Structure and Change in Economic History* (1981) 36; Kennedy D “Some Caution about Property Rights as a Recipe for Economic Development” *Harvard Law School Public Law and Legal Theory Working Paper Series* Paper no 0959 (2009) 7 referring to Kennedy D “Three Globalizations of Law and Legal Thought: 1850-2000” in A Santos & DM Trubek (eds) *The New Law and Economic Development: A Critical Appraisal* (2006). Development here refers to the neoclassical development project that took shape after the Second World War and is thus distinguished from the classical or enlightenment development concept. Neoclassical law and development discourse is based on the political and legal theory of Friedrich Hayek in *The Road to Serfdom* (1944), *The Constitution of Liberty* (1960) and *Law, Legislation and Liberty* (1973) arguing for a conception of liberty that requires a limited government subjected to the rule of law and strong property rights.

¹⁸ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 16. Modernisation is “the process by which a society comes to be characterized by a belief in the rational and scientific control of man’s physical and

development, which is equated to economic growth or increased gross domestic product, was pursued with great fervour.¹⁹ Economic development indicates an economy's shift from focusing on producing goods that generate little income to focusing on more technologically advanced industries (thus dependent on modernisation), resulting in the creation of higher income levels.²⁰

By acquiring permanent sovereignty over their natural resources, the newly liberated decolonised countries' had the means to achieve economic growth and thus development.²¹ The World Bank assisted these countries by funding infrastructure projects, required for economic growth to take place.²² During this phase, the law served as an instrument to achieve economic growth and development and regulated effective state intervention in the economy.²³

In due course, theories supporting the promised "trickle-down"²⁴ effect of economic growth were proven wrong.²⁵ In reaction, the second phase of development saw an increased focus on social development as opposed to only focusing on economic development.²⁶ Economic development may be easy to define; social development or social progress is not. Social development will be determined by the cultural principles and the ideologies of a specific society, rendering objective measures of its progression problematic.²⁷ Persons "sharing

social environment and the application of technology to that end" as defined by Sardar Z "Development and the Locations of Eurocentrism" in R Munck and D O'Hearn (eds) *Critical Development Theory: Contributions to a New Paradigm* (1999) 53. See discussion under section 2.1.2.1 below in this regard.

¹⁹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 9; Escobar (2012) 24. Gross domestic product refers to the total amount of goods and services produced by a country over a specified period – usually a year. Mohr P *Economic Indicators* (2004) 19.

²⁰ Lee (2017) *Cornell International Law Journal* 19; Thomas (2011) *Cornell Law Review* 973; Stiglitz JE "Inequality and Economic Growth" 2016 *The Political Quarterly* 134. See also Heyns & Mostert (2018) *Law and Development Review* section 2.1.1.

²¹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 53; UNGA Resolution 1803 (XVII) (14 December 1962) "Permanent sovereignty over natural resources". The effect of the declaration was, however, that colonialism was replaced with long-term concessions for the benefit of Western corporations for the extraction of natural resources.

²² Gordon & Sylvester (2004) *Wisconsin International Law Journal* 31. Gordon and Sylvester explain that the World Bank prioritised the creation of electric power facilities and roads for industries to flourish.

²³ Trubek DM & Santos A "An Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice" in A Santos & DM Trubek *The New Law and Economic Development: A Critical Appraisal* (2006) 2; Thomas (2011) *Cornell Law Review* 970. This constitutes the first of the three moments of law and development. See section 2.1.2.2 footnote 66 below for more on the law's role in development. See also Heyns & Mostert (2018) *Law and Development Review* section 2.1.1.

²⁴ Trickle-down theory implies that the actors in the economy with the most resources will promote economic growth, from which all members of society will benefit. Incentives to stimulate growth therefore focus on big business.

²⁵ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 32. Stiglitz (2016) *The Political Quarterly* considers the role of the trickle-down theory in the increase in inequality globally, showing that despite already questioned by the later part of the 20th century, the trickle-down theory is still followed in the current context.

²⁶ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 35.

²⁷ Lee (2017) *Cornell International Law Journal* 19.

common cultural and ideological backgrounds” must agree on how social development will take place in their specific context.²⁸

Resulting from the focus on social development in the 1970s, theories were created that placed non-Western societies and their basic needs at the centre of the development project.²⁹ These theories may have promoted “bottom-up” approaches, but they were created by international institutions, sharing the underlying assumptions of the larger, Westernised development project.³⁰

The repercussions of the debt crisis in the 1980s largely nullified the positive impact of development initiatives of the previous two decades.³¹ Consequently, the third phase of development practice entailed assisting developing countries to manage their debt through structural adjustment programmes.³² By providing funding assistance, both the IMF and the World Bank became intricately involved in the reformation of social and political policies of non-Western nations.³³

The fourth phase in development practice embraced neoliberal economic policy to align with the Washington Consensus and the global promotion of American economic and political

²⁸ Lee (2017) *Cornell International Law Journal* 19. See also Heyns & Mostert (2018) *Law and Development Review* section 2.1.1.

²⁹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 34 and 35. Theories such as “micro-development” and “endogenous development” were promoted, signifying a shift from focusing on infrastructure development to basic needs such as food, clothing, shelter, education and employment. The basic needs approach is contrasted with approaches to poverty that only focus income disparities, and rather looks at mobilising specific resources for specific groups. See Streeten PP “Basic Needs: Premises and Promises” *World Bank Reprint Series*: 62 reprinted from *Journal of Policy Modelling* (1) 1979.

³⁰ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 36. Policies followed were based on domestic policies of industrialised countries. See also Heyns & Mostert (2018) *Law and Development Review* section 2.1.1.

³¹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 37-44.

³² Gordon & Sylvester (2004) *Wisconsin International Law Journal* 38.

³³ Williams P & Taylor I “Neoliberalism and the Political Economy of the ‘New’ South Africa” 2000 (5) *New Political Economy* 23; Gordon & Sylvester (2004) *Wisconsin International Law Journal* 38 & 39, 43. The oil crisis of the 1970s resulted from spiking oil prices to the disadvantage of oil importing third world countries. The IMF responded to third world debt by implementing “structural adjustment”, as a means for countries in debt to address deficits. “Structural adjustment” entailed a range of free market economic policies enforced upon indebted developing countries, which caused macro-economic growth in certain instances, but little difference on micro level. The aim of structural adjustment programmes was to remove the state’s control over economic institutions through regulation by privatising state-owned assets and cutting government expenditure on basic services. Trade liberalisation was also promoted. Funding provided by the IMF and the World Bank was conditional on policy reformation. Since developing countries were worse off by the end of the 1980s, with more debt and less capable of providing services such as health care and education, structural adjustment is regarded as a failure. See Konadu-Agyemang K “The Best of Times and the Worst of Times: Structural Adjustment Programs and Uneven Development in Africa: The Case of Ghana” 2000 (52) *The Professional Geographer*; Murray W & Overton JD “Neoliberalism is Dead, Long Live Neoliberalism? Neoliberalism and the International Aid Regime of the 2000s” 2011 (11) *Progress in Development Studies* 308. See also Heyns & Mostert (2018) *Law and Development Review* section 2.1.1.

views in the 1990s.³⁴ The Washington Consensus consists of ten policies, proposed by John Williamson in 1989, which formed part of the reform package provided to developing countries by the World Bank and IMF. The policies advocate the creations of a free-market and macroeconomic stability.³⁵ Modernisation and development now required developing regions to be integrated into the global economy and to restrict government interference.³⁶ South Africa transitioned from an apartheid-state to a constitutional democracy during this time. As is shown in Chapter 3, the global trends of this era found their way into local policies facilitating empowerment, also of South African mining communities.

2.1.2. Assumptions underlying the Promotion of Development

As exhibited by the different phases in development practice, the idea of development, and the practices put in place to achieve development, have not remained stagnant.³⁷ Underlying the different iterations of the development idea, however, is the belief that development will take place if modernisation, legal formalisation and Western economic policy and ideology are pursued in developing countries. These assumptions are considered in this section.

2.1.2.1. Modernisation

Central to the idea of development is the notion that the non-Western world must pursue modernisation since it brought about advancement in the West.³⁸ “Modernisation” refers to a process in terms whereof a society reaches a point where rationality, science and technology

³⁴ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 44, referring to Mittelman J and Pasha M *Out from Underdevelopment Revisited: Changing Global Structures and the Remaking of the Third World* (1997) 42. See discussion under section 2.1.2.3 on neoliberalism.

³⁵ The policies are regarded as a failure. Blake R “The World Bank's Comprehensive Development Framework and the Micro-Paradigm of Law and Development” 2000 (3) *Yale Human Rights and Development Journal* 161.

³⁶ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 44, 46 & 48. World Bank policies in this regard include the *1989 Report on Sub-Saharan Africa: From Crisis to Sustainable Growth*, introducing “good governance” and the Comprehensive Development Framework, which promoted various aspects of development that are achievable through pro-market policies and incentives. The Comprehensive Development Framework is discussed under section 2.1.2.3 below. See also Heyns & Mostert (2018) *Law and Development Review* section 2.1.1.

³⁷ See section 2.1.1. above in this regard.

³⁸ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 15 & 16 referring to Sardar (1999) 53; Thomas (2011) 973 refers to modernisation as the link between “formal rationality” in governance and the apparent success of capitalist democracies in the West, as conceptualised by North DC & Thomas RB in *The Rise of the Western World: A New Economic History* (1973) 1 claiming that “our arguments central to this book are straightforward. Efficient economic organization is the key to growth; the development of an efficient economic organization in Western Europe accounts for the rise of the West.” Gordon and Sylvester refer to the observation of Mehmet O *Westernizing the Third World: The Eurocentricity of Economic Development Theories* (1995) 60 that traditional societies are viewed as not having the characteristics of “modern persons” and are therefore unable to take control over their own environments and taking political decisions.

serve as the society's means of controlling its physical and social environment.³⁹ Modernisation theory frames underdevelopment as the consequence of the traditional (read "primitive") economic, political, social and cultural structures in a society.⁴⁰ Accordingly, non-Western societies are expected to leave their traditional lifestyles behind for the sake of development, since tradition stands in the way of modernisation.⁴¹

In the development paradigm, it is assumed that a society, regardless of its history, will advance from one clearly demarcated stage to the next, to modernise.⁴² Different theories on the different stages of modernisation have been postulated, but all are founded on characteristics of industrialised societies based in the West and on linear progression.⁴³ For this reason, modernisation is often regarded as Westernisation, and vice versa.⁴⁴

Modernisation, and thus development, is furthermore associated with the idea of progress.⁴⁵ To progress means to accept scientific explanations of humankind and its interaction with one another and nature.⁴⁶ It also means embracing the notion of fundamental rights, as historically

³⁹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 15 employing the definition of Sardar (1999) 53. Economic rationality in this context centres on the belief that the individual's drive to maximise its own utility and interests directs the choices it makes in the economic market. Palmer DE "Economic Rationality" *Encyclopaedia Britannica* available at <<https://www.britannica.com/topic/economic-rationality>> accessed on 11 December 2019.

⁴⁰ Davis & Trebilcock (2008) *The American Journal of Comparative Law* 8, 9 footnote 14 referring to Black C *The Dynamics of Modernization: A study in Comparative History* (1966) 68-75.

⁴¹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 17, referring to Sardar (1999) 52. Tradition in this context refers to the "inherent conventions, social forms, modes of government or social institutions" that, according to traditionalists, have "evolved over time as effective adaptations to the needs of people, and therefore have a default authority". Blackburn (2005) 368.

⁴² Gordon & Sylvester (2004) *Wisconsin International Law Journal* 15 & 16. Gordon and Sylvester acknowledge that the history of development is indeed complex and that "the road to development is littered with discarded models and philosophies". They, however, follow the argument of Kothari and Minogue that the evolution of development theory has merely entailed reformulating modernisation theory. See Kothari U & Minogue M *Development Theory and Practice: Critical Perspectives* (2001) 7. This argument is followed in this thesis.

⁴³ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 16 & 17. Gordon and Sylvester refer to the Rostow blueprint that provided for five stages of modernisation: first stage: the existence of the traditional society with limited skills in science and technology; second stage: the incorporation of modern science creates increased agricultural and industrial production; third stage: this stage is regarded as the "take-off" stage with increased economic growth and technological development; fourth and final stages: more sophisticated and complex processes are embarked upon leading to higher consumption in societies. See in general WW Rostow *The Stages of Economic Growth: A Non-Communist Manifesto* (1990). Gordon & Sylvester also refer to Vargas GS *The New International Economic Order Legal Debate* 3-4, 29 (1983); Akinsanya A & Davies A "Third World Quest for a New International Economic Order: An Overview" 1984 *International Law Quarterly* 208, 209.

⁴⁴ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 18.

⁴⁵ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 17.

⁴⁶ Blackburn (2005) 294; Terreblanche S *A History of Inequality in South Africa: 1652-2002* (2002) 252. Hegel regarded history as proof of how rationality created progress. Voltaire, Kant and Condorcet emphasised the link between progress, rationality and reason. The work of social evolutionists such as Spencer, creator of the idea of Social Darwinism, are based on the idea of progress. Progress in scientific enquiry over the ages is regarded as the best example of human progress, even though subjected to criticism.

promoted by the French and the English in their colonial conquests and pursuit of world domination.⁴⁷ During colonial conquests, the notion of progress, as understood by the colonists, was enforced upon the colonies.⁴⁸ The necessity of progress in a society was thus regarded as self-evident and universal.⁴⁹

The link between development and modernisation is emphasised by the United Nations resolution proclaiming the 1960s as the “Development Decade”.⁵⁰ The resolution notes the need for “accelerate(d) progress” in developing countries to attain economic growth, to be achieved through increased exports, foreign exchange and domestic savings in developing countries.⁵¹ The resolution specifically mentions that developing countries should obtain an “equitable share of the earnings from the extraction of natural resources” and policies should incentivise private investment in developing countries.⁵² Developing countries had to adopt measures to eradicate illiteracy, hunger and disease since these aspects negatively affect the productivity of people in developing countries.⁵³ Emphasis was also placed on education and vocational training and the enhancement of scientific and technological exploration in developing countries.⁵⁴

Changes in global politics influenced ideas surrounding “development” and “modernisation”.⁵⁵ The collapse of communism and the Soviet Union by the late 1980s, served to confirm the position of the United States as a global superpower, thereby also elevating the economic

⁴⁷ Gordon & Sylvester (2004) 17, referring to Sbert JM “Progress” in Sachs W (ed) *The Development Dictionary* (1992) 192 & Tucker V “The Myth of Development: A Critique of a Eurocentric Discourse” in Munck & O’Hearn (1999) 4&5. See Chapter 2 of this thesis where the effects of British colonial conquests in the context of the creation of mining communities are discussed.

⁴⁸ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 17 & 18 referring to Sbert (1992) 192 & Tucker (1999) 4 & 5.

⁴⁹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 17 & 18 referring to Sbert (1992) 192 & Tucker (1999) 4 & 5.

⁵⁰ UN Resolution 1710 (XVI) (19 December 1961) “United Nations Development Decade: A Programme for International Economic Cooperation”.

⁵¹ UN Res 1710 (1961) Article 1.

⁵² UN Res 1710 (1961) Articles 2 (b), (c) & (d). See also UNGA Res 1803 (XVII) (14 December 1962) “Permanent sovereignty over natural resources”; UNGA Res 3281 (XXIX) (12 December 1974) “Charter of Economic Rights and Duties of States”.

⁵³ UN Res 1710 (1961) Article 4 (d).

⁵⁴ UN Res 1710 (1961) Article 4 (e). The efforts procured during the development decade are not regarded as being successful in assisting the developing world, but still, modernisation serves as the underlying narrative for development. Gordon & Sylvester (2004) *Wisconsin International Law Journal* 18 referring to Vargas (1983) 29. See also Jackson P “A Prehistory of the Millennium Development Goals: Four Decades of Struggle for Development in the United Nations” 2007 (XLIV) *UN Chronicle* available at <<https://unchronicle.un.org/article/prehistory-millennium-development-goals-four-decades-struggle-development-united-nations>> accessed on 6 December 2019.

⁵⁵ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 44.

policies and worldviews of the United States as representative of “the West”.⁵⁶ By this time, the modernisation and development of a country were understood to entail the integration of the country’s economy into the global economy, liberalisation of its domestic markets and privatisation of its formerly state-controlled functions.⁵⁷ In this sense, modernisation as the backbone of development constitutes the promotion of neoliberalism and capitalism.⁵⁸

A link between development, modernisation and mining specifically, has also been established. Proponents of mining argue that the extraction of mineral resources leads to development, economic growth and modernisation.⁵⁹ One of the discourses relevant here is the sustainable mineral development consensus, which discourse promotes the basics of neoliberal economic policy while also promoting the notion of sustainability as a means to address the environmental impacts of mining.⁶⁰ Another discourse engaging with development and modernisation in the context of mining, is neoextractivism, the concept denoting a government’s control of and intervention in its mining industry to obtain the maximum amount of benefit from its resources for its people.⁶¹ Whereas the “catchup” model dictating that developing regions will follow the same development path as developed regions by embracing economic growth, technology and industrialisation, is contested to some extent by the notion

⁵⁶ Williams & Taylor 2000 *New Political Economy* 23, 26; Terreblanche (2002) 106. These views and policies are also described as Anglo-American, being representative of the United Kingdom and the United States.

⁵⁷ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 44 referring to Mittelman & Pasha (1997) 42. Liberalisation in this context includes the removal of trade barriers.

⁵⁸ See section 2.1.2.3 below.

⁵⁹ Field TL *State Governance of Mining, Development and Sustainability* (2019) 42. In chapter 2, Field describes pro-mining discourses such as sustainable mineral development consensus, responsible mining and neoextractivism. Field engages with discourses for and against mining and considers the different views on government’s role in the mining industry. This thesis does not analyse government’s role in regulating the mining industry and therefore does not deal with Field’s study in further detail.

⁶⁰ Field (2019) 43-45 referring to Seck SL “Transnational Corporations and Extractive Industries” in S Alam A Sudumu, CG Gonzales & J Razzaque (eds) *International Environmental Law and the Global South* (2015) 380. Fields emphasises the initial role of the World Bank and IMF in promoting economic liberalism when financing mining projects – not much consideration was given to “sustainable” development by the mining industry. By 1998, however, the World Bank’s policy guidelines pertaining to mining included significant reference to sustainability as part of development brought about by mining. See also Field’s discussion of the Mining, Minerals and Sustainable Development (MMSD) project at 51. See section 2.1.2.3 below for a discussion of the main characteristics of neoliberal economic policy. A detailed discussion of “sustainability” falls outside the scope of this thesis.

⁶¹ Field (2019) 73 referring to Solomon M (compiled) *The Rise of Resource Nationalism: A Resurgence of State Control in an Era of Free Markets, or the Legitimate Search for a New Equilibrium?* (2012) 73.

of neoextractivism,⁶² some of the main tenets of neoliberal development theory are maintained.⁶³

The Westernisation and modernisation of South African mining communities are not explicitly advocated for in the Mining Charter and other relevant legislation.⁶⁴ It is, however, maintained in this thesis that these notions inform development theory and are also visible when the role of the law in development is considered, as discussed under section 2.1.2.2, below. In the same way that modernisation is equated with development, development practice over the years focused significantly on the Westernisation of the legal systems of non-Western countries to achieve development, as described in section 2.1.2.2.⁶⁵

2.1.2.2. *Legal Formalisation, Rule of Law and Fundamental Values*

Legal reform in developing nations has long been emphasised as a prerequisite for development to take place, albeit the role the law should play in this regard has been viewed differently over the years.⁶⁶ In the development paradigm, it is therefore accepted that the entrenchment of the

⁶² Field (2019) 73, 75 referring to Gudynas E “Debates on Development and its Alternatives in Latin America: A Brief Heterodox Guide” in M Lang & D Mokrani *Beyond Development: Alternative Visions from Latin America* (2013) 15.

⁶³ Field (2019) 75. Neoextractivism is promoted in terms of alternative socialist growth models, but economic growth is still regarded as an indicator of development. The protection of the environment is not considered as an immediate concern for as long as poor socio-economic conditions are present. See section 2.1.2.3 below for a discussion of the main characteristics of neoliberal economic policy.

⁶⁴ See section 3 of Chapter 3.

⁶⁵ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 18.

⁶⁶ Trubek (2006) 75,76 & 82; Santos & Trubek (2006) 1-3, 5, 8 & 9; Davis & Trebilcock (2008) *The American Journal of Comparative Law* 9, 11-15, 18 & 20; Thomas (2011) *Cornell Law Review* 970, 974, 977-978 & 991; Gordon & Sylvester (2004) *Wisconsin International Law Journal* 18. The following stages or “moments” in the relationship between law and development are commonly acknowledged (the stages overlap and are not always clearly distinguishable from one another): Post World War II, the replication of Western legal systems in developing countries were pursued in terms of modernisation theory to obtain economic growth, democracy and the protection of human rights. The law was viewed as an instrument to intervene in the economies of developing countries to achieve development. After the failures of the law and development movement, a renewed interest in law’s role in development arose in the 1970s in the form of New Institutional Economics (NIE). NIE emphasises the importance of the design of public sector institutions and the interaction of these institutions with the private sector. NIE has its origins in the Coase Theorem, which provides for excluding government regulation and for not providing a regulatory solution for all social harms - Coase R “The Problem of Social Cost” 2013 (reprinted from 1960) *Journal of Law and Economics*. A lot of emphasis is also placed on the importance of property rights. (See the works of Douglass C North *Institutions, Institutional Change, and Economic Performance* (1990); *Understanding the Process of Economic Change* (2005) and *Violence and Social Orders* (2009) and the works of De Soto H *The Other Path: The Invisible Revolution in the Third World* (1989) & *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000) on the importance of protecting property rights and other institutions for development to take place). Legal reform itself was viewed as development – the law was no longer merely an instrument to achieve development. A legal system is regarded as prerequisite for development to take place. The consideration of the law’s role in development also manifested specifically in the interest in constitutional law and its role in development. Between 1989 and 1999, member states of the United Nations increasingly introduced bills of rights and/or constitutional review processes. The protection of democracy, the separation of powers and the protection of the freedom of the press were regarded as necessary for development to take place. A further moment in law and development is recognised where the law is understood in terms of its place in the

rule of law, the formalisation of legal rules and rights and the protection of human rights and fundamental values are required for developing nations to develop into the industrialised economies of the West.⁶⁷ In this section, it is considered how this assumption became entrenched in the paradigm.

The initial replication of “modern” Western legal systems in developing countries during the 1960s and 1970s, accompanied by the transformation of local legal cultures, did not yield the intended results postulated by modernisation theory.⁶⁸ This approach to development was based on the assumption that all societies undergo the same stages of transformation to reach a specific end: the implementation of modernised legal systems and liberalism.⁶⁹ The economic growth secured by modernisation and liberalism would translate into democratisation and

neoliberal market. The uncritical pursuit of neoliberalism is criticised but there is no consensus regarding the extent to which the development construct is still stuck in neoliberal thinking.

⁶⁷ Trubek (2006) 74; Kennedy (2009) 1 & 2; Davis & Trebilcock (2008) 23-25. The classic, often cited conception of the rule of law principal holds that certain basic individual rights will be protected by a government if it acts in terms of clear, pre-determined rules that apply generally to its subjects and that are enforced in terms of fair procedures by impartial courts. Dicey *An Introduction to the Study of the Law and the Constitution* (1979). Other understandings of the rule of law principle are considered in section 2.1 of Chapter 6.

⁶⁸ Trubek (2006) 78; Trebilcock & Mota Prado (2014) 56-58; Trebilcock M & Daniels R *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (2008) argue that countries struggle with the implementation of legal reform due to financial, technical and human resource constraints, societal norms that are in conflict with the notion of rule of law and political economy constraints. See section 2.1.2.1 on modernisation theory in the development context.

⁶⁹ Trubek (2006) 80-82. As Trubek puts it “‘Western law’ was the higher evolutionary stage towards which all systems were moving...”. This era saw the promotion of “embedded liberalism” that constituted a balance between protectionist and state led policies and open economies subjected to globalisation. Democracy had to be protected at national level and governing authorities were held accountable in terms of international law.

upholding human rights.⁷⁰ This assumption proved incorrect.⁷¹ Yet, development practice maintained an emphasis on the law.⁷²

The global political and economic changes characterising the early 1990s translated into, amongst other things, an increase in globalisation, causing the expansion of big industry to developing countries.⁷³ Developing countries now had to replace policy providing for state intervention and funding; Economic growth had to be achieved through market liberalisation, the export of goods and services and attracting private foreign investment.⁷⁴ This shift set the scene for the neoliberal turn.⁷⁵

During this time, development practitioners pursued the entrenchment of the principle of the rule of law in developing nations (as opposed to merely transplanting Western modernised legal systems).⁷⁶ In terms of a legal perspective, upholding the rule of law translates into judicial and law enforcement agency reform, the promotion of legal education and the improvement of correctional services and administrative agencies.⁷⁷

⁷⁰ Trubek (2006) 78-80. A lot of emphasis was for instance placed on legal education. Initially, Western legal systems were replicated in developing countries without much adjustment for local conditions. The reasoning was that legal development would follow the evolutionary stages of economic growth. See the discussion of the Rostow blueprint at footnote 43 above. Regarding the protection of rights, the work of TH Marshall is relevant. Marshall divides citizenship in three categories, which also constitute phases in the formation of the citizenship concept, giving way to three types of rights. The civil aspect of citizenship relates to civil rights, being those rights a citizen requires to promote its individual freedom. Here the rights to freedom of speech, freedom of person, holding property, entering into contracts and being regarded equally under the law are pertinent. The political aspect of citizenship translates into political rights to participate in government by for instance voting in elections. The social element of citizenship gives rise to social rights to economic welfare and other assistance, enabling the citizen to be “civilised” in accordance with prevailing standards. He proclaimed that a modern, civilised, democratic state must provide its citizens with certain social rights. As opposed to the liberal notion of protecting the property rights only of a few, every citizen now had to enjoy these social rights. Marshall TH *Citizenship and Social Class* (2009/1950) 148, 149, 153. Terreblanche (2002) 478; Kistner U, Ismail Sooliman Q & Van Marle K “Poverty and Rights: Philosophical, Historical and Jurisprudential Perspectives” in C Soudien, V Reddy and I Woolard (eds) *Poverty & Inequality: Diagnosis, Prognosis, Responses – State of the Nation* (2019) 97, 98.

⁷¹ Trubek (2006) 79. Instead of advancing democracy and the protection of human rights in developing nations where authoritarian rule was prevalent, it became clear that legalism and instrumentalism could support authoritarianism. See Trubek D “Back to the Future: The Short and Happy Life of the Law and Society Movement” 1990 (18) *Florida State University Law Review* 1-55.

⁷² Trubek (2006) 82; Davis & Trebilcock (2008) 9, 11, 12, 14, 15, 18 & 20.

⁷³ Trubek (2006) 82; Gordon & Sylvester (2004) *Wisconsin International Law Journal* 44. The fall of the Berlin wall and communism affirmed the position of the Anglo-American thinking. See section 2.1 of Chapter 3 in this regard.

⁷⁴ Trubek (2006) 83; Gordon & Sylvester (2004) *Wisconsin International Law Journal* 46 & 47.

⁷⁵ Trubek (2006) 83; Gordon & Sylvester (2004) *Wisconsin International Law Journal* 48; Terreblanche (2002) 482-483. Neoliberal economic policy and the impact for development practice and discourse is considered in section 2.1.2.3 of this chapter and analysed in Chapter 6.

⁷⁶ Trubek (2006) 83; Davis & Trebilcock (2008) 23-25.

⁷⁷ Trebilcock & Mota Prado (2014) 50-54 referring to Trebilcock & Daniels (2008).

An economic perspective on the rule of law focuses on securing property and contract rights in terms of private and procedural law.⁷⁸ Contract rights must be legally enforceable to protect investors' interests.⁷⁹ The protection of well-defined property rights is required to obtain economic growth, which is generally regarded as the central tenement of development.⁸⁰

In this context, certain assumptions underly the understanding of what would constitute well-defined and strong property rights.⁸¹ Property rights are assumed to manifest in some ideal form that can be distinguished from the social and economic struggles experienced in a given society.⁸² Due to the clear distinction between the public and the private sphere, it is easier to enforce property rights.⁸³ The protection of private property rights does not have an impact on the distribution of wealth.⁸⁴ Social issues are regarded as being separate from property issues and cannot be addressed within the property regime.⁸⁵ If operating in a well-functioning free-market economy, the market forces will control and allocate private rights, removing the need for other interventions to ensure equitable allocation of resources.⁸⁶ Lastly, it is generally assumed that economic growth and efficiency is created when property rights are formalised and that legal policy is not required to intervene in this regard.⁸⁷

In a South African context, these assumptions can be contested because of the contention regarding the protection of private property rights in South Africa.⁸⁸ The question, however, is

⁷⁸ Trebilcock & Mota Prado (2014) 63-75 referring to De Soto (2000); Trebilcock M & Veel P E "Property Rights and Development: The Contingent Case for Formalization" 2008 (30) *University of Pennsylvania Journal of International Law* 397; Santos & Trubek (2006) 5; Thomas (2011) 977; Brand D & Van Marle K "Poverty and the Ordinary Law: Introduction" 2013 (29) *South African Journal on Human Rights* 465.

⁷⁹ This follows the assumption that private investment is required for economic growth that will lead to development. Trebilcock & Mota Prado (2014) 70-75 referring to North (1990) 54; Williamson OE *The Mechanisms of Governance* (1996); Dam KW *The Law-Growth Nexus: The Rule of Law and Economic Development* (2006) 124-128.

⁸⁰ Kennedy (2009) 2; Trebilcock & Mota Prado (2014) 64 referring to De Soto (2000) 35. The economic benefits of protecting property rights include the efficiency of the exclusive use of resources; increased access to credit because of secure tenure and transferable property; increased incentives for investment and less inefficient use of resources because of secure tenure. Also see footnote 66 above.

⁸¹ Kennedy (2009) 1.

⁸² Kennedy (2009) 1.

⁸³ Kennedy (2009) 1. The protection of property rights goes together with a liberal and neoliberal regime. See section 2.1.2.3 for a discussion of the assumptions on which neoliberal ideology is based.

⁸⁴ Kennedy (2009) 2.

⁸⁵ Kennedy (2009) 2.

⁸⁶ Kennedy (2009) 2.

⁸⁷ Kennedy (2009) 2.

⁸⁸ Ramose criticises the protection of property rights in s 25 of the South African Constitution 1996 as an obstacle for transformation. According to Ramose, the length and detailed nature of the property clause hide the fact that rights are infringed by the implementation of the clause. See Ramose MB & Hook D "To Whom does the Land Belong?" 2016 (50) *Psychology in Society*. Others have criticised the hierarchy maintained by protecting different types of rights to property – see Van der Walt AJ "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" 1999 (64) *Koers* 259-294. S 25 is also regarded as "a compromise between the recognition of existing property rights for the minority and the aspirations for

whether incorporating the idea of development into South African mechanisms to empower mining communities will inadvertently promote these assumptions about property and other rights. This matter is further addressed in Chapter 6.

In the development context, the law thus plays a specific role: It provides the foundation for market relations and serves as a limitation of state intervention in the economy.⁸⁹ The state is mandated to provide the necessary institutions that will ensure the promotion of the rule of law and the protection of property rights and contract rights.⁹⁰

The rediscovery of the law in development was driven by two different camps.⁹¹ The one, more powerful camp was the movement led by the World Bank and IMF that pursued the liberalisation of economic markets, privatisation and the implementation of institutions required for a market economy.⁹² The implementation of the rule of law was regarded as a way to achieve these goals.⁹³

The other camp pursued the entrenchment of democracy and human rights in the developing world.⁹⁴ However, as was observed from earlier efforts to implement modernised legal systems in developing countries, the human rights camp was confronted with the reality that the mere transferal of democracy and human rights did not lead to economic growth and democratisation.⁹⁵ The human rights camp had to promote the protection of human rights as a separate project with the assistance of international legal instruments to complement domestic law.⁹⁶ Thus, the acceptance of the rule of law had to be promoted.⁹⁷ To ensure the protection

access to property by the majority” – Hendricks F “Rhetoric and Reality in Restitution and Redistribution: Ongoing Land and Agrarian Questions in South Africa” in F Hendricks, L Ntsebeza & K Helliker *The Promise of Land: Undoing a Century of Dispossession in South Africa* (2013) 30.

⁸⁹ Santos & Trubek (2006) 5&6 refer to this as the second, neoliberal moment in law and development; Thomas (2011) 974 ascribes this to the influence of the work of Hayek (1944), (1960) & (1973). See footnote 17. As Brand & Van Marle (2013) *SAJHR* 465 argue, the law, as the substantive and procedural rules that regulate holding property and transacting between legal subjects, creates access to basic resources and thus, as Sen *A Poverty and Famines. An Essay on Entitlement and Deprivation* (1981) 166 states, “stands between availability and entitlement”.

⁹⁰ Trubek (2006) 84, 85; Terreblanche (2002) 478.

⁹¹ Trubek (2006) 84.

⁹² Trubek (2006) 84 & 85. North DC “Institutions” 1991 (5) *Journal of Economic Perspectives* 97 defines institutions as “humanly devised constraints that structure political, economic and social interaction”. These constraints can be informal such as social conventions, customs or traditions or formal such as constitutions, laws and property rights. Institutions along with economic constraints provide a set of choices determining the scope of any economic activity. See footnote 66 above for more on institutional economics.

⁹³ Trubek (2006) 85. See the discussion under section 2.1.1 of this chapter for more on the fourth phase of development practice.

⁹⁴ Trubek (2006) 84.

⁹⁵ Trubek (2006) 84.

⁹⁶ Trubek (2006) 84 & 85.

⁹⁷ Trubek (2006) 84.

of human rights and the promotion of economic growth, the state must warrant the constitutional protection and promotion of certain rights and the independence and powers of the judiciary.⁹⁸

The promotion of basic or fundamental human rights and democracy in developing nations thus forms part of the relationship between law and development. The right to development, itself, was officially declared a human right in terms of the 1986 United Nations Declaration on the Right to Development.⁹⁹ The declaration confirms that development is an entitlement and a pre-condition for social life.¹⁰⁰

The acknowledgement of development as a basic right furthers the sentiment underlying the configuration of development as freedom¹⁰¹ and capabilities¹⁰² that development should be more than just the pursuit of economic growth. The values underlying these proposed capabilities and freedoms are similar to those underpinning human rights.¹⁰³ The Capabilities Approach, also referred to as the Human Development Approach, endorses the notion that development should create an environment enabling people to thrive by making opportunities available to every person.¹⁰⁴ Development, as understood in terms of this approach, has its origins in the idea of human flourishing and self-realisation.¹⁰⁵

⁹⁸ Trubek (2006) 85.

⁹⁹ UNGA Res 41/128 (4 December 1986) “Declaration on the Right to Development.

¹⁰⁰ Stevens C & Ntlama N “An Overview of South Africa’s Institutional Framework in Promoting Women’s Right to Development” 2016 (20) *Law, Democracy and Development* 52, 54 & 55. The declaration defines the right to development as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised”. The African Charter on Human and People’s Rights (1981), Art 22, also provides for the inalienable right to development. Stevens & Ntlama notes that the African Charter is the only regional human rights instrument which incorporates the right to development. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* case 276/2003 the African Commission had to consider the justiciability of the right to development. The Commission reiterated the importance of the right to consultation and participation in development process as key components of right to development. Stevens and Ntlama argue that *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* 2014 6 BCLR 762 (CC) confirms, without explicit reference to the *Endorois* case, the interrelationship between rights of fundamental importance and the right to development.

¹⁰¹ See in general Sen A *Development as Freedom* (2001).

¹⁰² See in general Nussbaum MC *Creating Capabilities* (2011).

¹⁰³ Nussbaum (2011) 62.

¹⁰⁴ Nussbaum (2011) 1, 14. Nussbaum shares the sentiment of the late Mahbub ul Haq, Pakistani economist that initiated the first Human Development Reports of the United Nations Development Programme in 1990.

¹⁰⁵ Nussbaum (2011) 23. These views were promoted by Western philosophers such as Aristotle and John Stuart Mill and Eastern philosophers such as Rabindranath Tagore.

The Capabilities Approach provides a means of measuring development achievements¹⁰⁶ by determining what an individual is capable of doing and being in a given environment.¹⁰⁷ The approach either uses empirical indicators to measure the quality of life¹⁰⁸ or proposes several core human values, or Central Capabilities, which are universal and indispensable for the good life.¹⁰⁹ The capabilities are categorised per the following values, which values are also protected as fundamental rights in the South African Constitution:¹¹⁰ Life,¹¹¹ bodily health,¹¹² bodily integrity,¹¹³ senses, imagination and thought,¹¹⁴ emotions,¹¹⁵ practical reason,¹¹⁶ affiliation,¹¹⁷ interaction with other species,¹¹⁸ play,¹¹⁹ and control over one's environment.¹²⁰ To eradicate social injustice and inequality, every person's Central Capabilities must be realised by government through public policy.¹²¹ Constitutional drafting and amendment, judicial interpretation and the creation of legislation should promote the values underlying the Central Capabilities.¹²²

¹⁰⁶ Nussbaum (2011) 69.

¹⁰⁷ Nussbaum (2011) 69.

¹⁰⁸ Nussbaum (2011) 19; Sen (2001) 18 & 19; Sen A *Inequality Reexamined* (1992) 43 & 44 and chapters 3 and 4 in general. This approach is proposed by Sen. He does not argue for the promotion of specific capabilities, but rather for freedom as an overall good. Development therefore is freedom.

¹⁰⁹ Nussbaum (2011) 15, 33 & 34. The capabilities are described with a specific emphasis on the challenges faced by poor nations.

¹¹⁰ The capabilities listed correspond with the following rights protected in the Bill of Rights of the Constitution: s 9 – the right to equality; s 10 – the right to human dignity; s 11 – the right to life; s 12 – the right to freedom and security of the person; s 15 – the right to freedom of religion, belief and opinion; s 16 – the right to freedom of expression; s 18 – the right to freedom of association; s 19 – the right to make political choices; s 23 – the right to fair labour practices and to form and join trade unions; s 24 – the right to benefit from an environment that is not harmful to one's health; s 25 – the right not to be deprived of property; s 26 – the right to access to adequate housing; s 27 – the right to health care, food, water and social security and s 31 – the right to belong to cultural, religious and linguistic communities.

¹¹¹ The ability to have a normal length of life and the quality of life that makes it worth living.

¹¹² Good health, reproductive health, adequate nourishment and adequate shelter.

¹¹³ Freedom of movement, freedom from violence (sexual and domestic), sexual and reproductive freedom.

¹¹⁴ The right to education and training, freedom of cultural, political and religious association, freedom of choice and of expression.

¹¹⁵ The ability to have attachment to things outside of one's body and the support of human association.

¹¹⁶ Protection of freedom of conscience and religious association, being able to form conception and be critical of the good.

¹¹⁷ (1) Freedom of assembly and political speech: the ability to live with and be recognised by others, engage in social interaction and (2) self-respect and non-humiliation: being treated with dignity, not being discriminated against.

¹¹⁸ To live with and relate with animals, plants and the world of nature.

¹¹⁹ Being able to enjoy and take part in recreational activities.

¹²⁰ (1) Control over political environment: participation in political decision-taking and other matters that impact one's life and (2) control over material environment: the ability to hold property on an equal basis than others, being able to work as a human being, enter into meaningful relationships of mutual recognition with other workers.

¹²¹ Nussbaum (2011) 19.

¹²² Nussbaum (2011) 75.

From the above discussion, it is deduced that development and rights rhetoric has been amalgamated in the development paradigm. This thesis argues that the latter amalgamation implies that there should be a clearly defined bearer of the right (or capabilities and freedoms) in the development paradigm: It must be clear who the beneficiary of development rights or initiatives is and whether such a beneficiary is in fact poor. In a neoliberal oriented development paradigm, a legal subject will only be able to transact in the economic market if it can exercise these rights and will thus only “develop” when it is being afforded these rights. Applied to the research question of this thesis, South African mining communities must thus be capable of receiving and holding these rights for mine community development in terms of the Mining Charter to be successful. This point is further explored in Chapter 6.

2.1.2.3. *Economic Policy and Ideology*

The South African policy context within which mine community development and empowerment are regulated came into being at a time when development policies favoured neoliberal solutions to achieve development.¹²³ Neoliberal economic policy, however, did not feature as a component of development theory immediately after the Second World War. The period before the war saw a rise in scepticism regarding economic liberalism.¹²⁴ Initial development policies thus showed traces of socialist principles.¹²⁵ Post-war development theory promoted neo-Keynesian and neoclassical principles to provide formerly colonised nations with a means of promoting economic growth in the context of the global economy.¹²⁶ Under neo-Keynesian principles, the state had a significant role to play in development.¹²⁷

¹²³ See section 2.2 of Chapter 3.

¹²⁴ Cammack P “Neoliberalism, the World Bank and the New Politics of Development” in U Kothari & M Minogue (eds) *Development Theory and Practice: Critical Perspectives* (2002) 158 & 161. The crash of the stock markets in 1929 and the negative impacts of industrialisation, contributed to the increased critique of economic liberalism.

¹²⁵ Cammack (2002) 160. Cammack refers to the lecture of Joseph A Schumpeter “The March into Socialism” delivered on 30 December 1949 to the American Economic Association in New York on 30 December 1949. “Socialism” here means “that organization of society in which the means of production are controlled, and the decisions on how and what to produce and on who is to get what, are made by public authority instead of by privately-owned and privately managed firms” as Schumpeter refers to it. See also Schumpeter JA *Capitalism, Socialism & Democracy* (2010) Chapter 2.

¹²⁶ Cammack (2002) 161. Neo-Keynesian principles allowed for government intervention, national economic planning and the restriction of the movement of capital across borders. Neoclassical theory of state holds that the market ideal of efficient transactions between private actors should be supported by appropriate laws and institutions. Thomas (2011) 968. See footnote 17 above.

¹²⁷ Cammack (2002) 161; Terreblanche (2002) 481, 493 note 14. Keynes JM *The General Theory of Employment, Interest and Money* (1949) 382,473 argues for a mixed capitalist system that should provide for a social democracy and welfare state, providing social rights, as argued for by Marshall (1949). On this basis, a welfare state was introduced in the United States through the New Deal in 1933. In the United Kingdom, welfare state principles were introduced in 1909 to a limited extent before the Second World War and implemented increasingly until suppressed by the Thatcher government.

Development policy thus dictated the use of macroeconomic instruments to promote development.¹²⁸

The neoliberalist approach to development practice that became prominent during the 1980s and 1990s was inspired by the Washington Consensus¹²⁹ and the worldwide acceptance of American economic and political views.¹³⁰ Neoliberalism was promoted through internationally managed policies that required the restructuring of economies.¹³¹ Fiscal reform and incentives for entrepreneurship replaced elements of the post-war political economy such as redistributive tax measures.¹³² Neoliberal economic policy limited the state's control of labour and economic markets while also amending social security legislation to ensure market forces are not restricted unnecessarily.¹³³

Underlying neoliberal ideology, there are a few core assumptions, some of which have their roots in liberalism.¹³⁴ Liberalism, as a political ideology, centres on the individual who holds rights against the government, such as the right to property, fair and transparent legal processes, equality, freedom of expression, and freedom of religious and ideological persuasion.¹³⁵ A liberalist perspective maintains that by protecting these rights and by allowing each individual

¹²⁸ Cammack (2002) 161. Monetary and fiscal policies are thus utilised in this regard.

¹²⁹ See section 2.1.1 for a description of the Washington Consensus.

¹³⁰ Gordon and Sylvester (2004) 44, referring to Mittelman & Pasha (1997) 42; Terreblanche (2002) 482, 483. The notion of a welfare state lost popularity, specifically in America and Britain, as a result of the stagflation experienced in the 1970s. Increased levels of unemployment did not match decreased levels of productivity, meaning that governments could not afford paying unemployment benefits. A shift towards neoliberalism and scepticism about the state intervention in the economy was regarded as a means of addressing the negative consequences of the welfare state. It was assumed that the free market was more efficient in distributing goods. The wave of neoliberalism is associated with the rule of Margaret Thatcher in Britain and Ronald Reagan in the United States of America who both promoted the ideals of neoliberalism.

¹³¹ Cammack (2002) 163.

¹³² Cammack (2002) 163.

¹³³ Cammack (2002) 163. This movement thus replaced the principles propounded by Schumpeter (see footnote 125 above) as part of the post-war political economy. Terreblanche (2002) 483 argues that the neoliberal camp overreacted to government failures in welfare states, which failures, it was argued, could be addressed through the efficiency of the free market. Little consideration was given to the unequal power relations prevalent at the time that contributed to government failures, specifically in developing nations. See also Heyns (2019) *Law and Development Review* section 4.2.

¹³⁴ Williams & Taylor 2000 *New Political Economy* 22. As stated by Brown W *Undoing the Demos: Neoliberalism's Stealth Revolution* (2015) 20, the term "neoliberalism" is mainly used by those critical of neoliberalism.

¹³⁵ Classic economic liberalism is associated with the work of John Locke and Adam Smith, amongst others. Locke in *Second Treatise of Government* (1690) argues that man has a natural right to life, liberty and property but opts to trade the rights to be part of society, to elect executive power that can protect the rights of man in terms of common laws. In *The Wealth of Nations* (1776), Smith argues against the regulation of commerce and argues for the division of labour and accumulation of capital. He maintains that a country's wealth lies in its accumulation of capital. He is also in favour of free trade and competition and a limited government. Blackburn (2005) 209.

to pursue its own best interests the wealth and wellbeing of a society will be optimised.¹³⁶ Liberal-inspired socio-economic and political policies are thus aimed at the individual; “community” is not recognised as such.¹³⁷

Neoliberal thinking follows the above-mentioned liberalist principles but focuses more on the functioning of economic markets, not to be interfered with by government unnecessarily.¹³⁸ In a neoliberal world, domestic economic markets are intrinsically linked with the global economic market, allowing the economic actor to operate on a global scale.¹³⁹ In other words, national priorities must give way to international trends and market forces.

The first assumption on which neoliberalism is based is that the economic and political aspects of a society are clearly separated, irrespective of how a society came into being.¹⁴⁰ Within the neoliberalist frame of reference, economic action is regarded as inherently rational: The separation of the political and the economic aspects in a society, is regarded as an ideologically neutral action.¹⁴¹ In terms of a neoliberal outlook, political action is regarded as irrational.¹⁴²

¹³⁶ Smith (1776); Hume D *A Treatise of Human Nature* (1739); Hume D *An Enquiry Concerning the Principles of Morals* (1751).

¹³⁷ See section 3.1 of this chapter for a discussion of the concept “community”. See also Heyns (2019) *Law and Development Review* section 4.2.

¹³⁸ Williams & Taylor (2000) *New Political Economy* 22. Brown (2015) 17 regards neoliberalism as “a peculiar form of reason that configures all aspects of existence in economic terms”. Terreblanche (2002) 486, 492 referring to Esping-Anderson G *The Three Worlds of Welfare Capitalism* (1990) notes that Adam Smith promoted intervention in the instances of market failure and is wrongly interpreted to advocate no government intervention and an absolute belief in the free market system. Terreblanche allocates blame for this misinterpretation to David Ricardo and Milton Friedman, who advocated social benefits for the poor would create, rather than solve, poverty and unemployment and would further dependency.

¹³⁹ Williams & Taylor (2000) *New Political Economy* 22. Neoliberal policy promotes globalisation, which can be defined as “a world in which societies, cultures, politics and economies have...come closer together” - Kiely R “Globalisation, (Post-) Modernity and the Third World” in R Kiely & P Marfleet (eds) *Globalisation and the Third World* (1998) 3. See also Kiely R “The Crisis of Global Development” in Kiely & Marfleet (1998) 25.

¹⁴⁰ Williams & Taylor (2000) *New Political Economy* 22 referring to Polányi K *The Great Transformation: The Political and Economic Origins of Our Time* (1957) 71. This assumption echoes a similar sentiment expressed by the assumptions on which property rights in the development paradigm are conceived. See discussion on property rights under section 2.1.2.2 above and the critique of this assumption in section 2.2 of Chapter 6.

¹⁴¹ Economic rationality in this context centres on the belief that the *homo economicus* or “the economic man”, as created by John Stuart Mills, is mainly motivated to maximise its own utility and interests. The choices it makes in the economic market are driven by this motivation. Mills describes the economic man as “a being who desires to possess wealth, and who is capable of judging the comparative efficacy of means for obtaining that end”- Mills JS “On the Definition of Political Economy; and on the Method of Investigation Proper to It” 1836 *London and Westminster Review* 321. See also Palmer DE “Economic Rationality” *Encyclopaedia Britannica*; Persky J “Retrospectives: The Ethology of *Homo Economicus*” 1995 (9) *Journal of Economic Perspectives* 221 & 222. From an ethics perspective, philosophers such as Plato and Aristotle viewed “rationality” as one of the highest goods to be pursued by humans. Kant and Hegel perceived rationality as a way for an individual to act freely. Hume limited rationality to mathematical and logical reasoning since reasoning in a broader sense can still be derailed by human passions. Blackburn (2005) 308; MacIntyre (2004) 70.

¹⁴² Williams & Taylor (2000) *New Political Economy* 22. See also Heyns (2019) *Law and Development Review* section 4.2.

The rational character of economic problems means that these problems can be solved through technical and rational “expert” intervention, which intervention, again, is neutral towards social and political issues.¹⁴³ The result of this first assumption is the deduction that economics motivates all human activity since all humans strive to act rationally.¹⁴⁴

The first assumption leads to the second assumption that economics should govern politics since politics are inherently irrational.¹⁴⁵ Underlying this second assumption is the liberal principle that diverse interests can be harmonised within the framework provided by a free market.¹⁴⁶ In the instance where resources must be redistributed, policy interventions will enable the market to determine the redistribution of resources.¹⁴⁷ This often leads to “one size fits all” approaches to redistribution problems, of which the structural adjustment programmes prescribed for developing countries in the 1980s, are good examples.¹⁴⁸ For the markets to operate optimally, the *status quo* must be maintained through the protection of law and order generally and of rights and property specifically, sometimes at the expense of distributive justice.¹⁴⁹ Distributive justice in some instances requires undermining the *status quo* by removing the legal protection of certain rights.¹⁵⁰

¹⁴³ Williams & Taylor (2000) *New Political Economy* 22.

¹⁴⁴ Williams & Taylor (2000) *New Political Economy* 22. See footnote 141 above.

¹⁴⁵ Williams & Taylor (2000) *New Political Economy* 23.

¹⁴⁶ Williams & Taylor (2000) *New Political Economy* 23; Palmer “Economic Rationality” *Encyclopaedia Britannica*; Henderson JP “Adam Smith, Ricardo and Economic Theory” 1977 (21) *The Centennial Review* 118. Harmonisation takes place as a result of Smith’s (1776) “invisible hand”. See also Heyns (2019) *Law and Development Review* section 4.2.

¹⁴⁷ Williams & Taylor (2000) *New Political Economy* 23.

¹⁴⁸ See footnote 33 above.

¹⁴⁹ Williams & Taylor (2000) *New Political Economy* 23; Cammack (2002) 166. Embracing the free market in this context does not require abolishing state regulation, but regulation should be directed at enabling market-friendly policies.

¹⁵⁰ Land reform in South Africa is an example hereof. As explained at footnote 191 at section 3.3 of Chapter 3, Subs 25(6) and 25(7) of the Constitution provide for three different types of land reform to address the legacies of land dispossession under apartheid. In some instances expropriation of property rights held currently will have to take place in terms of s 25(2) to give effect to land reform measures. Ss 25(2) and 25(3) determine when expropriation may take place. A major point of contention over the last couple of years has been the requirement set by s 25(2) that compensation must be paid when expropriation takes place since, in a land reform context, funds are not always available to pay compensation. Also, previously advantaged white property owners will once again receive financial benefit at the expense of previously disadvantaged black persons. Currently, the proposed amendment of s 25 to determine that no compensation will be payable for expropriation in the instance of land reform, is being considered. See the Constitution Eighteenth Amendment Bill of 6 December 2019. Also see Ngcukaitobi T “What Section 25 means for land reform” *Mail & Guardian* 13 December 2019 available at <<https://mg.co.za/article/2019-12-13-00-what-section-25-means-for-land-reform/>> accessed on 16 March 2020, for a discussion of some of the problems pertaining the proposed amendment bill.

The economic actor in a neoliberal system seeks to optimise its position. Such individual optimisation will benefit the greater society.¹⁵¹ A third assumption holds that the economic actor ultimately wishes to optimise its position in the global market, thus the global market is the optimal size of a market.¹⁵² The role of a national government thus is limited to protect the economic actor from external threats.¹⁵³

The World Bank contributes greatly to solidifying principles in favour of a neoliberal free-market economy as a means to achieve development.¹⁵⁴ Framed in poverty rhetoric to cater to the needs of the non-Western world, the fundamentals of capitalism are promoted as the natural path for the global economy.¹⁵⁵ The World Bank regards privatisation and marketisation as more favourable than government regulation.¹⁵⁶

The failure of the structural adjustment approach, however, caused uncertainty as to the ability of neoliberal inspired policies to secure the attainment of development goals.¹⁵⁷ Faith in the “trickle-down” effect of neoliberal policies faded. The development paradigm’s focus moved beyond promoting economic growth for its own sake, embracing a broader notion of development¹⁵⁸ placing greater emphasis on local contexts and the social aspects of

¹⁵¹ Williams & Taylor (2002) *New Political Economy* 23; Henderson (1977) *The Centennial Review* 122 comparing the work of Smith (1776) with the work of David Ricardo as compiled in Ricardo D, Straffa P & Dobb MH (eds) *The Works and Correspondence of David Ricardo* (1952-1973).

¹⁵² Williams & Taylor (2000) *New Political Economy* 23.

¹⁵³ Williams & Taylor (2000) *New Political Economy* 23. Cammack (2002) 166. The limitation of government’s role in the neoliberal context is also a result of the neoliberal belief that all political activity, and thus government’s activity, is irrational. See footnote 141 above. See also Heyns (2019) *Law and Development Review* section 4.2.

¹⁵⁴ Cammack (2002) 159. See section 2.1 of Chapter 3, footnote 23, on the mandate of the World Bank and the IMF.

¹⁵⁵ The fundamental principles on which capitalism is based include the following: capital’s dominance over labour; limited intervention in the markets for labour, goods and investment; government creating a favourable environment for investment; global and local regulation following the principles of capitalist reproduction and promoting the ideologies justifying capitalism. Cammack (2002) 159 & 160. Cammack argues that development policies were framed by the World Bank by “cloaking their commitment to capitalist commitment in arguments and language that disguise its logic, and promote it as a solution for the very conditions – poverty and inequality on a global scale – that itself produces”.

¹⁵⁶ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 46.

¹⁵⁷ Murray & Overton (2011) *Progress in Development Studies* 308, 313. See footnote 33 above for a description of the structural adjustment programmes.

¹⁵⁸ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 45; Blake (2000) *Yale Human Rights and Development Journal* 162; The World Bank Group, *A Proposal for a Comprehensive Development Framework* (A Discussion Draft) (Jan 21 1999). The Comprehensive Development Framework (CDF) is the result of reports created by the World Bank between 1991 and 1999. In terms of the CDF, the focus should be placed on structural aspects such as good governance and well-structured financial systems, human aspects such as education and health, physical aspects such as infrastructure and sector-specific aspects of development such as the promotion of rural, urban and private sectors. The CDF laid the foundation for the Millennium Development Goals, which served as the basis for the Sustainable Development Goals pursued currently. See “Comprehensive Development Framework” at <https://www.worldbank.org/en/webarchives/archive?url=httpzzxxweb.worldbank.org/archive/website01013/WEB/0__PAGEP.HTM> accessed on 16 December 2019.

development.¹⁵⁹ In 1990, the United Nations Development Programme (“UNDP”) presented the idea of “human development” that turns on the promotion of human abilities, such as the ability to live a “long and healthy life” and to have access to a “decent standard of living”.¹⁶⁰ Conditions for human development should be created for individuals to participate in life on communal and political levels in a society pursuing “environmental sustainability, human security and rights, and gender equality”.¹⁶¹

The Comprehensive Development Framework (“CDF”) issued by the World Bank, the Millennium Development Goals and Sustainable Development Goals,¹⁶² together with other policies on aid and development assistance,¹⁶³ all, ostensibly, represented a break from neoliberal development policy.¹⁶⁴ In its pursuit of the elimination of poverty, these policies turn to the state to facilitate development, thereby negating one of the main principles of neoliberalism: minimising state intervention.¹⁶⁵ There is an explicit focus on improving the

¹⁵⁹ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 45. For instance, development policies had to be determined by individual member states.

¹⁶⁰ Lee (2017) *Cornell International Law Journal* 16; United Nations Development Programme “What is Human Development” available at <<http://hdr.undp.org/en/content/what-human-development>> accessed on 9 April 2020. The UNDP has since 1990 annually published the annual Human Development Index, which measures global human development.

¹⁶¹ Lee (2017) *Cornell International Law Journal* 16; UN Development Programme.

¹⁶² In 2000, eight Millennium Development Goals (“MDG’s”) were set by the United Nations. The 8 goals are to eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, combat HIV/Aids, malaria and other diseases, ensure environmental sustainability and create a global partnership for development. The MDG programme concluded by the end of 2015. United Nations “United Nations Millennium Development Goals and Beyond 2050” available at <https://www.un.org/millenniumgoals/> accessed on 7 October 2019. The work done in terms of the programme is now continued in terms of the 2030 Agenda for Sustainable Development (“SDG’s”). The 2030 Agenda for Sustainable Development was adopted at the United Nations on 25 September 2015. United Nations “UN Sustainable Development Goals” available at <<https://sustainabledevelopment.un.org/?menu=1300>> accessed on 16 March 2020.

¹⁶³ Murray & Overton (2011) *Progress in Development Studies* 313; UN “Monterrey Consensus on Financing for Development” (2003); G8 *Summit Document on Africa: A Historic Opportunity* (Gleneagles 2005) available at <http://data.unaids.org/topics/universalaccess/postg8_gleneagles_africa_en.pdf> accessed on 16 December 2019. During the 2000s, UN member states at the Monterrey Consensus of 2003 and the G7/G8 countries at the 2005 Gleneagles Summit decided to increase aid amounts to poor nations. In 2005, the Development Assistance Committee of the Organisation for Economic Co-operation and Development (“OECD”) provided a monitoring system to assess progress and to ensure accountability between aid donors and recipients – OECD *Paris Declaration on Aid Effectiveness* (2005) available at <<https://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm>> accessed on 16 December 2019. The OECD also created the Accra Agenda for Action (2008) to reinforce the objectives of the Paris Declaration by assessing progress that has been made and making suggestions for improvement. Available at <<https://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm>> accessed on 7 October 2019. A discussion of these documents falls outside of the scope of this thesis.

¹⁶⁴ Murray & Overton (2011) *Progress in Development Studies* 313.

¹⁶⁵ Murray & Overton (2011) *Progress in Development Studies* 313. Stiglitz referred to this change in tract as the “post Washington Consensus consensus”. See Stiglitz J “More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus” The 1998 WIDER Annual Lecture, Helsinki, 7 January 1998 available at <<https://www.globalpolicy.org/component/content/article/209/43245.html>> accessed on 16 December 2019 and Stiglitz J “The Post Washington Consensus Consensus” 2005 *The Initiative for Policy Dialogue*.

capacity of the state to deliver basic services to promote development.¹⁶⁶ Whereas the previous development policies generally enabled development practitioners and development institutions to direct and implement development initiatives, the new policies claim to provide the development beneficiaries with ownership of the development projects.¹⁶⁷

Irrespective of this broader understanding of development, the CDF epitomises the neoliberal trajectory taken by development theory as from the late 1980s.¹⁶⁸ The basic premise of the CDF is that the poor should be incorporated into the global capitalist economy by being enabled to work by publicly funded programmes.¹⁶⁹ The capitalist commitment to using resources, human and otherwise, effectively, is thus served well.¹⁷⁰ Furthermore, this new wave of development policy does not undermine or question the inviolability of the global economic market.¹⁷¹ To

¹⁶⁶ Murray & Overton (2011) *Progress in Development Studies* 313. Participating states in the MDG and SDG programmes must report on progress and achievement of goals.

¹⁶⁷ Murray & Overton (2011) *Progress in Development Studies* 314, 315. The 2005 Paris Convention (see footnote 163) set the following principles for providing aid: 1) As owners of development projects, developing countries must create the means of addressing issues such as institution reform and corruption. 2) Countries providing aid abide by the strategies set by developing countries and respect and use local systems. 3) Countries providing aid to the same region must harmonise their initiatives to avoid duplication. 4) Instead of merely focusing on the aid that is provided, it should be determined if the aid results in development. 5) The providers of aid should be held accountable for development results. See *Paris Declaration and Accra Agenda for Action* (2008).

¹⁶⁸ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 45. See in general Cammack (2002) for a discussion of the relevant CDF reports. Cammack shows that the reports issued by the World Bank all advocated neoliberalism, even though the different reports emphasised different elements. For instance, initial reports placed emphasis on market-friendly policies, but by 1999, it was held that macroeconomic stability was required for attaining economic growth. It was also acknowledged that the benefits of growth do not necessarily “trickle down” to the poor: Human needs must be addressed directly. Institutions are of great importance for development to take place - The World Bank *World Development Report 2000/2001: Attacking Poverty* (2001).

¹⁶⁹ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 47; Cammack (2002) 164; The World Bank *World Development Report 1990: Poverty* (1990) Foreword. Cammack argues that the proposal to “use the poor’s most abundant asset – labour” (World Bank (1990) iii) constitutes nothing more than “the capitalist exploitation of labour on a global scale”.

¹⁷⁰ World Bank (1990) 137; Cammack (2002) 165. By propounding the underlying assumption that the poor are willing to offer their labour at minimal wages, those who are not poor will not seek employment as part of these public employment programs – thereby ensuring the effective use of resources. Murray & Overton (2011) *Progress in Development Studies* 316 argue that the policies still pursue neoliberal objectives.

¹⁷¹ Murray & Overton (2011) *Progress in Development Studies* 311. Murray and Overton argue that the development aid regime of the 2000s, including initiatives such as the MDG’s and the SDG’s, exhibits characteristics of neostructuralism. During the 2000s, Latin-American governments adopted neostructuralist notions as an alternative to following the neoliberal policies set by Western institutions such as the IMF and the World Bank. Neostructuralist policies do not work against the forces of globalisation, but promote social inclusion by allowing state intervention to create the institutions necessary for human welfare. Emphasis is placed on participatory democracy. Neostructuralist policies, however, still pursue economic growth through exports and therefore do not deny the existence of global markets. Murray and Overton therefore argue that despite the different *modus operandi*, neostructuralism still aims to secure the goals set by neoliberalist policies, therefore constituting a continuation of neoliberal aid policies created in the 1990s.

be certain, the power relations present under the neoliberal regime remained firmly in place, resulting in donors still having significant power in controlling development initiatives.¹⁷²

The post-neoliberal development policies discussed above, are underpinned by a specific understanding of the ideal state and institutions: The model put forward resembles the state and institutions in the Western, “developed” world.¹⁷³ The ideal state that can meet its subjects’ development needs, abides by the principles of democracy and upholds basic human rights.¹⁷⁴ It promotes “good governance” and pursues “transparency” and “accountability” when managing the country’s finances.¹⁷⁵ By adopting modern, Western management systems, governments receiving development aid can assure aid providers that they will be able to determine how funding is used.¹⁷⁶ Despite having control over development processes to development aid recipients still have to implement foreign policy as was the case with the enforcement of neoliberal inspired structural adjustment programmes. The “new fuzzy rhetoric of recipient ownership”¹⁷⁷ did not yield the autonomy promised.¹⁷⁸ The latter observation is of particular importance for the argument forwarded in this thesis. The Mining Charter follows the rhetoric of ownership as is evident in its provision that allows host communities to hold shares in the mining company. This aspect is considered in more detail in Chapter 7.

There is no consensus as to whether development is still locked in the neoliberal paradigm or whether it has entered a new era.¹⁷⁹ Certainly, the limits of markets are increasingly recognised¹⁸⁰ and the definition of development is being expanded.¹⁸¹ The idea of development, however, remains subject to a Western worldview. Not only have the origins of the idea of development been founded in the West, but also, the adaptations of the idea have been steered

¹⁷² Murray & Overton (2011) *Progress in Development Studies* 315.

¹⁷³ Murray & Overton (2011) *Progress in Development Studies* 315.

¹⁷⁴ Murray & Overton (2011) *Progress in Development Studies* 315.

¹⁷⁵ Murray & Overton (2011) *Progress in Development Studies* 315. See Sarwar Lateef K “Evolution of The World Bank’s Thinking on Governance” in *World Development Report: Background Paper – Governance and the Law* (2017); Shihata I “Introductory Statement made by the General Council of the World Bank in introducing his legal memorandum to members of the World Bank Board” (1990); Stiglitz JE “Introduction” in CL Gilbert & D Vines (eds) *The World Bank: Structured Policies* (2006) and North (1990). Further discussion of these concepts falls outside of the scope of this thesis.

¹⁷⁶ Murray & Overton (2011) *Progress in Development Studies* 315, 316.

¹⁷⁷ Murray & Overton (2011) *Progress in Development Studies* 315.

¹⁷⁸ Murray & Overton (2011) *Progress in Development Studies* 315.

¹⁷⁹ Santos & Trubek (2006) 3 refer to this as the third moment of law and development.

¹⁸⁰ See for instance Soros G *The Crisis of Global Capitalism: The Open Society Endangered* (1998). Soros argues that the Bretton Woods institutions were created in a different time and their interventions should be revisited in the light of the problematic conditions they set for countries to access funds.

¹⁸¹ Santos & Trubek (2006) 6.

by Western institutions. Promoting “development”, therefore, cannot be politically and ideologically neutral. The latter argument is expanded on in Chapter 6.

2.2. Empowerment and Local Economic Development

Chapter 3 discusses the policy environment in which broad-based black economic empowerment (“B-BBEE”) and local economic development (“LED”) became part of South African poverty alleviation and development policy. It outlines how these policies were created under the influence of institutions commonly associated with the notion of development such as the World Bank. In this section, it is shown that empowerment and LED are means of promoting development, therefore forming part of the global development paradigm sketched in this Chapter.

In realising that the participation of poor citizens of non-Western countries is required for the larger development project of the World Bank to be successful, the World Bank’s policies have since the late 1990s placed more focus on the “empowerment” of people.¹⁸² The empowerment project forms part of the shift towards “bottom-up approaches” pursued as a means of creating development approaches that are more context-sensitive and that provide developing regions with ownership of their development destinies.¹⁸³ Initiatives of the World Bank, such as “community-driven development,” regard poor communities as the drivers of poverty alleviation processes, and not merely as the beneficiaries of these processes, thereby empowering poor communities.¹⁸⁴

Empowerment constitutes a global approach to development that emphasises the importance of including the voices of the poor in global conversations about their well-being and development.¹⁸⁵ In this global developmental sense, empowerment is also regarded as a means to improve efficiency and economic growth.¹⁸⁶ Empowerment, therefore, signifies a means of development where the developing entity supposedly retains more control over the development process – as opposed to other development approaches that enforce development

¹⁸² Parpart (2002) 44 & 45; The World Bank *World Bank Participation Source Book* (1996); World Bank (1999) 153; World Bank (2000/1) v. The shift in emphasis coincides with giving “ownership” over development projects, as discussed under section 2.1.2.3 – see footnote 167 above.

¹⁸³ See discussion of post-neoliberal development policies under section 2.1.2.3 above.

¹⁸⁴ Dongier et al (2002) 303.

¹⁸⁵ Parpart (2002) 45, 52. World Bank (2000/1).

¹⁸⁶ Mainstream institutions such as the World Bank understand “empowerment” in this manner. Parpart (2002) 45.

from the top down.¹⁸⁷ Progress (or transformation, from one state to another) remains embedded, however, in thinking on empowerment, as is the case with development.¹⁸⁸

In the post-apartheid South African economic landscape, empowerment has been qualified as “*broad-based black economic empowerment*”, or B-BBEE. B-BBEE serves as a vehicle for the transformation of the South African economy in general and,¹⁸⁹ in terms of the Mining Charter,¹⁹⁰ of the mining industry specifically.

The other development initiative relevant to mining communities, but distinct from B-BBEE measures set out in the Mining Charter, is LED.¹⁹¹ Whereas development theory generally maintains that an increase in economic growth will accelerate the alleviation of poverty, theories to the contrary have emerged over the years.¹⁹² With LED, there is a strong emphasis on meeting local needs, without isolating the local economy for the effects of globalisation and international markets.¹⁹³ A balance, therefore, has to be maintained between pursuing economic growth and addressing poverty.¹⁹⁴

LED is a strategy for achieving “community economic development” and promoting “self-help” and “self-reliance”.¹⁹⁵ As in the case of empowerment, LED is aimed at replacing “top-down” approaches to development with “bottom-up” approaches.¹⁹⁶ The premise is that local communities must be afforded agency and self-determination in developmental matters.¹⁹⁷

¹⁸⁷ Parpart (2002) 44 & 45.

¹⁸⁸ Parpart (2002) 52 & 53.

¹⁸⁹ Seekings J & Nattrass N *Class, Race and Inequality in South Africa* (2005) 343.

¹⁹⁰ The Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (“Mining Charter”) is created by the Minister of Mineral Resources in terms of s 100 of the MPRDA, to facilitate the distribution of the benefits from the South African mining industry to previously disadvantaged or black persons. See discussion at section 3 of Chapter 3.

¹⁹¹ As discussed under section 3 of Chapter 3, LED in mining areas is promoted in terms of the integrated development plan (“IDP”) of the local municipality governing the mining area and the social and labour plan (“SLP”) created by the mining right holder for the mining area.

¹⁹² See discussion under sections 2.1.2.2 and 2.1.2.3 above.

¹⁹³ Nel E & John L “The Evolution of Local Economic Development in South Africa” in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and delivery - Urban policy in South Africa* (2006) 209 refers to the working definition of LED of the International Labour Organisation available at <<https://www.ilo.org/empent/areas/local-economic-development-led/lang--en/index.htm>> accessed on 17 December 2019.

¹⁹⁴ Nel & John (2006) 218 & 223. In South Africa, bigger metropolises such as Johannesburg, Cape Town and Durban have adopted LED policies that focus on both economic growth and pro-poor strategies. Smaller and rural towns, such as mining towns, are typically more dependent on single industries. LED programmes in these areas, therefore, lack the longer-term strategies visible in the programmes of larger towns, and tend to take the form of responding to development crises.

¹⁹⁵ Nel E “Local Economic Development: A Review and Assessment of its Current Status in South Africa” 2001 (38) *Urban Studies* 1005.

¹⁹⁶ Nel (2001) *Urban Studies* 1005.

¹⁹⁷ Nel (2001) *Urban Studies* 1005.

LED initiatives, therefore, are implemented at a local, municipal level and not at a national level.¹⁹⁸

As part of the post-neoliberal policies, LED once again embraces government intervention to achieve development.¹⁹⁹ In the South African context, local government has three roles to play. It must take charge of policymaking processes.²⁰⁰ After policy has been created, local government is responsible for the administration of the relevant policies and the programmes and projects that flow from the policies.²⁰¹ Finally, local government must initiate economic development programmes by exercising its regulatory and public spending powers and by creating a conducive business environment.²⁰²

Local government may be the organ primarily responsible for LED in a given area, but it is not the only entity tasked in this regard.²⁰³ The private sector and non-governmental institutions can play a significant role in LED, depending on the level of LED that is being pursued.²⁰⁴ As is set out in Chapter 3, a mining company will contribute to LED in a mining area in terms of the IDP and the SLP.²⁰⁵

Intellectual movements that disregard the separation between economy and society influenced LED theory in South Africa.²⁰⁶ LED therefore emphasises that economic decision-making is shaped by social aspects, contrary to neoliberal thinking and accompanying assumptions about

¹⁹⁸ Nel (2001) *Urban Studies* 1005; Binns T & Nel E “Devolving Development: Integrated Development Planning and Developmental Local Government in Post-apartheid South Africa” 2002 *Regional Studies* 924; Bennett RJ *Decentralization, Local Governments and Markets: Towards a Post-Welfare Agenda* (1990) 222.

¹⁹⁹ See section 2.1.2.3 above in this regard and Department of Provincial and Local Government *National Framework for LED in South Africa (2006-2011): Stimulating and Developing Sustainable Local Economies* (2006) as example.

²⁰⁰ National Framework (2006) 15.

²⁰¹ National Framework (2006) 15.

²⁰² National Framework (2006) 15. Ss 152 and 153 of the Constitution.

²⁰³ National Framework (2006) 15.

²⁰⁴ Nel (2001) *Urban Studies* 1006. In this regard, differentiation is made between formal and informal level of LED. When engaging in LED on a formal level, local and higher authority structures, as well as formal business sectors, are involved. In the instance of informal LED, LED pivots on self-reliance initiatives. LED operations occur at the community level, led by community-based organisations and non-governmental organisations.

²⁰⁵ See section 3 of Chapter 3.

²⁰⁶ National Framework (2006) 4 & 5. The framework mentions the influences of “New Institutionalism”, a method of studying sociology, political science, economics and organisational behaviour with the intention to determine how choices are affected by institutional structures, rules, norms and cultural differentials. Breuning M & Ishiyama JT “Neoinstitutionalism” *Encyclopaedia Britannica* available at <<https://www.britannica.com/topic/neoinstitutionalism>> accessed on 17 December 2019. Also see the following works of March JG & Olsen JP: *The New Institutionalism: Organizational Factors in Political Life* (1984); *Rediscovering Institutions: The Organizational Basis of Politics* (1989) & *Democratic Governance* (1995).

property rights.²⁰⁷ Mindfulness of local contexts is promoted and social capital, protected.²⁰⁸ LED policy in South Africa is regarded as unique for placing significant emphasis on poverty alleviation, therefore maintaining a balance in its regulation of the market.²⁰⁹

As is noted earlier regarding post-neoliberal development policies, such as empowerment and local economic development, it is not clear whether the break away from neoliberal motivations serves as mere rhetoric, or whether there is, in fact, a true abandonment of neoliberal notions. For this thesis, however, it is to be noted that these notions form part of the larger global development paradigm.

3. Development Beneficiaries and Problems: “Community” and “Poverty”

Two further concepts, in addition to “empowerment”, “LED” and “development” require theoretical scrutiny for this thesis: “community” and “poverty”. Development, empowerment and LED serve the purpose of addressing poverty and inequality. In the context of “mine community development”, it is the poverty and inequality suffered by a specific mining community that is addressed. The concepts “poverty”²¹⁰ and “community”²¹¹ are both employed in legislation, policy documents and media articles without critical reflection on the meaning of these concepts.

In this section, a description is provided of some of the common theoretical understandings of “community” and “poverty”, to the extent that such theories align with communities and poverty operating in the development paradigm. The purpose is to set up a theoretical understanding of these concepts, to be considered alongside definitions provided in the legislative system, as discussed in Chapter 4. The theoretical understandings proposed here are analysed in Chapter 6 where the politics of development are addressed.

²⁰⁷ National Framework (2006) 3. See sections 2.1.2.2 and 2.1.2.3 above.

²⁰⁸ National Framework (2006) 4 places emphasis on promoting the “Global South”.

²⁰⁹ Rogerson CM “Pro-Poor Local Economic Development in South Africa: The Role of Pro-Poor Tourism” 2006 (11) *Local Environment* 37-60, 38, 40; Nel E & Rogerson CM *Local Economic Development in the Developing World: The Experience of Southern Africa* (2005); Scott G & Pawson E “Local Development Initiatives and Unemployment in New Zealand” 1999 *Tijdschrift voor Economische en Sociale Geografie* 184-195.

²¹⁰ See section 2 of Chapter 2 where the narrative of mining communities is described.

²¹¹ See section 2 of Chapter 4 where the definitions of “community” in the relevant legislation and policies are considered.

3.1. Community

By analysing the relevant definitions of “community” in Chapter 4, it is shown that different types of communities are provided for in the legislative system in the context of mine community development.²¹² The types of communities acknowledged can be divided into two groups: communities that the law preserves and communities that the law “fixes” or transforms.²¹³ The former type of community can be explained as the authentic, essential community – that is a community centred on essence or identity.²¹⁴

An essentialist understanding of community has been evoked by theorists to ward off the negative effects of modernisation.²¹⁵ Traditional community structures provided hierarchies and structures that predetermined values and identity, which values and identity constitute the essence of such a community.²¹⁶ These structures and hierarchies are important tools to provide recognition of persons and their position in society.²¹⁷ The breakdown of traditional community structures and overemphasis of the importance of the liberalist individual, because of modernisation, are regarded by some as evidence that humanity is moving away from its true nature.²¹⁸ Striving for a sense of community in its essentialist form will address these concerns.²¹⁹

The members of the community in this sense share familial ties, geographic space and shared religion, custom or culture.²²⁰ The maintenance and constant reaffirmation of tradition and culture is a founding principle of community, leaving no space for the contestation of the values

²¹² See footnote 1 above.

²¹³ See sections 2.3 and 3.3 of Chapter 4.

²¹⁴ Bessant K “Authenticity, Community and Modernity” 2010 (41) *Journal for the Theory of Social Behaviour* 2; Odysseos L “Constituting Community: Heidegger, Mimesis and Critical Belonging” 2009 (12) *Critical Review of International Social and Political Philosophy* 38. Section 3.1 of this chapter is based on a publication by the student: Heyns A “Mining Community Development in South Africa: A Critical Consideration of how the Law and Development Approach the Concept ‘Community’” 2019 (12) *Law and Development Review*. In terms of the Memorandum of Understanding between the student and her supervisor, the student committed contractually to publish articles while completing her PhD thesis. See also the declaration regarding the inclusion of publications.

²¹⁵ Tönnies F & Harris J *Gemeinschaft und Gesellschaft* (2001); Bessant (2010) *Journal for the Theory of Social Behaviour* 2; Heidegger M *Being and Time* (1962); Husserl E *The Crisis of European Sciences and Transcendental Phenomenology* (1954); Buber M *Between Man and Man* (1947); Buber M *I and Thou* (1958); Buber M *The Knowledge of Man: A Philosophy of the Interhuman* (1965). See discussion of modernisation under footnote 18 and section 2.1.2.1 above.

²¹⁶ Juul S “The Discussion of the Good versus the Just” in S Juul *Solidarity in Individualized Societies - Recognition, Justice and Good Judgment* (2013) 73; Terreblanche (2002) 478.

²¹⁷ Juul (2013) 73; Taylor C “The Politics of Recognition” in A Gutman (ed) *Multiculturalism: Examining the Politics of Recognition* (1994).

²¹⁸ Bessant (2010) *Journal for the Theory of Social Behaviour* 2,7; Tönnies (2001) 22 & 52.

²¹⁹ Bessant (2010) *Journal for the Theory of Social Behaviour* 7 referring to Heidegger (1962); Tönnies (2001) 22. See also Heyns (2019) *Law and Development Review* section 4.1.

²²⁰ Tönnies (2001) 27.

so affirmed.²²¹ At the centre of this community is the patriarchal household.²²² Economic self-sufficiency and independence from the outside world are maintained.²²³ Even though there is a “plurality of singular beings”,²²⁴ the co-existence of community members is not the result of a social contract.²²⁵ Unification is pre-determined by a higher power, which also dictates “natural will” and decision-making.²²⁶ Community comes before the individual and the individual is constituted or given its identity by its being a member of the community and its relationship with others.²²⁷

Another attribute shared by members of a community of essence is communication.²²⁸ Shared language and other means of showing reciprocity and expressing shared awareness form part of the foundation of community.²²⁹ In this way, community members act as part of the larger communal framework, making it possible to pursue a common goal.²³⁰ The focus, however, is on “being with” others to pursue the “ideal of shared public life, of mutual recognition and identification”.²³¹ The focus is not on binding together previously unattached individuals since a previous state is not recognised.²³²

It is accepted that theories on “community” explained above cannot encapsulate the subtleties of a traditional community in the South African context.²³³ Nonetheless, there are similarities between the essentialist or authentic notion of community put forward and the traditional

²²¹ Tönnies (2001) 49.

²²² A system based on patriarchy is based on government by fathers, be it the government of a family, a church or a society. Blackburn (2005) 270.

²²³ Tönnies (2001) 49.

²²⁴ Bessant (2010) *Journal for the Theory of Social Behaviour* 4-6 referring to Heidegger (1962).

²²⁵ A social contract in this instance refers to the construct created by Hobbes, Locke and Rousseau in terms whereof law and political power is created by means of agreement between citizens. Blackburn (2005) 342.

²²⁶ Tönnies (2001) xlii. In Book Two, Tönnies sets out his understanding of human will and contrasts natural will, to be found in *Gemeinschaft*, or traditional community, with rational will, to be found in *Gesellschaft*, or the modern-day society.

²²⁷ Tönnies (2001) 38; Bessant (2010) *Journal for the Theory of Social Behaviour* 3 referring to Heidegger (1962); Odysseos (2009) *Critical Review of International Social and Political Philosophy* 41 referring to Gelven M A *Commentary on Heidegger's "Being and Time"* (1970) 67-68. See also Heyns (2019) *Law and Development Review* section 4.1.

²²⁸ Bessant (2010) *Journal for the Theory of Social Behaviour* 8 & 15 referring to Husserl (1950) (1954) & (1927) and Buber (1958).

²²⁹ Bessant (2010) *Journal for the Theory of Social Behaviour* 8 referring to Husserl (1950) (1954) & (1927).

²³⁰ Bessant (2010) *Journal for the Theory of Social Behaviour* 13 referring to Buckley RP “Husserl’s Rational *Liebesgemeinschaft*” 1996 (26) *Research on Phenomenology* 122 commenting on Husserl.

²³¹ Young IM *Justice and the Politics of Difference* (1990) 12.

²³² Bessant (2010) *Journal for the Theory of Social Behaviour* 15 referring to Buber (1947). See also Heyns (2019) *Law and Development Review* section 4.1.

²³³ The theories were created in a European context by theorists disillusioned with the effects of modernisation and industrialisation in Europe - Tönnies (2001); Bessant (2010) *Journal for the Theory of Social Behaviour* 2; Heidegger (1962); Husserl (1954); Buber (1947); Buber (1958); Buber (1965). See discussion of modernisation under footnote 18 and section 2.1.2.1 above.

community recognised by the South African legislative system.²³⁴ The authentic community is based on community of family, land and religion.²³⁵ The traditional community, or “community”, is constituted by a group of people with rights to land in terms of custom, which in many instances operate on a familial level and consists of a spiritual or religious element.²³⁶ A “community” or traditional community, therefore, operates in terms of a pre-determined order (determined by custom) and is similar to the authentic community.

Traditional communities share certain characteristics with indigenous communities, as recognised in international law, and as communities sharing culture, religion or language, as recognised by the 1996 Constitution.²³⁷ The South African legislative system recognises traditional communities also in the context of empowerment in the mining industry.²³⁸

The law recognises authentic indigenous and traditional communities to address the injustice caused by colonialism and, in the context of mining communities, the exploitative practices of the mining industry, especially under apartheid.²³⁹ The injustice in this instance took the form of denying these communities their essence or identity, which essence or identity must now be preserved.²⁴⁰ Recognition thus enables the previously excluded identities to participate in and form part of power structures in society.²⁴¹ By providing for the participation of communities in this way, recognition empowers communities to control their destinies.²⁴²

The oppression of and discrimination against groups of people have been opposed as part of the struggle for recognition.²⁴³ To amend historic injustices through recognition, multiculturalism and ethnicity are to be celebrated.²⁴⁴ In many instances, recognition takes the form of special rights being awarded to minority or other previously marginalised groups.²⁴⁵

²³⁴ See footnote 1 above and sections 2.2 and 2.3 of Chapter 4 in this regard.

²³⁵ Tönnies (2001) 27.

²³⁶ See sections 2.2 and 2.3 of Chapter 4 in this regard. See also Heyns (2019) *Law and Development Review* section 4.1.

²³⁷ See sections 2.1 and 2.2 of Chapter 4.

²³⁸ See footnote 1 above and section 3 of Chapter 4 in this regard.

²³⁹ Chapter 2 section 3.2.3 sets out the effects of the pursuit of European commercial interests generally, and through mining specifically, for traditional communities in South Africa. See also Heyns (2019) *Law and Development Review* section 4.1.

²⁴⁰ Fraser N “Culture, Political Economy, and Difference: On Iris Young’s Justice and the Politics of Difference” in N Fraser (ed) *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* (1997) 17 & 18.

²⁴¹ Young (1990) 37.

²⁴² Young (1990) 37.

²⁴³ Honneth A *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (1996); Fraser (1997) 12.

²⁴⁴ Juul (2013) 74. Gender and racial discrimination and oppression have been challenged based on recognition.

²⁴⁵ Juul (2013) 75. The right to self-determination (Charter of the United Nations (1945), Article 1(2)), the right to sovereignty over resources (UNGA Res 1803 (XVII) (14 December 1962) “Permanent sovereignty over natural resources”) and the rights of indigenous peoples (UNGA Res 295 (2007) A/RES/61/295 “Declaration

The recognition of “community” in terms of the legislative system serves as an example hereof.²⁴⁶

Recognition in the form of providing legal rights implies that the community as the recipient of these rights must first be recognised as a legal subject.²⁴⁷ As is expanded on in Chapter 6, an entity will only be acknowledged as a legal subject if certain attributes can be ascribed to it.²⁴⁸ These attributes represent a specific view of the individual and its relationship with others, which view correlates with a Western worldview, and not necessarily the views held by an indigenous or traditional community.²⁴⁹ The recognition of an entity as a legal subject can thus be interpreted as the conversion of non-Western societies to Western ways.²⁵⁰ This argument is considered in Chapter 6.

The essential or authentic community, however, is not the only type of community that is acknowledged or recognised by the legislative system relevant to this thesis. Community is also acknowledged as something that must be transformed.²⁵¹ For this thesis, this transformation can be regarded as development.²⁵² In the mining context, sharing the negative effects of mining, such as poor socio-economic conditions in mining areas, is regarded as a binding factor to constitute a “mine community”. Chapter 2 describes the challenges faced by communities in mining areas and exposes the poverty narrative associated with these communities.²⁵³ Thus, the commonality shared in this kind of community is poverty.²⁵⁴ Poverty is not regarded as an identity or essence of a community to be preserved or protected.²⁵⁵ The

on the Rights of Indigenous Peoples”) acknowledged by the UN all serve as an example of instances where recognition entailed awarding rights.

²⁴⁶ Examples are the following: The right to form communities based on culture, religion or language as provided for in the Constitution; the acknowledgment of “community” in terms of the MPRDA and the Mining Charter and the rights that follow such acknowledgment. See section 2.2 of Chapter 4 in this regard.

²⁴⁷ Juul (2013) 86.

²⁴⁸ The legal subject must be capable of holding and using rights in a market system. It will furthermore be viewed as an autonomous individual, not a group of people sharing certain commonalities. See section 3 of Chapter 6 in this regard.

²⁴⁹ As set out in section 2.1.2 of this chapter, for the purposes of this thesis, a Western worldview centres on the autonomous individual, enabled by modernisation and the (Westernised) law to use and enforce rights in the economic market.

²⁵⁰ Juul (2013) 81. Contentious as such an argument may be, modernity is often associated with Westernisation. See section 2.1.2.1 above.

²⁵¹ See sections 2.3 and 3.3 of Chapter 4.

²⁵² If, as is done in Chapter 4, the empowerment measures prescribed for this kind of community is considered in comparison with the empowerment measures prescribed for the traditional community, it is clear that the community to be transformed, such as the “mine community”, must develop.

²⁵³ See section 2 of Chapter 2 in this regard.

²⁵⁴ See section 2 of Chapter 2 in this regard.

²⁵⁵ Lister R “(Mis)recognition, Social Inequality and Social Justice: A Critical Social Policy Perspective” in T Lovell (ed) *(Mis)recognition, Social Inequality and Social Justice: Nancy Fraser and Pierre Bourdieu* (2007) 164.

mere recognition of this type of community in this context, thus, is not sufficient to resolve the injustices suffered by this community.²⁵⁶

Furthermore, recognition of this community to transform, is problematic since the meaning of “poverty”, as the commonality constituting the community, is nebulous. Poverty can be defined in different ways and the allocated definition will determine the solution proposed to solve poverty.²⁵⁷ Without clear meaning, it is not possible to determine who is afflicted by poverty and how it should be addressed. The understanding of poverty thus gives content to the concept of “development” as a solution to poverty. The following section considers different meanings of poverty.

3.2. Poverty

Generally, poverty is constituted by the lack of basic necessities of life.²⁵⁸ Various views exist on the causes of poverty, the nature of basic necessities required and how these basic needs should be met. In their consideration of poverty as an injustice, specifically in the South African context, Brand et al criticise viewing poverty as a type of moral deficiency on the part of the poor.²⁵⁹ Such an approach, in general, invokes indifference but may result in the provision of aid.²⁶⁰ Since this approach to poverty does not engage critically with the cause of poverty or

²⁵⁶ Lister (2007) 164; Lister refers to Coole D “Is Class a Difference that makes Sense?” 1996 (77) *Radical Philosophy* 21, 22.

²⁵⁷ Brand D, De Beer S, De Villiers I & Van Marle K “Poverty as Injustice” 2013 (17) *Law, Democracy and Development* 274; Ross T “The Rhetoric of Poverty: Their Immortality, Our Helplessness” (1991) 79 *Georgetown Law Journal* 1499.

²⁵⁸ Soudien C, Reddy V & Woolard I “South Africa 2018: The State of the Discussion on Poverty and Inequality” in Soudien C, Reddy V & Woolard I *Poverty & Inequality: Diagnosis, Prognosis, Responses – State of the Nation* (2019) 3. Poverty is generally understood as “a deprivation of basic capabilities” (Sen A *Development as Freedom* (1999) 20) and as the lack in basic goods and services “necessary for a minimal or socially acceptable standard of living” (Yang L “The Relationship Between Poverty and Inequality: Concepts and Measurement” *CSE Papers* no 205 Centre for Analysis of Social Exclusion London School of Economics (2017) 2).

²⁵⁹ Brand et al (2013) *Law, Democracy and Development* 274. Terreblanche (2002) 52, 53, 252 shows that this kind of approach to poverty has been present in South Africa throughout the colonial period and even today. Poverty as moral, religious or biogenetic shortcomings has been promoted by Protestant Anglo-Saxon views and fits in with Herbert Spencer’s doctrine of Social Darwinism, which promotes the view that English speaking people are superior to all other races. Social Darwinism is a reinterpretation of Charles Darwin’s position on the survival of the fittest species and natural selection. Spencer’s social Darwinism supported the idea that stronger individuals will survive whereas weaker individuals will not, where strong translated into rich and weak into poor. The argument was broadened to describe the competition between strong, rich nations and weak poor nations, confirming the superiority of wealthier western nations over nations holding traditional values. This notion of superiority was transplanted in South Africa and taken up by the white Afrikaners of the middle classes and sustained by religious beliefs confirming their superiority over black indigenous people. Values such as a certain type of work ethic, individual initiative and achievement were regarded as means of setting the Afrikaners apart from the indigenous peoples, thereby justifying the better economic positions they occupied.

²⁶⁰ Brand et al (2013) *Law, Democracy and Development* 274. This view is described as the empirical explanation of poverty.

with the poor themselves, aid provided will not necessarily address the underlying causes of poverty.²⁶¹

Another approach to poverty is to view it as economic or social regression or a lack of socio-economic development.²⁶² In this instance, poverty is a practical social problem that can be measured or quantified.²⁶³ From this point of view, poverty in a society is inevitable – there is no underlying or historic cause.²⁶⁴ Poverty is also not regarded as political or as being embedded in a particular way of thinking.²⁶⁵ The solutions crafted to address poverty tend to pursue longer-term goals, such as increased investment, economic growth, and economic efficiency.²⁶⁶ Whereas these initiatives can contribute significantly to national development objectives, the immediate circumstances of the poor remain unchanged.²⁶⁷ The technical nature of the solutions furthermore excludes the poor from conversations about these initiatives, since they are not well-versed in the technical language employed in this regard.²⁶⁸

When poverty is approached practically as described above, it must be measured to determine who qualifies as poor. Poverty lines are used for this purpose,²⁶⁹ as was done by the World Bank in 1948.²⁷⁰ By instituting poverty lines, the World Bank determined that a significant section of the global population was to be seen as “poor” and “underdeveloped”, thus creating the socio-economic gap between the West and the rest of the world.²⁷¹

²⁶¹ Brand et al (2013) *Law, Democracy and Development* 274.

²⁶² Brand et al (2013) *Law, Democracy and Development* 275.

²⁶³ Brand et al (2013) *Law, Democracy and Development* 275. This view is described as the functionalist approach to poverty.

²⁶⁴ Brand et al (2013) *Law, Democracy and Development* 275.

²⁶⁵ Brand et al (2013) *Law, Democracy and Development* 275.

²⁶⁶ Brand et al (2013) *Law, Democracy and Development* 275. See section 2.1.2.3 – significant emphasis is placed on economic growth and Gross Domestic Product in the development paradigm.

²⁶⁷ Brand et al (2013) *Law, Democracy and Development* 275.

²⁶⁸ Brand et al (2013) *Law, Democracy and Development* 275; Terreblanche (2002) 58-62. Gordon & Sylvester (2004) *Wisconsin International Law Journal* 81 referring to Escobar A *Encountering Development: The Making and Unmaking of the Third World* (2011) 41 argue that the development problem is framed in such a manner that only expert Western intervention can make sense of the problem.

²⁶⁹ Subramanian S *The Poverty Line* (2012) 6. A poverty line describes the minimum amount of income a person needs to obtain the basic necessities and to ensure survival. A person is regarded as “poor” if such an amount of income cannot be obtained. Merriam Webster available at <<https://www.merriam-webster.com/dictionary/poverty%20line>> accessed on 19 December 2019.

²⁷⁰ Gordon and Sylvester (2004) *Wisconsin International Law Journal*, 11; Esteva G, Babones SJ & Babcicky P *The Future of Development: A Radical Manifesto* (2013) 121; Escobar (2011) 24. In 1948, the World Bank determined that persons with an annual per capita income below \$ 100 should be regarded as “poor”. In so doing, the World Bank classified the majority of the world’s population as poor.

²⁷¹ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 12.

Poverty lines have become more nuanced over the years.²⁷² Despite being more nuanced, the measures used to set a poverty line reflect the standards of Western societies, since the institutions creating and implementing these poverty lines are situated in the West.²⁷³ Inevitably, it is disregarded how “the poor” view themselves.²⁷⁴ Poverty lines are furthermore criticised for turning poverty status into a binary aspect, reducing persons’ livelihoods to being either poor or not.²⁷⁵ Identifying the poor thus implicates decisions regarding ideology, policy and interest.²⁷⁶

To counter the effects of viewing poverty as either moral deficiency or a lack of development, Brand et al propose a dialectical understanding of poverty.²⁷⁷ Here, the power relations, economic structures and ideological motivations of society are considered to explain how resources are distributed, and accordingly, why “poverty” exists.²⁷⁸ Since poverty is considered as an injustice, a revolutionary restructuring of a society’s socio-economic and political order is required.²⁷⁹ As described below, B-BBEE in South Africa is not formulated based on this conception of poverty, but rather maintains a practical approach.

In formulating the means through which poor rural communities in South Africa should benefit from B-BBEE, the Black Economic Empowerment Commission, in 2001, used a poverty line to classify people as poor.²⁸⁰ National poverty lines are also issued regularly to improve the implementation of development programmes by determining the relevant poverty profile.²⁸¹ This serves to show the relevance of poverty lines in recent times and the South African context.

²⁷² Subramanian (2012) 6. Poverty lines follow one of three approaches to income poverty: the subsistence approach, the basic needs approach or the relative deprivation approach. A discussion of these approaches falls outside of the scope of this thesis. For more on poverty lines, see Streeten PP *Basic Needs: Premises and Promises* World Bank Reprint Series: 62 reprinted from *Journal of Policy Modelling* 1979 (1); Sen A *Poor, Relatively Speaking* Oxford Economic Papers no. 35(2) (1983) 153-169; Townsend P A *Sociological Approach to Measurement of Poverty: A Rejoinder to Prof Amartya Sen* Oxford Economic Papers no. 37(4) (1985) 659-668.

²⁷³ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 13; Escobar (2011) 24.

²⁷⁴ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 13; Escobar (2011) 24.

²⁷⁵ Subramanian (2012) 6.

²⁷⁶ Subramanian (2012) 5 & 6. Subramanian is critical of how income and poverty are generally measured. He identifies two phases of measurement: (1) identifying the poor and (2) the collection of information on income distributions. He specifically focuses on the identification phase.

²⁷⁷ Brand et al (2013) *Law, Democracy and Development* 275.

²⁷⁸ Brand et al (2013) *Law, Democracy and Development* 275.

²⁷⁹ Brand et al (2013) *Law, Democracy and Development* 275, referring to Gutierrez G A *Theology of Liberation: History, Politics and Salvation* (1988) 171 & Boff L, Boff C, Verstappen J, Klein Goldewijk BMJ *Wat is de Theologie van de Bevrijding?* (1986) 35.

²⁸⁰ Black Economic Empowerment Commission *Black Economic Empowerment Commission Report* (2001) 48. The assessment was done in 1996 and a poverty line of R 800 per month was used to determine the percentage of people living in poverty.

²⁸¹ Statistics South Africa *National Poverty Lines* (2018) 5.

As indicated above, development policies are often associated with the view of poverty as a measurable occurrence. The development problem, framed as poverty, is regarded as an issue of the maldistribution of resources, and not necessarily as a misrecognition of identity. The solution is to distribute resources equitably, but how equitable distribution should take place, will depend on the ideology that is followed.²⁸² This thesis considers the broader theoretical paradigm within which proposals are made for redistribution; the purpose is not to determine the most suitable method of distribution. Chapter 6, however, does consider certain implications the development paradigm described here has for the distribution of resources.²⁸³

The critics of viewing poverty merely as a measurable occurrence argue that poverty or underdevelopment is not a neutral and universal concept, but is constructed by a society based on that specific society's views and values.²⁸⁴ Following this argument, in the global development paradigm real poverty and hardship in the non-Western societies may have been created when their subsistence lifestyles encountered the consumption patterns of the West.²⁸⁵ Viewing poverty as the result of oppressive interferences, because of colonialism and the enforcement of poverty lines, thus requires addressing the underlying power relations and a socio-economic system that causes and maintains poverty.²⁸⁶ In this manner, the latter mentioned view of poverty creates the possibility of transcending the binary distinction between misrecognised communities and communities subjected to the maldistribution of resources.

Two conclusions are reached at this point. First, "poverty" is not an ideologically neutral concept and it has no universally agreed-upon definition. Many assumptions are made about people and their livelihoods when characterising them as poor. These assumptions do not always consider underlying political causes for poverty. As is shown in Chapter 6, poverty rhetoric is an effect of the politics of development that has consequences for how the development problem and solutions are framed in the legislative system.

²⁸² Distributive justice is concerned with the distribution of goods amongst the members of a society in a "morally just" way, but political liberals, social contract theorists and Marxists have all proposed different views as to what exactly a "morally just" distribution of goods would entail. Young (1990) 16, 17; Fraser (1997)17.

²⁸³ See section 3 of Chapter 6.

²⁸⁴ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 12; Esteva (2013) 6-8.

²⁸⁵ Esteva (2013) 31.

²⁸⁶ Brand et al (2013) *Law, Democracy and Development* 275-277 referring to Gutierrez (1988) 171 & Boff et al (1986) 35.

Second, whereas the problem faced by authentic communities (or traditional communities) is framed by the law²⁸⁷ as the misrecognition of these communities, the problem faced by communities to be transformed (or mining communities) is framed as the maldistribution of resources. By distinguishing between communities in this manner, the Mining Charter treats “community” and “mine community” differently,²⁸⁸ possibly perpetuating inequality, instead of addressing it as is shown in Chapter 7.

4. Conclusion

In this chapter, substance is given to the concepts “empowerment”, “development”, “community” and “poverty” to describe the development paradigm within which B-BBEE and the LED of mining communities take place. The conceptual framework provided here is analysed in the remainder of the thesis.

It is first shown that the idea of development has been founded in the West and the adaptations of the idea over the years have been steered by Western institutions. A developing region must embrace modernisation, legal formalisation and Western economic ideologies, for development to take place. The fundamental values protected as part of the development project all represent a specific worldview. The idea of development, therefore, remains subject to a Western worldview. Empowerment and LED are local manifestations of the broader idea of development and share similar theoretical foundations and origins. Promoting “development”, therefore, cannot be politically and ideologically neutral, as is argued in Chapter 6.

Second, the concept of “community”, as the beneficiary of “development”, is investigated. The essential or authentic community is compared with and found to be similar to the community the legislative system wishes to preserve. In the mining context, traditional communities, defined as “host community” or “community”, are recognised by the law for their inherent identity.

The community to be transformed lacks such an inherent identity, as the only commonality shared is poverty. However, “poverty” is not an ideologically neutral concept and it has no universally agreed-upon definition. Many assumptions are made about people and their

²⁸⁷ See sections 2.3 and 3.3 of Chapter 4.

²⁸⁸ See sections 2.3 and 3.3 of Chapter 4.

livelihoods when characterising them as poor. These assumptions do not always consider underlying political causes for poverty.

The distinction between the two types of communities results in the law treating the communities differently. The different framings result in different means of empowerment being prescribed by the legislative system. The differential treatment may be arbitrary and may worsen inequality in mining areas, as is argued in Chapter 7.

Chapter 6 builds on the conceptual framework set out here. The development paradigm is considered more critically by focusing on the politics of development.

CHAPTER 6: Problematizing the Paradigm - The Politics of Development

1. Introduction

Thus far, this thesis has argued that the development and empowerment of mining communities in South Africa arise out of the global development paradigm.¹ This development paradigm is described in Chapter 5 where the meanings and assumptions underlying the concepts “development”, “empowerment”, “community” and “poverty” are highlighted.² In this, Chapter 6, the development paradigm is problematised by pointing out the politics of development: the underlying political and ideological assumptions of the development paradigm. The discussion is generalised, in the sense that the focus is not on a specific country or development practice, but rather on the concept of development in abstract terms. The effects of the politics of development are evident in the relationship between South African mining communities and mining companies and government, as is argued in Chapter 7.

The politics of development are considered, first, by considering the universalisation of certain views and assumptions in the development paradigm. Section 2 analyses the notion that the institution of a Westernised modernised legal system and the protection of property rights are required as part of the development process. The discussion exposes the link with modernisation, neoliberalism and capitalism to show the subjective nature of the idea of development.

Secondly, it is shown in section 3 how a system of development values maintains the relationship between the “developed” and the “developing” regions and defines the development beneficiary and problem. It is specifically considered how the legal system that underlies the global development paradigm conceives “the poor”.

2. Universalisation of Views and Values

Chapter 5 considers certain aspects of development. The link with modernisation and Westernisation of a region and its citizens’ way of life is exposed. More specifically, Chapter 5 shows that the modernisation or Westernisation of a non-Western country’s legal system

¹ See Chapters 5 in general.

² See section 2.2 for a discussion of “development” and “empowerment”, section 3.1, for a discussion of “community” and section 3.2 for a discussion of “poverty”.

must take place for development to occur.³ Legal formalisation should thus be pursued by implementing the rule of law and protecting fundamental values.⁴ Furthermore, development is regarded as the outcome of adhering to Western economic policy and ideology by aligning domestic policy with the underlying principles of capitalism and neoliberalism.⁵ Development is thus regarded as part of the natural path of progress in any society.⁶ It is just a matter of developing or non-Western nations having to play catch-up.⁷

In this section, it is argued that the views on the law, property rights and economic growth propounded in the development paradigm are universalised when development is promoted, without much critical reflection. This uncritical view on development is problematised by showing that a specific system of thought and worldview is enforced in the pursuit of development. Development can thus not be regarded as a neutral, universal and objective ideal, as is often the case both in a global and in a South African context.⁸ This thesis proposes this observation as the first aspect of the politics of development.

It is firstly explored how upholding a singular view of the law and legal systems is not only impossible, but also not favourable for developing regions. This section analyses the views on the law and rights accompanying the development project since these underlying views will affect the drafting of legislation and policy, such as legislation and policy that aim to empower and develop mining communities in South Africa. The association of development with this type of legal formalisation has been criticised.⁹ The points of criticism are discussed below. Even though these concerns are aimed at the assumption that legal formalisation is one of the cornerstones of the development concept, these points of criticism also confirm the drive to Westernise or modernise as part of the development project. The intersection with neoliberal

³ See section 2.1.2.1 of Chapter 5. Due to implementation practices of institutions such as the World Bank during the 1990s, development has also become closely associated with the ideas and values underlying neoliberalism and capitalism and the institution of Westernised and modernised legal systems.

⁴ See section 2.1.2.2 of Chapter 5.

⁵ See section 2.1.2.3 of Chapter 5.

⁶ Gordon RE & Sylvester JH “Deconstructing Development” 2004 (22) *Wisconsin International Law Journal* 15.

⁷ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 15 footnote 55.

⁸ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 73. In 2011, the National Planning Commission released the *National Development Plan: Vision for 2030*. With this plan, the commission sets out to “chart(ing) a new path” for South Africa and to eliminate poverty and reduce inequality by 2030. The plan’s foreword attests to the plan’s focus on the creation of capabilities as a means of development. It thus confirms the commission’s support of the idea of development. See section 2.1.2.2 of Chapter 5 for a discussion of creating capabilities to achieve development. Furthermore, black economic empowerment in South Africa is situated in the development paradigm as is shown in section 2.1.2.3 of Chapter 5.

⁹ See in general Kennedy D “Some Caution about Property Rights as a Recipe for Economic Development” (2009); Trubek D “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future” in A Santos & D Trubek (eds) *The New Law and Economic Development: A Critical Appraisal* (2006).

and capitalist thinking also becomes evident, further confirming how a specific worldview is promoted when promoting development.

Secondly, the requirement that property and other rights must be protected and allocated for development to take place, is considered. This section lastly elaborates on the effects of the universalisation of the views discussed for developing peoples. The development paradigm considered in this thesis does not necessarily have regard for the reasons behind poverty and inequality in developing countries. Local views in developing countries may not be compatible with the prevailing system of thought. In the pursuit of development, local views are often dismissed as backwards.¹⁰

2.1. Promoting a Singular View on the Law

The promotion of the rule of law and, thus, the clarification and formalisation of legal rules and principles in a society are regarded as preconditions for development to take place.¹¹ In effect, the legal systems of developing regions are to be modernised or Westernised.¹²

The assumption that development will take place if legal formalisation has taken place, is linked with the neoliberal nature of the development project.¹³ As explained in Chapter 5, neoliberal policies promote economic liberalisation to increase the role of the private sector in the economy and society.¹⁴ To achieve this, the privatisation of major industries, deregulation

¹⁰ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 73. See the discussion under section 2.3 below.

¹¹ De Soto H *The Other Path: The Invisible Revolution in the Third World* (1989) 185-187; World Bank *World Development Report 1996: From Plan to Market* (1996); World Bank *World Development Report 1997: The State in a Changing World* (1997); World Bank *World Development Report 2002: Building Institutions for Markets* (2002); World Bank *Doing Business in 2004: Understanding Regulation* (2004). Significant private and Western funding has been allocated to rule of law reform in Latin America, sub-Saharan Africa, Central and Eastern Europe and Asia since the 1990s as development assistance. Davis K & Trebilcock M “The Relationship between Law and Development: Optimists versus Skeptics” 2008 (56) *The American Journal of Comparative Law* 4 referring to Trubek (2006) 74; Carothers T “Promoting the Rule of Law Abroad: The Problem of Knowledge” 2003 (Working Paper no 34) *Carnegie Endowment for International Peace Rule of Law Series* & Dam KW *The Law-growth Nexus: The Rule of Law and Economic Development* (2006).

¹² Davis & Trebilcock (2008) *The American Journal of Comparative Law* 9; Gordon & Sylvester (2004) *Wisconsin International Law Journal* 18. Thomas C “Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism” 2011 (96) *Cornell Law Review* 973 & 974; Thomas C “Re-Reading Weber in Law and Development: A Critical Intellectual History of ‘Good Governance’ Reform” 2008 Cornell Law School Research Paper No 08-034 3; Rostow WW *The Stages of Economic Growth: A Non-Communist Manifesto* (1990). See section 2.1.2.1 of Chapter 5 for a discussion of modernisation. For an opposing perspective as to the role and origins of the law and human rights in former colonies such as South Africa, see also Ngcukaitobi T *The Land is Ours: South Africa’s First Black Lawyers and the Birth of Constitutionalism* (2018). The author argues that the South African Bill of Rights originated in South Africa as a result of the work of a group of black intellectuals and lawyers dating to the beginning of the twentieth century and thus contests the argument that the South African Constitution is not suited for the South African context.

¹³ Trubek (2006) 85.

¹⁴ See section 2.1.2.3 of Chapter 5 for a discussion of the basic principles of neoliberalism.

of the market, the promotion of free trade, and the reduction in government spending must take place.¹⁵ Development, in this sense, requires national economies to be integrated into the global economy and to pursue free-market principles and economic efficiency.¹⁶ Accordingly, foreign investment is required for development to occur.¹⁷ The assumption is that foreign investment will only take place if there are clear and formalised legal rules and principles that ensure the foreign investor that its investment is protected by the law against arbitrary deprivation.¹⁸ The promotion of democracy, constitutionalism and basic human rights accompanies formalisation and the implementation of the rule of law in a development context.¹⁹

However, as attested to by the different legal histories of developed societies, the formalisation of legal principles can take place in different ways.²⁰ The rule of law principle can also have different understandings.²¹ The classic often cited conception of the rule of law principle holds

¹⁵ According to Brown W *Undoing the Demos: Neoliberalism's Stealth Revolution* (2015) 28, neoliberalism represents the “enacting (of) an ensemble of economic policies in accord with its root principle of affirming free markets”. Deregulation and privatisation convert public services such as education and social welfare into profit seeking activities. See section 2.1.2.3 of Chapter 5 for a discussion of the basic principles of neoliberalism.

¹⁶ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 44, 46 & 48. World Bank policies in this regard include the 1989 *Report on Sub-Saharan Africa: From Crisis to Sustainable Growth*, introducing “good governance” and the Comprehensive Development Framework, which promoted various aspects of development that are achievable through pro-market policies and incentives. See section 2.1.2.3 of Chapter 5 for a discussion of the basic principles of neoliberalism.

¹⁷ Trubek (2006) 83; Gordon & Sylvester (2004) *Wisconsin International Law Journal* 46 & 47; Kennedy (2009) 21.

¹⁸ Kennedy (2009) 21.

¹⁹ Davis & Trebilcock (2008) 14-21. Brown (2015) 67 describes the “economisation of law” under a neoliberal regime: The rule of law is maintained not in substance but as an instrument to further neoliberal economic policy. The rule of law legitimises government as the creator of the rules to take part in economic action. The actors subjected to these rules are either individuals or business enterprises.

²⁰ Kennedy (2009) 20. Kennedy argues that even among “developed” societies, there is a significant difference in the ways in which a legal system is structured and the balance between formality and informality is attained. He refers to the observation of Polányi K *The Great Transformation: The Political and Economic Origins of Our Time* (1957) that the rapid industrialisation that took place in England between 1760 and 1840 may have been the result of a very informal property law and judicial procedure system, since the law slowed the process down. The powerful positions held in developed economies as a result of membership to an “old boy’s network” also serves as an example of more informal business structures, often sidestepping the formality prescribed by the law.

²¹ Trubek (2006) 88; Thomas (2011) *Cornell Law Review* 1002-1005 and Santos A “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development” in A Santos & D Trubek (eds) *The New Law and Economic Development: A Critical Appraisal* (2006) 257, 259-266 refer to the various perceptions of the rule of law and exposes the theoretical incoherence present. He indicates that the principle is considered by classical thinkers such as Aristotle, Montesquieu and Locke when setting out the limits of government. Aristotle (*The Politics* Book III Part 16 (1962)) envisaged a society ruled by law and reason, rather than persons and passions. Montesquieu (*The Spirit of Law* Book VI chap 11-6 (1748)) proposed an independent judiciary as a means of checking government’s exercise of power to protect the individual’s freedoms. Locke (*The Second Treatise of Government* (1988) 350-353) argued for the protection of the property of the individual by establishing law by consent, setting up an independent judiciary and setting up an authority to execute the sentences created by the judiciary. More contemporary thinkers’ work also feature. Friedrich Hayek’s (*The Road to Serfdom*, (1944); *The Constitution of Liberty* (1960) and *Law, Legislation and Liberty*, (1973)) view of the rule of law is pursued in the development context by considering the rule of law as an instrument to achieve economic

that certain basic individual rights will be protected by a government if it acts in terms of clear, pre-determined rules that apply generally to its subjects and that are enforced in terms of fair procedures by impartial courts.²² In a development context, a distinction can be drawn, first, between an institutional and substantive conception of the rule of law, and secondly, between an instrumental and intrinsic conception of the rule of law.²³ When viewed as an institution, the rule of law will be in place when legal rules are put in place.²⁴ These rules, however, are not assessed on any normative basis, as in the case of a substantive conception.²⁵ A substantive conception of the rule of law assumes that there are rules in place, but requires the pursuit of specific values.²⁶ An intrinsic conception of the rule of law views the rule of law a goal in itself and not merely as an instrument to achieve other goals in society, such as development.²⁷

It is not possible to prescribe one specific mode of formalisation that will guarantee development since development scholars do not agree on how legal formalisation should take place, how institutions should be set up in developing countries or what the rule of law should entail.²⁸ Irrespective, one substantive neoclassical vision of the law is promoted in developing countries.²⁹ The neoclassical view of the state entails upholding a strict distinction between the

growth. However, AV Dicey's conception of the rule of law (see footnote 22 below), as supported by Amartya Sen, (*Development and Freedom* (2001)) as an end in itself, is also favoured.

²² Dicey A *An Introduction to the Study of the Law and the Constitution* (1885) xcvi-cl1. Also see Raz J "The Rule of Law and its Virtue" 1977 (93) *The Law Quarterly Review* 226. He argues for a list of aspects as indicators of the presence of the rule of law. These include that "all laws should be prospective, open and clear", "laws should be relatively stable" and "the making of particular laws... should be guided by open, stable, clear and general, rules". As noted by Davis & Trebilcock (2008) 24, Raz not only focuses on the legal norms constituting the rule of law, but also on the institutions enforcing the law and, in this regard, emphasis is placed on the independence of the judiciary, accessibility to the courts and the promotion of natural justice.

²³ Santos (2006) 258.

²⁴ Santos (2006) 258.

²⁵ Santos (2006) 258.

²⁶ Santos (2006) 258.

²⁷ Santos (2006) 259.

²⁸ Davis & Trebilcock (2008) *The American Journal of Comparative Law* 7, 8, 60. Davis and Trebilcock consider two works arguing for using the law to achieve development (or in some instances, law because of development): Carothers (2003) *Carnegie Endowment for International Peace Rule of Law Series* and Dam (2006). Davis and Trebilcock reach the conclusion that despite the reasons for being optimistic about the role legal reform can play in promoting development, there is no clarity on how legal reform or formalisation should take place. To be certain, Carothers and Dam do not even agree on one, universal understanding of what development should entail. Dam (2006) equates development with economic growth whereas Carothers (2003) considers a broader notion of development that also focuses on social development and the promotion of human rights. Davis & Trebilcock also approach the empirical evidence in favour of legal reform for the sake of development with caution - see Williams A & Siddique A "The Use (and Abuse) of Governance Indicators in Economics: A Review" 2007 *Economics of Governance*.

²⁹ Thomas (2011) *Cornell Law Review* 974, 975, 976, 1005; North DC *Structure and Change in Economic History* (1981) 36. Neoclassical law and development discourse is based on the political and legal theory of Friedrich Hayek (1944), (1960) and (1973) arguing for a conception of liberty that requires a limited government subjected to the rule of law and strong property rights.

public and the private sphere.³⁰ Relations in the public sphere are presented as the vertical relationship between state and subject and contrasted with the horizontal relationship between subjects in the private sphere where the state cannot intervene.³¹ Appropriate laws and institutions must support the efficiency of market transactions between private actors.³²

Scholars have criticised the drive for upholding the rule of law as part of development, for merely reflecting the ideological stronghold of Western capitalism.³³ The development paradigm presents this singular version of the law as natural and inevitable (or universal), disregarding debates within the West about other possible versions and other approaches to the law that emphasise social contexts, relationships and communal living.³⁴ In this context, the reasons for the existence of underdevelopment cannot be engaged with in-depth, since assumptions are made about the world and livelihoods that do not reflect local values.³⁵ The universal assumption that formalisation is necessary for development to take place often means that local context and relationships are overlooked.³⁶ Western legal systems also suffer systemic flaws and consequent market failures.³⁷ Transplanting these systems into developing regions thus may have dire consequences for these regions.³⁸

The promotion of legal formalisation will also have varying consequences depending on the underlying values of a given developing society.³⁹ It should, for instance, be considered how legal certainty for the foreign investor will bring about development for the persons living in the developing region.⁴⁰ Here, the issue of the historic allocation and distribution of resources

³⁰ Thomas (2011) *Cornell Law Review* 1005. Kennedy (2009) 7. Whereas neoliberalism and neoclassical economics are not synonymous, neoliberal economics share certain principles with neoclassical economics such as that individual economic actors have rational preferences and wish to maximise their utility. Free markets are also opted for instead of central planning. See section 2.1.2.3 of Chapter 5.

³¹ Kennedy (2009) 7.

³² Thomas (2011) *Cornell Law Review* 968.

³³ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 20; Snyder FG “Law and Development in the Light of Dependency Theory” 1980 (14) *Law and Society Review* 723, 727-728.

³⁴ Thomas (2011) *Cornell Law Review* 1005 & 1006; Alexander GS, Peñalver EM, Singer JW & Underkuffler LS “A Statement of Progressive Property” 2009 (94) *Cornell Law Review* 743, 743-744. The law and economics and neoclassicism approaches in US property law discourse are often promoted in development policies.

³⁵ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 20. Snyder (1980) *Law and Society Review* 723, 731.

³⁶ Kennedy (2009) 21.

³⁷ Kennedy (2009) 21; Thomas (2011) *Cornell Law Review* 1007.

³⁸ Kennedy (2009) 21.

³⁹ Kennedy (2009) 21. Kennedy argues that whereas clear title may make it easier to sell property, the impact on the purchase price is uncertain since it depends on how the parties to the sale agreement view clear title and principles of contract making.

⁴⁰ Kennedy (2009) 21.

come into play.⁴¹ Legal formalisation for the sake of development in many instances ignores the patterns of resource allocation in place before formalisation.⁴² This accords with neoliberal thinking that regards the economic and political aspects of a society as completely separate.⁴³ In the process of formalising legal principles, the *status quo* is cemented by confirming and protecting the rights of certain sections of a society, irrespective of how the rights were acquired.

In the South African context, the property clause contained in the Constitution presents such a situation.⁴⁴ By protecting against the arbitrary deprivation of property, section 25 of the Constitution prevents the type of dispossessions that took place under apartheid.⁴⁵ Foreign investors generally require this type of protection.⁴⁶ The property clause, however, also protects the property interests of persons who benefited under apartheid by acquiring such rights. Thus, the unjust patterns of resource allocation are ignored.⁴⁷

2.2. Property Rights, Economic Growth and Development

The formalisation of legal rules entails upholding strong and well-developed property rights, which are required to maintain financial markets and to obtain economic growth.⁴⁸ Both of

⁴¹ Kennedy (2009) 22. See the discussion under section 2.1.2.2 of Chapter 5 of the assumptions accompanying the protection of property rights in the development paradigm.

⁴² Kennedy (2009) 22.

⁴³ See section 2.1.2.3 of Chapter 5 for a discussion of the fundamentals of neoliberal thinking.

⁴⁴ Section 25 of the Constitution of the Republic of South Africa, 1996.

⁴⁵ S 25(1) of the Constitution determines that deprivation of property may only take place in terms of law of general application, which law may not allow for arbitrary deprivation. See section 3 of Chapter 2 for a discussion of land deprivation during colonial times and under the apartheid regime.

⁴⁶ Kennedy (2009) 21.

⁴⁷ Scholars such as Modiri, referring to Ramose, argue that the adoption of the Constitution confirms the acceptance of a Western legal system to the exclusion of local indigenous systems. Ramose suggests that the property clause protects white owned property interests. See Modiri JM “The Time and Space of Critical Legal Pedagogy” 2016 (27) *Stellenbosch Law Review* and Ramose MB & Hook D “To Whom does the Land Belong?” 2016 (50) *Psychology in Society*. See also Ramose MB “Towards a post-conquest South Africa: beyond the constitution of 1996” 2018 (34:3) *South African Journal on Human Rights* 326-341.

⁴⁸ Kennedy (2009) 2; Thomas 2011 *Cornell Law Review* 967, 982; Gordon & Sylvester (2004) *Wisconsin International Law Journal* 47; Cammack P “Neoliberalism, the World Bank and the New Politics of Development” in U Kothari & M Minogue (eds) *Development Theory and Practice: Critical Perspectives* (2002) (2002) 172; De Soto H *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000). The argument is based on the work of North that showed that certain economies were not able to create efficient property right systems and thus lacked development. See North DC *Institutions, Institutional Change and Economic Performance* (1990) 20-23 & North DC and Thomas RB *The Rise of the Western World: A New Economic History* 1 (1973) arguing that “(E)fficient economic organization is the key to growth; the development of an efficient economic organization in Western Europe accounts for the rise of the West.” The New Institutional Economics (“NIE”) (see footnote 66 of Chapter 5) arguments also share a belief in the correlation between the success of the West and law and capitalism, but NIE placed much greater emphasis on the protection and enforcement of property rights as a requirement for efficient economic production and therefore development. NIE emphasises the need for a legal framework that will protect clear and comprehensive property rights. Other institutions deemed necessary are contracts, company and foreign investment law, insolvency law and competition law, and an independent judiciary.

these goals are associated with the development idea considered in this thesis.⁴⁹ This section criticises the focus on property rights in the development paradigm on the same basis as the requirement for legal formalisation and the implementation of the rule of law: It amounts to universalising subjective views on the role of the state and its relationship with its subjects.⁵⁰

The link between development and the protection of property rights is ascribed to the apparent historic link between economic growth in the West and the protection of property rights.⁵¹ This argument for the promotion of property rights, however, has been criticised for being based in ideology rather than in history.⁵² Even though industrialisation and economic growth occurred in contexts where property regimes were in place, different Western economies have entrenched different ideas about property rights.⁵³ Irrespective, the development idea carries with it a rather oversimplified view of property rights influenced by neoclassical law and development discourse.⁵⁴ Simply put, the state must protect property rights, and the various debates about the appropriate role for the state in a given context, are ignored.⁵⁵ The emphasis on the requirements that property rights should be well-developed or “clear” and “strong” is thus problematic.⁵⁶ The clarity and strength of property rights will depend greatly on the context within which it is pursued.⁵⁷

Furthermore, the uncritical pursuit of a Westernised property law system in the development paradigm ignores the problems associated with this system.⁵⁸ Property market failures because of systemic flaws occur regularly and will not have the effect of promoting development in

⁴⁹ See section 2.1.2.3 of Chapter 5 in this regard. Certainly, it has been admitted that development amounts to more than economic growth. See for instance Sen A *Development as Freedom* (2001) in this regard. However, significant emphasis is still placed on the economic aspect of development.

⁵⁰ See section 2.1 of this chapter.

⁵¹ Kennedy (2009) 1. See footnote 48 above.

⁵² Kennedy (2009) 1.

⁵³ Kennedy (2009) 1; Thomas (2011) *Cornell Law Review* 1006. Thomas shows how even Hernando de Soto, a firm proponent of the positive role of property rights in development, acknowledges that there is no single universal approach to the titling of land. See Rose CM “Invasions, Innovations, Environment” in D Benjamin Barros (ed) *Hernando de Soto and Property in a Market Economy* (2010) 21, 24-30.

⁵⁴ Thomas (2011) *Cornell Law Review* 1005. Thomas argues that, whereas theories on the rule of law discourse in development theory is rather incoherent and complex, discourse on property rights tend to be too simplistic, theoretically, because reliance is placed on one model of the state and its interactions with its subjects. See discussion under section 2.1 of this chapter for the meaning of “neoclassical” in this context.

⁵⁵ Thomas (2011) *Cornell Law Review* 1005. As an example of alternative understandings of property, Thomas refers to Alexander GS et al (2009) *Cornell Law Review* 743 & 744 arguing for property as a measure of civic duty, communal wealth and environmental guardianship.

⁵⁶ Kennedy (2009) 1.

⁵⁷ Kennedy (2009) 21; Thomas (2011) *Cornell Law Review* 1006.

⁵⁸ Thomas (2011) *Cornell Law Review* 1007.

non-Western societies.⁵⁹ The notion of property rights is promoted in the development paradigm on the assumption that social issues are regarded as being separate from property and economic issues and cannot be addressed within the property regime.⁶⁰ In a development context, this assumption is significant, especially when considering inequality in South Africa, and South African mining communities.⁶¹ The economic and political aspects of the oppression and exploitation are intertwined to such an extent that separation is impossible; political actions have economic consequences and *vice versa*.⁶² A forced separation can be regarded as a means of denying certain oppressive and exploitative aspects of a society's history.

The assumptions about the role of property rights in the development paradigm are highlighted in this thesis, as the assumptions imply that entities or individuals holding formalised property rights in a development paradigm will develop more successfully.⁶³ This assumption is relevant for the argument forwarded in this thesis: The empowerment of mining communities is unsuccessful because the theoretical foundations of empowerment are embedded in the development paradigm. It creates uncertainty as to who should benefit and how they should benefit from empowerment, creating expectations that cannot be met and furthering tension in the mining industry. The legal framework for mining⁶⁴ distinguishes between different types of communities in the context of the Broad-Based Black Economic Empowerment (“B-BBEE”) in the mining industry.⁶⁵ This differentiation translates into awarding some types of communities the right to shares (property) in a mining company as part of empowerment and development, to the exclusion of other types of communities. By formalising traditional

⁵⁹ Thomas (2011) *Cornell Law Review* 1007 refers to Dyal-Chand R “Leaving the Body of Property Law? Meltdowns, Land Rushes and Failed Economic Development” in D Benjamin Barros (ed) *Hernando de Soto and Property in a Market Economy* (2010) 83-84, 90.

⁶⁰ Kennedy (2009) 2.

⁶¹ See Chapter 2 in this regard.

⁶² The recruitment of migrant workers for the South African mines serves as an example in this regard. The recruitment, that can be regarded as an economic action, is the result of political action that dispossessed these workers of their independence and freedom to pursue a livelihood of their choosing. See section 3 of Chapter 2 for a discussion of these instances of dispossession.

⁶³ See section 2.1.2.2 of Chapter 5 and section 2.2 above in this regard.

⁶⁴ The law under consideration includes the Constitution of the Republic of South Africa, 1996 (“the Constitution”); Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”), the broad-based socio-economic empowerment charter issued in terms of s 100(2) of the MPRDA (“Mining Charter”), the Social and Labour Plan (“SLP”) to be created in terms of ss 22 and 23 of the MPRDA and the regulations 40-46 of the Regulations in terms of section 107(1) of the MPRDA (GNR 527 GG 26275 of 23 April 2004) and the Integrated Development Plan (“IDP”) to be created in terms of the Local Government: Municipal Systems Act 32 of 2000. The following legislation is also considered to the extent that it provides for “community” that will also qualify as mining communities: The Restitution of Land Rights Act 22 of 1994, the Traditional Leadership and Governance Framework Act 41 of 2003 and the Interim Protection of Informal Land Rights Act 31 of 1996.

⁶⁵ See section 3 of Chapter 3 for a discussion of the legislative system and Chapter 4 for an identification of the different types of communities that are acknowledged by the legislative system.

communities' entitlement to shares, the underlying inequalities between traditional and mining communities are cemented, as is discussed in Chapter 7 as one of the effects of the politics of development for mining communities in South Africa.

2.3. The Effect on “Developing” Peoples

Promoting Western law and legal systems as ideal models in the developing world can have detrimental effects on developing countries.⁶⁶ Furthermore, there is no definitive empirical evidence that shows the successes in promoting property rights and the rule of law as part of development in developing countries.⁶⁷ Irrespective of the issues identified, the makers of development policy in developing countries are forced to work in this problematic paradigm based on these ideas about the law and property rights.⁶⁸

Central to the critique of legal formalisation as a means of advancing development set out in this section, is that the notions of modernisation and neoliberalism are universalised and ideologically neutralised in the global development paradigm.⁶⁹ Development can thus be challenged for constituting an ideology, as it presents the ideas, attitudes and values of a specific group or class of people with significant power in society.⁷⁰ Development solutions reflect the inputs and the interests of those who regard themselves as “developed” and not of those that must still achieve this status in the view of the proponents of development.⁷¹ The result is that groups of people already empowered can claim truth and universality of their worldviews.⁷² These “truths” may be false for those who live by a different value system, but because of the powerful position occupied by the first-mentioned group in society, these “truths” are enforced upon others.⁷³ The “truths” are associated with the values of the West since the development project is driven by institutions situated in the West.⁷⁴

⁶⁶ Thomas (2011) *Cornell Law Review* 1007, referring to Dyal-Chand (2010) 83-84, 90, shows that market failures associated with Western property rights regimes cause severe harm in non-Western countries.

⁶⁷ Thomas (2011) *Cornell Law Review* 1008.

⁶⁸ Thomas (2011) *Cornell Law Review* 1006.

⁶⁹ See section 2.1 above.

⁷⁰ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 72.

⁷¹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 72 at footnote 315 refer to Kohl H *From Archetype to Zeitgeist: Powerful Ideas for Powerful Thinking* (1993).

⁷² Gordon & Sylvester (2004) *Wisconsin International Law Journal* 72 invoke postmodernist thinking in this regard by questioning the ideas of “modernity” and “progress” and the possibility of the existence of a grand theory or narrative that can represent and explain everything. See Sarup MP & Tasneem R *Identity, Culture and the Postmodern World* (1996) 95.

⁷³ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 71; Tucker V “The Myth of Development: A Critique of a Eurocentric Discourse” in R Munck & D O’Hearn (eds) *Critical Development Theory: Contributions to a New Paradigm* (1999) 1.

⁷⁴ The World Bank serves as the best example of such a Western institution.

Accordingly, the first aspect of the politics of development is that within the development paradigm considered in this thesis, a worldview is imposed upon the developing world. In this process, local worldviews and contexts are regarded as inferior and other (Western) worldviews, based on modernisation, neoliberalism and legal formalisation, are set as the ideal, inadvertently forming part of development theory. Besides the oppressive nature of imposing ideas and values that originated in one part of the world on another, disregarding local contexts necessarily leads to policymaking that is out of touch with the actual problems experienced by those regarded as “developing”.⁷⁵ Chapter 4 shows the interpretational difficulties regarding empowerment policies aimed at South African mining communities, which difficulties are ascribed to the politics of development. It is not argued that the values on which the development paradigm was founded have remained stagnant, but these values remain embedded in Western thinking and have played a specific role in the creation of empowerment policies in South Africa.⁷⁶

This thesis accepts that development is given meaning to or “brought into being” through the discourse or dialogue on development, thus further undermining the proclaimed universality of development and accompanying values.⁷⁷ In other words, conceptually, development lacks any inherent meaning. A discourse implies that established practices determine who can participate in the conversation, from what points of view and with what authority.⁷⁸ In the context of development, these practices exclude the viewpoints of development-beneficiaries and divest them of their agency.⁷⁹ Developing entities accordingly misrepresented as mere objects of development, lacking self-determination.⁸⁰

The promotion of development will thus negatively affect a group of people that holds a view of the world that differs from the views of those enforcing development. The problems such a group of persons faces and the identities it represents may be misconfigured in development

⁷⁵ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 73.

⁷⁶ See section 2.2 of Chapter 3.

⁷⁷ Gordon & Sylvester (2004), *Wisconsin International Law Journal* 72 at footnote 314, referring to Ashcroft B, Griffiths G & Tiffin H *Key Concepts in Post-Colonial Studies* 71 (1998); Esteva G, Babones SJ & Babcicky P *The Future of Development: A Radical Manifesto* (2013) 5-10; Escobar A *Encountering Development: The Making and Unmaking of the Third World* (2012) 39-44.

⁷⁸ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 72 & 82. Escobar (2011) 39. “Discourse” in this sense refers to the Foucauldian (*Order of Things* (1970); *Archaeology of Knowledge* (1972)); “Order of Discourse” in M Shapiro (ed) *Language and Politics* (1984)) notion of discourse as “an order or ensemble of normative speech acts that constitute a particular field and subjects within it”. As Brown shows, discourses that dominate in society come to be regarded as truth and common sense. Brown (2015) 117.

⁷⁹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 85.

⁸⁰ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 85. See also Heyns & Mostert (2018) *Law and Development Review* section 2.1.2.

solutions, thus detracting from the efficacy of such solutions and policies.⁸¹ This aspect is expanded on in section 3 below.

Furthermore, due to the enforcement and universalisation of certain values and truths that accompany the pursuit of development, it has been branded as neo-colonial.⁸² The transition from colonialism to development is regarded merely as a shift in emphasis, and not the end of one project and the beginning of another.⁸³ Instead of development bringing about transformation, the prior relationship between developed and developing countries remains in place.⁸⁴

3. Creating “the Poor”

The second aspect of the politics of development is the fact that the development paradigm creates the developing entity by determining how the developing entity and development problem are defined, specifically in legislation and policy providing for development. It is argued that the meaning of poverty, and thus the content of poverty rhetoric, is determined by the values and views upheld in the development paradigm. To be acknowledged in this development paradigm, the development beneficiary will have to conform to this value system.⁸⁵

This section firstly considers how “the poor” was created in the global development paradigm, thereby setting up the relationship between the developed and developing world still visible in the twenty-first century.⁸⁶ Secondly, this section analyses the presentation of the poor by the law in a neoliberal setting, to show how the definition of a group of poor persons disables such a group from operating in the neoliberal market.⁸⁷ Finally, the effects of the second aspect of the politics of development for developing entities are set out.

⁸¹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 85. See also Heyns & Mostert (2018) *Law and Development Review* section 2.1.2.

⁸² Gordon & Sylvester (2004) *Wisconsin International Law Journal* 78.

⁸³ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 78, referring to Kothari U “Feminist and Postcolonial Challenges to Development” in U Kothari & M Minogue *Development Theory and Practice: Critical Perspectives* (2002) 37 & Devesh K, Lewis JP & Webb RC *The World Bank: Its First Half Century – History* (1997) 96.

⁸⁴ Phillips A “The Concept of ‘Development’” 1977 (4) *Review of African Political Economy* 15.

⁸⁵ See section 2 above.

⁸⁶ Some would argue that it is not a new relationship that was set up, but merely the continuation of the relationship between the coloniser and colonised. Gordon & Sylvester (2004) *Wisconsin International Law Journal* 78.

⁸⁷ It should be noted that a consideration of the physical presence or representation of impoverished communities, such as South African mining communities at for instance meetings where development aspects are discussed, or consultation with representatives of these communities, falls outside of the scope of this thesis.

3.1. The Relationship between the “Developed” and the “Developing” Worlds

It is often argued that the inauguration speech of USA President Truman in 1949 created the “underdeveloped” or “poor” world.⁸⁸ The Point IV Program⁸⁹ was initiated during this occasion to address, what Truman described as the “primitive and stagnant” “economic life” of the poor, constituting “a handicap and a threat both to them and to the more prosperous areas”.⁹⁰ As a result of the advances in science and industrialisation developed nations, such as the United States, had the duty “to relieve the suffering of these people”.⁹¹ As part of this plan, various institutions and professions were to be created with the specific mandate to promote development.⁹² Development thus served as the developed world’s response to the aftermath of colonialism and the Second World War, thereby constituting the foundation of the future relationship between the developed and developing world.⁹³

For the development project to have obtained traction in the non-Western world, the lesser status of the livelihoods of persons living in the non-Western world had to be confirmed. The remarks by President Truman, therefore, condescendingly portrayed non-Western societies and showed little regard for lifestyles and livelihoods that differ from American or European ways.⁹⁴

Remarks, such as those of President Truman, do not probe the reason for the “suffering of these people”.⁹⁵ In the development paradigm, it is accepted that underdevelopment or poverty is the

⁸⁸ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 10; Escobar (2011) 3; Esteva (2013) 5.

⁸⁹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 10; Esteva (2013) 3; Committee on Foreign Affairs *Point Four Background and Program (International Technical Cooperation Act of 1949)* (1949). Truman’s Inaugural Address January 20, 1949, available at <https://avalon.law.yale.edu/20th_century/truman.asp> accessed on 11 March 2020.

⁹⁰ Truman (1949).

⁹¹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 9; Truman (1949).

⁹² Truman (1949); Gordon & Sylvester (2004) *Wisconsin International Law Journal* 9. The World Bank and IMF were created in execution of this mandate.

⁹³ Phillips (1977) *Review of African Political Economy* 17; Cammack (2002) 161. Even the nationalist development policies promoted before the rise in popularity of neoliberal economic policy focused on economic growth in former colonies rather than addressing the liability of the Western world in colonisation. See section 2.1.1 of Chapter 5.

⁹⁴ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 9.

⁹⁵ In anticipation of the launch of the Development Decade program (see section 2.1.2.1 of Chapter 5), the inaugural address of President JF Kennedy declared, “to those people in huts and villages of half the globe struggling to break the bonds of mass misery, we pledge our efforts to help them help themselves”. A similar attitude can thus be detected here. Kennedy’s Inaugural Address 20 January 1961 available at <<https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/inaugural-address-19610120>> accessed on 23 December 2019.

result of the isolation of developing or non-Western societies from the global economy.⁹⁶ As a capitalist construction, development does not acknowledge the history behind underdevelopment.⁹⁷ As is also indicated in Chapter 5, the neoliberal development project possibly promotes a definition of poverty that also accepts poverty in society as a mere eventuality.⁹⁸ The history of the relationship between the developed and developing country is not considered in understanding why underdevelopment or poverty exists in the first place.⁹⁹

Rather, non-Western societies and former colonies have been equated to “poor” and “underdeveloped”, based on their diversion from Western standards.¹⁰⁰ Development, therefore, is promoted as the solution to bring such societies within the realm of the global economy.¹⁰¹ Poverty or a lack of development is described in such a manner that it can only be solved through Western intervention.¹⁰²

⁹⁶ Phillips (1977) *Review of African Political Economy* 9; Escobar (2011) 47, Esteva (2013) 17 argues that “market society operates through the creation of scarcity, which in turn shapes all needs, usually through dispossession”.

⁹⁷ Phillips (1977) *Review of African Political Economy* 9, 10 & 17. Phillips argues that the development project ensures the survival of the developed world’s capitalist practices to accumulate capital in the developing world. Underdevelopment theory is a response to orthodox development theory which uncritically accepts that underdevelopment is the result of these countries (and communities could also be added) being isolated from the global economy and that development is the solution to bring the relevant country up to standard. Poor nations provide natural resources, cheap labour and destination for obsolete technology, thereby perpetuating dependency on richer, industrialised nations. Underdevelopment theory had its origins in the manner in which Marxism dealt with certain conceptual problems it faced in the 20th century, when capitalism did not fail as Marxism predicted. Marxism holds that capitalism consisted of an inherent contradiction between capital and labour always expressed in class struggle and cyclical booms and regressions, which would eventually lead to the implosion of capitalism. Instead, the post-Second World War era saw an economic boom and rather successful implementation of employment policies and social welfare mechanisms. See Frank AG “The Development of Underdevelopment” 1966 (September) *Monthly Review Press* & “Dependence is Dead, Long Live Dependence and Class Struggle: An Answer to Critics” 1974 *Latin American Perspective*.

⁹⁸ Section 3.2 of Chapter 5.

⁹⁹ Phillips (1977) *Review of African Political Economy* 9, 18. Phillips argues that the British model of capitalist accumulation set the context within which post-war development initiatives were created. Largely, inequality between the developed and developing world is the result of colonial dispossession of human and other resources for the benefit of the coloniser, leaving the colonised country “underdeveloped”. See footnote 97 above on “underdevelopment”.

¹⁰⁰ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 71.

¹⁰¹ Phillips (1977) *Review of African Political Economy* 9. See Cammack (2002) where he discusses the development reports issued by the World Bank and shows the emphasis these reports have placed on the integration of the non-Western world into the global economy.

¹⁰² Gordon & Sylvester (2004) *Wisconsin International Law Journal* 81, 83-85. Development “experts” such as economists, anthropologists, sociologists and academics trained in the West are all involved in executing the development project in the non-Western world. Gordon and Sylvester refer to the depiction by the World Bank of Egypt’s development problems as an example in this regard. Due to its geography - being situated in the narrow strip in the Nile Valley - Egypt is considered overpopulated and unable to produce sufficient food for the growing population. To address these problems, Western input in the form of expertise (new irrigation methods and seed varieties, for example) and capital are required. Yet, it is not commonly accepted that Egypt is for example overpopulated. High population density is, according to Mitchell T “The Object of Development America’s Egypt” in J Crush (ed) *Power of Development* (1995) 129-157 not necessarily overpopulation. The problem can be rephrased as issues of consumption and access to land, which rephrasing would necessarily require different development solutions.

Development has been criticised for forcing those benefitting from development to “accept (their) relative inferiority and inadequacy” and to “evolve and advance towards something else”.¹⁰³ Non-Western or “developing” peoples are not allowed to present their own identities, views and needs, resulting in ineffective development policies and the objectification of “developing” peoples.¹⁰⁴

3.2. The Law and the Presentation of the Poor

Plainly stated, the problem addressed by development is poverty.¹⁰⁵ Underlying the neoliberal construct that informs the development paradigm, is a specific functionalist conception of poverty as economic and social regression or underdevelopment, as is set out in Chapter 5.¹⁰⁶ The construct regards a lack of adequate access to resources and poverty as practical, inevitable social problems, which can be measured or quantified.¹⁰⁷ This pragmatic approach to poverty alleviation maintains that development merely requires that the distribution of resources should be rectified and normalised by the workings of the free market.¹⁰⁸

Further to the neoliberal values underpinning the development idea, the development paradigm operates on the assumption that a modernised legal system with sufficient protection of human, property and other rights is required for development to take place.¹⁰⁹ The focus on legal formalisation and the protection of rights indicates that a person or group of persons will be regarded as “developed” if it can hold and enforce property, contracting and other rights.¹¹⁰ Thus, the developing entity obtains access to the free market, and accordingly resources, if it acquires the necessary rights. To be able to hold rights, a person or group of persons must be

¹⁰³ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 2 quoting Esteva G “Development” in W Sachs (ed) *The Development Dictionary: A Guide to Knowledge as Power* (1992) 6.

¹⁰⁴ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 83-86. Role players in the development paradigm, such as the World Bank, do not acknowledge their complicity in development’s failures.

¹⁰⁵ See section 3.2 of Chapter 5.

¹⁰⁶ Brand D, De Beer S, De Villiers I and Van Marle K “Poverty as injustice” 2013 (17) *Law, Democracy and Development* 273, 275. See also section 3.2 of Chapter 5.

¹⁰⁷ Brand et al (2013) *Law, Democracy and Development* 273, 275. In section 3.1 above, it is stated that the lack of development or poverty is regarded as a deviation from Western living standards. Determining what would constitute a lack of resources in a Western development paradigm would thus reflect resources utilised by Western lifestyles. Esteva (2013) 31 argues that the introduction of Western consumption patterns in non-Western societies caused “underdevelopment” in the first place.

¹⁰⁸ See section 3.2 of Chapter 5.

¹⁰⁹ See section 2.1.2 of Chapter 5 and section 2 above. The protection of property rights and human rights as prerequisites for development to take place, is emphasised.

¹¹⁰ See section 2.1.2 of Chapter 5 and section 2 above.

acknowledged as a legal subject.¹¹¹ An inability to hold rights, and thus to be regarded as a legal subject, is tantamount to being poor, and therefore in need of development.

In this section 3.2, it is argued that poor persons, such as poor mining communities, are presented by the law and legal instruments, such as the legislative measures considered in this thesis, in such a manner that it cannot act as a legal subject. The discussion commences with a reconsideration of the basic tenets of neoliberalism and the law's role in a neoliberal development paradigm. The configuration of the legal subject, as the entity capable of holding rights in a neoliberal development paradigm, is contemplated.¹¹² An analysis of the effect of the subjectification on the ability to hold property and human rights in the context of development and poverty alleviation follows: It is shown that instead of addressing poverty, the *status quo* remains.

As is explained in Chapter 5, neoliberal thinking takes on liberalist principles.¹¹³ Liberalism, as a political ideology, centres on the individual who holds rights against the government, such as the right to property, fair and transparent legal processes, equality, freedom of expression, and freedom of religious and ideological persuasion.¹¹⁴ A liberalist perspective maintains that by protecting these rights and by allowing each individual to pursue its own best interests the wealth and wellbeing of a society will be optimised.¹¹⁵ The focus is on the individual and not on groups of persons pursuing communal interests.¹¹⁶

Neoliberalism represents more than a version of capitalism that dictates policy and favours the free market.¹¹⁷ It redefines the relationship between the state, its subjects and the economy.¹¹⁸ In so doing, neoliberalism reduces human beings to actors in the market,¹¹⁹ carrying the

¹¹¹ Cronje DSP "Persons" in M Kühne, JA Faris & LTC Harms (eds) *The Law of South Africa* (2009) volume 20(1) para 438.

¹¹² The terms "legal subject" is used here as an entity with the ability to bear rights and duties and perform juristic acts such as entering into contracts; that has *locus standi* and can be held accountable for its actions. Cronje (2009) para 438.

¹¹³ Williams P and Taylor I "Neoliberalism and the Political Economy of the 'New' South Africa" 2000 (5) *New Political Economy* 22.

¹¹⁴ See section 2.1.2.3 of Chapter 5.

¹¹⁵ See section 2.1.2.3 of Chapter 5. See also Heyns (2019) *Law and Development Review* section 4.2.

¹¹⁶ See section 3.1 of Chapter 5.

¹¹⁷ Brown (2015) 30.

¹¹⁸ Brown (2015) 50 referring to Foucault's understanding of neoliberalism.

¹¹⁹ Brown (2015) 17, 30, 31 & 50 regards neoliberalism as "a peculiar form of reason that configures all aspects of existence in economic terms" and "an order of normative reason that, when it becomes ascendant, takes shape as a governing rationality extending a specific formulation of economic values, practices and metrics to every day dimension of human life". Brown (2015) 32-43 shows how people are converted into human capital, since the action of exchange, propagated by Adam Smith in *Wealth of the Nations* (1776), is replaced with that of competition. Accordingly, the subject finds itself in a position where it has to compete with the state, since even the state has its own competitive position in the market to consider. Brown's main argument is that

responsibility to ensure their wellbeing.¹²⁰ Neoliberal policy, therefore, does not support the notion of the welfare state, meaning it is challenging for humans to thrive.¹²¹

The law is effectively “economised” under a neoliberal regime: The rule of law is maintained not in substance but as an instrument to further neoliberal economic policy and to legitimise government as the creator of the rules for actors (individuals or businesses) to take part in economic activity.¹²² Access to resources is thus determined by economic markets and the law: The law regulates transactions that take place in the economic market between the state and its subjects and between legal subjects *inter se*.¹²³ The law does so by awarding rights in terms of the principles of property, contract and procedural law.¹²⁴ Rights constitute the building blocks of Westernised law and allow the bearer thereof to claim a performance or a thing from another.¹²⁵ The conclusion of the transactions in the economic market has the effect of allocating resources to persons operating in this system.¹²⁶

Thus, to be able to participate in transactions that allocate resources, a person or group of persons must be acknowledged as a legal subject, capable of holding and exercising certain legal rights. The legal rules providing these rights are based on ingrained ideas and assumptions about poverty and development, and thus about those who are lacking basic resources.¹²⁷ Accordingly, these ingrained ideas will determine who can function as a legal subject.

The legal subject does not exist *a priori*. Modern legal systems entrenching rights produce their legal subjects.¹²⁸ Subjectification, as in the way in which a legal system creates its subjects,

neoliberalism is detrimental to democracy since only the economic dimension of human existence is acknowledged, neglecting the political dimension, which is important for democracy to thrive.

¹²⁰ Brown (2015) 132 & 133.

¹²¹ Brown (2015) 134.

¹²² Brown (2015) 67.

¹²³ Brand D & Van Marle K “Poverty and the Ordinary Law: Introduction” 2013 (29) *South African Journal on Human Rights* 2013 (29) 465; Cammack (2002) 159, 172.

¹²⁴ Brand & Van Marle (2013) *SAJHR* 465.

¹²⁵ Douzinas C *Human Rights and The Empire: The Political Philosophy of Cosmopolitanism* (2007) 9.

¹²⁶ Brand & Van Marle (2013) *SAJHR* 465; Cammack (2002) 159, 172. It is not argued that the South African economic landscape can be described as a purely neoliberal system. Social grants and other welfare measures are in place that do not typically fit in with a neoliberal system. The argument here is that the empowerment and development policies in place have their origins in neoliberal thinking that influenced transition politics in the 1990s. See section 2.2 of Chapter 3.

¹²⁷ Brand & Van Marle (2013) *SAJHR* 465. See section 3.2 of Chapter 5.

¹²⁸ Stewart L “Rights Discourse and Practices, Everyday Violence and Social Protests: Who Counts as Subjects and Whose Lives are real in the Neo-Colonial South African Nation State” 2014 (18) *Law, Democracy and Development* 2, footnote 3. Stewart draws on Judith Butler’s notion of performativity, the idea that the body is created through the language employed to describe it - Butler J *Bodies that Matter: On the Discursive Limits of “Sex”* (2003) 2-3; Butler J *Gender Trouble: Feminism and the Subversion of Identity* (1990) 2. Butler again follows Foucault who argues that legal subjects are produced by the legal systems of power that represents these subjects - Butler J “Foucault and the Paradox of Bodily Inscriptions” 1989 (86) *Journal of Philosophy* 601.

takes place based on supposedly transcendental values and standards, but follows ingrained ideas about who can act as a legal subject.¹²⁹ The requirements set by the system to qualify as the bearer of rights, serve as a definition of the legal subject – in other words, an entity is defined following the extent to which it complies, or deviates, from the criteria.¹³⁰

An abstraction is created to represent a specific person or groups of persons before the legal system.¹³¹ Due to the socio-economic conditions to which impoverished groups of persons, such as a poor mining community, are exposed, they are stigmatised as “vulnerable” and “poor”.¹³² The abstraction confirms the inability of the poor to participate as legal subjects in a complex legal system thereby establishing how these persons deviate from the requirements set by the legal system to be regarded as a legal subject.¹³³ Thus, when the law is interpreted, or policy is created in the context of poverty alleviation, “the poor” serves as a predetermined identity.¹³⁴

The argument here is not that poverty is merely a legal and social construction; being deprived of the basic necessities of life is a dire reality.¹³⁵ It is, however, maintained that the abstraction put forward by the legal system will never be a true and accurate depiction of the impoverished person or its livelihood.¹³⁶ In a system where recognition is key to access a market of resources,

¹²⁹ Stewart (2014) 13 referring to Deleuze G *Negotiations* (1995) 176, 150 & Deleuze G & Guattari F *A Thousand Plateaus: Capitalism and Schizophrenia* (2005) 171.

¹³⁰ Stewart (2014) *Law, Democracy and Development* 2.

¹³¹ Stewart (2014) *Law Democracy and Development* 2 footnote 3.

¹³² Stewart (2014) *Law, Democracy and Development* 3, 9.

¹³³ See footnote 112 above on the meaning of “legal subject”. Stewart (2014) *Law, Democracy and Development* 2 footnote 3, 3, 6 & 7 and 9. Stewart considers the ability of poor women in the Marikana area to exercise their constitutional right to protest their deplorable socio-economic conditions. She specifically addresses the South African judiciary’s interpretation of socio-economic rights, but a discussion hereof falls outside the scope of this thesis. Stewart furthermore refers to reports such as the National Planning Commission’s report on governance (Department of the Presidency of South Africa: National Planning Commission *Institutions and Governance Diagnostics Report* (2010) 16-17) and the way in which it addresses issues regarding the poor. Assumptions are made about the capabilities and literacy of the poor, and thus it is accepted that they are not able to act as autonomous entities in this system. The complexity of the legal system is ascribed to the neoliberal setting within which it operates. See Bangstad S, Eriksen T, Comaroff J & Comaroff JJ “‘Anthropologists are Talking’: About Anthropology and Post-Apartheid South Africa” 2012 (77) *Ethnos: Journal of Anthropology* 128.

¹³⁴ Stewart (2014) *Law, Democracy and Development* 6, 7 & 9.

¹³⁵ Soudien C, Reddy V & Woolard I “South Africa 2018: The State of the Discussion on Poverty and Inequality” in Soudien C, Reddy V & Woolard I *Poverty & Inequality: Diagnosis, Prognosis, Responses – State of the Nation* (2019) 3. Poverty is generally understood as “a deprivation of basic capabilities” (Sen A *Development as Freedom* (1999) 20) and as the lack in basic goods and services “necessary for a minimal or socially acceptable standard of living” (Yang L “The Relationship Between Poverty and Inequality: Concepts and Measurement” CSE Papers no 205 Centre for Analysis of Social Exclusion, London School of Economics (2017) 2). Gordon & Sylvester (2004) *Wisconsin International Law Journal* 15 explain that by deconstructing development, they acknowledge the “concrete aspects of poverty”, but also imagine the possibility that non-Western peoples maintained a lifestyle worth recognising before “the West came to their rescue”.

¹³⁶ Stewart (2014) *Law, Democracy and Development* 9.

an inaccurate abstraction will prevent the impoverished person to be recognised as an autonomous individual, capable of holding and exercising rights, depriving these persons of any agency they may have had.¹³⁷ Poverty alleviation measures will furthermore have an exclusionary effect and will not be effective¹³⁸ – much as is the case with development policy that is created based on universalised views and values.¹³⁹

The effect of creating an inaccurate abstraction can be illustrated as follows. The qualification as a legal subject is aligned with the values and views of those formulating policy. If the values and views are not ascribed to by, or representative of the poor, they cannot be recognised as autonomous, legal subjects, thus requiring assistance to be uplifted from this dubious status.¹⁴⁰ Poverty alleviation policy and rhetoric are introduced to address the situation. A paradox unfolds here: Poverty alleviation policy and rhetoric operate on the assumption that only those in power can enable the poor to participate in the legal system, implying that, because of their lack of resources, the poor are incapable of voicing their own needs.¹⁴¹ The poor are thus perpetually marginalised and disabled to voice their views and needs.¹⁴²

A group of impoverished persons that lacks cohesiveness and accordingly does not represent a recognisable identity to constitute a legal subject, such as a poor mining community, will not be able to hold property and contract rights.¹⁴³ As is elaborated on in Chapter 7, the differentiation made by the Mining Charter between traditional communities and poor mining communities, amount to property rights being awarded to the one type of community and not the other. In the development paradigm that has been described thus far, development, therefore, will not take place, and the poor mining community will remain marginalised and regarded as underdeveloped or developing.

Property rights are not the only type of rights associated with development. Human and socio-economic rights form part of development discourse.¹⁴⁴ Closely associated with human rights,

¹³⁷ Stewart (2014) *Law, Democracy and Development* 9. As contemplated by Gordon & Sylvester (2004) *Wisconsin International Law Journal* 15, poverty alleviation in the development paradigm disregarded the possibility of non-Western peoples possessing indigenous knowledge on how to lead a life worth living.

¹³⁸ Stewart (2014) *Law, Democracy and Development* 9. Predetermined identities hinging on poverty and vulnerability create and confirm binary categories that cannot accommodate all impoverished persons.

¹³⁹ See section 2.3 of this chapter.

¹⁴⁰ Stewart (2014) *Law, Democracy and Development* 6 & 7.

¹⁴¹ Stewart (2014) *Law, Democracy and Development* 6 & 7. Stewart uses the National Planning Commission (2010) report as an example. See National Planning Commission (2010) 16 & 17 where emphasis is placed on “(g)iving voice to the poor”.

¹⁴² Stewart (2014) *Law, Democracy and Development* 6 & 7.

¹⁴³ See section 2.5 of Chapter 2 and section 2.3 of Chapter 4.

¹⁴⁴ See section 2 of Chapter 5.

the configuration of development as freedom and capabilities signifies the critique against regarding development only as economic growth.¹⁴⁵ In essence, socio-economic rights, regarded as second-generation rights, differ from property and other first-generation (civic and political) rights, where a negative obligation is placed on government not to interfere with the rights of the individual legal subject.¹⁴⁶ In the instance of second-generation rights, a positive obligation is placed on government to enable access to basic amenities such as housing, infrastructure and health care to ensure human flourishing and self-realisation.¹⁴⁷ In a South African context, the promotion of socio-economic rights is closely related to poverty alleviation.¹⁴⁸

Socio-economic rights discourse, however, suffers the same problems as discourses on first-generation or political rights, such as property rights, as discussed above.¹⁴⁹ Social rights still serve to enable the autonomous individual to further its interests in a market economy.¹⁵⁰ The “social” nature of social or socio-economic rights can be interpreted as a commitment to move beyond a liberal conception of the relationship between subject and state,¹⁵¹ but the premise remains: by creating a suitable environment for individuals, the state enables them to obtain, for their benefit, access to the goods and services underlying the social rights.¹⁵² In this context,

¹⁴⁵ Nussbaum MC *Creating Capabilities* Harvard University Press (2011) ix, x, 1, 46, 47.

¹⁴⁶ For a discussion of the distinction between first, second and third generation rights, see Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2014) chapter 50.2, 3. For a discussion of the differences between political, civic and social rights, see the discussion of Marshall TH “Citizenship and Social Class” in J Manza & Sauder M (eds) *Inequality and Society* (2009/1950) 148 at footnote 70 of Chapter 5 of this thesis. See also Brand D “Introduction to Socio-Economic Rights in the South African Constitution” in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) for a more detailed discussion of socio-economic rights.

¹⁴⁷ Brand (2005) 1; Nussbaum (2011) 23, 79, Sen (2001). The notion of human flourishing and self-realisation were promoted by Western philosophers such as Aristotle and John Stuart Mill and Eastern philosophers such as Rabindranath Tagore.

¹⁴⁸ Brand (2005) 1 emphasises the transformative nature of the Constitution by referring to Klare’s notion of “transformative constitutionalism” – the idea that the Constitution can be interpreted in such a manner as to obtain social change in the post-apartheid context, which translates into, among other things, poverty alleviation. See Klare K “Legal Culture and Transformative Constitutionalism” 1998 (14) *South African Journal on Human Rights* 151-156 and Klare K & Davis DM “Transformative Constitutionalism and the Common and Customary Law” 2010 (26) *South African Journal on Human Rights*. See also Brand et al (2013) *Law, Democracy and Development* for a more sceptical approach to the ability of the law, and thus the Constitution through socio-economic rights, to address poverty.

¹⁴⁹ See section 2.2 above.

¹⁵⁰ Kistner et al (2019) 102 referring to Menke C *Kritik der Rechte* (2015) and Heyns C and Brand D “Introduction to Socio-Economic Rights in the South African Constitution” 1998 (2(2)) *Law, Democracy and Development* 159.

¹⁵¹ Klare (1998) *South African Journal on Human Rights* 153. Klare emphasises the affirmative nature of the state’s duty to give effect to socio-economic rights, as opposed to the negative nature of the state’s duty in realising liberal first generation rights. See a discussion of the basic tenets of liberalism above in this section 3.2.

¹⁵² Kistner et al (2019) 102 referring Heyns & Brand (1998) *Law, Democracy and Development* 159, 107.

first-generation rights, such as property rights, will take precedence over social rights.¹⁵³ In mining areas, where property rights are allocated to one type of community and development or social rights to another type of community, inequality will thus persist, as is argued in Chapter 7.

Furthermore, to enforce socio-economic rights, subjectification will still take place, and subjectification will once again be based on underlying values.¹⁵⁴ Human rights discourse centres on the idea that a list of human rights and traditions can be abstracted as ahistorical, to be advanced as universal, fundamental and transcendental human rights.¹⁵⁵ The fundamental, neutral and transcendental nature of the rights or values can be critiqued. The inclusion of the word “rights” in the word “human rights” confirms the concept’s association with a Western notion of the law, legal system and morality.¹⁵⁶ As such, human rights form part of the Western imagination.¹⁵⁷ That is not to deny the potentially radical and subversive nature of human rights to bring about true transformation for those that are marginalised.¹⁵⁸ However, by *allowing* the poor access to the formal legal system through human or socio-economic rights, human rights confirm the status of the poor on the margins of the legal order.¹⁵⁹

Whereas human rights can be regarded as a testament to the moral commitments of a society,¹⁶⁰ it may also represent the enforcement of the ideology of the wealthy, or the West, onto the poor,¹⁶¹ constituting cultural imperialism.¹⁶² Development capabilities and freedoms also

¹⁵³ Kistner et al (2019) consider the decisions in *Dladla v City of Johannesburg* 2018 2 SA 327 (CC) and *City of Johannesburg v Blue Moonlights Properties* 2012 2 SA 104 (CC). Both cases concerned the eviction of poor persons from private property by the owners of the property and the duty of local government to provide temporary accommodation to those evicted. A complete discussion of the facts falls outside the scope of this thesis. Kistner et al (2019) 107 observe that first generation rights, such as the right to property, will always take precedence over second generation, social rights. The scope of the duty of the state to provide for the poor, and thereby realising social or socio-economic rights, will be determined by the norms of society, which in a capitalist environment, imply that each person is responsible for its own wellbeing.

¹⁵⁴ Stewart (2014) *Law, Democracy and Development* 13 referring to Deleuze (1995) 176, 150.

¹⁵⁵ Stewart (2014) *Law, Democracy and Development* 3 referring to Deleuze G *On Human Rights* (1996) extract from *L'Abecedaire de Gilles Deleuze, avec Claire Parnet, Video Ed. Montparnasse* available at <<http://www.generation-online.org/p/fpdeleuze10.htm>> accessed on 31 December 2019.

¹⁵⁶ Douzinas (2007) 9.

¹⁵⁷ Douzinas (2007) 9, 10.

¹⁵⁸ Douzinas (2007) 10.

¹⁵⁹ Douzinas (2007) 10.

¹⁶⁰ Davis & Trebilcock (2008) *The American Journal of Comparative Law* 15 referring to Hathaway O “Do Human Rights Treaties Make a Difference?” 2002 (111) *Yale Law Journal* 1936.

¹⁶¹ Stewart (2014) *Law, Democracy and Development* 19 referring to Douzinas (2007) 33 and Butler J *Frames of War* (2009) x. Davis and Trebilcock (2008) *The American Journal of Comparative Law* 15 refer to Farber DA “Rights as Signals” (2002) 31 *Legal Studies* 83 who argues that constitutional and human rights reforms can also be viewed as the political elite of a developing country committing to the rule of law and economic liberalisation to attract foreign investment.

¹⁶² Nussbaum MC *Creating Capabilities* (2011) 101; Juul S “The Discussion of the Good versus the Just” in S Juul *Solidarity in Individualized Societies - Recognition, Justice and Good Judgment* (2013) 63.

reflect cultural imperialism.¹⁶³ The international or universal endorsement of fundamental rights, capabilities or freedoms implies that these values are to be elevated above history.¹⁶⁴ The propounded capabilities or development values disregard local contexts and thus exhibit imperialist tendencies implying.¹⁶⁵

By accepting and using Western rights discourse, the poor are taking on the ways of the West, which may have caused the impoverishment in the first place.¹⁶⁶ The reliance on human rights as a universal set of moral principles is furthermore complicated by the paradoxical nature of human rights.¹⁶⁷ Various discourses attempt to give meaning to human rights and to dictate their nature, leaving no substantial core.¹⁶⁸ Accordingly, the concept “human rights” merely presents the different perspectives on it, lacking inherent substance.¹⁶⁹ The concept requires constant redefinition because it attempts to encapsulate dynamic aspects such as humanity and issues of morality.¹⁷⁰ Human rights by implication constitute a “non-essence”.¹⁷¹ Irrespective of its lack of substance or essence, actors in the legal system are subjectified based on the supposed universal views and values that human rights present.¹⁷²

The effect of the universalisation of views in the development paradigm is expanded on in section 2 above. The purpose of this section is to show how the beneficiary of development

¹⁶³ See discussion of development as freedom and the central capabilities at section 2.1.2.2 of Chapter 5.

¹⁶⁴ Nussbaum (2011) 101-103 Juul (2013) 63.

¹⁶⁵ Juul (2013) 63 referring to MacIntyre *A Whose Justice? Which Rationality?* (1988). For Nussbaum (2011) 102 & 103 the Western origins of human rights do not nullify them since many cultures and religions have historically borrowed from each other. She further argues that the fundamental values proffered by Western society also exist in Asian traditions, some even long before European Enlightenment took place.

¹⁶⁶ Stewart (2014) *Law, Democracy and Development* 19 referring to Douzinas (2007) 33 and Butler (2009) at x. Esteva (2013) 31 argues that the discrepancies between the livelihoods of Westerners and non-Westerners, and resultant inequality, are the result of the introduction of Western consumer patterns in other areas of the world.

¹⁶⁷ See in general Douzinas *C The End of Human Rights* (2000); Douzinas (2007); Schroeder J “Left Against Rights: A Review of Douzinas’ ‘Human Rights and Empire’” (2008) available at *Social Science Research Network* <<http://ssrn.com/abstract=1104773>> accessed on 31 December 2019. For critique on Douzinas, see Morss J “Saving Human Rights from its Friends: A Critique of the Imaginary Justice of Costaz Douzinas” 2003 (27) *Melbourne University Law Review*; Motha S & Zartadoulides T “Law, Ethics and the Utopian End of Human Rights” 2003 (12) *Social Legal Studies*.

¹⁶⁸ Douzinas (2007) 8, 9. Douzinas refers to different constitutional, legal, judicial, academic, political and cultural discourses on human rights, all having originated in different schools of thought and all propounding different notions of human rights and the subject to which human rights belong.

¹⁶⁹ Douzinas (2007) 8-14. The acknowledgment of the right to development as a human right attests to the lack of substance presented by human rights. For the right to development to have any effect for developing countries, the developed world had to give effect thereto, but these countries denied the existence of such a right, begging the question whether acknowledging development as a human right has any significance. See Stevens C & Ntlama N “An Overview of South Africa’s Institutional Framework in Promoting Women’s Right to Development” 2016 (20) *Law, Democracy and Development*.

¹⁷⁰ Schroeder (2008) 7; Douzinas (2007) 9. Morality is viewed not as a universal constant, but rather from a relativist perspective, thus not capable of giving absolute essence.

¹⁷¹ Schroeder (2008) 7; Douzinas (2007) 9.

¹⁷² Stewart (2014) *Law, Democracy and Development* 20.

initiatives, “the poor”, is created in the development paradigm based on certain ingrained, universalised ideas. By creating legal subjects and allocating rights, human and otherwise, to these subjects, the existent power and economic relations in society are maintained, and in effect, the distribution of resources.¹⁷³ The status of the poor as “developing” relative to the “developed” will remain firmly in place.

The reliance on a set of universalised values, be it human rights, development freedoms or capabilities, normalises exclusion because the values promote a very confined idea of the bearer of the rights or capabilities.¹⁷⁴ “The poor” are viewed only in terms of “their corporeal needs for shelter, clothing, food, medical treatment, ablution facilities, clean running water...”.¹⁷⁵ This status prevents the poor from taking part in the formal economy or the formulation of development objectives.¹⁷⁶ Effectively, the poor are not regarded as autonomous legal subjects in a neoliberal development paradigm. Rather, the inferior “Other” is created that requires the assistance of the developed world to achieve the same levels of development of the West.¹⁷⁷

3.3. The Effect on “Developing” Peoples

Development beneficiaries or “the poor” - and by implication development problems - are defined from within the development paradigm based on the values propounded by the idea of

¹⁷³ Brand & Van Marle (2013) *South African Journal on Human Rights* 465; Douzinas (2007) 9, 10; Stewart (2014) *Law Democracy and Development* 9.

¹⁷⁴ Stewart (2014) *Law Democracy and Development* 3, 20 referring to Deleuze (1996).

¹⁷⁵ Modiri J “Law’s Poverty” 2015 (18) *Potchefstroom Electronic Law Journal* 241.

¹⁷⁶ Brand et al (2013) *Law, Democracy and Development* 273.

¹⁷⁷ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 79 & 80. Gordon & Sylvester note that the inferior status of the Other originated in colonial discourse that regarded races and peoples not associated with the coloniser as inferior, therefore requiring the intervention of the coloniser. “Othering” or referring to “the Other”, refers to the depiction of other human beings in terms of how others differ from the Self. A deconstructionist perspective, propounded by Jacques Derrida, determines that this depiction will always take place from the viewpoint of the Self, thereby privileging the Self and providing an inaccurate and unjust depiction of the Other. Derrida (“Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas” in J Derrida *Writing and Difference* (1980) 123-124; *The Gift of Death* (1995) 78; *Politics of Friendship* (1997) 256 & Derrida and Ferraris M *A Taste for the Secret* (2001) 73) comments on the relation with “the Other” in conversation with Emmanuel Levinas (*Collected Philosophical Papers* (1987); *Totality and Infinity: An Essay on Exteriority* (1969)) and Edmund Husserl (*Cartesian Meditations: An Introduction to Phenomenology* (1960)), both associated with phenomenology. See Morin ME “The Self, the Other and the Many: Derrida on Testimony” 2007 (40:2) *Mosaic: An Interdisciplinary Critical Journal* 165-173. Gordon and Sylvester uses the notion of the Other in the context of the relationship between the Western world and the third, developing world and thus the relationship between the coloniser and colonised. The Self is equated to the Western world or the coloniser, and the Other to the third world or colonised. Accordingly, the developing world is always perceived from the Western world’s perspective. Gordon and Sylvester refer to Tucker V “The Myth of Development: A Critique of a Eurocentric Discourse” in R Munck & D O’Hearn (eds) *Critical Development Theory: Contributions to a New Paradigm* 13 (1999); Gordon R “Saving Failed States: Sometimes a Neocolonialist Notion” 1997 (91) *Proceedings of the Annual Meeting (American Society of International Law)* 420-422 & Davidson B *The Black Man’s Burden: Africa and the Curse of the Nation-State* (1993).

development. While acknowledging the deprivation of basic necessities suffered by people regarded as developing, and South African mining communities, specifically,¹⁷⁸ “the poor” is in effect created by the development paradigm. The development problem and beneficiary are described in development policies from the perspective of those accepting the value system underlying the development paradigm. The developed entity, therefore, controls how the developing entity is framed and perceived.

The global development paradigm, the relationship between developed and developing nations and the perception of the poor in this global context is considered in this thesis from a theoretical point of view with a specific purpose: The argument is made that legislation and policy providing for the empowerment and development of South African mining communities originated, operate and should, therefore, be interpreted in this theoretical context. Furthermore, the purpose is to show the significance of distinguishing between an autonomous, independent, recognisable singular entity, capable of holding rights on the one hand, and poor and vulnerable groups of people on the other hand, as is done in the context of the empowerment and development of mining communities in South Africa.

The definition or abstraction of entities regarded as poor is significant when the formulation of legislative intervention aimed at mining communities is contemplated. As has been reiterated throughout this thesis, it is maintained that the legislative system¹⁷⁹ acknowledges and attempts to present two types of mining communities in the context of development and empowerment, by relating each of these communities to a specific problem or injustice. The community that is preserved by the law is related to the injustice of the misrecognition of its inherent essence or identity, while the community that the law aspires to transform or develop is related to poverty and thus the injustice of the maldistribution of resources.¹⁸⁰

Accordingly, the former community is recognised by the law, as a legal subject capable of holding rights, whereas the latter community is recognised only to the extent that it lacks the attributes of a legal subject. Due to the way the law in a neoliberal development paradigm subjectifies impoverished people, a poor mining community would not be regarded as an autonomous legal subject. An entity recognised for its inherent identity, however, may be cast in a different light because it more closely resembles an autonomous, individual legal

¹⁷⁸ See section 2 of Chapter 2.

¹⁷⁹ See footnote 64 above for a description of the relevant legislation.

¹⁸⁰ See section 3 of Chapter 5.

subject.¹⁸¹ This type of differentiation in the legislative system constitutes the second effect of the politics of development for legislative formulation in the context of the empowerment and development of mining communities in South Africa.

4. Conclusion

In this chapter, development is problematised for representing a specific worldview and accordingly, specific values.¹⁸² The worldview largely represents Western values by entrenching principles such as modernisation, neoliberalism and capitalism, legal formalisation and the protection of rights.¹⁸³ All these principles are abstractions from the experiences and characteristics of Western societies, but the development paradigm presents these principles as universal truths.¹⁸⁴ Development, as configured in the development paradigm considered here, therefore, is not necessarily the natural route to be followed by all of humankind.¹⁸⁵

Due to colonisation, the historic relationship between the developed and developing world was one of severe inequality, which is still visible today.¹⁸⁶ This inequality translates into poor socio-economic conditions, and also unequal global power relations.¹⁸⁷ The historic and current powerful position of the West enables it to impose its development values upon the non-Western world.¹⁸⁸ Thus, instead of acknowledging and addressing past injustices, development promotes the notion that any society will follow a similar, linear path to modernity.¹⁸⁹

The result is that “development” is set as a standard against which the developing world is measured. In other words, the developing countries are viewed according to its level of development.¹⁹⁰ It is problematic if the beneficiary of development is viewed from this

¹⁸¹ The operation of the Communal Property Association Act 28 of 1996 (“CPAA”), discussed in section 2.2 of Chapter 4, is an example of how a disadvantaged community must first transform into a recognisable entity or legal subject before it can hold property. A disadvantaged community must register in terms of the CPAA to be able to hold property and must comply with further requirements such as the drafting of a constitution (s 6), which constitution must further the principles set out in the CPAA (s 9).

¹⁸² See section 2 of this chapter.

¹⁸³ See section 2 of this chapter.

¹⁸⁴ See section 2.3 of this chapter.

¹⁸⁵ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 73.

¹⁸⁶ See footnote 107 above.

¹⁸⁷ Inequality and poverty are related conceptually, but are not synonymous: Inequality depicts the “uneven distribution of resources and opportunities among individuals, among groups in a population or among countries, occurring at a given point in time or over time” (Yang (2017) 4). Poverty can however be created as a result of the uneven distribution of resources. Post-apartheid South Africa serves as an example in this regard. Soudien, Reddy & Woolard (2019) 3.

¹⁸⁸ See in general Cammack (2002) and Trubek D “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future” in Santos A & D Trubek (eds) *The New Law and Economic Development: A Critical Appraisal* (2006).

¹⁸⁹ See section 2 of this chapter.

¹⁹⁰ Gordon and Sylvester (2004) *Wisconsin International Law Journal* 3.

perspective because the beneficiary is not necessarily represented accurately, which causes ineffective policies.¹⁹¹ In effect, an abstraction of “the poor” or “the developing peoples” is created in the development paradigm on which development and poverty alleviation policies are based.

The politics of development are constituted by the underlying values and assumptions accompanying the idea of development and the fact that these values and assumptions are enforced upon the developing world. It specifically translates into a singular view on the role the law and rights play in the development process and the inaccurate depiction of the development beneficiary. Chapter 7 shows the effects of the politics of development, traced in the legislative system, for mining communities in South Africa.

¹⁹¹ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 81, 83-85. See footnote 102 above for a discussion of the example Gordon and Sylvester uses in this regard.

CHAPTER 7: The Consequences of the Politics of Development for Mining Communities

1. Introduction

This thesis shows that the notion of Black Economic Empowerment (“BEE”) or Broad-Based Black Economic Empowerment (“B-BBEE”) is located in the development paradigm.¹ BEE addresses the problem of “disempowerment”, that is poverty, inequality and underdevelopment caused by past racial discrimination in South Africa.² Empowerment, as a strategy, pursues investment, economic growth and efficiency and transfers ownership in businesses to black people. Since the Mining Charter promotes empowerment in the mining industry, it takes on the mentioned aspirations of empowerment.³

The global development paradigm has been problematised in this thesis by exposing the politics of development, which consist of the ideologies and values inadvertently promoted by the development project.⁴ By universalising certain views and effectively creating the poor, the development paradigm shows scant regard for dissenting views and values.⁵ Development beneficiaries, such as mining communities in South Africa, are branded as poor, and, subsequently, as deviating from the requirements to be regarded as legal subjects and rights bearers, based on the universalised values.⁶

In this chapter, the discussion returns to the more practical implications and applications of the politics of development for the empowerment and development of mining communities in South Africa. The focus is once again on how the development beneficiary (the mining community) and the development problem are framed in the South African legislative system.⁷

¹ See section 2.2 of Chapter 5. Also see section 2.2.2 of Chapter 3 for an explanation of the difference between BEE and B-BBEE.

² Black Economic Empowerment Commission *Black Economic Empowerment Commission Report* (2001) 3 & 9. See section 2.2.2 of Chapter 3.

³ See section 3 of Chapter 3.

⁴ See Chapter 5 for a discussion of the global development paradigm and Chapter 6 for a discussion of the politics of development.

⁵ In Chapter 6, it is shown how the development paradigm promotes a single view of the law and legal formalisation, embraces the notion of property rights and rights in general without much critical reflection and creates a group of poor persons that cannot meet the requirements necessary to be regarded as a legal subject. Underdevelopment, or the disparities between “developed” and “developing” thus remain in place.

⁶ See sections 2.3 and 3.3 of Chapter 6.

⁷ The law under consideration includes the Constitution of the Republic of South Africa, 1996 (“the Constitution”); Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”), the broad-based socio-economic empowerment charter issued in terms of s 100(2) of the MPRDA (“Mining Charter”), the Social and Labour Plan (“SLP”) to be created in terms of ss 22 and 23 of the MPRDA and the regulations 40-46 of the Regulations in terms of section 107(1) of the MPRDA (GNR 527 GG 26275 of 23 April 2004) and

The argument forwarded in this chapter is that the differentiation between “community” or “host community” and “mine community” by the legislative system serves as evidence of the politics of development and that this distinction may perpetuate inequality in mining areas, instead of addressing inequality and poverty.⁸

In section 2, it is shown that the legislative system frames the beneficiaries of development in mining areas, following the abstraction created of the poor in the global development paradigm.⁹ As a result of the framing, the two types of communities are set up against each other in an unequal relationship that may contribute to conflict in mining areas. The hierarchy created is regarded as an effect of the politics of development for legislative formulation in the context of the empowerment and development of mining communities in South Africa.

Section 3 illustrates how the notion of “community”, as the entity with an inherent identity that must be preserved through recognition by the law conflicts with the idea of development. This paradox is exposed as yet another effect of the politics of development for legislative formulation in the context of the empowerment and development of mining communities in South Africa.

2. Misrecognition versus Maldistribution

To illustrate how the differential treatment of host communities and mine communities reflects the effects of the politics of development in legislative formulation, it must be considered what shareholding in a neoliberal development paradigm¹⁰ signifies in comparison to benefitting from open-ended development projects.

the Integrated Development Plan (“IDP”) to be created in terms of the Local Government: Municipal Systems Act 32 of 2000. The following legislation is also considered to the extent that it provides for “community” that will also qualify as mining communities: The Restitution of Land Rights Act 22 of 1994, the Traditional Leadership and Governance Framework Act 41 of 2003 and the Interim Protection of Informal Land Rights Act 31 of 1996 and the Communal Property Association Act 28 of 1996 (“CPAA”).

⁸ The MPRDA and the Mining Charter treat traditional communities (defined as “community” or “host community”) and mining communities (defined as “mine community”) differently. The empowerment of communities or host communities takes place by allocating to these communities, equity ownership in the form of shareholding in the relevant mining company. Mine communities are empowered by means of the mine community development projects to be implemented by the mining company in terms of the Mining Charter and the SLP, and other development initiatives provided for in the IDP.

⁹ See section 3 of Chapter 6.

¹⁰ As explained in section 2.1.2.3 of Chapter 5, there is no consensus as to whether the development paradigm still operates based on neoliberal values. Traces of neoliberal objectives are still visible, however. Furthermore, since the South African policies on B-BBEE was heavily influenced by neoliberal development initiatives, as explained in section 2 of Chapter 3, it is assumed for the purposes of the argument in this thesis that the development idea still represents neoliberal values to a large extent. Chapter 6 is also based on this assumption.

The allocation of property rights presumes the existence of a legal subject. Accordingly, it is considered to which extent “host community” and “mine community” as depicted in the legislative system, in general, and in the Mining Charter, specifically, constitute legal subjects.

2.1. The Significance of Shareholding

The B-BBEE framework links shareholding in a company with the ownership of a company.¹¹ To claim that a shareholder is an owner of a company may be disputed, especially by scholars that emphasise the similarities between a shareholder of a company and a creditor of a company.¹² “Shares”, however, have been acknowledged as “property” in South African law and provides the shareholder with certain entitlements.¹³ Shareholding in a company affords a shareholder interest in the assets of the company.¹⁴ A shareholder is entitled to attend the general meetings of the company to vote on resolutions taken by the company.¹⁵ A company must distribute its profits amongst shareholders in the form of dividends.¹⁶ Upon the dissolution

¹¹ The B-BBEE scorecard and the Mining Charter require of a business wishing to comply with B-BBEE to promote various elements as “broad-based black economic empowerment”. The element measuring the amount of shareholding held by black individuals or businesses in the B-BBEE compliant business is “ownership”. See sections 2.2.2 and 3.2 of Chapter 3.

¹² See Ireland P “Company Law and the Myth of Shareholder Ownership” 1999 (62:1) *The Modern Law Review Limited* 32-57, 36. Ireland traces the origins of shareholding in business partnerships and usury practices under Roman law where persons put their capital at risk for the benefit of a business. He emphasises that over time, a distinction was made between “lenders” of capital, outside of the business, who earned interest as reward for putting their capital at risk, and “partners”, inside the business, receiving profits in return for capital provided to the business. He traces the evolution of the partnership into the joint stock company which eventually became the company structure under English Law, transferred into the South African legal system. See Girvin SD “The Antecedents of South African Company Law” 1992 (13) *Journal of Legal History* 63-77.

¹³ *Ben Tovim v Ben-Tovim* 2001 3 SA 1074 (C). The Companies Act 71 of 2008 in s 1 defines a share as “one of the units into which the proprietary interest in a profit company is divided” also signifying the link with property and ownership. Section 35 of the Companies Act stipulates that a share is movable property.

¹⁴ See *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 1 SA 276 (A) at 288 ; *Liquidators Union Share Agency v Hatton* 1927 AD 240 at 250–251; *De Leef Family Trust v CIR* 1993 3 SA 345 (A) at 356–357; *Borland’s Trustee v Steel Brothers & Co Ltd* 1901 1 Ch 279 at 288; *Wessels v DA Wessels en Seuns (Edms) Bpk* 1987 3 SA 530 (T) at 541; *Cooper v Boyes NO* 1994 4 SA 521 (C) at 533–535; *Smuts v Booyens*; *Markplaas (Edms) Bpk v Booyens* 2001 3 All SA 536 (SCA) at 540; *Tigon Ltd v Bestyet Investments (Pty) Ltd* 2001 4 SA 634 (N) at 642; *Brink v Mampudi Mining (Pty) Ltd* 2003 5 SA 221 (T) at 225; *Flexi Holiday Club v La Lucia Sands Shareblock Ltd* 2006 2 All SA 479 (D) at 482. See also notes on s 35 of the Companies Act in Delpont P (ed) *Henocheberg on the Companies Act 71 of 2008* (2011).

¹⁵ A company acts through the resolutions taken by its shareholders at shareholders meetings held in terms of ss 60-65 of the Companies Act, read with the company’s Memorandum of Incorporation (“MOI”), the document regulating the rights, duties and responsibilities of shareholders and directors – s 15. The Companies Act and the MOI determine which company matters are under the control of the directors and which matters can only be approved by shareholders. Despite the broad range of powers afforded to directors, it is still accepted that the shareholders can exercise ultimate control over the company at a shareholders meeting since shareholders can appoint directors (s 68) and change the company’s MOI (s 16) – Notes on s 60 of the Companies Act in *Henocheberg* (2011).

¹⁶ The board of directors of a company will take the decision to make a distribution of profits to shareholders, subject thereto that the requirements of the Companies Act in s 46 and the MOI are met. Notes on s 46 of the Companies Act in *Henocheberg* (2011).

of the company, a shareholder also has certain rights regarding the residual assets of the company.¹⁷

Shareholding in a company and the relationship between the shareholder and the company is well regulated with relative clarity in terms of legislation.¹⁸ Thus, when the legislative system determines that shares should be allocated to host communities, there is relative certainty what such an allocation would entail.

Black ownership of South African businesses, and by implication black shareholding in companies, was regarded as the only means of black economic empowerment when black economic empowerment was first implemented.¹⁹ Despite the subsequent focus on *broad-based* empowerment initiatives, ownership is still an important, if not the most important, aspect of B-BBEE.²⁰ Most of the controversy that surrounded the finalisation of the 2018 Mining Charter was caused by changes to the ownership element.²¹ The protection of ownership and property rights is also of significant importance in the development paradigm.²² It thus follows that holding ownership and property rights in the development paradigm will constitute development.²³ The allocation of shares to host communities in terms of the Mining Charter can be equated to the allocation of rights in the neoliberal development paradigm, which paradigm places a great premium on the attainment of such rights.

The allocation of rights to an entity implies that such an entity is recognised as a legal subject, since rights, and in this instance shares, can only be held by and clearly identifiable entity, capable of exercising the entitlements associated with such a right or share.²⁴ Seemingly, the Mining Charter allocates such characteristics to a “host community”.

¹⁷ See *Letseng Diamonds Ltd v JCI Ltd; Trinity Management (Pty) Ltd v Investec Bank Ltd* 2007 (5) SA 564 (W) at 17. See also notes on s 35 of the Companies Act in *Henochsberg* (2011).

¹⁸ In South Africa, the Companies Act together with the MOI (see footnote 15 above) of the company regulate the relationship between the company and its shareholders. Various aspects of this relationship are provided for such as the acquisition of shares, transferability of shares and the rights of shareholders.

¹⁹ See section 2.2.2 of Chapter 3.

²⁰ See in general Horne R “Patterns of Ownership and Labour Unrest within the South African Mining Sector” 2015 (40) *Journal of Contemporary History* 25-47.

²¹ See footnote 83 at section 5 of Chapter 1.

²² See section 2.1.2.2 of Chapter 5 and section 2.2. of Chapter 6.

²³ See sections 2.2 and 2.3 of Chapter 6.

²⁴ The term “legal subject” is used here as an entity: with the ability to bear rights and duties and perform juristic acts such as entering into contracts; that has *locus standi* and can be held accountable for its actions. Cronje DSP “Persons” in M Kühne, JA Faris & LTC Harms (eds) *The Law of South Africa* (2009) volume 20(1) para 438.

2.2. The “Host Community” as Legal Subject and Right Bearer

A person or group of persons must hold certain attributes to be able to act as an economic actor and to access resources (and to avoid or cure poverty or underdevelopment) in a neoliberal system.²⁵ For one, the person or group of persons must be able to hold and enforce rights and to contract with other economic actors. An entity will only be afforded such an ability if it is acknowledged as a legal subject and to be acknowledged as such, an entity must be clearly described in the relevant legal instruments.²⁶

It is argued in this thesis that a “host community”, including a traditional community, as formulated in terms of the MPRDA and the Mining Charter possesses an inherent, pre-existing essence or identity.²⁷ This essence or identity is created by shared custom or religion, familial ties and interest in land.²⁸ Colonial and apartheid regimes in South Africa disregarded the identity of traditional communities by either breaking down the communal structures or abusing the structures to pursue the interests of these regimes.²⁹ These types of injustices were not unique to colonial rule in South Africa; indigenous communities worldwide suffered misrecognition under colonial rule.³⁰ In response to such misrecognition, international law and domestic law now recognise indigenous and traditional communities by allowing for their self-realisation and acknowledging their leadership structures and customs, thereby preserving their identities or essence.³¹

²⁵ See section 3.2 of Chapter 6.

²⁶ See section 3.2 of Chapter 6. Also see in general Stewart L “Rights Discourse and Practices, Everyday Violence and Social Protests: Who counts as Subject and whose Lives are Real in the Neo-Colonial South African Nation State? 2014 (18) *Law, Democracy and Development* 1-21. Stewart is critical of the complex legal organisations and rights discourse that accompanies neoliberal capitalism and argues that these phenomena marginalise the poor, causing increased social protests in South Africa. See also Heyns (2019) *Law and Development Review* section 4.2.

²⁷ See sections 2.3 and 3.3 of Chapter 4.

²⁸ The MPRDA defines “community” as

“a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community”.

The 2018 Mining Charter defines “host community” as:

“a community within a local or metropolitan municipality adjacent to the mining area, as defined in the MPRDA”.

²⁹ See section 3 of Chapter 2.

³⁰ See in general Battiste M “Introduction: Unfolding the Lessons of Colonization” in M Battiste (ed) *Reclaiming Indigenous Voice and Vision* (2000) xvi.

³¹ See sections 2.2 and 2.3 of Chapter 4.

Even though the Mining Charter does not state this explicitly, it clearly reinforces the narrative that traditional communities suffered misrecognition under previous regimes.³² Understood in terms of its essence or identity, the traditional or host community can be regarded as a legal subject in the neoliberal development paradigm. Neoliberalism centres on the idea of an autonomous individual because of its association with liberalism.³³ It thus presupposes an individualist formulation of the legal subject.³⁴ Whereas individualism may not be upheld within a community,³⁵ the MPRDA and the Mining Charter approach the community/host community as a singular entity by recognising it for its identifiable identity and essence, and by affording it rights in the form of shares in the mining company.³⁶

The Mining Charter's formulation of the provisions empowering host communities through shareholding in mining companies, however, does not entitle host communities to take up shareholding in its capacity as an autonomous entity. Shareholding must be held in trust for the benefit of the host community.³⁷ The Mining Charter provides for the representation of the host community on the board of the trustees,³⁸ which board must also be representative of the relevant traditional authority.³⁹ Very little guidance, however, is provided in the Mining Charter regarding how the trust should be set up and administered. This omission is curious, since B-BBEE shareholding trusts, in the mining industry specifically but in other industries as well, have been criticised for not ensuring that the benefits of shareholding reach the

³² See section 3.2 of Chapter 3 and sections 2.2, 2.3 and 3.3 of Chapter 4.

³³ See section 2.1.2.3 of Chapter 5.

³⁴ See section 2.1.2.3 of Chapter 5 and section 3.2 of Chapter 6.

³⁵ The community of essence or authentic community is not made up of autonomous individuals that each present its own, separate identity. See section 3.1 of Chapter 5 in this regard.

³⁶ It is acknowledged that the mere inclusion of the provision in the Mining Charter that provides host communities with the opportunity to obtain shares in the mining company, does not in itself have the effect of issuing and allocating shares to the host community. The requirements and processes of the Companies Act and the mining company's MOI must be met and followed before the host community will in fact become a shareholder. The point made here is that, when compared with the formulation of a mine community, the way the Mining Charter approaches the host community enables it to act as a legal subject in a neoliberal system.

³⁷ 2018 Mining Charter para 2.1.4.1. This requirement can be compared to the operation of the Communal Property Association Act 28 of 1996 ("CPAA"), discussed in section 2.2 of Chapter 4. A disadvantaged community must register in terms of the CPAA to be able to hold property and must comply with further requirements such as the drafting of a constitution (s 6), which constitution must further the principles set out in the CPAA (s 9). Accordingly, A disadvantaged community must first transform into a recognisable entity or legal subject before it can hold property.

³⁸ The 2018 Mining Charter does not make any reference to the board of trustees or how the board should be comprised.

³⁹ 2018 Mining Charter para 2.1.4.1.3.

intended beneficiaries.⁴⁰ A trust, however, is recognised by law as a structure suitable to hold shares and to exercise the entitlements associated with shareholding.⁴¹

The Mining Charter indicates how the host community is to benefit from shareholding: The returns received by the trust relating to the shareholding should be used to promote the development of the host community.⁴² A host community development programme must be created in this regard.⁴³ The initiatives funded in terms of the programme do not replace the programmes provided for in terms of the SLP and mine community development.⁴⁴ Seemingly, shareholding in a mining company is reduced to open-ended and vaguely formulated development initiatives, much as is the case with the empowerment of mine communities.

That being said, in theory, the trust can represent the interests of the host community as a shareholder at general meetings of the mining company.⁴⁵ To that extent, empowerment - and even development - will afford the host community with powers that the mine community does not obtain, as is discussed below. In the context of a neoliberal development paradigm, such a distinction is significant. It shows the impact of the politics of development present in legal formulation.

⁴⁰ Previous drafts of the Mining Charter have reflected the DMR's view that nebulously defined trusts result in the restricted flow of benefits to intended beneficiaries – see the preambles of the draft 2016 Mining Charter, draft 2017 Mining Charter and the draft 2018 Mining Charter. The final 2018 Mining Charter, in its preamble, ascribes the problems to the “inefficient administration” of the trusts. Regarding problems associated with B-BBEE ownership trusts in general, see Steyn P “Implications of B-BBEE Commission investigations of ownership trusts?” *bbrief* 14 September 2017 available at <<https://www.bbrief.co.za/2017/09/14/implications-of-B-BBEE-commission-investigations-of-ownership-trusts/>> accessed on 11 February 2020; Stoddard E “Trusts under BEE scrutiny in yet another dramatic policy shift” *Business Maverick* 1 May 2019 available at <<https://www.dailymaverick.co.za/article/2019-05-01-trusts-under-bee-scrutiny-in-yet-another-dramatic-policy-shift/>> accessed on 11 February 2020 and Steyn P “B-BBEE Commissioner says broad-based trust not compliant” *Business Day* 28 May 2019 available at <<https://www.businesslive.co.za/bd/opinion/2019-05-28-b-bbee-commissioner-says-broad-based-trusts-not-compliant/>> accessed on 11 February 2020.

⁴¹ A trust is not regarded as having a separate legal personality. It is regarded as “an accumulation of assets and liabilities” which “vests in the trustees” – *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 at 10. Also see *Lupacchini NO & Another v Minister of Safety and Security* 2010 6 SA 457 (SCA) at 1 where Nugent JA stipulates that a trustee “holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose”. The Trust Property Control Act 57 of 1988 and the relevant trust deed determine the trustees' powers regarding the assets of the trust, including how the trustees should deal with shares held in companies. The Companies Act, s 1, however, regards trusts as juristic persons for the purposes of the Companies Act.

⁴² 2018 Mining Charter paras 2.1.4.1 & 2.1.4.2.

⁴³ 2018 Mining Charter para 2.1.4.2.

⁴⁴ 2018 Mining Charter para 2.1.4.2.

⁴⁵ See section 2.1 above for a description of the entitlements of a shareholder.

2.3. The Development of Mine Communities

Part of the argument forwarded in this thesis is that empowerment, viewed in theory, operates in the broader global development paradigm. The concept “development” is laden with meaning; it presupposes that “poverty” signifies a deviation from universally accepted living standards, which standards reflect the values of a specific group of people.⁴⁶ Empowerment initiatives are exposed to the same assumptions and worldviews underlying development. Empowerment and local economic development initiatives claim to promote “bottom-up” approaches that provide the local community with the opportunity to “own” and direct development initiatives.⁴⁷ However, the formulation of empowerment initiatives aimed at poor mining communities still presents the poor in terms of their helplessness and incapacity to act as legal subjects in a neoliberal system, especially when compared to the formulation of empowerment initiatives aimed at a host community.

The legislative system, specifically the MPRDA and the Mining Charter, provides for the development of mining communities in very broad and open-ended terms. The different iterations of the Mining Charter proposed over the last couple of years, each envisaged “mine community development” in a different way.⁴⁸ The 2017 draft Mining Charter stipulated that infrastructure projects, income-generating projects and enterprise development should be pursued as part of mine community development. None of the other iterations, the final 2018 Mining Charter included, provide specifics as to what “mine community development” should entail. The different iterations have attempted to give substance to “mine community development” by providing for the alignment of initiatives promoted as “mine community development” and initiatives promoted in terms of the social and labour plan (“SLP”) and the integrated development plan (“IDP”).⁴⁹ The final 2018 Mining Charter effectively collapses “mine community development” into the commitments of a mining company in terms of its SLP. No reference is made to alignment with the relevant IDP, but it must be noted that the

⁴⁶ See section 2.1 of Chapter 5 where the link between development and Western worldviews is explained and section 3.2 of Chapter 5 and section 3 of Chapter 6 where the concept “poverty” is considered.

⁴⁷ Parpart J “Lessons from the Field: Rethinking Empowerment, Gender and Development from a post-(post-?) Development Perspective” in K Saunders (ed) *Feminist Post-Development Thought* (2002) 44 & 45; The World Bank *World Bank Participation Source Book* (1996); The World Bank Group *A Proposal for a Comprehensive Development Framework* (A Discussion Draft) (Jan 21 1999) 153; The World Bank *World Development Report 2000/2001: Attacking Poverty* v; Nel E “Local Economic Development: A Review and Assessment of its Current Status in South Africa” 2001 (38) *Urban Studies* 1005. The shift in emphasis coincides with giving “ownership” over development projects. See section 2.2 of Chapter 5.

⁴⁸ See section 3.1 of Chapter 4.

⁴⁹ See section 3.1 of Chapter 4.

SLP should be drafted to align with the relevant IDP, in terms of the regulations to the MPRDA.⁵⁰ Exactly how alignment should take place is not clear.⁵¹

The nature and extent of the responsibilities of the mining company and the benefits to which the mine community is entitled, thus are much less clear than in the case of the empowerment of host communities. No rights or entitlements, similarly defined in law as shareholding, are provided to mine communities. The vague formulation “mine community development” in the Mining Charter follows the vague formulation of “mine community” in the Mining Charter.

The point here is that providing for two types of community in one legislative framework where one type is defined more clearly, with stronger benefits as opposed to another open-ended type of community, with weaker benefits, is problematic if effective and egalitarian poverty alleviation solutions are required. It is not argued that clear definitions of “community” would solve problems currently faced in the empowerment of mining communities. By all measures, strict definitions may serve to exclude persons that ought to benefit from empowerment initiatives.

2.4. The “Mine Community” as a Legal Subject

The question considered here is whether the politics of development cause the legislative formulation of “mine community” in a manner that does not allow poor mining communities to be economic actors and legal subjects in a neoliberal development paradigm. In this instance, the formulation of “mine community”, and by implication “mine community development”, is considered in comparison with the formulation of “community” and “host community”.

The mine community is acknowledged by the law for its potential or necessity to transform.⁵² The commonalities on which a mine community centre are recognised as poverty and the effects of mining.⁵³ The mine community is not recognised by the law for any pre-existing identity or essence, as is the case with the community and host community.⁵⁴

⁵⁰ Regulations in terms of section 107(1) of the MPRDA, reg 46 (c) (iii).

⁵¹ Heyns A & Mudimu G “Aligning Social and Labour Plans with Integrated Development Plans” in L Van Schalkwyk (ed) *Co-Ordinating Governance for Mining: Streamlining Systems for Improved Intergovernmental Relations* (2019).

⁵² See sections 2.3 and 3.3 of Chapter 4.

⁵³ “Mine community” is defined in the final 2018 Mining Charter at para 2.5.3 as “communities where mining takes place, major labour sending areas, adjacent communities within a local municipality, metropolitan municipality and/or district municipality”. See sections 2.3 and 3.3 of Chapter 4.

⁵⁴ See sections 2.3 and 3.3 of Chapter 4. If recognition is equated to preserving and celebrating identity, it becomes problematic to propagate poverty as a type of difference or identity that must be protected. Poverty will not be addressed if poor persons, as a group, are merely recognised as such. Lister R “(Mis)recognition,

The flourishing and development of an entity in a neoliberal economic and legal system depend on the extent to which this system recognises the entity.⁵⁵ Despite the apparent lack of identity or essence, the system will ascribe certain characteristics to an impoverished entity, such as a poor mining community, based on the extent to which such entities deviate from the standard characteristics of a legal subject.⁵⁶ The characteristics ascribed to the poor mining community are based on inaccurate and simplified abstractions that cause “othering” of the poor entity.⁵⁷

In comparison with the essentialist depiction of host communities in the Mining Charter, the broader, less clear understanding of the mining community that must be transformed, does not allow such a community to be the bearer of clearly defined rights.⁵⁸ Through poverty rhetoric, present-day discourse describing mining communities focus on the vulnerability and helplessness of poor mining communities, implying that it is not the misrecognition of these communities that must be addressed, which generally lead to awarding rights to the misrecognised entity.⁵⁹ The problem to be addressed is framed as the maldistribution of

Social Inequality and Social Justice: A Critical Social Policy Perspective” in T Lovell (ed) *(Mis)recognition, social inequality and social justice: Nancy Fraser and Pierre Bourdieu* (2007) 164. Lister refers to Coole D “Is Class a difference that makes sense?” 1996 (77) *Radical Philosophy* 21, 22.

⁵⁵ See sections 3.2 and 3.3 of Chapter 6.

⁵⁶ See section 3.2 of Chapter 6.

⁵⁷ Gordon RE & Sylvester JH “Deconstructing Development” 2004 (22) *Wisconsin International Law Journal* 79 & 80. “Othering” or referring to “the Other”, refers to the depiction of other human beings in terms of how others differ from the Self. A deconstructionist perspective, propounded by Jacques Derrida, determines that this depiction will always take place from the viewpoint of the Self, thereby privileging the Self and providing an inaccurate and unjust depiction of the Other. Derrida (“Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas” in J Derrida *Writing and Difference* (1980)123-124; *The Gift of Death* (1995) 78; *Politics of Friendship* (1997) 256 & Derrida and Ferraris M *A Taste for the Secret* (2001) 73) comments on the relation with “the Other” in conversation with Emmanuel Levinas (*Collected Philosophical Papers* (1987); *Totality and Infinity: An Essay on Exteriority* (1969)) and Edmund Husserl (*Cartesian Meditations: An Introduction to Phenomenology* (1960)), both associated with phenomenology. See Morin ME “The Self, the Other and the Many: Derrida on Testimony” 2007 (40:2) *Mosaic: An Interdisciplinary Critical Journal* 165-173. Gordon and Sylvester use the notion of the Other in the context of the relationship between the Western world and the third, developing world and thus the relationship between the coloniser and colonised. The Self is equated to the Western world or the coloniser, and the Other to the third world or colonised. Accordingly, the developing world is always perceived from the Western world’s perspective. Gordon and Sylvester refer to Tucker V “The Myth of Development: A Critique of a Eurocentric Discourse” in R Munck & D O’Hearn (eds) *Critical Development Theory: Contributions to a New Paradigm* 13 (1999); Gordon R “Saving Failed States: Sometimes a Neocolonialist Notion” 1997 (91) *Proceedings of the Annual Meeting (American Society of International Law)* 420-422 & Davidson B *The Black Man’s Burden: Africa and the Curse of the Nation-State* (1993).

⁵⁸ It will be very impractical to allocate shares in a mining company to a “mine community” if the mine community is regarded as the area where mining takes place and labour sending areas. Determining exactly who must benefit from the shareholding will be impossible.

⁵⁹ Juul S “The Discussion of the Good versus the Just” in S Juul *Solidarity in Individualized Societies - Recognition, Justice and Good Judgment* (2013) 75. The right to self-determination (Charter of the United Nations (1945) Article 1(2)), the right to sovereignty over resources (UNGA Res 1803 (XVII) (14 December 1962) “Permanent sovereignty over natural resources”) and the rights of indigenous peoples (UNGA Res 295 (2007) A/RES/61/295 “Declaration on the Rights of Indigenous Peoples”) acknowledged by the UN all serve as an example of instances where recognition entailed awarding rights. See section 3.1 of Chapter 5.

resources to these communities. The narrative promoted thus fits in perfectly with the depiction of the developing entity in the development paradigm described thus far in this thesis. A fringe identity is imposed upon a “mine community” since the politics of development do not allow for the developing identity to express its own identity, which is not based on its poverty, or worldviews.⁶⁰

The argument here is, firstly, that the different means of empowerment in the Mining Charter serve as evidence of the underlying distinction between the community as something to be preserved and recognised, and community as something to be transformed by the redistribution of resources. Recognition is thus set-up against redistribution. Secondly, this differentiation is the result of the politics of development: The values underlying the idea of development and empowerment necessitate the binary classification of developing entities – in this instance, the classification translates into the distinction between two types of communities in one legislative framework.

In a development context, the distinction between “mine community” and “host community” is significant. It is not proposed here to recognise a “mine community” in the same manner as a “host community” by affording rights to a mine community. The recognition of exclusive communities centred on fixed identities and culture is also problematic.⁶¹ It, however, must be acknowledged that the distinction creates and maintains an unequal relationship between more resilient predetermined identities, such as traditional communities, and the vulnerable, such as other communities in the mining area. The former can own rights and operate in the free market; the latter remains dependent on development projects that must create a more equal distribution of resources. In effect, the legislative system, specifically the Mining Charter, is formulated in such a way that inequality in mining areas is perpetuated, and not eradicated.

⁶⁰ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 82; Tucker (1999) 13.

⁶¹ Nancy contests the notion of a real, authentic, essentialist type community that is based on predetermined values, since being human has its origins in community with others, thus deriving their identities or their being-human from their community of others – what he describes as the “inoperative community” or “being-in-common”. See Nancy JL *The Inoperative Community* (1991); Norris A “Jean-Luc Nancy and the Myth of the Common” 2000 (7) *Constellations* 272. Breytenbach B *Notes from the Middle World* (2009) 7 & 9 also warns against the oppressive nature of culture as a predetermined identity, by depicting culture in broad terms as

“the receptacle of the riches of received (or stolen) certainties. Certainty, as we know, easily slides into Orthodoxy (with a nudge or two from those with vested interests), and this Security is customarily hoisted on a pedestal as Truth. Truth, strangely enough, even when enshrining the expression of shared convictions...must be only and One to survive...Diversity is not Truth’s favorite lover...It is very difficult for Truth’s power to imagine being divided or shared. Hence the potential – indeed, the predisposition – for conflict and the glorification of the manly virtues of combativeness and possession”

Consequently, groups of persons qualifying as “community” may be earmarked for mine community development and empowerment initiatives, to the exclusion of other groups of persons also carrying the burden of mining operations.⁶²

The creation of mining communities is the result of the historic pursuit of colonial and apartheid commercial interests in Southern Africa.⁶³ To a certain extent, the very existence of mining communities is representative of the exploitative practices of the mining industry during colonial and apartheid rule.⁶⁴ As has been mentioned in this thesis, host or traditional communities have also been affected by the discriminatory policies under colonial and apartheid rule.⁶⁵ Mine communities, as provided for in the Mining Charter, however, represent the effects of mining. It is thus to be expected that legislative formulation catering for the mining sector should do more to address the needs of mining communities. By evoking the narrative of Black Economic Empowerment and development, which notions both originated from a desire to address inequality,⁶⁶ the expectation is created under persons living in mining communities that poverty and inequality will be addressed and that mining companies are mainly responsible for this outcome. Instead, because of the politics of development, inequality is worsened, leading to conflict not only between different communities in the mining area but also between communities and mining companies and government.⁶⁷

The way in which development beneficiaries and problems are framed in the development paradigm is not the only problem and anomaly created in legislative formulation as a result of the politics of development. As is shown in section 3 below, the notion of “community development” is paradoxical, and possibly represents an impossibility, in theory at least.⁶⁸

⁶² For an example of such exclusion see footnote 68 at section 2.4 of Chapter 2.

⁶³ See section 3 of Chapter 2.

⁶⁴ See section 3.2 of Chapter 2.

⁶⁵ See section 3.2 of Chapter 2.

⁶⁶ BEE promotes the basic right to equality protected in s 9 of the Constitution of the Republic of South Africa, 1996, specifically in the context of inequality between black and white people in South Africa. Development, at its core, addresses the inequality between the developed and developing world, which translates into conditions of poverty in the developing world. See section 2.2.2 of Chapter 3 and section 3.2 of Chapter 5.

⁶⁷ Mining areas have increasingly become synonymous with protest action. Stewart (2014) *Law, Democracy and Development* 1-21 considers poor women in Marikana and argues that the subjectification in neoliberal legal system leaves the poor with no choice but to take part in protest action to obtain basic goods and services. Communities are indicating that protests are the result of being excluded from the benefits of the resources mined in the areas occupied by these communities. Steyn L “What’s really fuelling SA mine protests?” *Business Live* 21 November 2019 available at <<https://www.businesslive.co.za/fm/features/2019-11-21-whats-really-fuelling-sa-mine-protests/>> accessed on 11 February 2020. Also see Horne (2015) *Journal of Contemporary History* 25-47.

⁶⁸ Section 3 of this Chapter 7 is based on a publication by the student: Heyns A “Mining Community Development in South Africa: A Critical Consideration of how the Law and Development approach the Concept ‘Community’” 2019 (12) *Law and Development Review* 561. In terms of the Memorandum of

3. The Paradox of Community Development

The “community” or “host community” as formulated in the MPRDA and the Mining Charter represents a well-defined and predetermined identity or essence, like the authentic community.⁶⁹ The development paradigm favours entities that are clearly identifiable, such as the authentic community.⁷⁰ The very act of preserving this authentic community may, however, contradict the ambitions of any development project. This section briefly returns to the theoretical understanding of this authentic community to illustrate a further effect of the politics of development.

As a result of industrialisation, modernisation and urbanisation, small rural communities, representative of the authentic community (“Community”) transform into a modern-day society (“Society”).⁷¹ Society does not centre on a predetermined identity as is the case with the Community.⁷² In addition to describing a group of individuals group living together, but not as a Community, the concept of Society also explains the actual process of transformation or modernisation and development.⁷³ In a broad sense, Society thus embodies the effects of modernisation and development on Community.⁷⁴

A community member’s relationship with other members of the Community gives substance to such a member’s identity, but this is not the case with the members of Society.⁷⁵ Society represents a collection of individuals, and each member maintains its own identity and acts for its own interests, following a social contract.⁷⁶ Whereas Community emphasises the interrelatedness of its members, Society highlights how the interests of the individual members

Understanding between the student and her supervisor, the student committed contractually to publish articles while completing her PhD thesis. See also the declaration regarding the inclusion of publications.

⁶⁹ See section 3.1 of Chapter 5.

⁷⁰ See section 3.2 of Chapter 6.

⁷¹ The discussion that follows is based on the work of European sociologists that have analysed the effects of modernisation and technical advancement, as a type of development, in Europe. Tönnies F & Harris J *Gemeinschaft und Gesellschaft* (2001) x; R. Tilman “Ferdinand Tönnies, Thorstein Veblen and Karl Marx: From Community to Society and Back?” 2004 (11) *The European Journal of the History of Economic Thought* 584. Tönnies contrasts *Gemeinschaft* as the authentic community with *Gesellschaft* as the modern society. See section 2.1.2.1 of Chapter 5 on modernisation.

⁷² Tönnies (2001) 52.

⁷³ Tönnies (2001) x; Tilman (2004) *The European Journal of the History of Economic Thought* 584.

⁷⁴ See Heyns (2019) *Law and Development Review* section 4.1.

⁷⁵ Tönnies (2001) 52, 56, 57.

⁷⁶ Tönnies (2001) 63. Social contract in this instance refers to the construct created by Hobbes, Locke and Rousseau in terms whereof law and political power is created by means of agreement between citizens. Blackburn S *The Oxford Dictionary of Philosophy* (2005) 342.

cannot be reconciled.⁷⁷ This tension is accommodated by dividing, Society presumably,⁷⁸ into the public and private sphere.⁷⁹ Individuals have exclusive ownership and use of goods and resources and such goods can be transacted with by exchanging it for value.⁸⁰ Society signifies the effects of the pursuit of profit creation on Community;⁸¹ it merely serves as a platform for the promotion of capitalist ways.⁸²

The notion of Society described here is relevant when questioning the theoretical paradigm within which mine community development is positioned. Society is viewed in substance as that which replaces Community when modernisation takes place, but Society also represents the actual process of modernisation, and it is argued here development.⁸³ To develop, the developing entity must transform into something else.⁸⁴ Thus, development of a community means that “community” should be eradicated, showing to an inherent tension in the concept “community development”.⁸⁵

When addressing poverty in South African mining areas, the concepts “mine community development” and “host community development” through shareholding become problematic: If development programmes focus on the “community” centred on an essence, development will eradicate “community”. The legislature’s efforts to preserve “community”⁸⁶ will be negated by development, on a theoretical level, at least.⁸⁷

The paradox is deepened by the dichotomy between “host community” and “mine community”. Even though preserving the “host community” is in direct conflict with developing the “host community”, the “host community” is better positioned to benefit in a neoliberal development paradigm than the “mine community”, as argued in section 2 above. Due to the law recognising and preserving “host community” as a singular entity (as if it is an individual), “host community” is better positioned to operate as a legal subject in a neoliberal development

⁷⁷ Tönnies (2001) 52.

⁷⁸ Tönnies does not refer to the public and private sphere by name, but it would fit in with the social contract construction that he is utilising.

⁷⁹ Tönnies (2001) 52.

⁸⁰ Tönnies (2001) 54.

⁸¹ Tönnies (2001) 68.

⁸² Tönnies (2001) 71. See section 2.1.2 of Chapter 5 for a discussion of capitalism. See also Heyns (2019) *Law and Development Review* section 4.1.

⁸³ Tilman (2004) *The European Journal of the History of Economic Thought* 584. See also Heyns (2019) *Law and Development Review* section 4.1.

⁸⁴ See section 2.1 of Chapter 5 for a discussion of the development-concept.

⁸⁵ See section 2.1.2.1 of Chapter 5 for a discussion of modernisation. See also Heyns (2019) *Law and Development Review* section 4.1.

⁸⁶ See sections 2.3 and 3.3 of Chapter 4.

⁸⁷ See also Heyns (2019) *Law and Development Review* section 4.1.

context. In other words, because it is clearly defined in the legislative system, it is easier (not without its problems) to award rights to the host community as an entity. The same cannot be said for the more nebulously defined “mine community”. The only predetermined identity associated with a mine community recognised by the law is the shared effects of mining or poverty. Whereas the effects of mining are what should be addressed by mine community development, this commonality or identity is too weak to compete in a neoliberal development framework.

4. Conclusion

It is concluded that the assumptions about what it means to be a legal subject and what it means to be poor in the development paradigm translate into a differentiation between two groups of people in the mining legislative framework. Both groups are affected by mining and often share members, but are treated differently when it comes to empowerment initiatives. The notion of “community development” also presents a paradox, since development requires that “community” transforms into or be replaced with something else. However, even though “community” may be lost at a theoretical level because of development, in practice and the South African mining context, “community” may end up being the only beneficiary of development. Inequality and poverty in mining areas are consequently not addressed, but rather perpetuated.

The politics of development are quite visible in the legislative system regulating the empowerment and development of mining communities. It manifests in the apparent difficulty to conceptualise the beneficiaries of development as communities. Policies created on inaccurate framings, will not be successful in achieving the purpose they set out to achieve.⁸⁸ The perception that developing entities, such as mining communities, are not really benefitting from development initiatives, will be perpetuated.

⁸⁸ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 85.

CHAPTER 8: Conclusion and Recommendations

1. Introduction

This thesis addresses the question of why mining communities are still suffering under harsh socio-economic conditions, despite a legislative mandate on mining companies to alleviate poverty and inequality in areas where mining operations take place.¹ Instead of improving the lives of mining communities, the current empowerment initiatives perpetuate poverty and inequality from the past and create new inequalities.² The premise of this thesis is that theoretical ambiguity contributes to the problem, and it sets out to determine why this is the case.

The theoretical paradigm in which current attempts at the empowerment and development of mining communities are embedded was examined as a possible cause of continued lack of success in achieving sustainable and durable prosperity in mining communities.³ The paradigm originated in a different era and promotes values that are not necessarily neutral and universal.⁴ Initiatives created in this paradigm are out of touch with and ill-suited for local realities. In the context of the South African industry, these realities represent the legacy of past exploitative practices, which practices have had a significant effect on the relationship between mining companies and mining communities.⁵ The exploitative practices had particular consequences for land-owning traditional communities and mining communities that were created because of mining activities.

2. Addressing the Research Question

The empowerment and development of mining communities in South Africa perpetuate poverty and inequality in mining areas. The latter proposition is founded on the inquiries made in this thesis, the first of which is a historical inquiry. Mining communities were created in a historical context in which certain ideological motivations were promoted that dictated how black persons, indigenous to South Africa, and their livelihoods were viewed.⁶ In reaction to

¹ Section 2 of Chapter 2 shows that mining communities still face dire socio-economic conditions, despite legislative intervention, as discussed in section 3 of Chapter 3.

² Chapters 4 & 7 describe the interpretational challenges regarding the legislative intervention, and the effects for mining communities.

³ Chapter 5 sets out the theory underlying the global development paradigm. Chapter 6 describes the problematic nature of this paradigm.

⁴ See section 2.1.1 of Chapter 5.

⁵ See section 3 of Chapter 2.

⁶ See section 3 of Chapter 2.

the historic exploitation of black persons in the mining industry, which caused the creation of mining communities, present-day depictions of mining communities reflect underlying poverty rhetoric,⁷ which rhetoric is perpetuated by the empowerment and development initiatives aimed at poor mining communities.⁸ These initiatives were created in an ideological environment that influenced how the initiatives were formulated.⁹

An investigation into the nature of the abovementioned ideological environment shows that the promotion of development and empowerment causes legislative instruments, such as the Mineral and Petroleum Resources Development Act,¹⁰ the Mining Charter,¹¹ the Social and Labour Plan¹² and the Integrated Development Plan,¹³ to promote certain worldviews and underlying values inadvertently.¹⁴ These worldviews and underlying values affect how persons living in mining areas, subjected to harsh socio-economic living conditions, are presented in legislative provisions.¹⁵ It is specifically considered what the notion of “community” signifies in a development context and how “community” is represented in legislation. A summary of the discussions and conclusions regarding the points mentioned here is provided below.

2.1. Analysis of Context

To gain a deeper understanding of the nature of South African mining communities, Chapter 2 of the thesis describes the historical and present-day context within which these communities came into being and currently exist. The context is further broadened in Chapter 3 by considering the legislative interventions put in place after South Africa’s transition to a constitutional democracy to address the challenges faced by mining communities.

The following findings were made in Chapters 2 and 3 of the thesis. In South Africa, persons living in the mining area and affected by mining operations are referred to as the mining community.¹⁶ Mining areas are also often inhabited by communities living together in terms of custom, referred to as traditional communities, with an interest in the land on which mining

⁷ See section 2 of Chapter 2.

⁸ See section 3.2 of Chapter 5.

⁹ See section 2.1 of Chapter 3.

¹⁰ Act 28 of 2002.

¹¹ The Broad-Based Socio-Economic Empowerment Charter created in terms of the S 100(2) of the MPRDA (“the Mining Charter”).

¹² The Social and Labour Plan drafted and submitted by a mining right holder in terms of ss 22 and 23 of the MPRDA and regulations 40-46 of the Regulations in terms of section 107(1) of the MPRDA (GNR 527 GG 26275 of 23 April 2004).

¹³ S 23 and 25 of the Local Government: Municipal Systems Act 32 of 2000.

¹⁴ See section 2.2 of Chapter 5.

¹⁵ See section 3.2 of Chapter 6.

¹⁶ See section 2 of Chapter 2. The Mining Charter refers to “mine community”. See section 2.2 of Chapter 4.

takes place. The traditional community may form part of the larger mining community, but constitutes an identity separate from the larger mining community.¹⁷ The conditions faced by mining communities are depicted as poverty and inequality. Without critical reflection of the consequences of promoting such rhetoric,¹⁸ the narrative promoted maintains the perception that mining communities are not benefitting from mining operations as expected in the light of the mining industry's history of oppression and exploitation.

The creation of mining communities is the historical result of the European (colonial) pursuit of commercial interests in Southern Africa.¹⁹ The protection of such commercial interests required the implementation of oppressive labour practices, dispossession of land and the displacement of black persons during colonial and apartheid rule. Such practices, specifically the migration of black labour, ensured that industries such as the mining industry had access to a steady supply of cheap labour.²⁰ Migrants occupying areas where mining took place, formed new communities, without necessarily severing ties with the communities from where they originated.²¹

The oppressive practices also affected traditional communities, either because mining took place on the land occupied by these communities, or because these communities had to serve as labour reserves.²² Colonial and apartheid-authorities interfered with the communal and leadership structures of traditional communities as a means of obtaining control over black persons. Such interference complicated interest in land, damaged the legitimacy of traditional leadership structures and caused conflict amongst black persons.²³ The effects of the interference with the structures of traditional communities are still visible today.

The global environment in which policies were created to address the injustices caused by colonial and apartheid rule in South Africa, shaped the measures put in place to address poverty and equality, also in mining areas. The notions of black economic empowerment ("BEE") and local economic development ("LED") are specifically considered as part of the legislative context since both these measures are also prescribed for alleviating poverty in mining areas.²⁴ These notions were conceived in the Reconstruction and Development Programme ("RDP")

¹⁷ See section 2.4 of Chapter 2.

¹⁸ See sections 2.1 and 2.5 of Chapter 2.

¹⁹ See section 3 of Chapter 2.

²⁰ See section 3.2 of Chapter 2.

²¹ See section 3 of Chapter 2.

²² See section 3 of Chapter 2.

²³ See section 3 of Chapter 2.

²⁴ B-BBEE is incorporated into the Mining Charter and LED is promoted in terms of the SLP and the IDP.

and GEAR programme, which programmes promoted neoliberal views on the role of the state and the private sector in the economy and on poverty and poverty alleviation.²⁵

A consideration of the conception and evolution of BEE in South Africa shows how BEE furthers neoliberal ideals for the South African economy. It was implemented initially with a single focus on promoting black ownership of South African businesses but later transformed into Broad-Based Black Economic Empowerment (“B-BBEE”).²⁶ This transformation is significant for mining communities. B-BBEE was introduced to ensure that the economic benefits of BEE reach black South Africans at all levels of society, and not only the few that can obtain shareholding in companies.²⁷ The broad-based nature of B-BBEE also places more focus on alleviating poverty: Specific provision is made in the B-BBEE generic scorecard for the socio-economic development of communities within which businesses operate.²⁸

Through the Mining Charter, the MPRDA promotes the notion “empowerment” in mining areas and provides specifically for the empowerment of mine communities through mine community development.²⁹ Mine community development encompasses the same principles as socio-economic development in the generic B-BBEE scorecard. Mining communities further benefit from LED mandated in terms of the Social Labour Plan (“SLP”) system provided for in the regulations to the MPRDA.³⁰

Whereas the National Development Plan (“NDP”) does not speak to the development of mining communities explicitly, it is an example of an initiative created more recently that promotes development as a means to address the socio-economic problems in South Africa.³¹ The NDP builds on the goals set out in the RDP and GEAR programme and thus is generally perceived to promote neoliberal ideals.³² It does not constitute binding policy or legislation, but it does serve as confirmation that neoliberalism in the South African policy landscape is not dead.³³

An analysis of the historical and present-day factual and legislative contexts shows how the imposition of ideological views firstly contributed to the injustices of colonialism and apartheid and secondly shaped the policies that introduced the notions of empowerment and development

²⁵ See section 2.2.1 of Chapter 3.

²⁶ See section 2.2.2 of Chapter 3.

²⁷ See section 2.2.2 of Chapter 3.

²⁸ See section 2.2.2 of Chapter 3.

²⁹ See section 3.2 of Chapter 3.

³⁰ See section 3.2 of Chapter 3.

³¹ National Planning Commission *National Development Plan: Vision for 2030* (2011).

³² See section 2.2.3 of Chapter 3.

³³ See section 2.2.3 of Chapter 3.

into a democratic South Africa. In both instances, the ideological views represent European or Western interests, which have been cemented into the policy framework that caters for mining communities in South Africa.

As part of setting up the context relevant for this thesis, the specific legislative provisions are also considered. The thesis establishes that the Mining Charter and other relevant legislation³⁴ that provides for the “community” in the development context, refer to “community” in three types of situations. A group of persons sharing custom, belief and rights to land is regarded as a community and in many instances as an indigenous or traditional community.³⁵ In a mining context, specifically, the group of persons that share the effects of mining is also regarded as a community.³⁶ Furthermore, a group of persons living in the same geographical areas can also constitute a community.³⁷ In a development and South African, context, all three types of communities are associated with poverty and inequality.³⁸

Underlying the various definitions provided for “community”, is a distinction between two types of community: The community with a predetermined identity, usually structured around custom, is preserved by the law. The community sharing poverty is acknowledged by the law, but only because it requires transformation or intervention.³⁹ In the case of a South African mining area, the two conflicting notions of the community can exist in the same space.

By acknowledging both traditional communities and mining communities, the MPRDA and the Mining Charter acknowledge the historic injustices relating both to the exploitation of labour and dispossession of land.⁴⁰ The Mining Charter includes different means of empowering the two communities. Mine communities are empowered in terms of mine community development and host communities are empowered by being given the opportunity to hold shares in the mining company and any returns received on the shareholding must be utilised towards host community development. Despite the attempt in the latest Mining Charter

³⁴ Constitution of the Republic of South Africa, 1996 (“the Constitution”), the MPRDA, the SLP, the IDP, the Restitution of Land Rights Act 22 of 1994, the Traditional Leadership and Governance Framework Act 41 of 2003, the Interim Protection of Informal Land Rights Act 31 of 1996 and the Communal Property Association Act 28 of 1996. See section 2 of Chapter 4.

³⁵ See sections 2.2 & 3.3 of Chapter 4.

³⁶ See sections 2.2 & 3.3 of Chapter 4.

³⁷ See sections 2.2 & 3.3 of Chapter 4.

³⁸ See sections 2.2 & 3.3 of Chapter 4.

³⁹ See sections 2.2 & 3.3 of Chapter 4.

⁴⁰ See sections 2.2 & 3.3 of Chapter 4.

to provide for alignment with the SLP, the Mining Charter is not clear on the alignment of its provisions or how such provisions must align with instruments such as the IDP.⁴¹

Despite the policy and legislative system implemented to relieve mining communities of the conditions they face, these conditions remain prevalent in mining areas. Furthermore, mining communities are increasingly voicing their anger towards mining companies for not complying with the law.⁴² It is proposed in this thesis that the law is not clear on how the empowerment and development of mining communities should take place, creating loopholes for possible abuse. It is proposed that this ambiguity is the result of the theoretical paradigm in which these provisions operate.

2.2. Exposing the Politics of Development in Empowerment

Chapter 5 of this thesis describes the theoretical paradigm within which the empowerment and development legislation, applicable to mining communities in South Africa, is situated. The problems surrounding this paradigm, the politics of development, are exposed in Chapter 6.

The development paradigm is described by referring to the concepts, “empowerment”, “development”, “community” and “poverty”. Empowerment and LED are local manifestations of the broader, global idea of development and share similar theoretical foundations and origins.⁴³ The idea of development has been founded in the West and the adaptations of the idea over the years have been steered by Western institutions. The prerequisites to be met for development to take place and the fundamental values protected as part of the development project, all represent a specific worldview. The idea of development, therefore, remains subject to a Western worldview. Promoting “development” cannot be politically and ideologically neutral.⁴⁴

The concept of “community” is investigated as the beneficiary of “development”. The essential or authentic community is compared and found similar to the community the legislative system wishes to preserve. In the mining context traditional communities, are recognised by the law for their inherent identity.⁴⁵

The community to be transformed lacks such an inherent identity, as the only commonality shared is poverty. “Poverty” is not an ideologically neutral concept and it has no universally

⁴¹ See section 3.1 of Chapter 4.

⁴² See section 2 of Chapter 2.

⁴³ See section 2 of Chapter 5.

⁴⁴ See section 2 of Chapter 5.

⁴⁵ See section 3.1 of Chapter 5.

agreed-upon definition. Many assumptions are made about people and their livelihoods when characterising them as poor. These assumptions do not always consider underlying political causes for poverty.⁴⁶

Furthermore, whereas the problem faced by authentic communities (or traditional communities) is framed by the law as the misrecognition of these communities, the problem faced by communities to be transformed (or mine communities) is framed as the maldistribution of resources. The different framings result in different means of empowerment being prescribed by the legislative system.⁴⁷

The idea of development and the development paradigm can, therefore, be problematised for representing a specific worldview and accordingly, specific values. The worldview largely represents a Western worldview and entrenches principles such as modernisation, neoliberalism and capitalism and legal formalism and rights.⁴⁸ One of the most prominent assumptions is that the protection of property rights is a necessity for development to take place.⁴⁹ All these principles are abstractions from the experiences and characteristics of Western societies and promote principles of neoliberalism. Irrespective of the subjective nature of these principles and assumptions, the development paradigm presents these principles as universal truths.⁵⁰

Due to colonisation, the historic relationship between the developed and developing world was one of severe inequality, which inequality is still visible today. The inequality translates into socio-economic conditions, but also global power relations. The historic and present powerful position of the West enables it to enforce development values upon the non-Western world. Thus, instead of acknowledging and addressing past injustices, development promotes the notion that any society will follow a similar, linear path to modernity.⁵¹

The result is that “development” is set as a standard against which the developing world is measured. In other words, the developing countries are viewed according to its level of development.⁵² It is problematic if the beneficiary of development is viewed from this perspective because the beneficiary is not necessarily represented accurately, which causes

⁴⁶ See section 3.2 of Chapter 5.

⁴⁷ See section 3.2 of Chapter 5.

⁴⁸ See section 2 of Chapter 6.

⁴⁹ See section 2.3 of Chapter 6.

⁵⁰ See section 2.3 of Chapter 6.

⁵¹ See section 4 of Chapter 6.

⁵² See section 3.1 of Chapter 6. Gordon RE & Sylvester JH “Deconstructing Development” 2004 (22) *Wisconsin International Law Journal* 71.

ineffective policies.⁵³ The underlying values and assumptions accompanying the idea of development and the measure to which it is enforced upon the developing world constitute the politics of development.

Empowerment and BEE are framed subject to the politics of development and operate on the same assumptions and worldviews as development. Thus, even though empowerment focuses on “bottom-up” approaches as a countermeasure for the usual “top-down” approaches of development initiatives,⁵⁴ empowerment as a concept is still situated in the development paradigm. The significance hereof is that the notion empowerment, and by implication B-BEE, will be affected by the same problems as the notion development.

The framing of development beneficiaries and development problems in a neoliberal development is based on underlying assumptions about what it means to be a legal subject and what it means to be poor.⁵⁵ These assumptions are not universal, neutral or objective.⁵⁶ Deviation from these assumptions is characterised as poverty and underdevelopment, which characterisation results in marginalisation and reaffirmation of power relations.⁵⁷ In the context of the mining legislative framework, the assumptions translate into a differentiation between two groups of people, both affected by mining and often sharing members, but treated differently when it comes to empowerment initiatives. The differential treatment causes further inequality in the mining area.

2.3. Effects of the Politics of Development for Legislative Drafting

The differential treatment by the legislative system affirms a pursuit of recognition for traditional communities and redistribution for mine communities.⁵⁸ Recognition aims to rectify injustices that originate from the exclusion or denial of certain groups by preserving these groups’ identities.⁵⁹ Through recognition, previously marginalised identities are enabled to participate in and form part of power structures in society.⁶⁰ Typically, recognition by the law takes place by providing the marginalised identity with rights.⁶¹

⁵³ See section 3.1 of Chapter 6. Gordon & Sylvester (2004) *Wisconsin International Law Journal* 83-86.

⁵⁴ See section 2.2 of Chapter 5. Parpart J “Lessons from the Field: Rethinking Empowerment, Gender and Development from a post- (post-?) Development Perspective” in K Saunders (ed) *Feminist Post-Development Thought* (2002) 44 & 45.

⁵⁵ See section 3.2 of Chapter 6.

⁵⁶ See section 3.2 of Chapter 6.

⁵⁷ See section 3.2 of Chapter 6.

⁵⁸ See section 2 of Chapter 7.

⁵⁹ See section 3.1 of Chapter 5.

⁶⁰ See section 3.1 of Chapter 5.

⁶¹ See section 3.1 of Chapter 5 and section 2.4 of Chapter 7.

Even though the Mining Charter does not state this explicitly, it reinforces the narrative that traditional communities suffered misrecognition under previous regimes. The empowerment of host communities, including traditional communities, takes place by allocating shareholding in the relevant mining company to traditional communities.⁶² Traditional communities are evidently recognised as entities capable of holding shares. In a neoliberal development paradigm, such recognition is significant, as it suggests that the recognised entity conforms with the characteristics of a legal subject.⁶³

The significance of recognising host or traditional communities as such becomes clearer when compared to how a “mine community” is empowered. Mine communities are earmarked to benefit from mine community development projects to be pursued in terms of the Mining Charter, the SLP, and the IDP.⁶⁴ The recognition of mining communities as such therefore receives less emphasis. Rather, there is a focus on how resources should be distributed in terms of infrastructure development projects.⁶⁵

A focus on distribution aims to address the unequal distribution of goods amongst the members of society in a manner that is suitable according to the values of that society.⁶⁶ For mine communities, distribution measures translate into a focus on the poverty by which the community is plagued and inequality to which it is exposed.⁶⁷ Thus, if compared with the traditional or host community, the only predetermined identity associated with a mine community recognisable by the law is the shared effects of mining and poverty.⁶⁸ Whereas the shared effects of mining should be addressed by mine community development, the identity created by the commonality associated with mine community development is too weak to compete in a neoliberal development framework.⁶⁹ Consequently, traditional communities and mine communities are not placed on equal footing by the Mining Charter.

In a development context, the focus on the recognition of a traditional community, and therefore of the community’s identity, causes a paradox. Modernisation, transformation and accordingly development, require the community centred on a fixed, predetermined identity to be destroyed and replaced with something else. The concept of “community development” thus

⁶² See section 3.1 of Chapter 4.

⁶³ See sections 2.3 and 3.3 of Chapter 6.

⁶⁴ See section 3 of Chapter 4.

⁶⁵ See section 2.4 of Chapter 7.

⁶⁶ See section 3.2 of Chapter 5 and section 2 of Chapter 7.

⁶⁷ See section 3.2 of Chapter 5 and section 2.4 of Chapter 7.

⁶⁸ See section 2.4 of Chapter 7.

⁶⁹ See section 2.4 of Chapter 7.

presents an inherent paradox. Recognising or preserving community while also trying to develop it, is, theoretically at least, not possible.⁷⁰

The paradox is deepened by the differentiation between “community” and “mine community” in the Mining Charter. Even though preserving the “community” is in direct conflict with developing the “community”, the “community” is better positioned to benefit in a neoliberal development paradigm than the “mine community”.

As has been shown in this thesis, the essentialist or traditional understanding of “community”, is but one of the understandings of community in the context of mine community development in South Africa. Development as provided for by the legislative system possibly focuses more on communities that must be transformed, than communities of essence that must be preserved. However, the essentialist nature of “community” simplifies identifying and demarcating “community” when compared with broader notions of community such as “mine community”.⁷¹ Consequently, if a group of persons can qualify as “community” in terms of the legislative system, it can possibly benefit from mine community development and empowerment, but to the exclusion of other groups of persons also carrying the burden of mining operations.⁷² “Community development” provides yet another paradox: Theoretically, “community” may be lost because of development, but in practice, “community” may end up being the only beneficiary of development.

The difficulty in conceptualising the beneficiaries of development as communities in the Mining Charter and other relevant legislation is the result of the politics of development. Policies created based on inaccurate framings, will not be successful in achieving the purpose they set out to achieve.⁷³ Developing entities will not be enabled to operate as autonomous entities in the development framework. The perception that developing entities are not really benefitting from development initiatives and that development initiatives are a means for developed entities to control developing entities, therefore, will be perpetuated. In the context of the empowerment of mining communities in South Africa, mining communities will remain

⁷⁰ See section 3 of Chapter 7.

⁷¹ A community of persons that share space can be demarcated geographically. Geographic and municipal borders are permeable, however. The actual community that should benefit from mine community development is therefore still not easily identifiable. See section 2.2 of Chapter 4.

⁷² See section 2.4 of Chapter 7. See also Heyns (2019) Law and Development Review section 4.1.

⁷³ See section 3.1 of Chapter 6. Gordon & Sylvester (2004) *Wisconsin International Law Journal* 71.

poor, confirming the narrative depicting mining companies as controlling and limiting the distribution of the benefits of mining with those affected by mining.⁷⁴

3. Recommendations for Further Research

It is concluded in this thesis that the legislative formulation of initiatives aimed at the empowerment and development of mining communities reflects the underlying values of specific theoretical and ideological paradigm. An analysis of the theoretical paradigm shows that attempts at understanding who the persons are that are affected by mining operations and formulating the challenges they face will always be inaccurate because the paradigm operates on predetermined perceptions. The arguments outlined in this thesis are of a theoretical nature. It, however, is put forward that the creators of policy and drafters of legislation dealing with the empowerment and development of mining communities should take heed of the implications of accepting development and community rhetoric in legislation.

The problem identified could be addressed by rejecting the notions of development and empowerment altogether, as is proposed by some radical post-development proponents, in the hope that this abandonment would provide “developing” entities such as mining communities with the opportunity to determine their own destinies.⁷⁵ Such a rejection, however, may not suffice. The broader paradigm within which mine community development, specifically, and empowerment in general, operate will remain in place. The unwritten rules and views of the world, poverty and poverty alleviation, as well as the power relations, will still dictate how mining communities and the challenges they face are depicted. In the global development paradigm, the developing world will be released of its culpability regarding colonialization. In a South African mining context, mining companies will no longer be expected to make up for their contribution to apartheid. Abandoning the notion of development in the context of mining communities, may therefore not be to the advantage of mining communities.⁷⁶

If it is accepted that the development paradigm cannot be abandoned in the context of mining communities, it is recommended that policymakers should acknowledge the limitations to and

⁷⁴ See also Heyns (2019) Law and Development Review section 4.1.

⁷⁵ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 88 & 89 referring to Escobar A “Imagining a Post Development Era” in J Crush (ed) *Power of Development* (1995) 216-220; Minogue M & Kothari U “Conclusion: Orthodoxy and its Alternatives in Contemporary Development” in U Kothari & M Minogue (eds) *Development Theory and Practice: Critical Perspectives* (2002) 179-180; Rahnema M “Towards Post-Development: Searching for Signposts, a New Language and New Paradigms” in M Rahnema & V Bawtree (eds) *The Post-Development Reader* (1997) 381.

⁷⁶ Gordon & Sylvester (2004) *Wisconsin International Law Journal* 88 & 89.

implications of promoting the empowerment and development of poor mining communities. The larger construct and the effects of the development paradigm can be recognised and acknowledged in the following ways:

3.1. Legislative Reconceptualization of “Community” Forms

The first recommendation is that legislative provisions addressing the socio-economic conditions in mining areas should not formulate the concepts “mine community”, “community” and “host community” in isolation of one another and other actors occupying the mining area. The B-BBEE construct promoted by the Mining Charter acknowledges the different actors such as communities, labour sending areas, BEE entrepreneurs, and the employees of the mine by providing for different means of empowerment of the different actors.⁷⁷ The differentiation is justified to a certain extent, but, as explained in Chapter 7, such differentiation creates a hierarchy amongst the various actors in the mining area. This is especially the case where some entities obtain the right to shares in the mining company.⁷⁸ The creation of a hierarchy is the result of how a neoliberal development paradigm classifies entities in terms of predetermined characteristics. When poverty rhetoric, which forms part of the development paradigm, is invoked to describe a mine community, it is assumed that such a community is limited in its capability in acting in a neoliberal development paradigm.⁷⁹

Legislative reform and revision of the Mining Charter can therefore not only focus on amending the definitions of “community”, “mine community” and “mine community development”, as has been the case over the last couple of years.⁸⁰ The effects of the broader paradigm within which these formulation function must be challenged by taking a more holistic approach to the empowerment of persons living in mining areas. The definitions of development beneficiaries and formulation of development initiatives should reflect how the beneficiaries, especially the “host community” and the “mine community” relate to one another.⁸¹

⁷⁷ See sections 2.2.2 and 3.2 of Chapter 3.

⁷⁸ See section 3.1 of Chapter 4 and section 2.1 of Chapter 7.

⁷⁹ See section 3.3 of Chapter 6.

⁸⁰ As mentioned in sections 2 & 3 of Chapter 4, four draft Mining Charters were issued by the Department of Mineral Resources and Energy before the final version was gazetted in 2018. The various drafts each provided a slightly different formulation of “community”, “host community” and “mine community development”.

⁸¹ See section 2.2 of Chapter 4.

3.2. Greater Internal Cohesion of the Elements of the Mining Charter

The second recommendation relates to the first recommendation. The Mining Charter should stipulate how the different empowerment initiatives in the Mining Charter should interact with one another. The newest version of the Mining Charter provides for “host community development” that must be funded by the income realised by the host communities from its shareholding in the mining company.⁸² In addition to “host community development”, a mining company must still promote “mine community development”. Other than stating that the two initiatives do not replace one another, the Mining Charter does not indicate how the two initiatives should interact with one another. The result hereof could be the duplication of projects in one mining area or the creation of similar projects of differing quality.

The nature of B-BBEE is to promote empowerment at different levels of a business’ operations to eradicate inequality.⁸³ If the different elements, such as mine community development and host community development through equity ownership, are promoted in isolation of one another, inequality will certainly be perpetuated.

Clarity should also be provided on how the provisions of the Mining Charter should interact with other development initiatives such as the SLP and IDP.⁸⁴ The uncertainty in this regard creates loopholes in the system that may either cause duplication of development projects or exclusion from development projects.

3.3. Cautious Approach to the Rhetoric of Community

The third recommendation is that the use of “community” rhetoric in legislative instruments should be scrutinised. In the instance of “mine community”, specifically, the use of the word “community” is problematic. It is established in this thesis that reference to “community” signifies a group of people sharing a specific commonality, usually in an essentialist sense, meaning that the community constitutes an identity in itself.⁸⁵ The identity informs the identity of the community members. An essentialist view of the community can be applicable in the instance of a “mine community”, where community members share familial ties, custom and living space. However, “mine community” goes beyond this essentialist community. Not all groups of people included in the definition of “mine community” share these commonalities. Labour sending areas, also included in the definition of “mine community”, are commonly

⁸² 2018 Mining Charter para 2.1.4. See section 3.1 of Chapter 4.

⁸³ See section 2.2.2 of Chapter 3.

⁸⁴ See section 3.1 of Chapter 4 for a discussion of alignment problems.

⁸⁵ See section 2.3 of Chapter 4 and section 3.1 of Chapter 5.

situated far from mining areas. In this instance, the only shared commonality on which the mine community is centred is the shared effects of mining.

Even though the word “community” can have various meanings, using community rhetoric in legislative instruments creates a false sense of the essentialist community. Consequently, the impression is created that “mine community” should be assessed in the same manner as “community” and that it is possible to determine the identity of the members and leadership structures of the community. This is not possible in the case of “mine community”. The ideal is not to strive for a strict, narrow and inflexible definition of “mine community”. The fact of the matter, however, is that if one legislative system provides for a clearly defined, essentialist community on the one hand, and an open-ended, vaguely defined community on the other hand, without explaining the differentiation and the relationship between these two communities, problems will arise.

It is acknowledged that the use of community rhetoric is positive in the sense that it recognises the interdependence of persons living in a mining area. It opposes an overly individualistic view of how persons relate to one another. Community rhetoric in itself, however, cannot counter the individualist nature of the neoliberal development paradigm within which the community rhetoric is used. Development, as envisaged in the “mine community development” element of the Mining Charter, actually makes more sense if directed at a mining area. Separate provision should be made for the empowerment of labour-sending areas.

4. Final Word

The empowerment system promoted by the Mining Charter and other initiatives such as LED in terms of the SLP and the IDP is located in the global neoliberal development paradigm. Consequently, the politics of development are visible in the way in which the provisions of the Mining Charter and other legislative instruments provide for the empowerment and development of mining communities. In this neoliberal development paradigm, being recognised by the law as a community to be preserved is more favourable than being regarded as a poor community, therefore having to transform into something else through the redistribution of resources. The type of empowerment mechanisms prescribed by the Mining Charter for the “community” and “mine community” respectively follows from the distinction between communities with identities worth preserving and communities only recognised by their poverty.

The argument is neither that mine communities should be recognised for the identity they represent, as in the case of traditional communities, nor that traditional communities should only be acknowledged to the extent that they are poor. Rather, the argument put forward in this thesis is that, because of the neoliberal development paradigm within which empowerment operates, the differential treatment of these groups of people in the framing of legislation perpetuates inequality and conflict in mining areas.

As in the case of the definitions of “community” and “mine community”, the ambiguous terms in which the empowerment provisions are framed, create a lot of uncertainty. The interaction between the different empowerment and development measures are not clear. The uncertain terms of the legislative system place mining companies in a powerful, but also difficult position. On the one hand, the uncertainty creates the opportunity for mining companies to give effect to the obligations in the manner they deem fit, which may not always be beneficial to mining communities. On the other hand, because there is no clear indication of what exactly can be expected from mining companies, the perception amongst mining communities that mining companies operate only for their own benefit, will be reinforced. In this manner, the power relations in a mining area that have been founded even before the first mineral resources were found in South Africa, remain untouched.

Bibliography

Journal Articles

- Adelzadeh A & Padayachee V “The RDP White Paper: Reconstruction of a Development Vision?” 1994 (25) *Transformation* 1-18
- Akinsanya A & Davies A “Third World Quest for a New International Economic Order: An Overview” 1984 *International Law Quarterly* 208-217
- Alexander GS, Peñalver EM, Singer JW & Underkuffler LS “A Statement of Progressive Property” 2009 (94) *Cornell Law Review* 743-744
- Atmore A & Marks S “The Imperial Factor in South Africa in the Nineteenth Century: Towards a Reassessment” 1974 (3) *Journal of Imperial and Commonwealth History* 105-139
- Bangstad S, Eriksen T, Comaroff J & Comaroff JJ “‘Anthropologists are Talking’: About Anthropology and Post-Apartheid South Africa” 2012 (77) *Ethnos: Journal of Anthropology* 115-136
- Bessant K “Authenticity, Community and Modernity” 2010 (41) *Journal for the Theory of Social Behaviour* 2-32
- Binns T & Nel E “Devolving Development: Integrated Development Planning and Developmental Local Government in Post-Apartheid South Africa” 2002 *Regional Studies* 921-932
- Blake R “The World Bank’s Comprehensive Development Framework and the Micro-Paradigm of Law and Development” 2000 (3) *Yale Human Rights and Development Journal* 159-191
- Brand D & Van Marle K “Poverty and the Ordinary Law: Introduction” 2013 (29) *South African Journal on Human Rights* 465-466
- Brand D, De Beer S, De Villiers I & Van Marle K “Poverty as Injustice” 2013 (17) *Law, Democracy and Development* 273-297
- Buckley RP “Husserl’s Rational *Liebesgemeinschaft*” 1996 (26) *Research on Phenomenology* 166-129

- Butler J “Foucault and the Paradox of Bodily Inscriptions” 1989 (86) *Journal of Philosophy* 601-607
- Cawood FT, Minnitt RCA & Rungan SV “Incorporating BEE into the New Mineral Law Framework for the South African Mining Industry” 2005 (105) *Journal of the Southern African Institute of Mining and Metallurgy* 735-744
- Claassens A “Contested Power and Apartheid Tribal Boundaries: The Implications of ‘Living Customary Law’ for Indigenous Accountability Mechanisms” 2011 *Acta Juridica* 174-209
- Claassens A “Marriage, Land and Custom: What’s law got to do with it?” 2013 *Acta Juridica* 1-27
- Claassens A “Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act” 2005 *Acta Juridica* 42-81
- Coase R “The Problem of Social Cost” 2013 (reprinted from 1960 edition) *Journal of Law and Economics* 1-44
- Cobbing J “The Mfecane as Alibi: Thoughts on Dithakong and Mbolompo” 1988 (29) *Journal of African History* 487-519
- Coole D “Is Class a Difference that makes Sense?” 1996 (77) *Radical Philosophy* 17-25
- Davis DM “Is the South African Constitution an Obstacle to a Democratic Post-Colonial State?” 2018 (34) *South African Journal on Human Rights* 359-374
- Davis K & Trebilcock M “The Relationship between Law and Development: Optimists versus Skeptics” 2008 (56) *The American Journal of Comparative Law* 895-946
- Du Plessis W & Pienaar J “The More Things Change, the More They Stay the Same: The Story of Communal Land Tenure in South Africa” 2010 (16:1) *Fundamina* 73-114
- Farber DA “Rights as Signals” 2002 (31) *Legal Studies* 83-98
- Fine B “Chronicle of a Developmental Transformation Foretold: South Africa’s National Development Plan in Hindsight” 2012 (78) *Transformation: Critical Perspectives on Southern Africa* 115-132
- Fourie J & Green E “The Missing People: Accounting for the Productivity of Indigenous Populations in Cape Colonial History” 2015 *Journal of African History* 195-215

- Fourie J, Jansen A & Siebrits K “Public Finances under Private Company Rule: The Dutch Cape Colony (1652-1795)” 2013 *New Contree* 51-71
- Frank AG “Dependence is Dead, Long Live Dependence and Class Struggle: An Answer to Critics” 1974 *Latin American Perspective* 87-106
- Frank AG “The Development of Underdevelopment” 1966 (September) *Monthly Review Press* 37+
- Gelderblom O, De Jong A & Jonker J “The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602-1623” 2013 *The Journal of Economic History* 1050-1076
- Girvin SD “The Antecedents of South African Company Law” 1992 (13) *Journal of Legal History* 63-77
- Goody J “Feudalism in Africa?” *Journal of African History* (1963) 1-18
- Gordon R “Saving Failed States: Sometimes a Neocolonialist Notion” 1997 (91) *Proceedings of the Annual Meeting (American Society of International Law)* 420-422
- Gordon RE & Sylvester JH “Deconstructing Development” 2004 (22) *Wisconsin International Law* 1-98
- Hathaway O “Do Human Rights Treaties Make a Difference?” 2002 (111) *Yale Law Journal* 1935-2321
- Henderson JP “Adam Smith, Ricardo and Economic Theory” 1977 (21) *The Centennial Review* 118-139
- Heyns A & Mostert H “Three Mining Charters and a Draft: How the Politics and Rhetoric of Development in the South African Mining Sector are Keeping Communities in Poverty” *Law and Development Review* 2018 (11) 801-842
- Heyns A “Mining Community Development in South Africa: A Critical Consideration of how the Law and Development approach the Concept ‘Community’” 2019 (12) *Law and Development Review* 561-593
- Heyns C and Brand D “Introduction to Socio-Economic Rights in the South African Constitution” 1998 (2(2)) *Law, Democracy and Development* 153-168

- Horne R “Patterns of Ownership and Labour Unrest within the South African Mining Sector” 2015 (40) *Journal of Contemporary History* 25-47
- Howard J “Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry” 2014 (131) *The South African Law Journal* 11-27
- Humby T “The Bengwenyama Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land” 2012 (15) *Potchefstroom Electronic Law Journal* 165-189
- Humby T “The Community-Preferent Right to Prospect or Mine: Navigating the Fault-Lines of Community, Land, Benefit and Development in Bengwenyama II” 2016 *South African Law Journal* 316-351
- Humby T “The Community-Preferent Right to Prospect or Mine: Navigating the Fault-Lines of Community, Land, Benefit and Development in Bengwenyama II” 2016 *South African Law Journal* (2016) 316-351
- Ireland P “Company Law and the Myth of Shareholder Ownership” 1999 (62:1) *The Modern Law Review Limited* 32-57
- Irwin DA “Mercantilism as Strategic Trade Policy: The Anglo-Dutch Rivalry for the East India Trade” (1991) *Journal of Political Economy* 1296-1314
- Kapelus P “Mining, Corporate Social Responsibility and the ‘Community’: The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi” 2002 (39) *Journal of Business Ethics* 275-296
- Klare K & Davis DM “Transformative Constitutionalism and the Common and Customary Law” 2010 (26) *South African Journal on Human Rights* 403-509
- Klare K “Legal Culture and Transformative Constitutionalism” 1998 (14) *South African Journal on Human Rights* 146-188
- Konadu-Agyemang K “The Best of Times and the Worst of Times: Structural Adjustment Programs and Uneven Development in Africa: The Case of Ghana” 2000 (52) *The Professional Geographer* 469-483
- Lee Y “General Theory of Law and Development” 2017 (50) *Cornell International Law Journal* 415-471

- Legassick M “Legislation, Ideology and Economy in post-1948 South Africa” 1974 (1) *Journal of Southern African Studies* 5-35
- Legassick M “The State, Racism, and the Rise of Capitalism in the Nineteenth-Century Cape Colony” 1993 *South African Historical Journal* 329-368
- March JG & Olsen JP “The New Institutionalism: Organizational Factors in Political Life” 1984 *The American Political Science Review* 734-749
- Mickelson K “Rhetoric and Rage: Third World Voices in International Legal Discourse” 1997 (16) *Wisconsin International Law Journal* 353-420
- Mills JS “On the Definition of Political Economy; and on the Method of Investigation Proper to It” 1836 *London and Westminster Review*
- Mitchell G “Making Sense of Transformation Claims in the South African Mining Industry” 2013 (113) *Journal of the Southern African Institute of Mining and Metallurgy* 39-43
- Modiri J “Law’s Poverty” 2015 (18) *Potchefstroom Electronic Law Journal* 223-273
- Modiri JM “The Time and Space of Critical Legal Pedagogy” 2016 (27) *Stellenbosch Law Review* 507-534
- Morin ME “The Self, the Other and the Many: Derrida on Testimony” 2007 (40:2) *Mosaic: An Interdisciplinary Critical Journal* 165-178
- Morss J “Saving Human Rights from its Friends: A Critique of the Imaginary Justice of Costas Douzinas” 2003 (27) *Melbourne University Law Review* 889-904
- Motha S & Zartadoulides T “Law, Ethics and the Utopian End of Human Rights” 2003 (12) *Social Legal Studies* 243-268
- Murray W & Overton JD “Neoliberalism is Dead, Long Live Neoliberalism? Neostructuralism and the International Aid Regime of the 2000s” 2011 (11) *Progress in Development Studies* 307-319
- Nattrass N “The RDP White Paper: A Cocktail of Confusion” 1994 (12) *Indicator SA* 36-39
- Nel E “Local Economic Development: A Review and Assessment of its Current Status in South Africa” 2001 (38) *Urban Studies* 1003-1024
- Norris A “Jean-Luc Nancy and the Myth of the Common” 2000 (7) *Constellations* 272-295

- North DC “Institutions” 1991 (5) *Journal of Economic Perspectives* 97-112
- Odysseos L “Constituting Community: Heidegger, Mimesis and Critical Belonging” 2009 (12) *Critical Review of International Social and Political Philosophy* 37-61
- Pavlakis D “The Development of British Overseas Humanitarianism and the Congo Reform Campaign” 2010 (11:1) *Journal of Colonialism and Colonial History*
- Persky J “Retrospectives: The Ethology of *Homo Economicus*” 1995 (9) *Journal of Economic Perspectives* 221-231
- Phillips A “The Concept of ‘Development’” 1977 (4) *Review of African Political Economy* 7-20
- Ramose MB & Hook D “To Whom does the Land Belong?” 2016 (50) *Psychology in Society* 86-98
- Ramose MB “Towards a post-conquest South Africa: beyond the constitution of 1996” 2018 (34:3) *South African Journal on Human Rights* 326-341
- Raz J “The Rule of Law and its Virtue” 1977 (93) *The Law Quarterly Review* 198-202
- Rogerson CM “Pro-Poor Local Economic Development in South Africa: The Role of Pro-Poor Tourism” 2006 (11) *Local Environment* 37-60
- Ross T “The Rhetoric of Poverty: Their Immortality, Our Helplessness” 1991 (79) *Georgetown Law Journal* 1499-1547
- Scott G & Pawson E “Local Development Initiatives and Unemployment in New Zealand” 1999 *Tijdschrift voor Economische en Sociale Geografie* 184-195
- Snyder FG “Law and Development in the Light of Dependency Theory” 1980 (14) *Law and Society Review* 723-804
- Southall R and Tangri R “The Politics of Black Economic Empowerment in South Africa” 2008 *Journal of Southern African Studies* 699-716
- Stevens C & Ntlama N “An Overview of South Africa’s Institutional Framework in Promoting Women’s Right to Development” 2016 (20) *Law, Democracy and Development* 46-68

- Stewart L “Rights Discourse and Practices, Everyday Violence and Social Protests: Who Counts as Subjects and Whose Lives are real in the Neo-Colonial South African Nation State” 2014 (18) *Law, Democracy and Development* 1-21
- Stiglitz J “The Post Washington Consensus Consensus” 2005 *The Initiative for Policy Dialogue*
- Stiglitz JE “Inequality and Economic Growth” 2016 *The Political Quarterly* 134-155
- Streeten PP “Basic Needs: Premises and Promises” *World Bank Reprint Series: 62* reprinted from 1979 (1) *Journal of Policy Modelling* 136-146
- Thomas C “Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism” 2011 (96) *Cornell Law Review* 967-1024
- Tilman R “Ferdinand Tönnies, Thorstein Veblen and Karl Marx: From Community to Society and back?” 2004 (11) *The European Journal of the History of Economic Thought* 579-606
- Trebilcock M & Veel P E “Property Rights and Development: The Contingent Case for Formalization” 2008 (30) *University of Pennsylvania Journal of International Law* 397-481
- Trubek D “Back to the Future: The Short and Happy Life of the Law and Society Movement” 1990 (18) *Florida State University Law Review* 1-55
- Van der Schyff E “Who ‘owns’ the Country’s Mineral Resources? The Possible Incorporation of the Public Trust Doctrine through the Mineral and Petroleum Resources Development Act” 2008 (4) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 757-768
- Van der Walt A “Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa” 1999 (64:2&3) *Koers* 261-264
- Van der Walt AJ “Gedagtes oor die Herkoms en Ontwikkeling van die Suid-Afrikaanse Eiendomsbegrip (Vervolg)” 1988 *De Jure* (1988) 306-325
- Van der Walt AJ “Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa” 1999 (64) *Koers* 259-294
- Van der Walt AJ “The South African Law of Ownership: A Historical and Political Perspective” 1992 *De Jure* (1992) 446-457
- Warden-Fernandez J “Indigenous Communities’ Rights and Mineral Development” 2005 (23) *Journal of Energy & Natural Resources Law* 395-426

Williams A & Siddique A “The Use (and Abuse) of Governance Indicators in Economics: A Review” 2007 *Economics of Governance* 131-175

Williams P & Taylor I “Neoliberalism and the Political Economy of the ‘New’ South Africa” 2000 (5) *New Political Economy* 21-40

Books & Book Sections

Alam S, Atapatty S, Gonzales CG & Razzaque J (eds) *International Environmental Law and the Global South* Cambridge University Press: Cambridge (2016):

Seck SL “Transnational Corporations and Extractive Industries” in Alam et al (eds) (2016)

Anderson G *The Three Worlds of Welfare Capitalism* Polity Press: Cambridge (1990:41)

Aristotle & Everson S (ed) *The Politics* Cambridge University Press: Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo (1988)

Ashcroft B, Griffiths G & Tiffin H *Key Concepts in Post-Colonial Studies* Routledge: New York (1998)

Barnett M *Empire of Humanity: A History of Humanitarianism* Cornell University Press: Ithaca, NY (2011)

Barros DB (ed) *Hernando de Soto and Property in a Market Economy* Routledge: New York (2010):

Dyal-Chand R “Leaving the Body of Property Law? Meltdowns, Land Rushes and Failed Economic Development” in Barros (ed) (2010)

Battiste M “Introduction: Unfolding the Lessons of Colonization” in M Battiste (ed) *Reclaiming Indigenous Voice and Vision* UBC Press: Vancouver, Toronto (2000)

Bennett RJ *Decentralization, Local Governments and Markets: Towards a Post-Welfare Agenda* Clarendon Press: Oxford (1990)

Black CE *The Dynamics of Modernization: A Study in Comparative History* Harper & Row: New York (1966)

Boff L, Boff C, Verstappen J, Klein Goldewijk BMJ *Wat is de Theologie van de Bevrijding?* Averbode: Altiora (1986)

- Bond P *Against Global Apartheid: South Africa meets the World Bank, IMF and International Finance* UCT Press: Lansdowne (2001)
- Bond P *Elite Transition: From Apartheid to Neoliberalism in South Africa* University of KwaZulu-Natal Press (2000)
- Brand D & Heyns C (eds) *Socio-Economic Rights in South Africa* Pretoria University Law Press: Pretoria (2005):
- Brand D “Introduction to Socio-Economic Rights in the South African Constitution” in Brand & Heyns (eds) (2005)
- Breytenbach B *Notes from the Middle World* Haymarket Books: Chicago (2009)
- Brown W *Undoing the Demos: Neoliberalism’s Stealth Revolution* Zone Books: New York (2015)
- Buber M & Friedman M (ed and translate) *The Knowledge of Man: A Philosophy of the Interhuman* Harper & Row: New York (1965)
- Buber M & Smith RG (translate) *Between Man and Man* Routledge: London (1947)
- Buber M & Smith RG (translate) *I and Thou* Routledge: London (1958)
- Butler J *Bodies that Matter: On the Discursive Limits of “Sex”* Routledge: London (2003)
- Butler J *Frames of War: When is Life Grievable?* Verso: London (2009)
- Butler J *Gender Trouble: Feminism and the Subversion of Identity* Routledge: New York (1990)
- Crais C *The Making of the Colonial Order: White Supremacy and Black Resistance in the Eastern Cape, 1770-1865* Witwatersrand Press: Johannesburg (1992)
- Crush J (ed) *Power of Development* Routledge: London (1995):
- Escobar A “Imagining a Post Development Era” in Crush (ed) (1995)
- Mitchell T “The Object of Development: America’s Egypt” in Crush (ed) (1995)
- Crush J, Jeeves A & Yudelman D *South Africa’s Labor Empire: A History of Black Migrancy to the Gold Mines* Westview Press: Cape Town (1991)

- Dam KW *The Law-Growth Nexus: The Rule of Law and Economic Development* Brookings Institution Press: Washington DC (2006)
- Davenport J *Digging Deep: A History of Mining in South Africa* Jonathan Ball: UK (2013)
- Davidson B *The Black Man's Burden: Africa and the Curse of the Nation-State* Three Rivers Press: New York (1993)
- De Soto H *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* Basic Books: New York (2000)
- De Soto H *The Other Path: The Invisible Revolution in the Third World* Basic Books: New York (1989)
- Deleuze G & Joughin M (translate) *Negotiations* Columbia University Press: New York (1995)
- Deleuze G, Guattari F & Massumi B (translate) *A Thousand Plateaus: Capitalism and Schizophrenia* University of Minnesota Press: Minneapolis (2005)
- Derrida J and Ferraris M *A Taste for the Secret* Polity Press: Cambridge UK (2001)
- Derrida J *Politics of Friendship* Verso: London (1997)
- Derrida J *The Gift of Death* University of Chicago Press: Chicago (1995)
- Derrida J *Writing and Difference* University of Chicago: Chicago (1980):
- Derrida J "Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas" in Derrida (1980)
- Devesh K, Lewis JP & Webb RC *The World Bank: Its First Half Century – History* Brookings Institution Press: Washington DC (1997)
- Dicey A *An Introduction to the Study of the Law and the Constitution* 10th ed Palgrave Macmillan UK: London (1979) (1st edition 1885)
- Douzinas C *Human Rights and The Empire: The Political Philosophy of Cosmopolitanism* Routledge: Cavendish (2007)
- Douzinas C *The End of Human Rights: Critical Legal Thought at the Turn of the Century* Hart Publishing: Oxford (2000)

- Elphick R and Giliomee H (eds) *The Shaping of South African Society* Wesleyan University Press: Middletown (1989):
- Schutte G “Company and Colonists at the Cape, 1652-1795” in Elphick & Giliomee (eds) (1989)
- Escobar A *Encountering Development: The Making and Unmaking of the Third World* Princeton University Press: New Jersey (2011)
- Esping-Anderson G *The Three Worlds of Welfare Capitalism* Princeton University Press: New Jersey (1990)
- Esteva G, Babones SJ & Babcicky P *The Future of Development: A Radical Manifesto* University of Chicago Press: Chicago (2013)
- Feinstein CH *An Economic History of South Africa: Conquest, Discrimination and Development* Cambridge University Press: Cambridge (2005)
- Field TL *State Governance of Mining, Development and Sustainability* Edward Elgar Publishing Ltd: Cheltenham (UK) and Massachusetts (US) (2019)
- Foucault M “Order of Discourse” in M Shapiro (ed) *Language and Politics* Blackwell: Oxford (1984)
- Foucault M *Archaeology of Knowledge* Travistock: London (1972)
- Foucault M *Order of Things* Travistock: London (1970)
- Fraser N (ed) *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* Routledge: New York (1997):
- Fraser N “Culture, Political Economy, and Difference: On Iris Young’s Justice and the Politics of Difference” in Fraser (ed) (1997)
- Gelven M A *Commentary on Heidegger’s “Being and Time”* Harper and Row: New York (1970)
- Giddens A *The Third Way: The Renewal of Social Democracy* John Wiley and Sons: New Jersey (2013)
- Gilbert CL & Vines D (eds) *The World Bank: Structured Policies* Cambridge University Press: Cambridge (2006):

- Stiglitz JE “Introduction” in Gilber & Vines (eds) (2006)
- Giliomee H *Die Afrikaners* Tafelberg: Kaapstad (2004)
- Goehring B *Indigenous Peoples of the World: An Introduction to Their Past, Present, and Future* Purich Pub: Saskatoon (1993)
- Gutierrez G A *Theology of Liberation: History, Politics and Salvation* Orbis Books: Maryknoll, New York 15th edition (1988)
- Hayek F *Law, Legislation and Liberty* University of Chicago Press: Chicago (1973)
- Hayek F *The Constitution of Liberty* University of Chicago Press: Chicago (1960)
- Hayek F *The Road to Serfdom* Routledge: UK (1944)
- Heidegger M *Being and Time* Blackwell Publishers Ltd: Oxford and Cambridge 2001 edition (1962)
- Hendricks FT, Ntsebeza L & Helliker K *The Promise of Land: Undoing a Century of Dispossession in South Africa* Jacana Media: Johannesburg (2013):
- Hendricks FT “Rhetoric and Reality in Restitution and Redistribution: Ongoing Land and Agrarian Questions in South Africa” in Hendricks et al (2013)
- Hendricks FT, Ntsebeza L and Helliker K “Colonial Pasts and Democratic Futures in South Africa” in Hendricks et al (2013)
- Martin B “Living in a Theoretical Interregnum: Capital Lessons from Southern African Rural History” in Hendricks et al (2013)
- Ntsebeza L “The more things change, the more they remain the same: Rural Land Tenure and Democracy in Former Bantustans” in Hendricks et al (2013)
- Honneth A *The Struggle for Recognition: The Moral Grammar of Social Conflicts* MIT Press: Cambridge, Massachusetts (1996)
- Hume D *A Treatise of Human Nature* Dover Philosophical Classics 2003 edition (1739)
- Hume D *An Enquiry Concerning the Principles of Morals* Prometheus 2004 edition (1751)
- Husserl E & Carr D (translate) *The Crisis of European Sciences and Transcendental Phenomenology* Northwestern University Press: Evanston IL (1954)

- Husserl E *Cartesian Meditations: An Introduction to Phenomenology* Martinus Nijhoff: The Hague (1960)
- Jansen EG *Native Policy in the Union of South Africa* Pretoria (1950)
- Jeeves A & Cuthbertson G (eds) *Fragile Freedom: South African Democracy 1994-2004* Pretoria: UNISA Press (2008):
- Southall R “Political Change and the Black Middle Class in Democratic South Africa” in Jeeves & Cuthbertson (eds) (2008)
- Juul S *Solidarity in Individualized Societies - Recognition, Justice and Good Judgment* Routledge: New York (2013):
- Juul S “The Discussion of the Good versus the Just” in Juul (2013)
- Keegan T *Colonial South Africa and the Origin of the Racial Order* David Philip: Cape Town (1996)
- Keynes JM *The General Theory of Employment, Interest and Money* Macmillan: London (1936/1943) (1949)
- Kiely R & Marfleet P (eds) *Globalisation and the Third World* Routledge: New York (1998):
- Kiely R “Globalisation, (Post-) Modernity and the Third World” in Kiely et al (eds) (1998)
- Kiely R “The Crisis of Global Development” in Kiely et al (eds) (1998)
- Klugman J (ed) *A Sourcebook for Poverty Reduction Strategies* The World Bank: Washington, DC (2002):
- Dongier P, Van Domelen J, Ostrom E, Rizvi A, Wakeman A, Bebbington A, Alkire S Esmail T & Polski M “Community-Driven Development” in Klugman (ed) (2002)
- Kohl H *From Archetype to Zeitgeist: Powerful Ideas for Powerful Thinking* Little Brown: Boston (1993)
- Kothari U & Minogue M *Development Theory and Practice: Critical Perspectives* Palgrave: Hampshire (2002):
- Cammack P “Neoliberalism, the World Bank and the New Politics of Development” in Kothari et al (2002)

- Kothari U “Feminist and Postcolonial Challenges to Development” in Kothari & Minogue (eds) (2002)
- Minogue M & Kothari U “Conclusion: Orthodoxy and its Alternatives in Contemporary Development” in Kothari & Minogue (eds) (2002)
- Landwehr J *VOC: A Bibliography of Publications Relating to the Dutch East Company, 1602-1800* Brill/Hes & De Graaff: Utrecht (1991)
- Lang M & Mokrani D *Beyond Development: Alternative Visions from Latin America* Permanent Working Group on Alternatives to Development Rosa Luxemburg Foundation (2013):
- Gudynas E “Debates on Development and its Alternatives in Latin America: A Brief Heterodox Guide” in Lang & Mokrami (2013)
- Levinas E *Collected Philosophical Papers* Martin Nijhoff: Dordrecht (1987)
- Levinas E *Totality and Infinity: An Essay on Exteriority* Duquesne University Press: Pittsburgh, PA (1969)
- Locke J & Laslett P (ed) *The Second Treatise of Government* Cambridge University Press: Cambridge (1988)
- Lovell T (ed) *(Mis)recognition, Social Inequality and Social Justice: Nancy Fraser and Pierre Bourdieu* Routledge: London and New York (2007):
- Lister R “(Mis)recognition, Social in Equality and Social Justice: A Critical Social Policy Perspective” in Lovell (ed) (2007)
- MacIntyre A *A Short History of Ethics* Routledge Classics: London & New York (2002)
- MacIntyre A *After Virtue* Bloomsbury: London & New York (2013)
- MacIntyre A *Whose Justice? Which Rationality?* University of Notre Dame Press: Notre Dame, IN (1988)
- Maganya E (ed) *Development Strategies in South Africa* IFFA: Johannesburg (1996):
- Bond P “The making of South Africa’s Macro-Economic Compromise” in Maganya (ed) (1996)
- Malanczuk P *Akehurst's Modern Introduction to International Law* Routledge: London (1997)

Manza J & Sauder M (eds) *Inequality and Society* (2009/1950) New York: WW Norton and Co:

Marshall TH "Citizenship and Social Class" in Manza & Sauer (eds) (2009)

March JG & Olsen JP *Democratic Governance* Free Press: New York (1995)

March JG & Olsen JP *Rediscovering Institutions: The Organizational Basis of Politics* Free Press: New York (1989) (reissued Simon and Schuster: New York (2010))

March JG & Olsen JP: *The New Institutionalism: Organizational Factors in Political Life* (1984)

Mbeki M *Architects of Poverty: Why African Capitalism Needs Changing* Picado Africa: Johannesburg (2009)

Mehmet O *Westernizing the Third World: The Eurocentricity of Economic Development Theories* Routledge: (1995) (2002)

Menke C *Kritik der Rechte* Suhrkamp: Berlin (2015)

Mittelman J and Pasha M *Out from Underdevelopment Revisited: Changing Global Structures and the Remaking of the Third World* Palgrave Macmillan: United Kingdom (1997)

Mohr P *Economic Indicators* UNISA Press: Pretoria (2004)

Montesquieu C *The Spirit of Law* Davin Niven: Glasgow (1793)

Mostert N *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People* Jonathan Cape: London (1992)

Munck R & O'Hearn D (eds) *Critical Development Theory: Contributions to a New Paradigm* Zed Books: London & New York (1999):

Sardar Z "Development and the Locations of Eurocentrism" in Munck et al (1999)

Tucker V "The Myth of Development: A Critique of a Eurocentric Discourse" in Munck et al (1999)

Nancy J-L & Connor P *The Inoperative Community* University of Minnesota Press: Minneapolis (1991)

Nancy J-L & Macdonald B (translate) *The Experience of Freedom* Stanford University Press: Stanford (1993)

- Nancy J-L, Richardson RD & O'Byrne AE (translate) *Being Singular Plural* Stanford University Press: Stanford (2000)
- Nel E & Rogerson CM *Local Economic Development in the Developing World: The Experience of Southern Africa* Transaction Press: New Brunswick, NJ (2005)
- Ngcukaitobi T *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* Penguin Books: Cape Town (2018)
- North DC & Thomas RB *The Rise of the Western World: A New Economic History* Cambridge University Press: Cambridge (1973)
- North DC *Institutions, Institutional Change, and Economic Performance* Cambridge University Press: Cambridge (1990)
- North DC *Structure and Change in Economic History* WW Norton & Company (1981)
- North DC *Understanding the Process of Economic Change* Princeton University Press: New Jersey (2005)
- North DC, Wallis JJ & Weingast BR *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* Cambridge University Press: Cambridge (2012)
- Ntsebeza L *Democracy Compromised: Chiefs and the Politics of Land in South Africa* Brill: Leiden & Boston (2005)
- Nussbaum MC *Creating Capabilities* The Belknap Press of Harvard University: Cambridge & London (2011)
- Michie J & Padayachee V *The Political Economy of South Africa's Transition* Dryden Press: London (1997):
- Padayachee V "The Evolution of South Africa's International Financial Relations Policy: 1985-1995" in Michie & Padayachee (1997)
- Pienaar J *Land Reform* JUTA: Cape Town (2014)
- Piketty T *Capital in the Twenty-First Century* The Belknap Press of Harvard University Press: Cambridge Massachusetts (2014)
- Pillay U, Tomlinson R & du Toit J (eds) *Democracy and Delivery-Urban Policy in South Africa* HSRC Press: Cape Town (2006):

- Harrison P “Integrated Development Plans and Third Way Politics” in Pillay et al (eds) (2006)
- Nel E & John L “The Evolution of Local Economic Development in South Africa” U Pillay et al (eds) (2006)
- Polányi K *The Great Transformation: The Political and Economic Origins of Our Time* Beacon Press: Massachusetts (1957)
- Rahnema M & Bawtree V (eds) *The Post-Development Reader* Zed Books: London (1997):
- Rahnema M “Towards Post-Development: Searching for Signposts, a New Language and New Paradigms” in Rahnema & Bawtree (eds) (1997)
- Ricardo D, Straffa P & Dobb MH (eds) *The Works and Correspondence of David Ricardo* Volumes I-XI Cambridge University Press: Cambridge (1952-1973)
- Rostow WW *The Stages of Economic Growth: A Non-Communist Manifesto* Cambridge University Press: Cambridge (1960, revised illustrated edition 1990)
- Sachs W (ed) *The Development Dictionary: A Guide to Knowledge as Power* Zed Books: London (1992):
- Esteva G “Development” in Sachs (ed) (1992)
- Sbert JM “Progress” in Sachs (ed) (1992)
- Sandel M *Liberalism and the Limits of Justice* Cambridge University Press: Cambridge (1998)
- Santos A and Trubek DM and (eds) *The New Law and Economic Development: A Critical Appraisal* Cambridge University Press: Cambridge (2006):
- Kennedy D “Three Globalizations of Law and Legal Thought: 1850-2000” in Santos & Trubek (eds) (2006)
- Santos A “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development” in Santos & Trubek (eds) (2006)
- Trubek DM & Santos A “An Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice” in Santos & Trubek (eds) (2006)
- Trubek DM “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future” in Santos & Trubek (eds) (2006)

- Sarup M & Tasneem R *Identity, Culture and the Postmodern World* Edinburgh University Press: Edinburgh (1996)
- Saunders K (ed) *Feminist Post-Development Thought* Zed Books: London (2002)
- Parpart J “Lessons from the Field: Rethinking Empowerment, Gender and Development from a post-(post-?) Development Perspective” in Saunders (ed) (2002)
- Schumpeter JA *Capitalism, Socialism & Democracy* Routledge Classics: Oxon (2010)
- Seedat-Khan M, Jansen Z & Smith R (eds) *Sociology: A South African Perspective* Cengage Learning EMEA: Andover (2015):
- Ferrante J & Chagonda T “Social Stratification” in Seedat-Khan et al (eds) (2015)
- Seekings J & Natrass N *Class, Race and Inequality in South Africa* Yale University Press: New Haven and London (2005)
- Sen A *Development and Freedom* Oxford University Press: Oxford (2001)
- Sen A *Inequality Reexamined* Clarendon Press: Oxford (1992)
- Sen A *Poverty and Famines. An Essay on Entitlement and Deprivation* Oxford University Press: Oxford (1982)
- Smith A *An Inquiry into the Nature and Causes of the Wealth of the Nations* The University of Edinburgh Research Archive (1776)
- Soros G *The Crisis of Global Capitalism: The Open Society Endangered* Public Affairs: New York Revised Edition (1999)
- Soudien C, Reddy V and Woolard I (eds) *Poverty & Inequality: Diagnosis Prognosis Responses – State of the Nation* HSRC Press: Cape Town (2019):
- Kistner U, Ismail Sooliman Q & Van Marle K “Poverty and Rights: Philosophical, Historical and Jurisprudential Perspectives” in Soudien et al (2019)
- Soudien C, Reddy V & Woolard I “South Africa 2018: The State of the Discussion on Poverty and Inequality” in Soudien et al (2019)
- Subramanian S *The Poverty Line* Oxford University Press: New Delhi (2012)

- Taylor C “The Politics of Recognition” in A Gutman (ed) *Multiculturalism: Examining the Politics of Recognition* Princeton University Press: Princeton (1994)
- Taylor C *Sources of the Self* Cambridge University Press: Cambridge (1989)
- Terreblanche S *A History of Inequality in South Africa: 1652-2002* University of Natal Press: Pietermaritzburg (2002)
- Thornberry P *Indigenous Peoples and Human Rights* Juris Publishing: Manchester (2002)
- Tönnies F & Harris J (translate) *Gemeinschaft und Gesellschaft* Cambridge University Press: Cambridge (2001)
- Trebilcock M & Daniels R *Rule of Law Reform and Development: Charting the Fragile Path of Progress* Edward Elgar: Cheltenham, UK and Northampton, MA, USA (2008)
- Trebilcock MJ & Mota Prado M *Advanced Introduction to Law and Development* Edward Elgar Publishers: Cheltenham (2014)
- Van Schalkwyk L (ed) *Co-Ordinating Governance for Mining: Streamlining Systems for Improved Intergovernmental Relations* Juta: Cape Town (2019):
- Heyns A & Mudimu G “Aligning Social and Labour Plans with Integrated Development Plans” in Van Schalkwyk (2019)
- Walzer M *Spheres of Justice* Basic Books: New York (1983)
- Watson RL *The Slave Question: Liberty and Property in South Africa* Wesleyan University Press: London (1990)
- Williamson OE *The Mechanisms of Governance* Oxford University Press: New York, NY (1996)
- Worden N and Crais CC *Breaking the Chains: Slavery and its Legacy in the Nineteenth Century Cape Colony* Witwatersrand University Press: Johannesburg (1994)
- World Bank Group *A Proposal for a Comprehensive Development Framework (A Discussion Draft)* World Bank: Washington DC (1999)
- World Bank *World Bank Participation Source Book* World Bank: Washington DC (1996)
- Wynberg R and Hauck M (eds) *Sharing the Benefits from the Coast* Cape Town: UCT Press (2014):

Mbatha P & Wynberg R “Mining and the Myth of Benefits in South African Rural Coastal Communities” in Wynberg & Hauck (2014)

Young IM *Justice and the Politics of Difference* Princeton University Press: Princeton (1990)

Yudelman D *The Emergence of Modern South Africa: State, Capital and the Incorporation of Organised Labour on the South African Gold Fields* David Philip: Cape Town: (1983)

Case Law

Bafokeng Private Land Buyers Association v Royal Bafokeng Nation 2016 JDR 1108 (NWM)

Baleni v Minister of Mineral Resources and others 2019 2 SA 453 GP

Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others 2015 3 BCLR 268 (CC)

Ben Tovim v Ben-Tovim 2001 3 SA 1074 (C)

Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 4 SA 113 (CC)

Bengwenyama Minerals (Pty) Ltd v Genorah Resources (unreported TPD decision 39808/2007)

Bengwenyama Minerals (Pty) Ltd v Genorah Resources 2010 3 All SA 577 (SCA)

Bengwenyama-ya-Maswasi Community and others v Genorah Resources (Pty) Ltd and Others 2014 4 All SA 673 (SCA)

Bengwenyama-ya-Maswazi Community v Genorah Resources (Pty) Ltd 2014 All SA 673 (SCA)

Borland’s Trustee v Steel Brothers & Co Ltd 1901 1 Ch 279

Brink v Mampudi Mining (Pty) Ltd 2003 5 SA 221 (T)

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya case 276/2003

Chinese Association of South Africa v Minister of Labour (unreported PHC decision 59521/2007)

City of Johannesburg v Blue Moonlights Properties 2012 2 SA 104 (CC)

Cooper v Boyes NO 1994 4 SA 521 (C)

De Leef Family Trust v CIR 1993 3 SA 345 (A)

Dladla v City of Johannesburg 2018 2 SA 327 (CC)

Flexi Holiday Club v La Lucia Sands Shareblock Ltd 2006 2 All SA 479 (D)

Land and Agricultural Bank of South Africa v Parker and Others 2005 2 SA 77

Letseng Diamonds Ltd v JCI Ltd; Trinity Management (Pty) Ltd v Investec Bank Ltd 2007 (5) SA 564 (W)

Liquidators Union Share Agency v Hatton 1927 AD 240

Lupacchini NO & Another v Minister of Safety and Security 2010 6 SA 457 (SCA)

Macassar Land Claims Committee v Maccsand CC and Others 2017 4 SA 1

Mogale v Maakane 2010 JDR 1091 (NWM)

Smuts v Booyens; Markplaas (Edms) Bpk v Booyens 2001 3 All SA 536 (SCA)

South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others 2014 6 BCLR 762 (CC)

Standard Bank of South Africa Ltd v Ocean Commodities Inc 1983 (1) SA 276 (A)

The Traditional Authority of the Bapo Ba Mogale Community v Kenoshi 2010 JDR 0863 (GN)

Tigon Ltd v Bestyet Investments (Pty) Ltd 2001 4 SA 634 (N)

Tongoane v Minister of Agriculture and Land Affairs 2010 6 SA 214 (CC)

Wessels v DA Wessels en Seuns (Edms) Bpk 1987 3 SA 530 (T)

Legislation, Regulations, Charters, Guidelines and other Government Publications

(Interim) Constitution of the Republic of South Africa, Act 200 of 1993

African National Congress *Ready to Govern: ANC Policy Guidelines for a Democratic South Africa adopted at the National Conference* Policy Unit of the African National Congress (1992)

African National Congress *The Reconstruction and Development Programme: A Policy Framework* Johannesburg: Umanyano for African National (1994)

Bantustan Authorities Act 68 of 1951

Broad-Based Black Economic Empowerment Act 53 of 2003

Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry June 2017

Broad-Based Economic Empowerment Act 53 of 2003: Issue of Codes of Good Practice (GG 36928 & GN 1019 of 11 October 2013)

Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (GN 1002 GG 41934 of 27 September 2018)

Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838 GG 33573 of 20 September 2010)

Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (GN 1639 GG 26661 of 13 August 2004)

Communal Land Rights Act 11 of 2004

Communal Property Associations Act 28 of 1996

Companies Act 71 of 2008

Constitution Eighteenth Amendment Bill of 6 December 2019

Constitution of the Republic of South Africa, 1996

Department of Human Settlements, Department of Mineral Resources and the Presidency *Inter-Ministerial Committee on Eradicating Informal Settlements in Mining Areas: Department of Human Settlements Update; Limpopo Oversight Report* (10 March 2015) available at <<https://pmg.org.za/committee-meeting/20461/>> accessed on 20 February 2020

Department of Mineral Resources *Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry* (May 2015)

Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum Resources Development Act 28 of 2002*

Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties*

Department of Mineral Resources *Mining Charter Impact Assessment Report (2009)*

Department of Mineral Resources *Social and Labour Plan Guidelines for the Mining and Production Industries as required in terms of regulation 46 of the Mineral and Petroleum Resources Development Act 28 of 2002 (October 2010)*

Department of Provincial and Local Government *National Framework for LED in South Africa (2006-2011): Stimulating and Developing Sustainable Local Economies (2006)*

Department of Rural Development and Land Reform *Communal Property Associations: Annual Report 2018/19* 29 (October 2019) available at <<https://www.drdlr.gov.za/sites/Internet/publications/Reports/Pages/Annual-Reports.aspx>> <https://www.drdlr.gov.za/sites/Internet/publications/Reports/Pages/Annual-Reports.aspx> accessed on 11 February 2020

Department of the Presidency of South Africa: National Planning Commission *Institutions and Governance Diagnostics Report (2010)*

Department of Trade and Industry *Industrial Policy Action Plan, 2017/18 – 2019/20 (2017)*

Department of Trade and Industry *New Growth Path: Framework (2011)*

Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry for public comment (GG 41714 GN 611 of 15 June 2018)

Draft Reviewed Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 450 GG 39933 of 15 April 2016)

Extension of the Application of the Provisions of the Interim Protection of Informal Land Rights Act 31 of 1996 (GG 42111 GN 1384 of 14 December 2018)

Glen Grey Act of 1894

Government of the Republic of South Africa *Foreign Policy for South Africa: Discussion Document* (1 June 1996) available at <https://www.gov.za/documents/green-papers?order=field_gcisdoc_document_date&sort=asc> accessed on 19 November 2019

Group Areas Act 41 of 1950

Housing and Living Conditions Standard for the Minerals Industry issued in 2009 in terms of section 100 of the MPRDA (GN 445 GG 32166 of 29 April 2009)

Human Rights Commission Act 54 of 1994

Interim Protection of Informal Land Rights 31 of 1996

Local Government: Municipal Structures Act 117 of 1998

Local Government: Municipal Systems Act 32 of 2000

Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province (GG 38978 GN 699 of 2015)

Master and Servants Ordinance 1841s

Mineral and Petroleum Resources Development Act 28 of 2002

Mineral and Petroleum Resources Development Amendment Act 49 of 2008

Mineral and Petroleum Resources Development Amendment Bill B15D_2013

National Planning Commission *National Development Plan: Vision for 2030* (2011)

National Treasury *2017 Budget: People's Guide* National Treasury: Pretoria (2017)

Native (Urban Areas) Act 21 of 1923

Native Administration Act of 1927

Native Affairs Act of 1920

Native Land Act 27 of 1913

Regulations in Terms of Section 107(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (GNR 527 GG 26275 of 23 April 2004)

Restitution of Land Rights Act 22 of 1994

Stats SA “Key Findings: P0441 – Gross Domestic Product (GDP), 3rd Quarter 2019” available at <http://www.statssa.gov.za/?page_id=1856&PPN=P0441&SCH=7648> accessed on 13 January 2020

Stats SA “Key Findings: P0441 – Gross Domestic Product (GDP), 3rd Quarter 2019” available at <http://www.statssa.gov.za/?page_id=1856&PPN=P0441&SCH=7648> accessed on 20 February 2020

Stats SA *Gross Domestic Product, 4th Quarter 2015* Statistics South Africa: Pretoria (2016)

Stats SA *National Poverty Lines* Statistics South Africa: Pretoria (2018)

Stats SA *Poverty Mapping in South Africa: Applying small area estimation techniques using IES 20101/11 and Census 2011* Statistics South Africa: Pretoria (2018)

Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 & 2015* Statistics South Africa: Pretoria (2017)

Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 & 2015* (2017) Pretoria: Statistics South Africa Pretoria (2017)

Stats SA *Statistical Release P 0441: Gross Domestic Product – Second Quarter 2019* Statistics South Africa: Pretoria (2019)

Stats SA *Statistical Release P0277: Quarterly Employment Statistics – December 2015* Statistics South Africa: Pretoria (2016)

Stats SA *Subjective Poverty in South Africa: Findings from the Living Conditions Surveys, 2008/2009-2014/2015* Statistics South Africa: Pretoria (2018)

Traditional and Khoi-San Leadership Act 3 of 2019

Traditional and Khoi-San Leadership Bill B23_2015

Traditional Leadership and Governance Framework Act 41 of 2003

Trust Property Control Act 57 of 1988

White Paper on Reconstruction and Development (GG 16085 GN 1994)

Political Manifestos and Policy

“Declaration of the Economic Freedom Fighters National Assembly on what is to be done” 26 & 27 July 2013 available at <<https://www.politicsweb.co.za/documents/declaration-of-the-eff-national-assembly-july-26-t>> accessed on 26 March 2020

“Economic Freedom Fighters Founding Manifesto: Radical Movement Towards Economic Freedom in Our Lifetime” adopted at the EFF National Assembly 26 to 27 July 2013

The Freedom Charter adopted at the Congress of the People, Kliptown (26 June 1955)

International Instruments and Policy

African Charter on Human and People’s Rights (1981)

Charter of the United Nations (1945)

G8 Summit Document on Africa: A Historic Opportunity (Gleneagles 2005)

International Labour Organisation Convention No. 169 (5 September 1991) “Indigenous and Tribal Peoples Convention”

OECD Paris Declaration and the Accra Agenda for Action OECD Publishing: Paris (2008)

OECD Paris Declaration on Aid Effectiveness” OECD Publishing: Paris (2005)

UN “United Nations Millennium Development Goals and Beyond 2050” available at <<https://www.un.org/millenniumgoals/>> accessed on 7 October 2019

UN *Monterrey Consensus on Financing for Development* United Nations Department of Public Information: New York (2003)

UN Res 1710 (XVI) (19 December 1961) “United Nations Development Decade: A Programme for International Economic Cooperation”

UNGA Res 128 (1987) A/RES/41/128 “Declaration on the Right to Development”

UNGA Res 1803 (XVII) (14 December 1962) “Permanent Sovereignty over Natural Resources

UNGA Res 295 (2007) A/RES/61/295 “Declaration on the Rights of Indigenous Peoples”

UNGA Res 3281 (XXIX) (12 December 1974) “Charter of Economic Rights and Duties of States”

United Nations “UN Sustainable Development Goals” available at <<https://sustainabledevelopment.un.org/?menu=1300>> accessed on 16 March 2020

United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations of the Committee on the Elimination of Racial Discrimination* 19 October 2006 CERD/C/ZAF/CO/3 available at <<https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=45c30bc80&skip=0&query=cerd&coi=ZAFa>> accessed on 22 September 2020

United Nations Committee on the Elimination of Racial Discrimination *Concluding observations on the combined fourth to eighth periodic reports on South Africa* 5 October 2016 CERD/C/ZAF/CO/4-8 available at <<https://www.refworld.org/publisher,CERD,,ZAF,597b13e44,0.html>> accessed on 22 September 2020

United Nations Development Programme “What is Human Development” <<http://hdr.undp.org/en/content/what-human-development>> accessed on 3 July 2017 9 April 2020

United Nations Human Rights “Mandate of the Working Group on Indigenous Populations” available at <<https://www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx>> accessed on 11 February 2020

Conference & Research Papers, Lectures, Presentations & Panel Discussions

Carothers T “Promoting the Rule of Law Abroad: The Problem of Knowledge” 2003 (Working Paper no 34) *Carnegie Endowment for International Peace Rule of Law Series*

Froneman J “The (Constitutional) Problem of Property” lecture presented as part of the Prestige Lecture Series of the Faculty of Law, University of Pretoria 21 May 2014 available at <https://www.up.ac.za/faculty-of-law/news/post_2193499-the-constitutional-problem-of-property-prestige-lecture-by-justice-johan-froneman> accessed on 9 February 2020

Graduate School of Business, University of Cape Town “Radical Economic Transformation” panel discussion held on 19 April 2017 main article available at <<https://www.gsb.uct.ac.za/main-article>> accessed on 9 February 2020

Kennedy D “Some Caution about Property Rights as a Recipe for Economic Development” *Harvard Law School Public Law and Legal Theory Working Paper Series*, Paper no 0959 (2009)

Schumpeter J A “The March into Socialism” delivered on 30 December 1949 to the American Economic Association in New York on 30 December 1949

Sen A “Poor, Relatively Speaking” *Oxford Economic Papers* no. 35(2) (1983) 153-169

Shihata I “Introductory Statement made by the General Council of the World Bank in introducing his legal memorandum to members of the World Bank Board” (1990)

Stiglitz J “More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus” The 1998 WIDER Annual Lecture, Helsinki, 7 January 1998 available at <<https://www.globalpolicy.org/component/content/article/209/43245.html>> accessed on 16 December 2019

Stiglitz J “The Post Washington Consensus Consensus” *The Initiative for Policy Dialogue* (2005)

Thomas C “Re-Reading Weber in Law and Development: A Critical Intellectual History of ‘Good Governance’ Reform” 2008 *Cornell Law School Research Paper* No 08-034 1-115

Townsend P “A Sociological Approach to Measurement of Poverty: A Rejoinder to Prof Amartya Sen” *Oxford Economic Papers* no. 37(4) (1985) 659-668

Vargas GS *The New International Economic Order Legal Debate* 3-4, 29 (1983)

Yang L “The Relationship Between Poverty and Inequality: Concepts and Measurement” *CSE Papers* no 205 Centre for Analysis of Social Exclusion London School of Economics (2017)

Electronic Sources

“About the World Bank” available at <https://www.worldbank.org/en/about> accessed on 22 November 2019

“Anglo American Platinum signs agreement with Mapela Traditional Community to benefit surrounding communities” available at

<<https://www.angloamericanplatinum.com/media/press-releases/2016/18-04-2016.aspx>>
accessed on 17 September 2020

“Minerals Council South Africa: A Brief History” available at
<<https://www.mineralscouncil.org.za/about/history>> accessed on 10 January 2020

“Royal Bafokeng Platinum – Overview of our operations” available at
<<https://www.bafokengplatinum.co.za/brpm-joint-venture.php>> accessed on 17 September 2020

“Sibanye-Stillwater – Marikana” available at
<<https://www.sibanyestillwater.com/business/southern-africa/pgm-operations/marikana/>>
accessed on 17 September 2020

“South Africa GDP From Mining: 1993-2019 Data, 2020-2022 Forecast” *Trading Economics*
available at <<https://tradingeconomics.com/south-africa/gdp-from-mining>> accessed on 13
January 2020

Deleuze G *On Human Rights* (1996) extract from *L’Abecedaire de Gilles Deleuze, avec Claire Parnet, Video Ed. Montparnasse* available at <<http://www.generation-online.org/p/fpdeleuze10.htm>> accessed on 31 December 2019

Department of Trade and Industry “Economic Empowerment: B-BBEE Procurement,
Transformation and Verification” available at
<http://www.dti.gov.za/economic_empowerment/bee_veri.jsp> accessed on 9 February
2020

Department of Trade and Industry “Economic Empowerment: B-BBEE Sector Charters”
available at <https://www.thedti.gov.za/economic_empowerment/bee_sector_charters.jsp>
accessed on 26 March 2020

International Labour Organisation “Local Economic Development (LED)” available at
<<https://www.ilo.org/empent/areas/local-economic-development-led/lang--en/index.htm>>
accessed on 17 December 2019

International Monetary Fund “The IMF at a glance” 22 March 2019 available at
<<https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance>> accessed on 22 November
2019

Jackson P “A Prehistory of the Millennium Development Goals: Four Decades of Struggle for Development in the United Nations” 2007 (XLIV) *UN Chronicle* available at <<https://unchronicle.un.org/article/prehistory-millennium-development-goals-four-decades-struggle-development-united-nations>> accessed on 6 December 2019

Martinez Cobo JR “A Working Definition” available at <<https://www.iwgia.org/en/news-alerts/archive?view=article&id=340:a-working-definition-by-jose-martinez-cobo&catid=143>> accessed on 11 February 2020

Schroeder J “Left Against Rights: A Review of Douzinas’ ‘Human Rights and Empire’” (2008) available at *Social Science Research Network* <<http://ssrn.com/abstract=1104773>> accessed on 31 December 2019

South African History Online “South African Government of National Unity (GNU) – 1994-1999” available at <<https://www.sahistory.org.za/article/south-african-government-national-unity-gnu-1994-1999>> accessed on 9 February 2020

Reports

Action Aid South Africa “Mining in South Africa 2018: Whose Benefit and Whose Burden?” *Social Audit Baseline Report* Action Aid, SA: Johannesburg (2018)

Action Aid South Africa *Precious Metals II: A Systemic Inequality* (2016)

Bench Marks Foundation *Bench Marks Foundation 2016 Annual Report* Bench Marks Foundation: Johannesburg (2016)

Bench Marks Foundation *Policy Gaps Series* available at <<http://www.bench-marks.org.za/>> accessed on 5 April 2019

Bench Marks Foundation *The Policy Gap Series: Corporate Social Responsibility and the Mining Sector in Southern Africa: A Focus on Mining in Malawi, South Africa and Zambia* Bench Marks Foundation: Johannesburg (2008)

Bench Marks Foundation *The Policy Gap Series: Corporate Social Responsibility and the Mining Sector in Southern Africa: A Focus on Mining in Malawi, South Africa and Zambia* Bench Marks Foundation: Johannesburg (2008)

- Black Economic Empowerment Commission *Black Economic Empowerment Commission Report* Skotaville Press: Johannesburg (2001)
- CALS *The Social and Labour Plan Series: Phase 1: System Design - Trends Analysis Report* (2016)
- CALS *The Social and Labour Plan Series: Phase 2: Implementation - Operation Analysis Report* (2017)
- CALS *The Social and Labour Plan Series: Phase 3: Alternative Models for Mineral-Based Social Benefit* (2018)
- Committee on Foreign Affairs *Point Four Background and Program (International Technical Cooperation Act of 1949)* Government Printing Office: Washington (1949)
- Curtis M *Precious Metal: The Impact of Anglo Platinum on Poor Mining Communities in Limpopo, South Africa - Action Aid* Action Aid SA: Johannesburg (2008)
- G8 *Global Poverty Report* (Okinawa July 2000)
- IRR *Digging for Development* SA Institute for Race Relations: Johannesburg (2014)
- Martinez Cobo JR *Study of the Problem of Discrimination against Indigenous Populations: Final Report Submitted by the Special Rapporteur, Mr Joze Martinez Cobo* (5 August 1983) 1983E/CN.4/Sub.2/1983/21 available at <<https://www.un.org/development/desa/indigenouspeoples/publications/martinez-cobo-study.html>> accessed on 11 February 2020
- Minerals Council South Africa *Housing and Accommodation in the South African Mining Industry – Fact Sheet* Minerals Council of South Africa: Johannesburg (2019)
- MMSD “Local Communities and Mines” in *Breaking New Ground: Mining, Minerals and Sustainable Development* Earthscan Publications Ltd: London (2002)
- Mnwana S & Capps G “‘No chief ever bought a piece of land!’ Struggles over Property, Community and Mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province, South Africa” *SWOP Working Paper: 3* (2015) available at <<https://www.swop.org.za/working-papers>> accessed on 11 February 2020

- Sarwar Lateef K “Evolution of The World Bank’s Thinking on Governance” in *World Development Report: Background Paper – Governance and the Law* World Bank: Washington DC (2017)
- Solomon M (compiled) *The Rise of Resource Nationalism: A Resurgence of State Control in an Era of Free Markets, or the Legitimate Search for a New Equilibrium?* South African Institute of Mining and Metallurgy (2012)
- South African Human Rights Commission *Mining-Related Observations and Recommendations: Anglo Platinum, Affected Communities and other Stakeholders, in and around the PPL Mine, Limpopo* SAHRC: Johannesburg (2008)
- South African Human Rights Commission *South African Human Rights Commission National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa* SAHRC: Johannesburg (2018)
- The Editor “The Impact of Mining on the South African Economy and Living Standards” *Politics Web* 10 February 2018 available at <<http://fse.org.za/index.php/item/593-the-impact-of-mining-on-the-south-african-economy-and-living->> accessed on 14 February 2020
- TRC *Truth and Reconciliation Commission of South Africa Report* (2003)
- World Bank *1989 Report on Sub-Saharan Africa: From Crisis to Sustainable Growth* World Bank: Washington DC (1989)
- World Bank *Doing Business in 2004: Understanding Regulation* World Bank: Washington DC (2004)
- World Bank *World Development Report 1990: Poverty* Oxford University Press: New York (1990)
- World Bank *World Development Report 1996: From Plan to Market* World Bank: Washington DC (1996)
- World Bank *World Development Report 1997: The State in a Changing World* World Bank: Washington DC (1997)

World Bank *World Development Report 2000/2001: Attacking Poverty*. New York: Oxford University Press

World Bank *World Development Report 2002: Building Institutions for Markets* World Bank: Washington DC (2002)

Media

“LED: A Discussion Piece” *LED News* August Friedrich Ebert Stiftung: Johannesburg (2000)

Bendile D “White monopoly capital allegation finds little favour at ANC conference” *Mail & Guardian* 5 July 2017 available at <<https://mg.co.za/article/2017-07-05-white-monopoly-capital-finds-little-favour-at-anc-conference>> accessed on 9 February 2020

Business Live “Report fingers Bell Pottinger in ‘White Monopoly Capital’ campaign” *Times Live* 4 September 2017 available at <<https://www.timeslive.co.za/news/south-africa/2017-09-04-report-fingers-bell-pottinger-in-white-monopoly-capital-campaign/>> accessed on 9 February 2020

Business Report “Empowerment deals valued at R42bn in 2003” *IOL* 30 March 2004 available at <www.iol.co.za/business-report/economy/empowerment-deals-valued-at-r42bn-in-2003-765864> accessed on 18 October 2017

Daniel L “EFF blasts Ramaphosa for firing Moyane, cites ‘White Monopoly Capital’ agenda” *The South African* 2 November 2018 available at <<https://www.thesouthafrican.com/eff-tom-moyane-ramaphosa-white-monopoly-capital/>> accessed on 9 February 2020

Davies M “7 Things you need to know about radical economic transformation” *Huffpost* 29 June 2017 available at <https://www.huffingtonpost.co.za/2017/06/29/7-things-you-need-to-know-about-radical-economic-transformation_a_23007474/> accessed on 22 January 2019

De Waal M “Analysis: Mining’s unholy trinity and current impasse” *Daily Maverick South Africa* 11 October 2012 (copy with author)

Ensor L “Mantashe wants to axe long-delayed MPRDA Amendment Bill” *Business Day* 22 August 2018 available at <<https://www.businesslive.co.za/bd/national/2018-08-22-mantashe-wants-to-axe-mineral-and-petroleum-resources-development-amendment-bill/>> accessed on 11 February 2020

Forbes D “The Neoliberal ANC and its ‘Radical Economic Transformation’ hot air” *Rand Daily Mail* 21 April 2017 available at <<https://www.businesslive.co.za/rdm/politics/2017-04-21-david-forbes-the-neoliberal-anc-and-its-radical-economic-transformation-hot-air/>> accessed on 22 January 2019

Kane P “Could we be about to see a Miners Spring?” *Huffington Post* 25 June 2012 available at <http://www.huffingtonpost.com/patrick-kane/south-africa-mine_b_1967275.html> accessed on 7 January 2020

Kekana M “Sihle Zikalala: White Monopoly Capital in SA exists” *Eyewitness News* July 2017 available at <<http://ewn.co.za/2017/07/25/sihle-zikalala-we-ve-got-white-monopoly-capital-in-sa>> accessed on 9 February 2020

Khumalo S “Chamber of Mines announces name change to align with future vision” *Fin24* 23 May 2018 accessed on 6 January 2019. available at <<https://www.fin24.com/Companies/Mining/chamber-of-mines-announces-name-change-to-align-with-future-vision-20180523>> accessed 20 February 2019

Kiewiet L “Contentious traditional leadership Bill passed” *Mail & Guardian* 11 January 2019 available at <<https://mg.co.za/article/2019-01-11-00-contentious-traditional-leadership-bill-passed/>> accessed on 17 September 2020

Leonard L “How mining companies’ relationship with Government affects communities” *IOL News* 8 February 2019 available at <<https://www.iol.co.za/news/opinion/how-mining-companies-relationship-with-government-affects-communities-19197357>> accessed on 14 February 2020

Malope L “Ethnic tensions brewing” *City Press* 22 October 2017 available at <<https://www.fin24.com/Economy/South-Africa/ethnic-tensions-brewing-20171020>> accessed on 20 February 2020

Mzamo P “SA mining struggles don’t originate from White Monopoly Capital” *Mining News* 4 October available at <<http://www.miningnews.co.za/2017/10/04/sa-mining-struggles-dont-originate-from-white-monopoly-capital-mkhize/#>> accessed on 9 February 2020

Ngcukaitobi T “What section 25 means for land reform” *Mail & Guardian* 13 December 2019 available at <<https://mg.co.za/article/2019-12-13-00-what-section-25-means-for-land-reform/>> accessed on 16 March 2020

Omarjee L “More than 50% of SA’s population is living in poverty” *Fin 24* 22 August 2017 available at <<https://www.fin24.com/Economy/more-than-50-of-sas-population-is-living-in-poverty-20170822>> accessed on 13 January 2020

Parker F “Lonmin mining communities: A powder keg of inequality” *Mail & Guardian* 27 August 2012 available at <<https://mg.co.za/article/2012-08-27-lonmin-mining-communities-a-powder-keg-of-inequality>> accessed on 14 February 2020

Patel K “Deconstructing “White Monopoly Capital”” *Mail & Guardian* 27 January 2017 available at <<https://mg.co.za/article/2017-01-27-00-when-a-catchphrase-trips-you-up/>> accessed on 9 February 2020

Rutledge C “OPINION: The systemic inequality of mining affected communities” *Business Report* 19 February 2018 available at <<https://www.iol.co.za/business-report/opinion/opinion-the-systemic-inequality-of-mining-affected-communities-13363840>> accessed on 14 February 2020

Schutte G “Masses shackled by neoliberalism” *Pretoria News* 25 May 2017 available at <<https://www.iol.co.za/pretoria-news/masses-shackled-by-neoliberalism-9339621>> accessed on 10 April 2020

Secombe A “Department blindsides miners with the new charter” *Business Day Live* 15 April 2016 available at <<http://sa-monitor.com/department-blindsides-miners-new-charter-bdlive-15-april-2016/>> accessed on 14 February 2020

Secombe A “Mineral Council takes Mining Charter to court” *Business Day* 27 March 2019 available at <<https://www.businesslive.co.za/bd/companies/mining/2019-03-27-minerals-council-takes-mining-charter-to-court/>> accessed on 11 February 2020

Steyn L “Measuring the waves of migration” *Mail & Guardian* 11 January 2013 available at <<https://mg.co.za/article/2013-01-11-measuring-the-waves-of-migration>> accessed on 20 February 2020

Steyn L “What’s really fuelling SA mine protests?” *Business Live* 21 November 2019 available at <<https://www.businesslive.co.za/fm/features/2019-11-21-whats-really-fuelling-sa-mine-protests/>> accessed on 11 February 2020

Steyn P “B-BBEE commissioner says broad-based trust not compliant” *Business Day* 28 May 2019 available at <<https://www.businesslive.co.za/bd/opinion/2019-05-28-b-bbee-commissioner-says-broad-based-trusts-not-compliant/>> accessed on 11 February 2020

Steyn P “Implications of BBEE Commission investigations of ownership trusts?” *bbrief* 14 September 2017 available at <<https://www.bbrief.co.za/2017/09/14/implications-of-bbbee-commission-investigations-of-ownership-trusts/>> accessed on 11 February 2020

Stoddard E “‘Miner Spring’ may lead to more unrest” *Mail & Guardian* 6 September 2012 available at <<http://mg.co.za/article/2012-09-06-miner-spring-may-lead-to-more-unrest>> accessed on 7 January 2020

Stoddard E “Trusts under BEE scrutiny in yet another dramatic policy shift” *Business Maverick* 1 May 2019 available at <<https://www.dailymaverick.co.za/article/2019-05-01-trusts-under-bee-scrutiny-in-yet-another-dramatic-policy-shift/>> accessed on 11 February 2020

Van der Merwe M “Traditional and Khoi-San Leadership Bill: Rules of Engagement” *Daily Maverick* 15 May 2017 available at <<https://www.dailymaverick.co.za/article/2017-05-15-traditional-and-khoi-san-leadership-bill-rules-of-engagement/>> accessed on 17 September 2020

Vecchiato P “Minister to meet mines on black-ownership rules” *Fin24* 19 April 2016 available at <<https://www.fin24.com/Companies/Mining/minister-to-meet-mines-on-black-ownership-rules-20160419>> accessed on 26 March 2020

Visual images

Amnesty International “Smoke and Mirrors: Lonmin’s failure to address housing conditions at Marikana, South Africa” 15 August 2016 available at <<https://www.amnesty.org.nz/smoke-and-mirrors-lonmin%E2%80%99s-failure-address-housing-conditions-marikana-south-africa>> accessed on 23 February 2020

Manyane M “Miners still calling shacks home” *IOL* 19 August 2018 available at <<https://www.iol.co.za/sundayindependent/news/miners-still-calling-shacks-home-16634249>> accessed on 23 February 2020

Schneider V “The heavy toll of coal mining in South Africa” *Al Jazeera* 2 April 2015 available at <<https://www.aljazeera.com/indepth/features/2015/03/heavy-toll-coal-mining-south-africa-150329123518557.html>> accessed on 23 February 2020

Tolsi N (photography, Botes P) “Marikana: One year after the massacre” *Mail and Guardian* August 2013 available at <<https://marikana.mg.co.za/>> accessed on 6 January 2020

Reference Works

Black HC *Black’s Law Dictionary* 6th edition Springer Publishing: New York (1997)

Blackburn S *The Oxford Dictionary of Philosophy* Oxford University Press: Oxford second ed (2005)

Breuning M & Ishiyama JT “Neoinstitutionalism” *Encyclopaedia Britannica* available at <<https://www.britannica.com/topic/neoinstitutionalism>> accessed on 17 December 2019

Cronje DSP “Persons” in M Kühne, JA Faris & LTC Harms (eds) *The Law of South Africa* Lexisnexis Online: South Africa (2009)

Delport P (ed) *Henochsberg on the Companies Act 71 of 2008* Lexisnexis Online: South Africa (2011)

LaHaye L “Mercantilism” in Palgrave Macmillan (eds) *The New Palgrave Dictionary of Economics* Palgrave Macmillan: London (2008)

Merriam Webster available at <<https://www.merriam-webster.com/>> accessed on 10 April 2020

Palmer DE “Economic Rationality” *Encyclopaedia Britannica* available at <<https://www.britannica.com/topic/economic-rationality>> accessed on 11 December 2019

Scholtz BA & van Wyk C *BEE Service Empowerment* Lexisnexis Online: South Africa (2019)

South African History Online available at <<https://www.sahistory.org.za/>> accessed on 10 April 2020

Woolman S & Bishop M (eds) *Constitutional Law of South Africa* Juta e-publications (2014) 2nd edition

Inaugural Addresses

Inaugural Address of John F Kennedy on 20 January 1961 available at <<https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/inaugural-address-19610120>> accessed on 23 December 2019

Inaugural Address of Harry S Truman 20 January 20 1949 available at
<https://avalon.law.yale.edu/20th_century/truman.asp> accessed on 11 March 2020
