THE POSTCOLONIALITY OF LABOUR LAW: A SOUTH AFRICAN PERSPECTIVE

LINDIWE MAQUTU

922412862

Promoter: Dr Freddy Mnyongani

Co-promoter: Prof Managay Reddi

This thesis is submitted in fulfilment of the requirements for the degree of Doctor of Philosophy (PhD) in the School of Law, College of Law and Management Studies, at the University of KwaZulu-Natal, in June 2020

DECLARATION

I, **Lindiwe Maqutu**, declare that:

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ABSTRACT

This study locates itself in endeavours to decolonise the accepted legal knowledge. It concerns itself with the formation of South African labour law and reflects critically on the ideology informing the concept of labour and labour law since the colonial incursion of Europeans. A contrapuntal examination of the law which developed a wage labour system that denied Africans pertinent recognitions and entitlements is carried out using the vantage of postcolonial theory. The process advances revisiting the text of laws from a locus that centres the predicament of Africans rather than colonial preoccupations. Therefore the narration of the management of Africans during the nineteenth and twentieth centuries and the convoluted interaction between evolving social, political and economic institutions is revealed as labour law. With a particular focus on the circumstances of African mine workers in the then Transvaal, the study widens the understanding of historically operative labour law. Using early law, this study maps the development of an appetite for cheap labour following colonial invasion, which accelerated with the discovery of mineral deposits in South Africa. A comprehensive disclosure of the founding assumptions of labour law, such as territorial seizures, enslavement, corporeal deprivation and the development of corresponding property rights, highlights the damage wrought. An excavation of the often overlooked objectives and repercussions of legal provisions reveals that they rested on the conviction that African humanity ought to be downgraded. It began with the superior-inferior reasoning that yielded the master and servant positioning of relations between the white arrivals and Africans. The attempts to resolve the 'native question' were the fulcrum of the conceptual order that has been devised.

An examination of the post-apartheid hegemony of labour law considers whether the retention of the Eurocentric structures, under which labour relations are consigned to operate, is legitimated by the seeming incorporation of Africans into the scheme. The results indicate that the touted generalisable corporate benefits of collective bargaining and workplace compensation are deficient because they perpetuate the colonial notion of privileging a few at the expense of the many. Therefore a process of restoring faith in and being guided by African philosophical paradigms for the fashioning of South African labour law is required.

ACKNOWLEDGEMENTS

To my promoter, Dr Freddy Mnyongani, *ke leboha homenahane*. The patient subtle guidance you gave bolstered my confidence to mould the project. Thank you for the lengthy discussions and time spent on the drafts in between the onerous work you have been performing.

To my co-promoter, Professor Managay Reddi, thank you for taking the time to consider thoroughly and comment on my work, even in the midst of a pandemic and its numerous fall-outs. Your feedback helped mature the project.

I also acknowledge my parents *'Mé 'Mathabo le Ntate Maqutu* for your steadfast love, encouragement and dogged determination to see me complete this work. Thanks to my sister Siphiwe for your support and invaluable insights, and my brother Mpaiphele for having my back.

I dedicate this thesis to my children Thandaza and Mokuoane Moorosi – *Kea leboha ha le mphile sebaka sa ho qeta mosebetsi ona*.

LIST OF PUBLICATIONS

At the time of submission of this thesis a paper titled ‘The Concept of Labour in South African Law’ was just accepted for publication in *Fundamina* journal of legal history.

CONTENTS

ABBREVIATIONS

ACJ	Acting Chief Justice
ANC	African National Congress
BAC	Bantu affairs commissioner
CCMA	Commission for Conciliation, Mediation and Arbitration
CJ	Chief Justice
COIDA	Compensation for Occupational Injuries and Diseases Act
COSATU	Congress of South African Trade Unions
CRT	Critical Race Theory
GEAR	Growth Employment and Redistribution (strategy of 1996)
HIV	Human Immunodeficiency Virus
ICA	Industrial Conciliation Act
ILO	International Labour Organization
J	Judge
JP	Judge President
JSE	Johannesburg Stock Exchange
LRA	Labour Relations Act
MEC	Minerals Energy Complex
NAB	Native Advisory Board
NAD	Native Affairs Department
NEDLAC	National Economic Development and Labour Council

NEF	National Economic Forum
NGI	Native Grievances Committee
NLR	Native Labour Regulation Act No. 15 of 1911
NUM	National Union of Mineworkers
ODIMWA	Occupational Diseases in Mines and Works Act No. 78 of 1973
RDP	Reconstruction and Development Programme
SACP	South African Communist Party
SWU	Sweet Workers' Union
ZAR	Zuid-Afrikaansche Republiek (later renamed Transvaal)

CHAPTER 1

INTRODUCTION

1.1. Background and Outline of the Research Problem

In South Africa the notion of labour is intertwined with the account of colonialism. Following the establishment of European enclaves, what to do with Africans[1] preoccupied the minds of colonial arrivals. During the nineteenth century the fact that Africans were self-sufficient and could provide for themselves was deemed an unwelcome hindrance. The white incomers were in need of cheap labour but Africans did not need the wages offered and would work sporadically on a voluntary basis.[2] The overall recalcitrance of the African populace to submit to European authority and service the white communities was deemed a problem, hence the native 'problem' or native 'question' arose.[3] The native 'question' was dealt with by addressing the problem of the scarcity of labour. The labour 'problem' or 'question' related to the use and control of Africans as exploitable labour in order to maximise the profitability of the newly confiscated territory and resources, while at the same time maintaining the superior status of white workers.[4] Africans were systematically dispossessed of arable land, from which a livelihood was eked and forced into labour to pay the taxes imposed.[5] Thus coerced waged

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[1] In this study African signifies all recalled indigenous people living on the territories of South Africa that were encountered by Europeans on invasion. It includes: the San, the Khoi, the Xhosa, the Pondo, the Thembu, the Gcaleka, the Fengu, the Hlubi, the Zulu, the Ndebele, the Bakatla, the BaHananwa, the VhaVenda, the Bakwena, the Bapedi, the Barolong, the Swazi, the Basotho, the Batswana, the Shona and many others who were encountered by Europeans during incursions inland; those labelled 'Native', 'Hottentot', 'Bushman', 'Kafirs,' 'Native Foreigners', 'aboriginal … African', 'Bantu', 'Black' and at times 'coloured persons' in the laws of the Cape Colony, and the Zuid-Afrikaansche Republiek (ZAR).

[2] 'The Natives are independent', a witness of the 1893–1894 Cape Labour Commission, testified … '[t]hey have land and grow what they choose, and their wants are extremely small' - P Denis 'Abbot Pfanner, the Glen Grey Act and the Native Question' (2015) 58 *Southern African Journal* 271, 271.

[3] Note 2 above 272; G Capps 'Custom and exploitation: rethinking the origins of the modern African chieftaincy in the political economy of capitalism' (2018) 45 *The Journal of Peasant Studies* 969, 974-976.

4 F Barchiesi 'The Violence of Work: Revisiting South Africa's "Labour Question" Through Precarity and Anti Blackness' (2016) 42 *Journal of Southern African Studies* 875, 877; Denis (note 2 above) 272. Colonialism is premised on ideas of a disposable native 'other,' whose substandard humanity legitimates maltreatment as labour for the purpose of resource extraction. By contrast colonisers, deemed to possess higher-ranking fully realised humanity, are depicted as pioneers and endowed with attendant legal protections and privileges of masters or at least privileged workers. Jansen van Rensburg recounts the Transvaal creation of a 'servant class,' an underclass made up of non-whites that included indentured workers, people of mixed race ('coloureds'), with those of African descent ('natives') occupying the lowest rung - N Jansen van Rensburg 'A struggle for tenure by the "servant class" of Potchefstroom: A study in structural violence' (2013) 58 *Historia* 70.

[5] The 1844 Thirty-Three Articles of Potchefstroom (which preceded the formation of the Zuid-Afrikaansche Republiek (ZAR) in 1858) barred Africans and other non-Europeans from membership of the imposed colonial domain. Article 159 Volksraad resolution 181 of 1855 precluded Africans from having citizenship rights such as

labour became a method of creating colonial servants and was in this way directly connected to the management of the native question.[6]

The discovery of gold and diamonds deposits in the latter part of the nineteenth century, propelled the need for more human labour to work at the newly established mines in Griqualand West and the Zuid-Afrikaansche Republiek (ZAR), later renamed Transvaal.[7] This need for labour heightened demand for mechanisms to resolve the 'native question'. The 'native question' was resolved in a manner most advantageous to the white colonial communities. In line with this, colonialism has principally been justified on the European pretext that it entailed the stewardship of backward African societies towards worthwhile civilised modernism.[8] Becoming subjugated waged labourers was professed to be 'normative' antidote 'to what the discourse of political economy presented as the atavistic stagnation of the African life.'[9] However, in South Africa paid labour stands out as a mechanism of oppression.[10] Indeed, when minerals were discovered and the regulation of their acquisition was established, Africans were deliberately divested of any rights to prospect for or to become participants in the developing mining industry as anything other than cheapened 'native labour'.[11] In general, all relevant

owning land and later article 143 of 29 September 1864 proclaimed that land which had not been claimed the property of any white settlers, in accordance with ZAR law, automatically belonged to the state. Article 4 of Law No. 9 of 1870 decreed that Africans found within the ZAR without permit were obliged to enter into labour contracts in service of white farmers while article 15 mandated the payment of taxes by Africans to procure service for the farmers.

[6] Barchiesi (note 4 above) 879; Denis (note 2 above); Capps (note 3 above)969.

[7] Diamonds were discovered in 1867 in the Kimberley area of then Griqualand West and soon thereafter large gold deposits were discovered in the Zuid-Afrikaansche Republiek (ZAR) where Gold Law No.1 of 1871 was enacted.

[8] According to Comaroff and Comaroff, Western imperialist thinking has viewed the rest of the world as ancient, primitive and underdeveloped. The West exploited raw materials of the colonies 'ostensibly adding value and refinement to them' - J Comaroff & J Comaroff 'Theory from the South: Or, how Euro-America is Evolving Toward Africa (2012) 22 *Anthropological Forum* 113; Barchiesi (note 4 above) 882.

[9] Barchiesi (note 4 above) 882.

[10] Bachiesi (note 4 above) 883; by installing deliberate systems of material and political oppression of indigenes colonial authorities derived accumulative practices that eliminated any pretext of voluntariness in the wage labour extracted from Africans – Capps (note 3 above) 996.

[11] Proclamation No. 49 of 1872 of Griqualand West (annexed by the Cape) barred everyone who was not white from obtaining a license to prospect and to dig, with the effect of withdrawing the 46 licenses which had been granted to non-white people. Thereafter an all-white Diggers Committee issued certificates of good character only to white people, as a prerequisite to obtaining a license to prospect and then to dig. On the same day (23 July 1972) a Servants' Registry 'for the purpose of assigning or contracting all the natives who came for the purpose of seeking employment' was created in terms of Government Notice No. 68 to formally assign Africans their place. Gold Laws of the ZAR specifically relegated Africans to laboring for the white-only permit holders – article 16 Gold Law No. 7 of 1874.

material resources for subsistence and the mechanisms ushered in through colonialism for generating adequate independent livelihood, income or wealth were withheld from Africans.[12]

This thesis hypothesises that the regulation of labour in South Africa, far from being a mechanism to empower workers in response to the might of employers – to countervail power,[13] – historically has been a means to control and subdue workers under the weight of a developing Eurocentric capitalist system. Moreover it queries whether 'consensus'[14] has been a core feature of labour relations, since the 'native question' has been inextricably linked with the labour question. Thus it posits that the idea of an enabling legal environment for widespread worker solidarity which yields incremental gains was inimical to the framework that was developed.[15] Within this system, Africans, mixed-race labour recruits, bonded migrant labour, and descendants of former slaves were regulated in a dissimilar manner to that pertaining to white workers, to their detriment. Africans were the worst affected.

This study examines the regulation of African workers – those who have been referred to and defined in much of the law reviewed as: 'any member of the aboriginal races or tribes of Africa';[16] Hottentot, Bushman, Bantu and Black;[17] '… but does not include a person in any degree of European descent'.[18] The aim is to highlight the appearance of Africans in the laws

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[12] Note 5 above; note 11 above.

[13] For Kahn-Freund the purpose of labour law is 'to be a countervailing force to counteract the inequality of bargaining power which is inherent … in the employment relationship' – O Kahn-Freund *Labour and the Law* (1972) 8.

[14] M Brassey 'Fixing the Law that Govern the Labour Market' (2012) 33 *ILJ* 1, 12.

[15] In South Africa collective bargaining, managed through recognition of trade union membership, was developed to enhance the established privilege of white workers. The Industrial Disputes Act 1909 which installed industrial dispute resolution and collective bargaining in the Transvaal pertained only to white workers; the Industrial Conciliation Act 11 of 1924 which established a system of trade union registration and safeguards for purposes of collective bargaining omitted pass-bearing Africans from representation in industrial fora; the Industrial Conciliation Act 28 of 1956 defined an employee as 'any person (other than a native) employed by, or working for any employer and receiving, or being entitled to receive, any remuneration, and any other person whatsoever (other than a native) who in any manner assists in the carrying on or conducting of the business of an employer.' Although other non-white racial groups who were not African, such as Coloureds and Indians, could join trade unions it was in a capacities which were subordinated white dominion.

[16] Native Labour Regulation Act No. 15 of 1911.

[17] Workmen's Compensation Act No. 59 of 1934 defined 'native' as 'any person belonging to one or other of the following classes – (a) aboriginal tribes or races of Africa, including Bushmen, Hottentots and Korannas'; the Bantu Labour Act No. 67 of 1964 defined Bantu as defined as per the Bantu Registration Act No. 30 of 1950, in particular the regulations relating to people who from the appearance it was obvious were members 'of an aboriginal race of Africa.

[18] Natives Taxation and Development Act No. 41 of 1925; the Native (Urban Areas) Act No. 21 of 1923 defined 'coloured' as a 'person of mixed European and native descent and shall include any person belonging to the class called Cape Malays'. The writer has considered that the use of 'native'is pejorative in the text of the law assessed and thus uses African for descriptive and analytical purposes.

chosen, with regard to their regulation as a differentiated sort of labour. Thus the discussion of white, Asian, or coloured people will only occur in the context of explaining the position of Africans better – mostly as comparators. This deliberate pivot will use law to narrate the tale of what Euro-normative South African labour law gradually reveals about itself.

This study postulates that it would be simplistic to emphasise the omission of Africans from certain occupations and labour protections, such as trade union membership and the collective bargaining regime it installed, as *the* misdeeds of labour relations management in South Africa. It considers whether the established cultural environment was such that exclusion was likely inevitable. While the study focuses largely on the position of African labour as whole, rather than the unfairness garnered at an individual level, it posits that the perception in policy and law of the African as a substandard human has to initiate the examination. Having installed an ideology of unequal humanity, based on the notion of the supremacy of whites, colonial systems then established distinct measures for quantifying levels of humanity using money. This study advances the view that in labour relations the award of benefits, remuneration and compensation for injury or death has been tied to notions of civilised standards for white people and standards commensurate with backwardness for Africans.

The generalised oppression of labour was first implemented through the unfair, and by present standards unconscionable, individual labour contracts of employment into which Africans were channelled. Industrial scale mining objectives propelled the desire to subjugate labour *en masse*. The segregationist oppressive management of labour preceded and transcended the introduction and subsequent lawful recognition of trade unions in South Africa. South African trade unionism and its regulation evolved in line with the pre-established patterns in the labour sphere. Hence comprehensive disclosure of the premise from which labour was conceived and configured is necessary, since these foundational assumptions have been evident historically in the development of labour law, namely, freedom to choose an occupation, freedom of movement, property rights, freedom of association, and the right to form and join a trade union – to engage in collective bargaining and to go on strike.[19]

[19] Historically these freedoms were accorded to white people who as recognized citizens were granted farms and licenses to participate in mining activities as well as to join trade unions. In stark contrast Africans were dispossessed of property, subjected to restrictive pass laws, had no choice of occupation and were forced to avail themselves as cheap labour. See South Africa Act, 1909; Industrial Conciliation Act 11 of 1924; Native Labour Regulation Act 15 of 1911.

This study considers law to be performative in nature. Law reflects and implements particular ideological orientations. Framed though legal instruments, otherwise illegitimate aims have been sanctified using the authoritative gravitas of law.[20] Law does not remain apart from the milieu since it enables particular social, political and economic views. Therefore a provision of law ought not to be viewed apart from its tangible experiential effects. This necessitates evaluation of the historical conceptualisation and articulation of labour laws in South Africa. History has been described as '*the* prominent … instrument for the control of subject people'.[21] According to Fanon, when confronted with systemic power, African identity often withers into its assigned space, thus negating self-directed conception and understanding,[22] hence the pursuit of an alternate recount of past events using an historically obscured frame of reference in an effort to validate discounted realities.

This thesis advances an approach that seeks to re-imagine analysis of legal text from a vantage that centres the predicament of Africans, rather than the colonial preoccupations.[23] Therefore the study will re-examine the inception of South Africa's modern notions of labour through some excavation of past law, from an understanding that the edicts, proclamations and resolutions of the early nineteenth century have much to reveal about the evolution of current labour law. The story of the management of Africans during the nineteenth and twentieth centuries will be told through segments of selected laws which regulated the production of labour. The convoluted interplay between institutions which structured the evolution of social, economic and political engineering of distinct groupings of human beings is to be gleaned through focusing on the details of the law – specific sections of particular law. So, too, the collective pathologies and anxieties evident in incessant slogans guised as reassertions of power and conquest in these provisions of law.

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[20] Woronov describes the crafty process of fetishizing law as 'a privileged space purportedly stripped of "politics" where … rationality and technocratic expertise … [resolve] social questions' – T Woronov 'Waging Lawfare: Law, Environment and Depoliticization in Neoliberal Australia' (2017) *Capitalism Nature Socialism* 1,6.

[21] '[T]o have a history is the same as … to have a legitimate existence' - Ashcrof et al Reader 355 cf: G Delfino *Time History and Philosophy in the Works of Wilson Harris* (2014) 68.

[22] '… when I had to meet the white man's eye … [a]n unfamiliar weight burdened me. The real world challenged my claims [to full humanity]' – F Fanon *Black Skin White Mask* (1952)(trans C Markmann,1986)110.

[23] Rather than drawing an imaginary line on South Africa's problematic labour history, more time needs to be spent revisiting and re-reading foundational labour and other laws in order to discern and fully understand their purposes. The contention is that there has developed a selective amnesia that has led to a distorted understanding of colonialism, apartheid and the true fundamentals of South African labour and labour law.

The assumption that as apartheid ends the inclusion of Africans into a legal scheme formulated to advance colonial appropriation would dismantle colonialism seems misguided. In some ways, it may work to preserve colonial-based power structures and consequently shelter them from scrutiny. Charkrabarty dispels the fabrication that the oppressed become autonomous figures of sovereignty through superficial 'revolutionary' overthrow.[24] Such hollow 'flag independence' comes without recompense for a shameful era and does not facilitate social and economic deliverance.[25] Rather, it often denotes the continuity of colonial hegemony. Nandy warns that 'the West has not merely produced modern colonialism, it informs most interpretations of colonialism' – tainting 'interpretation of interpretation.'[26] Jansen draws attention to the South African reality that it is those in charge who deliberately '*select*', then disseminate what becomes known as 'a political act.'[27] Merely raising the 'flag of discontent' from within this fixed knowledge paradigm will not shift the established power arrangements.[28] Consequently, this thesis adopts the critical attitude of postcolonial theory as its theoretical framework.

Postcolonial theory is concerned with the kind of hybridity that emerges when the cultures of the coloniser and the colonised interact in an unequal manner. Essentialist models of theory determine the 'truth' of a particular identity or notion and discount variations. Postcolonial theory is critical of such models which demarcate a kind of 'purity' in or of theory. The conflicts and contradictions embedded in colonial rhetoric are displayed in order to examine the evident uncertainties in the authoritative position often associated with imposing colonial philosophy. The formulation of new narratives may begin when confronted with the 'bitter reality' of untenable aberrant depictions of indigenous cultures by the dominant arrangements.[29] Throughout this study, the analysis aims to elucidate how the law acts as an enabler of and for those it selects on the one hand, and as a barrier to those it excludes on the

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[24] D Chakrabarty 'Postcolonial Studies and the Challenge of Climate Change' (2012) 43 *New Literary History* 1 at 4.
[25] L Rukundwa and A van Aarde 'The formation of postcolonial theory' (2007) 63 *HTS* 1171, 1173.
[26] A Nandy *Intimate Enemy: Loss and Recovery of Self Under Colonialism* (1983) 12.
[27] J Jansen 'Sense and Non-sense in the Decolonisation of Curriculum' in *As by Fire: The End of the South African University* (2017).
[28] Jansen (note 27 above).
[29] L Rukundwa and A van Aarde 'The formation of postcolonial theory' (2007) 63 *HTS* 1171 at 1188; Lorde asks '[w]hat does it mean when the [undiluted] tools of racist patriarchy are used to examine the fruits of that same patriarchy? It means that only the most narrow perimeters of change are possible and allowable.' - A Lorde 'The Master's Tools Will Never Dismantle The Master's House' in C Moraga & G Anzaldua (eds) *This Bridge Called My Back: Writings by Radical Women of Color* (1983) 94.

other hand. This integral theme will reveal what de Sousa Santos described as 'abyssal' thinking, which by operation of law renders some 'invisible' to the eye of hegemonic discourse, created and maintained for the elite.[30]

Using postcolonial theory, this thesis aims to dislodge notions of neutrality and universality in the imposition of particular Eurocentric norms and standards geared toward colonial settlement and the management of labour through the law. In line with Ngugi wa Thiong'o, the aim is to unearth the suppressed memory of African legal historical experiences of labour regulation, cognisant that the South African post-colony spans the period of direct colonial rule up to the present day.[31] By resisting dialogue which disengages historical and existing knowledge from its disseminators and the particularities it represents, legal discourse may be correctly situated.[32] Ritskes aptly describes a process of salvaging a more accurate rendition of history as the precursor for progress.[33] This study undertakes this process. Thus the analysis will recount and locate the legal arrangements within their controlling conceptual matrix, and then explore and relate the African encounter with such laws, and ultimately consider whether the present milieu represents remediation of African ascendancy and cultural paradigms in the discourse of labour law, to achieve a measure of parity.[34]

This study tracks the evolution of labour attitudes and rules from the invasion at the Cape and then progresses to chart the process in the ZAR (later Transvaal and now Gauteng),

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[30] B de Sousa Santos 'Beyond Abyssal Thinking From Global Lines to Ecologies of Knowledges' (2007) 30 *Review* 45, 47.

[31] Ngugi wa Thiong'o describes '[o]n the one hand imperialism … in its colonial and neo-colonial colonialism phases continuously press-ganging the African hand to the plough to turn the soil over, and putting blinkers on him to make him view the path ahead only as determined for him by the master armed with the bible and the sword … on the other, and pitted against it, are the ceaseless struggles of African people to liberate their economy, politics and culture from that Euro-american stranglehold to usher a new era to true communal self-regulation and self-determination' – Ngugi wa Thion'go *Decolonising the Mind The Politics of Language in African Literature* (1986) 4.

[32] Mignolo asserts that 'the geo- and body-politics of knowledge has been hidden from the self-serving interests of Western epistemology and that a task of de-colonial thinking is the unveiling of epistemic silences' - W Mignolo 'Epistemic Disobedience, Independent Thought and De-Colonial Freedom' (2009) 26 *Theory Culture & Society* 4; Ngugi wa Thiong'o recalls that colonial incursion was effected by 'the night of the sword and the bullet … followed by the morning of the chalk and the blackboard. The physical violence of the battlefield was followed by the psychological violence of the classroom.' 'Economic and political control can never be complete or effective without mental control. To control a people's culture is to control their tools of self-definition in relationship to others.' – Ngugi wa Thion'go (note 31 above) 9, 16, 93.

[33] E Ritskes 'What is decolonisation and why does it matter?' available at https://intercontinentalcry.org/what-is-decolonisation-and-why-does-it-matter/, accessed on 7 August 2015.

[34] V Mudimbe *The Invention of Africa Gnosis Philosophy and the Order of Knowledge* (1988) 188.

where the position of mine workers over the centuries shall be used as the illustrative example.[35]

1.2. Research Design

1.2.1. Research objectives

This research aims to explore and more fully expose the manner in which labour law, as it has been conceived and regulated in South Africa, has historically subjugated workers. The master and servant positioning of relations between Europeans and Africans, from the perspective of the coloniser, characterises the colonial encounter and has been pertinent to the labour prescripts devised. The research therefore interrogates the historical theoretical frame in accordance with which labour and labour laws were conceived and enacted.[36] From a postcolonial theoretical perspective, the research considers the labour and other laws that launched and managed a bifurcated wage labour system, which excluded Africans from labour recognitions and attendant protective mechanisms, beginning with remuneration and compensation for workplace injury and then extending to collective bargaining which was contingent on trade union membership. The aim is to initiate broader understanding of historically operative labour law. Focusing on African mineworkers, the endowment and withholding of tangible corporate benefits of labour and other laws in South Africa over time will be reviewed. The study will deliberate methodically on the displays of hegemonic preoccupations in labour law over the nineteenth and twentieth centuries.

Having explored the ideological premise of South African labour law, the thesis will consider whether labour law within the currently established legal framework continues to exhibit, in some aspects, rationales akin to colonial tenets, and how this might affect the present-day socio-economic advancement of workers. Throughout the study, significant social and political circumstances which have engendered the reviewed industrial relations

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[35] The study remains cognisant of the significant synergetic sway of the other colonies in shaping the management of African labour in South Africa. Policy and practice regarding acquiring African labour in other colonial European settlements such as the Cape, the Orange Free State and Natal during the 19th century was relevant and influential to proceedings in the ZAR.

[36] Mudimbe describes a colonial arrangement in Africa which entailed 'the procedures for acquiring, distributing, and exploiting lands … the policies of domesticating the natives …, the reformation of the natives' minds, and the integration of local economic histories into the Western perspective.' Mudimbe (note 34 above)) 15; South Africa has been underscored as emblematic of colonial arrangements at their maximal worst – A Seidman *The Roots of Crisis in Southern Africa* (1985).

regulations will be gleaned, but the focus will be on the legal provisions themselves and an analysis of what they reflect. Using material compiled by colonial officials for use by the white community, this evaluation will proceed in a manner attentive to subaltern[37] perceptions and discernible experiences of African workers. The aim is to explore the compound and incongruous effects of labour regulation, which may continue to adhere to colonial binaries and separations.

1.2.2. Research Questions

This research asks how colonialism and apartheid distinctly affected the conception of South African labour and its regulation. It also asks whether the current labour laws continue to exhibit colonial hegemony.

1.2.3. Research Methodology

Desktop research has been conducted, using primary and secondary sources. Archived law, commission reports, legislation, case law, published books, journal articles, textbooks, as well as other relevant documentary material already in the public domain have been used. The study reflects critically on the ideology guiding and informing the conceptualisation of labour, labour law and its purpose. This research is conducted through the lens of a postcolonial theoretical framework.

The methodology involves a directed contrapuntal reading (reading counter-intuitively to the dominant culture of reference) of pertinent law that will map the evolution of the South African notions and attitudes toward labour. This entails a substantial recount of aspects of legal instruments and other official determinations of policy to reveal the outlook of significant decision-makers, and also the purposes sought to be achieved. The account of legal provisions means to widen the cognitive appreciation of the manner in which labour has been understood in South Africa. This kind of reading also obviates resort to generalised summaries, which tend to aggregate rather than engage with the myriad of complexities at hand.[38] The espoused

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[37] Subaltern (literally meaning someone of inferior rank) refers to the significant portion of the South African population which has remained marginal – excluded from the dominant power structures along with the institutions through which legal rights and protections have to be accessed.

[38] Prakash describes remedial inspection of 'colonial and nationalist archives … focusing on the their blind-spots, silences and anxieties,' in order to counteract the way 'colonial and liberal-nationalist projects' tend to hijack and then claim to distil both colonised and assumed decolonised consciousness – G Prakash 'Postcolonial Criticism and Indian Historiography' (1992) 31/32 *Social Text* 8, 9.

rationality and neutrality of law is challenged through re-reading that inevitably elicits a response from the reader who encounters first-hand the ambivalance created, as absurdities appear.

This study responds positively to the Gordon admonition to desist from 'disciplinary decadence' – the strict obedience to discrete knowledge and methodological enclaves establisheded within specific academic disciplines.[39] As such, this study readily connects philosophy and history with labour matters. Archived labour regulation is re-introduced as pertinent to contemporary discussion. Normally distinct subject boundaries within the field of law are rendered permeable during the enquiry. Indeed, during the process, aspects of constitutional law, property law, mobility law and mining law are considered pertinent to labour.

1.3. Literature Review

This part will set out the contours of the thesis, its premise and the key concepts on which analysis and discussion shall be conducted. Where studies have mapped historical South African labour law, focus has generally been on the right to engage in collective bargaining (trade union membership) or the development of fair labour practice rights.[40] Description of the influential prescripts of Roman-Dutch and English law have been marked in discussion and, inevitably, the International Labour Organization (ILO) conventions also loom large as

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[39] L Gordon 'Disciplinary Decadence and the Decolonisation of Knowledge' (2014) *African Development* 81-92.
[40] Budeli has considered how the international development of freedom of association has shaped the South African trade union law as a method of achieving incremental democracy in labour relations and comparison with western European and North American arrangements – M Budeli *Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order* (unpublished PhD thesis, University of Cape Town, 2007); Esitang has considered the drawbacks of heightened majoritarianism within collective bargaining under the Labour Relations Act - T Esitang *The Impact of Threshold Agreements on Organisational Rights of Miniority Trade Unions* (unpublished LLD thesis, University of Pretoria, 2017); Vettori examined the precarious position of increasingly atypical employment and employees who are able to access trade union membership in an environment of significant decline in union membership - M Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* (unpublished LLD thesis, University of Pretoria, 2005); Stewart examines the contested nature of labour time with a particular focus on South Africa mineworkers and also considers that there are racialized gaps in the manner in which we ascribe what constitutes work in South Africa – P Stewart Labour Time in South African Gold Mines: 1888-2006 (unpublished PhD thesis, University of the Witwatersrand, 2012); M Conradie *A Critical Analysis of the Right to Fair Labour Practices* (unpublished LLM thesis, University of the Free State, 2013); M Conradie 'The constitutional right to fair labour practices: a consideration of the influence and continued importance of the historical regulation of (un)fair labour practices pre-1977' (2016) 22(2) *Fundamina* 163-204; Smit examined unfair dismissal under the Code of Good Practice: Dismissal of the LRA in light of ILO conventions and comparable law in western Europe and the United States - P Smit Disciplinary Enquiries in Terms of Schedule 8 of the Labour Relations Act 66 of 1995 (unpublished PhD thesis, University of Pretoria, 2010).

legitimate guidance for labour regulation.[41] Where mining law has been the subject of study, the occupational status and working conditions of Africans has been peripheral to objectives.[42] In general these earlier studies ground their analysis in Roman-Dutch law, English law and other more modern Eurocentric conceptions of labour and the law. They have not adequately addressed the fact that during the time that such laws were developing in South Africa and elsewhere, they were founded on and depended on the subjugation of Africans for their protracted inscription, revisions and implementation. On the whole, analysis has not sought to deconstruct the values embedded in the norms. The legitimacy of labour laws as they exist has been largely assumed, with the only query being the exclusion of Africans from their full benefits. This study queries the entire conceptual order on which labour and its regulation has been grounded, from the localised position of South Africa. The legitimacy of Euorcentrism and the legal culture this has engendered is questioned. The prominence of the ideology of the invading white communities, *vis-à-vis* African people, in shaping South Africa specific labour tenets requires further scrutiny. The manner of abjection of Africans using Euro-normative labour standards needs revisiting and a more thorough recount. This has a bearing on whether continued present-day reliance on Eurocentric labour norms shall progressively eliminate the grim reality experienced by many Africans.

A comprehensive description of important concepts such as what is meant by imperialism, colonialism and Eurocentrism will now follow. These explanations demonstrate the interconnectedness of imperialism, colonialism and Eurocentrism which have operated under pre-determined and evolving racial hierarchies that were deployed to legitimate the conquest and the subjugation of African people. The notion of democracy as a governing principle is explained as precursor for understanding the regulatory framework under which South Africa has operated and claims to exhibit in the present-day. The singular significance

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[41] Ibid (note 40 above); J Grogan *Workplace Law 9 ed* (2007) 3-5; M Chanock 'Writing South African Legal History: A Prospectus' (1989) 30(2) *The Journal of African History* 265-288; other scholars highlight the 1922 riots of white workers on the Witwatersrand as the significant catalyst for the development of labour law via the Industrial Conciliation Act of 1924 – A van Niekerk and N Smit (eds) *Law@Work 3rd Edition* (2015); R Le Roux 'The Evolution of the Contract of Employment in South Africa' (2010) 39(2) *Industrial Law Journal* 139-165.

[42] Higgs investigated evolution of primarily diamond mining laws and the award of rights to prospect, peg and mine in South Africa - A Higgs *The Historical Development of the Right to Mine Diamonds in South Africa* (unpublished LLD thesis, North-West University, 2017); Ndlovu was concerned with the development of the diamond trade – F Ndlovu An Analytical Study of the Regulation of South African Diamond Trade from 1994 to 2009 with Reference to Aspects of the 1996 Constitution (unpublished PhD thesis, University of KwaZulu-Natal, 2009). This study focuses directly on African mine workers – the law and policy which managed workplace relations of those who perform this dangerous occupation.

of the construction of stratified racial profiles within the colonial matrix is also explained. Then the manner in which notable related philosophical frames such as decolonial thinking and critical race theory intersect with the chosen theoretical framework, postcolonial theory, is discussed. Thereafter all the concepts are tied together within the brief introduction of the postcolonial theoretical lens.

1.3.1. Explaining Imperialism, Colonialism and Eurocentrism

Understanding the layered connection of the thinking and processes encapsulated by the three concepts (imperialism, colonialism and Eurocentrism) and their pertinence to South Africa, in the context of labour consumption, will enable a better grasp of the intricacy of the ideological matrix undergirding the European invasion.[43] Indeed, postcolonial theory has evolved as a result of and in response to the interwoven development of imperialism, colonialism and Eurocentrism during this period.[44] Clarifying the contours of these three phenomena and other (auxiliary) related concepts lays the groundwork for understanding South Africa and its laws. At the outset, prior to separating the three processes, crucial similarities which support the understanding of the interconnectedness are underlined. Then the parameters of each concept, for purposes of this study, will be explained in turn.

Though sometimes used interchangeably imperialism and colonialism are not exactly the same. Both European colonialism and imperialism involve extending a state's authoritative reach into another territory. Both aim to dominate peoples and resources of the new territories in order to gain wealth, political power and wield authoritative knowhow for the dominating European state concerned. Imperialism has and deploys a particular logic which includes inculcation of its justifications as progressivism, known as 'intellectual imperialism'.[45] Consequently the pre-eminence of the European culture becomes widely accepted, while the indigenous culture becomes marked inferior and irrelevant.[46] Imperialism largely involves the

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[43] This study confines itself to the period of European expansion which occurred mainly in the 19th and 20th centuries.

[44] Nandy (note 26 above) 11.

[45] Creating 'a parallel structure in the way of thinking of subjugated people' - S Alatas 'Intellectual Imperialism: Definition Traits and Problems' (2000) 28 *Southeast Asian Journal of Social Science* 23, 24-26; according to Anghie '[i]t was simply and massively asserted that only … European law was counted as law … In its most extreme form, [this] … reasoning suggested that relations and transactions between the European and non-European states occurred entirely outside the realm of law' - A Anghie 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal*22.

[46] Alatas describes intellectual imperialism thus: '(1) The non-western world has a limited degree of competence and creativity; (2) It needs the guiding hands of the West to unfold this limited ability; (3) It is receptive to

set of beliefs behind the building of potential empires, while colonialism also includes the direct execution of the ideas. Colonialism is a part of imperialism that effectuates the imperialist vision. In imperialist terms, colonialism has been described 'as a form of enforced modernization, painful at times, but necessary for the ultimate benefit of [South] Africa.'[47] Related to imperialism and colonialism is the notion of Eurocentrism. In essence, Eurocentrism entails, whether consciously or unconsciously, the veneration of Europe and European knowledge derivatives in all forms of understanding, existence and practice.[48] The European form is looked to 'as a silent referent'.[49] This study posits that exercise of power and dominion in colonial territory has been integral to the developments in Europe and European thought.[50] Therefore imperialism, colonialism and Eurocentrism are, in many respects, cyclically constitutive and complementary to each other.

1.3.2. Imperialism

With imperialism, power is applied through sovereignty that may be obviously apparent, or through indirect cultural, political and economic means of domination in subject territories. For present purposes, imperialism means 'the acquisition of an empire of overseas colonies … [the] Europeanization' of African and other territories beginning in the fifteenth century and intensifying between the nineteenth and twentieth centuries.[51] Whether formally recognized or not, imperialism ensures that governance of territories and nations operates under a particular system, 'not merely political and economic, but also moral and intellectual.'[52] It does not require a hands-on or obvious invasion, but subsists on socio-economic and cultural dominance. It relies on and includes institutional structures of control emanating from and, in pertinent ways, directed from the metropolis of the empire. These are political arrangements

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compassion from the West as a younger man is willing to accept advice from an older and more experienced person; (4) It should not be left on its own to experiment with things unknown or alien to the West; (5) Whatever it has achieved in the past was incomplete and seriously defective; (6) The standards of the non-western world cannot be applied to measure the West … it is the West that can measure other civilizations than its own' – Alatas (note 45 above) 36.

[47] P Curtin 'The Black Experience of Colonialism and Imperialism' (1974) 103 *Daedalus* 17, 25

[48] '[T]hat Europe and its peoples were specifically endowed to conquer the world as part of a universalist, evolutionary doctrine' - C Orser 'An Archaeology of Eurocentrism' (2012) *Cambridge University Press* 737, 738.

[49] D Chakrabarty 'Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts? (1992) 37 *Representations* 1, 2.

[50] Spivak describes the 'Other of Europe' an entity methodically deprived by western knowledge accumulation and norms – a continuing reality - G Spivak 'Can the subaltern speak?' in P Williams & L Chrisman (eds) *Colonial Discourse and Postcolonial Theory A Reader* (1988) 66, 75.

[51] B Ashcroft G Griffiths & H Tiffin *Post-Colonial Studies The Key Concepts* (2007) 112.

[52] A Coomaraswamy *Essays in National Idealism* (1909) 2.

that enable the implementation of inter-connected economic systems of extraction within colonies and other subdued spaces. Imperialism is rooted in ideology. It provides justificatory support for (*inter alia*) colonisation which continues to be developed and adapted to suit calculated desires once colonialism has been installed. Said correctly describes imperialism as 'the practice, the theory, and the attitudes of a dominating metropolitan centre ruling a distant territory'.[53] With the inception of colonialism came the instatement of the idea that African life entailed listless backwardness which would be cured by service to more enterprising white arrivals.[54]

1.3.3. Colonialism

Young affirmed that imperialism is the 'concept' and colonialism is largely the 'practice', and the two are interlocked.[55] Colonialism connotes the implementation of imperialism, a European project of South African invasion which went hand-in-glove with violence and cultural oppression on a grand scale. Colonialism happened symbiotically with the development of capitalism as the dominant world economic system.[56] The colonies provided human and other material resources for the prosperity of colonial metropoles while simultaneously institutionalising unequal relations between colonising invaders and colonised peoples, with race being the control mode of differentiation.[57] In particular, the African, designated inferior, was exploited as a labour source for the benefit of the coloniser, while European culture and practice was assigned superior status.[58] In South Africa, as elsewhere, colonial settlement included deliberate dispossession and displacement of Africans – zoning and policing of spaces.[59] Mudimbe describes the 'colonizing structure' of European colonial incursion in Africa, namely, 'the domination of physical space, the reformation of the *natives*' minds, and

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[53] Whereas colonialism which derives from imperialism 'is the implanting of settlements on distant territory' - E Said *Culture and Imperialism* (1994) 9.

[54] The 1774 edict sanctioning the extermination of Africans labelled Bushmen, disposable creatures '*schepsel*', enabled the kidnap of women and children as involuntary servants; Proclamation 1 of 1809 (the Caledon Code) forced Africans into work contracts based on the notion that they were a lesser form of inert humanity.

[55] R Young *Postcolonialism: an Historical Introduction* (2001) 17 cf: A Roy 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29 *Adelaide Law Review* 315, 331.

[56] J Barreto 'Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto' (2012) 3 *Transnational Legal Theory* 1, 22; V Mudimbe *The Invention of Africa* (1988) 3.

[57] T Mahmud 'Cheaper than a Slave: Indentured Labor, Colonialism and Capitalism' (2013) 34 *Whittier Law Review* 215-243; J Gathii 'Imperialism, Colonialism and International Law' (2007) 54 *Buffalo Law Review* 1013-1066.

[58] A Mbembe 'Necropolitics' (2003) 15 *Public Culture* 11, 25-26

[59] Proclamation 1 of 1809 (the Caledon Code); Ordinance 49 of 1828 (Cape); Article 159 Volksraad Resolution 18 June 1855; South Africa Act, 1909; Natives Land Act No. 27 of 1913; Natives (Urban Areas) Act No. 21 of 1923; Population Registration Act No. 30 of 1950; Group Areas Act No. 41 of 1950.

the integration of local economies into the Western perspective.'[60] The advent of colonialism has installed the justificatory ethos of imperialism as generalised political philosophy.[61] Thus colonialism has been described as 'imperialism seen from below[,] … that view of the controllers which is held by the controlled.'[62]

Colonialism has involved large scale mineral extraction, displacement, dispossession and subjugation of the colonised, for the benefit of a white community as well as the colonial centre in Europe.[63] It signifies a measure of significant direct interference and control over people in situ. Though different in some aspects depending on the time and place of incursion, Loomba points out that colonialism always locks 'the original inhabitants and the newcomers into the most complex and traumatic relationships in human history.'[64] Where and when the new settlements or extraction stations are formed it has been accomplished through forceful disruptive delegitimation of the occupational living conditions and morals of the indigenous people.[65] The post-Enlightenment era[66] form of colonialism, which to a large degree affected South Africa, has been credited with organising economic structures in colonies which enable widespread ongoing mineral and human resource exploitation to benefit colonial metropoles well past formal decolonisation.[67] In fact, 'without colonial expansion the transition to capitalism could not have taken place in Europe.'[68]

The inland incursion of white *Boer* colonialism further consolidated the pre-established imperialist imperatives of sub-classes, presided over by a white master class, through law. Citizenship of the settlements developed in the ZAR, which included allotments of property

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[60] Mudimbe (note 34 above) 2.
[61] B Ashcroft, G Griffiths & H Tiffin *Postcolonial Studies The Key Concepts* 2 ed (2007) 40; According to Chanock:
'[t]he law was the cutting edge of colonialism … and part of the process of coercion. And it also came to be a new way of conceptualizing relationships and powers and a weapon within African communities … customary law, far from being a survival, was created by these changes and conflicts. It cannot be understood outside of the impact of the new economy on African communities. Nor can it be understood outside of the peculiar institutional setting in which its creation takes place' –
M Chanock *Law Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985) 4.
[62] A Thornton 'Colonialism' (1962) 17 *International Journal* 335, 341
[63] Roy (note 55 above) 331; R Sugirtharajah (ed) *The Postcolonial Biblical Reader* (2006) 16.
[64] A Loomba *Colonialism/Postcolonialism* (1988) 2.
[65] R Young *White Mythologies* (2004) 2-6.
[66] Enlightenment era refers to the 18th and 19th century European and intellectual discourse which developed ideas of modernity – that European civilisation represented the modern and was superior over other cultures.
[67] M Ntumy 'Neo-Naturalism: Tailoring Legal Philosophy to Capitalism and Neo-Colonialism' (1985) 17 *Zambia Law Journal* 11-34; S Merry 'Law and Colonialism' (1991) 25(4) *Law & Society Review* 889-922.
[68] A Loomba *Colonialism/Postcolonialism* (1988) 4.

burgerreg erf, were denied to racial groups relegated to the 'servant class'.[69] Residential locations were set aside for non-whites based on assigned group identification. The priority was to provide white farmers with sufficient labour to till and make profitable their acquired advantage, using cheap African labour. As demand for low-cost labour in the mines heightened, unfair legislative efforts to secure African labour expanded.[70] As the ZAR became the Transvaal, following discovery of mineral deposits in the latter part of the nineteenth century, a growing mining industry lured African labour from white farms with better pay. The colony tried to curb this African exodus through more onerous pass laws.[71] An additional poll tax was introduced forcing African male adults to carry passes which had to be re-endorsed yearly for a fee of one pound.[72] The one pound pass holders were the only African men allowed to obtain a further pass allowing them to go to the mines. British annexation (1877) transitioned the cash-strapped ZAR formally to Transvaal.[73] Typically, in 1894 mining contracts paid white workers £21 per month while African workers were paid 61shillings plus a feeding cost of 10 shillings per month.[74] In time, the increasing expertise of the cheap Africans came to be seen as threatening the position of the more expensive white workers and the resultant more formalised introduction of the industrial colour bar was instrumental in maintaining white supremacy in the work space.[75] This thesis hones in on the breadth of practices installed in responding to the 'native question.'

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[69] N Jansen van Rensburg'A Struggle for Tenure by the "servant class" of Potchefstroom: A Study in Structural Violence' (2013) 58 *Historia* 70, 71; Article 159 Volksraad Resolution 18 June 1855; article 6 *Grondwet* of the ZAR (1858).

[70] Resolution 24 of 1895 Transvaal obliged Africans to pay 10 shilling per hut annual, with every African male over the age of 21 years automatically assessed as having a hut – the hut tax. This resolution also mandated a 40 shilling poll tax from each African male, with exemptions granted to the aged, the chronically ill and those employed by white people. Initially 'the labour force on the Rand [mining industry] was divided – a minority of expensive white skilled labour and a majority of cheap black unskilled labour' - K Harris 'Early Trade Unionism and the Gold Rush on the Mines in South Africa and Australia: A Comparision' (1990) 35 *Historia* 76, 83

[71] P Delius *The Land Belongs to Us: The Bapedi Polity The Boers and The British in The Nineteenth Century Transvaal* (1984) 72-79.

[72] K Breckenridge 'Power Without Knowledge: Three 19th Century Colonialisms in South Africa' (2008) 26 *Journal of Natal and Zulu History* 3, 27.

[73] Resolution No. 198 Annexation of the South African Republic to the British Empire [12 April 1877] – G Eybers *Select Constitutional Documents Illustrating South African History, 1795-1910* (1918) 448-453.

[74] K Thorpe *Early strikes on the Witwatersrand gold mines (1886-1907), with specific reference to the 1907 strike* (unpublished MA thesis, University of Stellenbosch, 1986) 46 cf: Harris (note 70 above) 84. At the time £1 (pound sterling) was equal to 20s (shillings). Adult males to carry district passes and travel passes for mineworkers (each issued for a prescribed fee) as well as pay a Poll tax and the Hut tax – Native Pass Law (Law 22 of 1895), Native Pass Law for Gold Fields (Law 23 of 1895) & (Law 24 of1895).

[75] E Katz 'Revisiting the Origins of the Industrial Colour Bar in the Witwatersrand Gold Mining Industry 1891-1899' (1999) 25 *Journal of Southern African Studies* 73, 74; Mines and Works Act No. 12 of 1911; Native Labour Regulation Act No. 15 of 1911.

1.3.4. Eurocentrism

Eurocentrism has been labelled the intellectual euphemism for what remains of the racialised colonialism.[76] For the purposes of this study, Eurocentrism is synonymous with westernisation.[77] Its core feature, the pre-eminence of western European modes of thinking and being, was consolidated and presented in application during colonial invasion in South Africa and other parts of the world. Dominant European epistemologies that have come to represent western norms have generally ratified imperial acts of conquest.[78] Eurocentric theories propagating *inter alia* capitalism, sexism, racism, liberalism and communism have drawn from a grounding principle which designates indigenous colonised peoples inferior to Europeans.[79] This colonial racial hierarchy has been presented as normal. Its contrived inequity has been ratified through seemingly unassailable factual evidence, which requires that the subjugated submit to supposedly higher authority. Far from a benign acceptance of particular custom, 'it is the structural keeper of power and … implacable prejudgment.'[80] The predisposition is integral to and directs the manner in which theory has been and is conceived, and continues to be understood. Structures within which accepted theorising occurs are Eurocentric and remain constrained to conform to colonial templates where notions of universally applicable values, customs and law were assembled.[81] Noted indigenous culture has been designated quaint and localised, in comparison to generalisable norms.[82] This stifles development of non-Eurocentric

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[76] J Henderson 'Postcolonial Indigenous Legal Consciousness' (2002) 1 *Indigenous Law Journal* 1, 4-5.

[77] The imposed cultural practices and institutions largely emanating from Western Europe and North America have been constitutive of the socio-economic, political and legal culture referred to as Eurocentric. References to the west, western also refer to the same Euro-America cultural norms.

[78] Colonialism as a global system masterminded a separation of the world into sites, where on the one hand western law and moralities functioned and on the other hand (in conquered spaces) no 'sins' could be committed - S Ndlovu-Gatsheni 'Beyond the Equator There Are No Sins: Coloniality and Violence in Africa' (2012) 28 *Journal of Developing Societies*; Gathii (note 57 above) 1056-1058; *Cook v Sprig* [1899] AC 572; *Mokhatle & Others v Union Government (Minister of Native Affairs)* 1926 AD 71.

[79] In classic Eurocentric philosophy Thomas Hobbes advocates a social contract establishing the dominion of a sovereign, as an antidote to the 'state of nature', described thus: '…there is … no Culture of the Earth; … no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continual fear, and danger of violent death; And the life of man, solitary, poor, nasty, brutish and short' – T Hobbes *Leviathan* (1651) (1996) 89. Hobbes famously ascribed this state to Native Americans in North America. Much of colonialism was grounded on the colonised being the example of the state of nature as conceived by Hobbes. Also see E Cassirer *The Philosophy of the Enlightenment* (1955) 19.

[80] Henderson (note 76 above) 5.

[81] According to Modiri '[t]here still remains the view that despite the common law being thoroughly saturated in a "white, male, western and colonial perspective", it can still provide access to a neutral, pure and universal source of meaning' – J Modiri The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) apartheid South Africa' (2012) 28 *SAJHR* 405, 419.

[82] D Masaka 'African Philosophy and the Challenge from Hegemonic Philosophy' (2018) 22(3) *Education as Change* available at https://upjournals.co.za/index.php/EAC/article/view/2918/pdf , accessed on 5 December 2019; T Dladla 'Archie Mafeje and the Question of African Philosophy: A Liberatory Discourse' (2017) 36(3)

value systems, which have been delegitimised during the colonial process, while the colonial logic of Eurocentrism has been designated universal in applicability.[83]

Some critical theories have called into question the universality promoted in dominant Eurocentric thinking. But these debates have generally constrained assessment to accord with 'the space and time coordinates of the European epistemic standpoint and the European philosophical understanding of history.'[84] Notable in much of the counter-hegemonic debate has been the failure to fully integrate the colonial process; thus minimising the 'centrality of the discourse of "race" to the constitution of Western annals of knowledge, ethics and aesthetics'.[85]

How then is Eurocentrism to be fully discerned and a parley with other, at times opposing views, to be established? Noel proposed awareness that a by-product of the repression 'is that the dominator [Eurocentrism] succeeds in imposing his logic even on the process adopted by the dominated to escape his control.'[86] So a careful excavation of the foundational origins of persuasive ideas is advisable. According to Henderson, the indigene has habitually engaged in a process of attempting to mediate between the colonial and the indigenous while

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South African Journal of Philosophy 350-361; D Ndima *Re-Imagining and Re-Interpreting African Jurisprudence Under the South African Constitution* (unpublished LLD thesis, University of South Africa, 2013). Section 11 of the Native Administration Act No. 38 of 1927 stated that African law and custom would be applied to Africans, sometimes in 'modified' form, at the discretion of courts to the extent that it was not repugnant or in conflict with 'principles of public policy or natural justice'.

[83] Noel describes a state of alienation where '[t]he dominator does not feel that he is exercising unjust power, and the dominated do not feel the need to withdraw from his tutelage. The [dominated] … will insist that they want an authority more enlightened than their own to determine their fate' - L Noel *Intolerance: A General Survey* (1994) 79; A Quijano 'Coloniality and Modernity/Rationality' (2007) 21 *Cultural Studies* 168, 168-169; Weber describes it thus:

'A product of modern European civilization, studying any problem …, is bound to ask himself to what combination of circumstances the fact should be attributed that in Western civilization, and in Western civilization only, cultural phenomena have appeared which (as we like to think) lie in a line of development having universal significance and value' - M Weber The Potestant Ethic and the Spirit of Capitalism (1930) 13: cf K Appiah 'Is the Post- in Postmodernism the Post- in Postcolonial?' (1991) 17 *Critical Inquiry* 336-357, 343.

[84] Barreto (note 56 above) 4; Young 'challenges European Marxism's claim to a totalising knowledge through its grounding on a dialectical theory of history, [which is] … in fact operating within the limits of a fundamentally European perspective' – Young (note 65 above) 3; B Santos 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279.

[85] This demonstrates 'a remarkable amnesia about the intertwining of the colonial and imperial projects in the inscription of historical' undertakings - A Brah *Cartographies of Diaspora: Contesting Identities* (1996) 224 – 225; K Intemann E Lee K McCartney S Roshanravan & A Schriempf 'What Lies Ahead: Envisioning New Futures for Feminist Philosophy' (2010) 25 *Hypatia* 927, 929; M Lugones 'The Coloniality of Gender' (2008) *Words & Knowleges Otherwise* 1-17; C Davies 'Beyond Unicentricity: Transcultural Black Presences' (1999) 30 *Indiana University Press* 96-109.

[86] L Noel *Intolerance: A General Survey* (1994) 148-149 cf: Henderson (note 76 above) 17.

living 'with the ambiguity of thinking against the educated self.'[87] This motivates the need for engagement with an account of colonialism as encountered by the various components of colonised communities, thereby revealing 'the antagonistic and ambivalent moments within the "rationalizations" of modernity.'[88] A key building block of the whole edifice is the notion of unequal human racial categories.

1.3.5. The Centrality of Race

Racial ideologies were central to the treatment of the colonised people.[89] The white European man was declared the ideal human, superior in acumen and standing – a comparator against whom all other racial groupings were found wanting.[90] This othering of those primarily not European in appearance and geographical location fabricated the functional divide between human beings. History is replete with examples of how the weaponised totalising narratives of supposedly homogeneous races have been used to obscure unjustifiable brutality. Wallerstein emphasises that racism, a 'cultural pillar of historical capitalism', 'was the ideological justification for the hiearachization of the work-force and its highly unequal distributions of reward'.[91] A 'world-wide fault line' allocating positioning on the totem pole, decreed white people highest.[92] Wynter described the peculiar vilification of the sub-Saharan African, who came to represent the most inferior incarnation of humanity in western thought, as colonial racial hierarchies were assembled.[93] In South Africa the dispossession, killing and heightened exploitation of Africans was already inscribed in the ideology of colonial conquest. The racial

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[87] Henderson describes a 'split-brain society' where indigenous people devise ways of exploring and healing 'the gaps between systems of knowledge and peoples … [where] Educated Indigenous thinkers … reconsider Eurocentric discourse in order to reinvent an Indigenous discourse' – Henderson (note 76 above) 18.

[88] H Bhabha *The Location of Culture* (1994) 171.

[89] Rapid urban development in the Transvaal gave rise to policy and law which gave effect to the notion that Africans were a superfluous population whose primary duty was 'to minister to the wants of the white population' – Transvaal Local Government Commission (T.P. 1-1922) cf: Report of the Native Laws Commission 1946-48 UG No. 19 of 1948 (1948) 2-4; Natives (Urban Areas) Act No. 21 of 1923; Native Labour Regulation Act No. 15 of 1911.

[90] Modiri (note 81 above) 419.

[91] I Wallerstein *Historical Capitalism with Capitalist Civilization* (1983) (1996) 78-80.

[92] Wallerstein (note 91 above) 79.

[93] '[C]ondemned to be fixed and unmoving at the center of the universe as its dregs' - S Wynter 'Unsettling Coloniality of Being/Power/Truth/Freedom: Towards the Human After Man Its Overrepresentation – An Argument' (2003) 3 *The New Centennial Review* 257-337, 267; G Hegel *The Philosophy of History Georg Wilhelm Friedrich Hegel* (2001) available at https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/hegel/history.pdf, accessed on 4 April 2020 109-117; indeed the violence of colonial incursion was justified using the definitively descriptive racial categories which had been established, 'a foundational code' – D Goldberg 'The end(s) of race' (2004) 7 *Postcolonial Studies* 211, 212-213. According to Loomba 'in the colonial situation capitalism works differently, and this difference needs to be accounted for by thinking more concretely about race and ethnicity' – Loomba (note 64 above) 127.

colonial pecking order facilitated pogroms and the maximal abuse of Africans as cheap labour, since they were labelled the most degenerate and therefore disposable of racial categories.[94]

Historically, the marked cost-effectiveness of colonial enterprise incorporated the privileging of white workers as a whole, so long as their inflated wages were off-set by institutionalised paltry remuneration of Africans. The discovery of significant diamond, gold and other mineral deposits from the mid to late 1800s in the parts of South Africa drew mining conglomerates and heightened the desire to quell the recalcitrance of Africans to supply an abundant steady source of cheap labour. Consolidating control of invaded territories involved corralling Africans into reserves and limiting their free movement.[95] Measures were put in place to make continued occupation of land, by Africans in the vicinity, contingent upon service to the declared state and its white citizenry. Apart from being a method of revenue collection for established colonial settlements, the main purpose of imposing quit-rent, hut-tax and then the poll-tax, was to force Africans to have to work for money and to create a perpetual labour supply.[96]

The notion of racial classification as a dividing line of human subjectivity and consciousness was employed as a mechanism to legitimate slavery as well as colonial displacement, extermination and oppression of indigenous and other peoples. Racism has been defined as:

> 'politically, culturally and economically produced [hierarchy] and reproduced for centuries by the institutions of the "capitalist/patriarchal western-centric/Christian-centric modern/colonial world-system." The people above the line of the human are recognized socially in their humanity as human beings and, thus, enjoy access to rights[,] … people below of the line of the human are considered subhuman or non-human: that is, their humanity is questioned and, as such, negated'.[97]

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[94] Notwithstanding prohibitions against the formal institution of slavery agreed to in the San River Convention, which were incorporated in the subsequent 1857 South African Republic (ZAR) Constitution, the practice of raiding African settlements and capturing women and children as involuntary labour under the guise of apprenticeship occurred – F Morton 'Slave-Raiding and Slavery in the Western Transvaal after the Sand River Convention' (1992) 20 *African Economic History* 99, 103. According to Breckenridge by 1866 approximately ten per cent of the Transvaal Trekker population comprised the bonded children – Breckenridge (note 72 above) 24.
[95] In 1855 the ZAR Volksraad specifically prohibited ownership of fixed property by Africans – Article 159 Resolution of 1855. A Location Commission convened in 1881 yielded the Occupation Act of 1886, followed by the Squatter Law of 1887; L Kriel 'African reaction to white penetration: The Hananwa of Blouberg 1886-1894' (2000) 45 *Historia* 57-70.
[96] Article 18 Ordinance 2 of 1864 ZAR; Articles 15, 16 & 17 Law 9 of 1870 ZAR; J Bergh 'White farmers and African labourers in the pre-industrial Transvaal' (2010) 55 *Historia* 18, 21.
[97] R Grosfeguel 'What is Racism?' (2016) 22 *Journal of World-Systems Research* 9, 10; Madlingozi recounts that

Fanon described 'a Manichean world' where the othered native pitted against the coloniser is said to represent the 'absence of values,' to negate values.[98] European discourse created a taxonomy of humanity in order of importance and development.[99] The influential 1735 *Systema Naturae* by Linnaeus, categorised people into four different races, namely, 'Europeans [that appear] … "whitish", Americans "reddish," Asians "tawny," and Africans "blackish".[100] When the 1758 tenth edition of the book set out behavioural characteristics of each race, Africans had the following traits: 'phlegmatic; … women without shame, … crafty, indolent, negligent … governed by caprice.' By contrast Europeans 'were "white, sanguine, inventive [and] … governed by laws."'[101] Subsequent racial categories of Blumenbach and others also routinely designated deviations from the archetypal Caucasian substandard; particularly as race was considered indicative of civilisational status.[102] Wessels CJ described the Africans of South Africa thus:

'[h]istorically in South Africa society is a society split into two – one white and supposedly human, and the other black and supposedly sub-human. An invisible but very much felt Line ran through the South African society in a way that banished Africans to the zone of non-beings. …[I]t is not that African people were marginal to or on the periphery of civil society; they were not part of it' - T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123, 143.

[98] 'The customs of the colonized people, their traditions, their myths – above all, their myths – are the very sign of that poverty of spirit and of their constitutional depravity' – F Fanon *The Wretched of the Earth* (1963) 41-42.

[99] Roy (note 55 above) 324; much of this later culminated in the inculcation of Social Darwinism which endorsed a hierarchy of races, where different races were at varying levels of human progression – the European classified the most evolved.

[100] C Linnaeus *Systema Naturae* (1735) cf: S Muller-Wille 'Race and History: Comments from an Epistemological Point of View' (2014) 39 *Sci Technol Human Values* 579-606.

[101] Asiatics were said to be *inter alia* 'avaricious …[and] ruled by opinions', while the 'Cooper coloured, choleric' Americans were ruled by custom – M Yudell 'A Short History of the Race Concept' available at https://www.councilforresponsiblegentics.org/pageDocuments/K41Q3T8YCD.pdf 3, accessed on 6 February 2019; A Loomba *Colonialism/Postcolonialism 2nd Edition* (2005) 100.

[102] Johann Blumenach, a late 1700s medical scientist and reputed founder of craniometry, set out a hierarchical biological construction of the human species, based on geographic regions – the European Caucasian being the most superior and beautiful – other races being a consequence of degeneration from environmental factors. For Georg Hegel *The Philosophy of History* (1837) sub-Saharan Africa was inhabited by a Negro who 'exhibits the natural man in his completely wild and untamed state … [lacking] harmonious humanity', which justified the suspension of European morality in relation to them. Hegel stated that for the Negro 'slavery is … a mode of becoming participant in a higher morality and the culture connected thereto' – Hegel (note 93 above). Derogatory racial commentary is also to be found in Marxist notions on labour, work, class, capitalism and the social structure operation in the system. Indeed Engel casts racial groupings thought inferior as ahistorical. The production and class delineation comprising the Marxist evolving rendition of history, are premised on notions of 'natural conditions [including] … racial conditions … hereditary … disparities' - E van Ree 'Marx and Engel's theory of history: making sense of the race factor' (2019) 24 *Journal of Political Ideologies* 54, 59. Commenting of the brutality occasioned by British colonialism in India, Marx declares that 'whatever may have been the crimes of England she was the unconscious tool of history' in forcing 'the crumbling of an [undesirable] ancient world' – K Marx 'The British Rule in India' in J Cohen et al (eds) *Marx & Engels Collected Works Volume 12 1854-54* (2010) 132, 126.

'… they are not civilised Europeans but kaffirs living more or less in a state of nature … [prone to acting] according to their natural and inherited impulses'.[103]

The intention to exploit colonial resources, material as well as human, solidified the obviously negative view of African people based on race.[104]

Therefore placing the making and approval of knowledge and cultural norms outside of the machinations that order and manage society concealed the attachment of these processes to their principal locus of control. The development of knowledge does not occur in the abstract but is an exercise of power which is connected with the conditions sought to be institutionalised.[105] Hence when Magubane observed '[t]he ideology of racism, called into life and fed by the expansionist and exploitative … relations of imperialism,'[106] it ought to prompt review of the justificatory edifice on which racial categories which ground Eurocentrismrest.

1.3.6. Democracy

The 1903 post Anglo-Boer war deliberations of the white contingent, on the formation of a unified colonial state, relegated the fate of Africans to that of being used merely as a cheap source of disenfranchised labour.[107] At its inauguration, the Union of South Africa[108] created what has been reputed to have been a white parliamentary democracy that generally deprived non-whites of the right to participate in their governance (the vote).[109] This bifurcated state

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[103] *Rex v Xulu* 1933 AD 197, 200.

[104] Waitz explained it thus:
'If there be various species of mankind, there must be a natural aristocracy among them, a dominant white species as opposed to the lower races who by their origin are destined to serve the nobility of mankind, and may be tamed, trained, and used like domestic animals … Wherever the lower races prove useless for the service of the white man, they must be abandoned to their savage state, it being their fate and natural destination' - T Waitz *Introduction to Anthropology* (1863) 13; *On The Origin of Species* (1859) by Charles Darwin which proposed a theory of evolution by natural selection, morphed into Social Darwinism - the placement the European as the fittest of human races, and so '[i]mperialism and dogmatic racism were translated into biological language' – G Mc Connaughey 'Darwinism and Social Darwinism' (1950) 9 *Osiris* 397, 398; H Spencer *Principles of Sociology* (1874-75).

[105] In line with Foucault, Barreto explains the fusion of power to epistemology thus: '[a]s knowledge that "precedes" or justifies knowledge, epistemology always remains in close contact with power' – Barreto (note 56 above) 6.

[106] B Magubane *The Political Economy of Race and Class in South Africa* (1979) 3.

[107] *Transvaal Colony Department of Native Affairs Annual Report 1902-1903* available at https:///.wiredspace.wits.ac.za/.../TRANSVAAL%20COLONY%20DEPT%20OF%20NATIVE, accessed on 6 June 2019; *South African Native Affairs Commission Report (1903-1905)*. This was in line with the general immateriality placed on the plight of Africans in policy considerations and enactments of the ZAR (and then the Transvaal) and other settlements throughout the 19th century.

[108] Established by the South Africa Act of 1909.

[109] This study contends that the system of governance that was installed was not in fact a democracy, but a farcical approximation of 'government by minorities' spearheaded by colonial hegemony - R Dahl A Preface to Democratic Theory (1956) cf: R Krouse 'Polyarchy & Participation: The Changing Democratic Theory of Robert

subjected Africans to oppressive administrative rule based on the proposition that the African leadership had transferred its peoples' sovereignty to the British Crown.[110] Though overwhelming in number, 'African people were [not simply] marginal to or on the periphery of [the recognised] civil society; they were not part of it'.[111] Hence it is averred that acceptance of the proposition that the Union of South Africa or indeed the Republic of South Africa (up to 1994 and arguably possibly beyond it) created any sort of democracy amounts to tacit acceptance of the sub-human categorisation imbued on Africans by operation oflaw.

The democracy of present-day South Africa is much like Dahl's polyarchy: 'elite minority rule and socioeconomic inequalities alongside formal political freedom and elections involving universal suffrage'.[112] Presently people submit to this type of social control, a governance that effectively excludes the majorities from meaningful participation. But it should be borne in mind that this South African rendition of polyarchy was not even initially contested as happened with conception of the *demos* – the people – in the west.[113] Instead it has been transmitted through the colonial super structure of western hegemony, and it is argued that it therefore rests on precarious legitimacy, if any legitimacy at all. This model differs slightly from its predecessor during colonialism and apartheid in that the former limited the franchise to a select *de facto* white minority. Moreover, legislative supremacy has been replaced with a codified constitutional sovereignty. Since elections have been held out as

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Dahl' (1982) 14 *Polity* 441, 443. In reality the *demos* (African people) played no part in creating the Union and were wholly barred from citizenship thereto. Moreover the Union was a British Colony, not an independent state. This study considers that the 19th century polities of the Cape, the ZAR (later Transvaal), Natal and the Orange Free State which gave franchise and governing rights to white men (citizens) also were not examples of democracy.

[110] Lagden Report *South African Native Affairs Commission 1903-1905: Report with Annexures no. 1 to 9* (1905); in terms of section 147 South Africa Act of 1909 reserves called 'native locations' were created and a Governor-General was appointed to exercise the power of a 'supreme' chief over the 'natives.' Then the Native Land Act 27 of 1913 set aside 7% of the land mass of the Union for the established reserves into which Blacks were to be corralled.

[111] Madlingozi (note 97 above) 143.

[112] Dahl has argued for a revised and (in his view) more practical adaptation of the democratic ideal, reconciled to the reality that though many may vote only a few have access to resources and the levers of power as most proximate to 'quite probably unattainable' democracy. Polyarchy requires an environment of political contestation in which periodic elections are held, that yield 'government by *minorities*' which side-lines participation of most citizens – Dahl cf: Krouse (note 109 above) 443; W Robinson *Promoting Polyarchy: Globalization, US Intervention, and Hegemony* (1996) 51.

[113] That said, the traditional Greek notion of the *demos* ('the people') who could have *kratos* ('power') was elitist and only included a minority, while excluding those deemed to be lacking 'civic virtues' such as lower classes, women and slaves – J Ranciere 'Introducing Disagreement' (trans S Corcoran, 2004) 9 *Angelaki Journal of the Theoretical Humanities* 3-8.

significant signifiers of democracy, the continued widespread adversity of much of the society is then not denounced as un- or anti-democratic.

This thesis advances that there is a more compelling rendering of the meaning and purpose of democracy which is rooted in acknowledging the entitlement of the discounted multitudes to establish and manage the affairs of governance.[114] Here democracy is not judged by the erection and maintenance of ratified arrangements, but must be 'embodied in the very forms of concrete life and sensible experience.'[115] Thus democracy is an expression of 'the power of the people with nothing, the speech of those who should not be speaking, those who were not really speaking beings' – those 'beyond count'.[116] This does not just refer to acknowledged inter-societal socio-economic depravation, but to those who remain unseen and must subsist beyond its precincts in the colonial zone.[117] Therefore democracy should disrupt 'all logics that purport to found domination on some entitlement to dominate.'[118] Properly installed democracy would interrogate one's understanding of the society from the perspective of the erstwhile discarded members of the populace. From this vantage examination of what labour is and thereafter its regulation would have to occur in order to displace rather than endorse the enduring master-servant paradigm in South Africa. Indeed the notion of work has yet to be interrogated. Our understanding of what constitutes work, how it might be identified and quantified, would likely be revised.

1.3.7. Decolonial Thinking and Critical Race Theory versus Postcolonial Theory

This study situates itself within a discourse that grapples with the shortcomings and failures of formal decolonisation, particularly as it pertains to ratified knowledge – epistemological decolonisation. The assertion of Santos that 'political resistance … needs to be premised upon epistemological resistance', is well placed.[119] Despite African decolonisation occurring in the 1950s and 1960s in many of the colonised countries, the practice of suppressing indigenous

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[114] Ranciere explained that: '[t]raditionally, it had been enough not to hear what came out the mouths of the majority of human beings – slaves, women, workers, colonised peoples, etc. – as language, and instead to hear only cries of hunger, rage, or hysteria, in order to deny them the quality of being political animals' – Ranciere (note 113 above) 5.
[115] J Ranciere *Hatred of Democracy* (2006) 3.
[116] Ranciere (note 113 above) 5; G Spivak 'Can the Subaltern Speak?' available at: http://abahlali.org/files/Can_the_subaltern_speak.pdf, accessed on 8 December 2019.
[117] J Butler Bodies *That Matter: on the Discursive and Limits of "Sex"* (1993) 3; Santos (note 30 above) 51; Ranciere (note 113 above) 5; Madlingozi (note 97 above).
[118] Ranciere (note 113 above) 5.
[119] Santos (note 30 above) 63.

knowledge has largely continued to hold. Therefore the faulty outcomes of colonial resistance movements ought to be traced to their ideological foundations. Ndima has denounced the ingrained acceptance of western methods as 'scientific and rational' and above reproach in comparison to African ones as repetitive justification for Africa's underdevelopment.[120] Colonialism with its associated notions of civilisational superiority assigned to itself exclusive possessor and purveyor of 'reason', and its rationales appear largely intact despite decolonisation.[121] An effort to decolonise knowledge paradigm shift, which recognises on equal footing indigenous jurisprudential thought in order to 'reconceive' African law, has been advocated.[122] The process endorsed in this thesis does not discard Eurocentric norms wholesale, but acknowledges that they are insufficient because they do not engage the contested nature of the terrain. Hence 'a critical dialogue' with erstwhile marginalised culture is recommended in order to 'rid [Eurocentrism] … of its destructive core, and to actualize its emancipatory potential for the victims of power … in the colonised world.'[123]

Apart from postcolonial theory there are a number of other models that undertake to interrupt entrenchment of the biases of colonial reasoning in mainstreamed understandings. Such outlooks are in many respects complementary to postcolonial theory. Two prominent and relevant ones have been selected for brief discussion. Decolonial thinkers in a sense differentiate coloniality from colonialism, with coloniality being residual ubiquitous globalised arrangements of power resulting from colonialism. Coloniality means that 'the model of power that is globally hegemonic today' derives from arrangements set in motion during European colonial infiltration.[124] The violent control required to implement subjugation of subject peoples to colonial rule gradually yielded to 'social and cultural control' – a mystique around

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[120] D Ndima 'Reconceiving African jurisprudence in the post-imperial society' (2015) *CILSA* 362.
[121] M Ramose 'In Memoriam: Sovereignty and the New South Africa' (2007) 16 *Griffith Law Review* 310, 313; a 'monopoly of truth and the criteria to decide truth claims … [t]he relegation of Southern knowledges to nonexistence or invisibility' - J Barreto 'Epistemologies of the South and Human Rights: Santos and the Quest for Global and Cognitive Justice' (2014) *21 Indiana Journal of Global Legal Studies* 395, 403.
[122] Ndima (note 120 above) 363.
[123] Barreto (note 56 above) 27; B Santos 'From the Postmodern to the Postcolonial – And Beyond Both' in E Rodriguez M Boatca & S Costa (eds) *Decolonizing European Sociology: Transdisciplinary Approaches* (2009) 225, 232.
[124] Barreto states that '[t]he economic and political injustices that characterize the world order today result in, and are sustained by, the cognitive injustice that exists at the core of the production of knowledge since the beginnings of the modern colonization of the world. These injustices are intertwined, and constitute and feed each other' – Barreto (note 121 above) 397; A Quijano 'Coloniality of Power Eurocentrism and Latin America' (2000*) International Sociology* 533; Barreto (note 56 above) 6; N Maldonado-Torres 'On the Coloniality of Being: Contributions to the Development of a Concept' (2007) 21 *Cultural Studies* 240-270; S Ndlovu-Gatsheni 'Genealogies of Coloniality and Implications for Africa's Development' (2015) 40 *African Development* 13, 15-19.

the exploits which designated advanced nature to westernisation.[125] Destabilising the normalisation of myopic western tenets as indisputable generalisable truth or knowledge, along with the deconstruction of such, preoccupies the decolonial scholar.

While in agreement that the colonialism established matrices of power that remain,the present study takes the view that the formalised decolonisation undertakings which followed World War II did not end colonisation. Colonialism continues. For the purposes of this study, coloniality is largely synonymous with colonialism[126]; it denotes the continuation of colonialism in an era of 'flag independence'. As will become apparent, in postcolonial theory the postcolonial period begins with the colonial encounter or invasion, and is not bound by temporal, geographic and other demarcations founded on Eurocentric logic. Rather, since colonial dominion is incessantly unstable due to its inherent fallacies, it has morphed in response to changed conditions.

Therefore colonialism is not historicised since the decolonisation marked by 'flag independence' represents a continuum in the colonial experience. The validity of the global penetration of European colonial power in decolonial perception is endorsed here as it bears close resemblance to the analytical perspective of postcolonial theory. This will be revealed in due course. However, this study is less concerned with the global dimension of colonial power and rather seeks to unearth unique yet representative characteristics within specific circumstances. This thesis hones in on the localised nature of colonial ideology as it pertains to an historical South African attitude towards labour regulation and whether it may continue to subsist in South African labour law. That said, the decolonial turn too has as a primary concern the unearthing of the silences implanted in Eurocentric normativity, which have

[125] 'Cultural Europeanisation was transformed into an aspiration[,] … a way of participating and later to reach the same material benefits and the same power as the Europeans' – Quijano (note 83 above) 169.

[126] By colonialism this study means the superstructure which incorporates the varied forcible methods of implementation of imperialist logic which has since morphed to the legitimation of westernisation throughout the world – Eurocentrism. Colonialism as the entire system including approximations of democracy which are implanted in the affected cultural spaces.

marginalised the colonised.[127] They too perform epistemic disobedience by honing in on how 'the geo- and body-politics of knowledge' conceal hegemonic western agendas.[128]

Critical Race Theory (CRT) prioritises the illumination of the embedded racialised character of ideology in current systems of knowledge and the practices and structures they support. The theory focuses on the nature of law, its cultural persuasions, and the manner in which this has served to extend racial subjugation.[129] It rails against a pervasive belief 'that our blackness is a condition from which we must be liberated'; through recognising that ratified knowledge and practices have been premised on ascribing Africans and other non-whites sub human status.[130] Therefore a race-conscious, rather than supposedly race-neutral,re-evaluation of norms and values ascribed to law, culture and social practice is advocated. A reassessment that is alive to the manner in which the humanity of African people has been displaced by hegemonic culture is legitimated. CRT seeks to respond to law as a system of domination by establishing criticism from the marginalised realities of African and other side-lined racialised groupings.[131] Like postcolonial theory it asserts that the radical deconstruction of Eurocentric systems has been sorely deficient because it has been premised on the belief that Africans are inferior. Since it in effect supports white supremacy, Eurocentrism does not exist outside the invention of racial groups and the subjugation of African people. Thus CRT also queries the 'very foundations of the liberal order, including equality theory, legal reasoning … and neutral principles of constitutional law.'[132]

CRT is therefore similar in function to postcolonial theory, but is a more direct expansion of the critical legal studies movement.[133] CRT theorists realised that deletions of obvious discrimination in formal law, following the American Civil Rights Movement of the

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[127] R Grosfoguel 'The Epistemci Decolonial Turn: Beyond policitcal-economy paradigms' (2007) 21(2-3*) Journal of Cultural Studies* 211-233; W Mignolo 'Eptistemic Disobedience and the Decolonial Option: A Manifesto' (2011) *Transmodernity* 44-66; N Dastile & S Ndlovu-Gatsheni 'Power, Knowledge and Being: Decolonial Combative Discourse as a Survival Kit for Pan-Africanists in the 21st Century' (2013) 20(1) *Alternation* 105-134; S Zondi 'A Decolonial Turn in Diplomatic Theory: Unmasking Epistemic Injustice' (2016) 41(1*) Journal for Contemporary History* 18-37.
[128] Mignolo (note 32 above) 4.
[129] Modiri (note 81 above).
[130] J Calmore 'Critical Race Theory, Archie Shepp and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World' (1992) 62 *Southern California Law Review* 2129, 2131, 2138.
[131] K Chrenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *The University of Chicago Legal Forum* 139-167.
[132] R Delgado & J Stefancic *Critical Race Theory: An Introduction* 2nd Edition (2001) 3.
[133] D Bell 'Who's Afraid of Critical Race Theory?' (1995) *University of Illinois Law Review* 893; R Delgado & J Stefancic 'Critical Race Theory: An Annotated Bibliography' (1993) 79 *Virginia Law Review* 461-516.

1960s, had not eliminated *de facto* racial discrimination. That situation is akin to the post-apartheid South Africa of today, as recognised by contemporary South African CRT scholarship.[134]

Though this study is grounded in postcolonial theory it acknowledges the affinity of decolonial thought as well as CRT. Analysis made by decolonial, CRT and other scholarship that adds value in assessing the historical law and policy or the emancipatory capacities of the post-apartheid constitutional era shall be utilised in the study. This study is less concerned with discreet labelling of theories, or notions that strict fidelity to chosen theoretical guidance will somehow yield more 'scientific' or ratifiable assessment. It is the thought paradigm of postcolonial theory that guides the undertaking. The directive of Gordon to divest academic research of 'disciplinary decadence' is endorsed.[135] Indeed, postcolonial theory denounces essentialist ideas of pure theory and functions in the realm of hybridity and processes of mimicry which instigate alteration of thought and practice. Indeed these theories are not unique in the endeavour to deconstruct mainstream western paradigms.[136] Postcolonial theory has been chosen because it so defies legal reasoning and its pillars of certainty, claiming to be objective and neutral. Rather, postcolonial theory articulates complexity and ambivalence of culture and human reasoning, consequent to colonialism, on which law rests.

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[134] J Modiri 'The grey line in-between the rainbow: (Re) thinking and (re) taking critical race theory in post-apartheid South Africa' (2011) 26 *Southern African Public Law* 177-201; J Modiri 'Towards a "(post-)apartheid" critical race jurisprudence: "Diving our racial times"' (2012) 27 *SAPL* 229-256; J Modiri 'Race, Realism and Critique: The Politics of Race and Afriforum v Malema in the (In)equality Court' (2013) 130 *SALJ* 274-293.

[135] Gordon advocates a willingness to traverse the boundaries within sets of knowledge 'transdisciplinarity' leading to the 'teleological suspension of disciplinarity, where disciplines work through each other … to bring reality into focus' – Gordon (note 39 above) 87.

[136] Marxism, critical theory, post-structural/postmodern theory, feminist theory, radical feminist theory and critical legal studies are among some of the theories that take this approach. Postcolonial theory, CRT and Decolonial thinkers build on some of these critiques, incorporating aspects of their deconstructive methods when centering racial subjugation of Africans and other non-whites through *inter alia* slavery, colonialism and epistemic violence. To be sure, even the centering of race while seeking to displace Eurocentric logic is not unique only to these theories: womanist theory, black radical feminist theory, Africana critical theory, LatCrit theory and Afrocentrism are among some of the others - N Rousseau 'Historical Womanist Theory: Re-Visioning Black Feminist Thought' (2013) *Race, Gender & Class* 191-204; R Rabaka *Africana Critical Theory: Reconstructing the Black Radical Tradition From W.E.B Du Bois and C.L.R James to Franz Fanon and Amilcar Cabral* (2010); F Valdes 'Legal Reform and Social Justice: An Introduction to LatCrit Theory, Praxis and Community' (2005) 14(2) *Griffith Law Review* 148-173.

1.4. Chapter breakdown

1.4.1. Chapter 1: Introduction and Background

This chapter has set out the objective of the thesis to properly situate the vexed history of South African labour and labour law from a perspective that hones in on the depiction and experiences of the Africans who were encountered by white arrival on invasion. This has introduced the argument that while the political context, as facilitated by imperialism and colonisation yielded eurocentrism may have facilitated the domination and subjugation of African people, it is the law, and for present purposes, labour law that facilitated the 'othering' of Africans. The conceptualisation of the African as 'Other', with a view to extracting maximal labour to meet the colonial interests is key to understanding the evolution of labour law in South Africa. Discussion introduced how the 'native question' was conceived and articulated as part of a larger perceived labour problem or question. A pattern of intermittently solving the issue through law, by forcing Africans to become a servant race, was presented. The significance of the viewpoint taken by the study to re-read historic law with a view to integrating all applicable labour law is explained. The purpose and rationale of the study as well the two research questions were set out. The contours of pertinent concepts that ground understanding of the thesis such as imperialism, colonialism, eurocentrism, racism and democracy were clarified. Lastly the selection of the theoretical framework – postcolonial theory – was explained along with the unconstrained manner of interpretation which shall ensue.

1.4.2. Chapter 2: Theoretical Framework: Postcolonial Theory

The essential elements of postcolonial theory are discussed. The analytical tools garnered from the theory in use throughout the study are described. The chapter begins with the gradual pivot from drawbacks of reasoning borne of anti-colonial resistances; a recognition of the pervasiveness of counterproductive Eurocentric logic. The unfeasibility of recreating or reclaiming a mystified pre-colonial culture, as precondition for authentic emancipation, for it to be used in spaces created by and for implementation of Eurocentrism is discussed.Analysis points out that it is the hybridity and ambivalence of African repetitions of European patterns that creates the space for the subversion of the mainstreamed. The exposition of adulteration of colonial hegemony by the discomforting presence and position of the colonised is the mammoth task of this outlook. There is a sustained refusal to permit Africans continually to recede into contrived obscurity. The chapter discusses the theory in detail: its origins and how

it has evolved over time, how it operates, the pertinent critiques of its tenets and methods, as well as its strengths and limitations and the possible benefits that will flow from using it in a study such as this one.

1.4.3. Chapter 3: The Concept of Labour in South African Law

The chapter reviews the belief systems of the primarily Dutch and English incomers regarding the African people encountered during the violent conquest of South Africa, as reflected in labour regulations. Beginning with the Cape and then moving inland to focus in more detail at the ZAR (later Transvaal), the legal discourse on Africans and the manner of their utilisation as labour for white people is explored. The manner in which the discovery of diamonds and gold deposits accelerated consolidation of existing attitudes in policy and labour regulation is explored. This chapter proffers that mining regulations and other highlighted laws that developed in Griqualand West and in the ZAR were noteworthy labour laws.

1.4.4. Chapter 4: The Functions of Labour Law, Policy, and Industrial Relations Model

This chapter critically evaluates the oft expressed descriptions of labour law and its purposes in academic discourse. Using the postcolonial theoretical framework it considers how these contentious depictions compare to the objectives which were laid bare that had already been solidified in South Africa when the twentieth century began. The assessment of the efficacy of collective bargaining makes it clear that in South Africa conditions were such that it was not available to most of the workers, so too the sort of corporatist arrangements that were implanted. Examination of the stated applicable policy of the time ties together the pivot towards more authentic understanding of the historical utility of legally sanctioned collective bargaining in South Africa.

1.4.5. Chapter 5: Enslaved Master Alongside Unconquerable Slave? African Labour at the Mines 1910-1920

The chapter considers the labour structure that was certified by the creation of the Union of South Africa. Since implementation of settlement of the ‘native question’ has been preoccupied with essentialising Africans as the ‘native’, an account of what law deemed characteristic of a ‘native’ is made. The manner in which the Union ousted Africans from recognition and citizenship in the consolidated colony is also clarified as a background to the legislative enactments. This study asserts that in the labour arena human status was quantified in monetary

terms. The regulation of African labour at the Witwatersrand mines is described through a dual process of conditions of service on the one hand (how they were engaged and which jobs they could perform), and on the other hand the compensation payable for injury, disease or death consequent on mine work. Thus discussion first centres on the Mines and Works and the Native Labour Regulation Acts, 1911. It then moves to a detailed description of the Workmen's Compensation and the Miners' Phthisis Acts in the first decade of the twentiethcentury.

1.4.6. Chapter 6: Labour Regulation of the Twentieth Century: Living and Working in the Mining Environs Before 1948

In line with utilising working conditions and provision for compensation as gauges of the ranking of Africans in law, this chapter begins with reviewing the living and working conditions created by the operation of the Mines and Works Act and the Native Labour Regulation Act, as recorded by the Natives Grievances Inquiry (NGI). It then incorporates mobility, occupation, taxation and mining regulation into the development of South African labour law from a perspective which considers its effects on Africans. A critical assessment is made of how collective bargaining affected the livelihood of African workers, as managed by the operation of the Industrial Conciliation Act alongside the Wage Act. As acquired occupational silicosis along with accidental injury and death continued to be a major risk factor for mineworkers, the awarding of workplace compensation is employed to illuminate further the effect of differential labour standards during the first half of the twentieth century. Throughout the chapter, the reasoning in pertinent cases and the commissions of inquiry that recorded the situation of Africans and affected the policies formulated for labour management are evaluated.

1.4.7. Chapter 7: Labour Regulation of the Tweniteth Century: Living and Working in the Mining Environment in the Apartheid Era

This chapter continues to map the development of labour and other related law beginningwith the framework created for the induction of apartheid. The Fagan commission, which was significant to the overall policy and its management of Africans precedes the discussion of the laws that followed. Next the Botha commission, a momentus report about matters of controlling African labour and whether to permit their participation in the industrial relations structures of the law, was a forerunner to the Native Labour (Settlements of Disputes) Act of 1953. The prinicipal mining labour law, the Bantu Labour Act of 1964, is evaluated in light of the working

conditions it administered and the context within which it operated. The manner in which compensation was reformulated and disbursed over this time is interrogated. Lastly, the influence of Wiehahn commission (convened in the late 1970s in response to turbulent labour relations) on modifications to labour and other laws is examined.

1.4.8 Chapter 8: The Post-Apartheid Hegemony of Labour Law

This chapter considers the post-apartheid arena of labour regulation. It begins with a deconstruction of the constitutionalism currently in force. Notions of the rule of law and constitutional supremacy are tested for authentic liberatory capability. The historic justification for conquest is investigated and reiterated through the cases. Whether or not such legitimation has been overturned by the current constitutional matrix is debated. The capacity of current corporatist industrial relations to enable progressive upward mobility of African workers through collective bargaining is investigated. Whether collective bargaining, in its current majoritarian form may be the panacea for the subjugation of the majority of workers, particularly mineworkers, is debated. Finally compensation for occupational disease, injury or death is considered as a tangible marker of whether African personhood, and therefore sovereignty, has in fact been adequately reasserted rather than rehabilitated in present-day South Africa.

1.4.9 Chapter 9: Conclusions and Recommendations

This chapter aggregates the issues discussed and the conclusions reached and makes recommendations based on the findings.

CHAPTER 2

THEORETICAL FRAMEWORK: POSTCOLONIAL THEORY

2.1. Introduction

Postcolonial theory assists in the analysis of imperialist narrative and in responding to the persistence of *de facto* colonialism through undertaking an in-depth interrogation of the multiple factors and contradictions at hand. Significantly, the disjointed psyche engendered by colonial enterprise, that is evident in the provisions of the law, is given prominence. The irresolvable incongruities are highlighted as an enabling analytical tool to dispel notions of neutrality in the fashioning and implementation of labour regulations. The uncertainties which the theory allows to be revealed are then used to disarticulate the authoritative *Grundnorms* behind the ordering of labour relations. Because it seeks to unsettle what has been presumed settled in labour law, it enables the retelling of labour history in a manner not 'premised on the silence of the native'.[1] A disruptive *difference* is initiated by focusing on African workers so that a secondary reading of the concept of labour is presented from within the colonial text that is examined.

Discussion in this chapter will introduce the chosen theoretical framework, postcolonial theory, as well as the interpretative devices it has developed. This theory, which has more formally been developed since the latter part of the twentieth century (the 1980s), draws from historical scholarship that has queried the legitimacy of the widespread subjugation of non-white people in thought and practice.[2] The theory has been the subject of debate among scholars, who deliberate on its meanings and the veracity of its analytical tools. This chapter will engage with some critiques while setting out its key concepts which are used inthesis.

Analysis commences on the complexities associated with recovering authentic indigenous culture, following *de jure* decolonisation. Attempts to rehabilitate the colonised African mind by seeking to retrieve a fabled history where African personhood was unchallenged have been fraught. There is realisation that in South Africa, and indeed throughout other colonised territories, the colonial pecking order of the human race also took

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[1] E Said *Culture and Imperialism* (1993)99.
[2] H Bhabha *The Location of Culture* (1994).

shape through manipulating and co-opting the social formations and traditions of the colonised.[3] This poses a dilemma for the post-independence intellectual, subsisting in ostensibly decolonised sites that are trying to divest themselves of colonial influence. The discussion clarifies postcolonial theory in a way that encompasses the debates around it. It pinpoints the mechanisms used by the theory to reveal how specific law and legal interpretation are complicit in purposefully implementing Eurocentrism. The chapter then describes how understanding the notion of hybridity and the use of repetitive mimicry in postcolonial theory, offers a road-map for thinking through and then navigating the challenging terrain in the localised setting of labour law.

2.2. Constructing an un-colonised African

Cursory investigation reveals that the ascendancy of European norms was not demolished by ceremonial decolonisation marked by the ending of apartheid in South Africa. Instead those formalities may have worked to conceal the preservation of existing ideologies and power distribution. Beliefs that particular race groups or genders need and in fact 'beseech domination' appear to linger,[4] which steers deference to western norms. This is manifest in the stated performative role of law, as it enunciates and gives credence to these values. Seeming theoretical naiveté allows the anti-colonialist, who fought against the segregation which subjugates indigenous and other race groups, to accept preeminent merit in a contrived formal decolonisation.

Postcolonial theory is an offshoot of the anti-colonial movement which preceded the decolonisation happening mostly in the mid to late twentieth century. Anti-colonial struggles often used aspects of colonial hegemony such as human rights discourse, that were thought to be emancipatory. Since then, according to Nandy, some of the staunch anti-colonialists have now embraced the modern adapted colonialism.[5] Ekeh identifies two primary power groups in the postcolonial African state whose ancestries differ, those belonging to the class of colonial

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[3] Many social structures and practices have been translated and concretised in African traditions and customs in a manner which conforms to the existing colonial schema; engineered through Eurocentrism with cooperation of colonially ordained indigenous authorities - A Loomba *Colonialism/Postcolonialism* (1998) 127.

[4] Said (note 1 above) 9; according to Crust '[t]o give a colony the forms of independence is a mockery; she would not be a colony for a single hour if she could maintain an independent station' – E Crust 'Reflections on West African Affairs …' (1839) cf: Bhabha (note 2 above) 85.

[5] A Nandy *Intimate Enemy: Loss and Recovery of Self Under Colonialism* (1983) 1.

governors, and the African middleclass which developed from colonialism.[6] Both groups 'wield much power, but have little authority;' moreover, the burgeoning African governors are not autonomous.[7] The postcolonial African ruling classes, being products of colonial instruction, derive their legality from colonial values rather than any indigenous systems.[8]

Since decolonisation, marked by apparent independence, does not denote the end of colonialism, postcolonial theory establishes a critical academy from which to observe the present-day governing structures and their operation. For Bhabha this critique serves openly to bear 'witness to the unequal and universal forces of cultural representation' in the scheme to retain command.[9] Therefore the pervasive rejection of indigenous cultures must be exposed and disrupted. Colonial history is relevant because this is where the contemporary arrangements of power and privilege originate.[10]

Central to colonialism is the manner in which it operates in the minds of both the coloniser and the colonised, a 'shared culture'.[11] These mental effects are particularly debilitating for the oppressed subjects who have come to believe that resisting their subjugation may only be done in accordance with structures set up by the coloniser.[12] Spivak describes this as 'the elites' hegemonic access to "consciousness"'.[13] To gain involvement in colonial enterprise the native has had to accept the ideology presented 'as a way to preserve a minimum of self-esteem in a situation of unavoidable injustice.'[14] This 'cultural consensus' is based on propagation of the belief in the 'civilising intent' dogma by the colonised.[15] Young refers to a

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[6] P Ekeh 'Colonialism and the Two Publics in Africa: A Theoretical Statement' (1975) 17 *Comparative Studies in Society and History* 91, 92-94.
[7] Ekeh (note 6 above) 93; H Egede 'African "Social Ordering" Grundnorms and the Development of an African Lex Petrolea' (2016) 28 *Denning Law Journal* 138, 140.
[8] Ekeh (note 6 above) 94-96.
[9] In so doing scholarship emanating from former colonies, such as South Africa should 'intervene in those ideological discourses of modernity that attempt to give a hegemonic "normality" to the uneven development and the differential, often disadvantaged, histories of nations, race, communities, peoples – Bhabha (note 2 above) 171.
[10] R Young *Postcolonialism: An Historical Introduction* (2001) 57-69.
[11] Fanon describes 'the negro enslaved by his inferiority, the white man enslaved by his superiority alike behave in accordance with a neurotic orientation' – F Fanon: cf: Bhabha (note 2 above) 43; Nandy (note 5 above) 1.
[12] Nandy (note 5 above) 3; L Rukundwa & A van Aarde 'The Formation of Postcolonial Theory' (2007) 63 *HTS Theological Studies* 1171, 1175.
[13] D Landry and G MacLean (eds) The Spivak Reader: Selected Works of Gayati Chakravorty Spivak (1996) 207.
[14] Nandy (note 5 above) 11.
[15] Therefore 'in the eyes of the European civilization the colonizers were not a group of self-seeking, rapacious, ethnocentric vandals and self-chosen carriers of a cultural pathology, but ill-intentioned, flawed instruments of history, who unconsciously worked for the upliftment of the underprivileged of the world' - Nandy (note 5 above) 14.

process of 'turning the inculcation of inferiority into self-empowerment'.[16] This awakening should persuade those affected to abandon interpretations of the lived and material realities which favour hegemonic elites.[17] The objective is to use the reconstructed knowledge about the underpinnings of laws and practices to chart a new course, rather than to allow contemplations of the colonial past to engulf and thwart emancipatory necessity.[18] Bhabha asserts that challenging the colonial narrative should not only isolate distortions of historical realities, but should also portray the fallacy of 'a pre-given image of human knowledge.'[19] Bhabha and Fanon metaphorically explained that under present systems 'the white man's eyes break up the black man's body' in a process of 'epistemic violence' that depicts the colonial subject as primal and debauched.[20]

Efforts to recover genuine indigenous African culture, pre-colonial ethos to be reinstated following the overthrow of colonial rule, have not escaped colonial tampering. Current indigenous traditions have been developed or adapted largely in reaction to and aligned with western invasion and cultural diffusion.[21] On this Ranger remarks:

> '[t]he invented traditions of African societies - whether invented by the Europeans or by Africans themselves in response – distorted the past but became in themselves realities through which a good deal of colonial encounter was expressed.'[22]

Anti-colonial nationalism has not resolved colonial hierarchy and has instead generally substituted a minority of select Africans in the position of erstwhile colonisers, in effect failing to unseat white dominion.[23] Anti-colonial movements, premised on nationalist or nativist ideas,

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[16] Young (note 10 above) 275.
[17] As Isasi-Diaz stated 'I denounce and deconstruct only to rescue what is mine, recognizing that to do so I have to embrace the life-long process of freeing myself of the internalized oppressors' - A Isasi-Diaz 'Mocking/tricking the oppressor: Dreams and hopes of Hispanas' (2004) 65 *Theological Studies* 341, 344.
[18] Isasi-Diaz (note 17 above) 344.
[19] Bhabha (note 2 above) 41.
[20] Ibid 42; Fanon argued that as things stand '[t]he black man has no ontological resistance in the eyes of the white man' - F Fanon *Black Skin White Masks* (1952) (trans C Markmann, 1986) 110-112.
[21] Mahmud explains that 'through the selective recognition, malleable norms of the colonized were truncated and reconstituted as fixed' - T Mahmud 'Law of Geography and the Geography of Law: A Post-Colonial Mapping' (2010) 3 *Washington University Jurisprudence Review* 64, 84.
[22] T Ranger 'The Invention of Tradition in Colonial Africa' in E Hobsbawm & T Ranger (eds) *The Invention of Tradition* (1983) 212.
[23] They have been '[s]haped by the immanent logic of colonialism, Third World nationalism could not escape from reproducing racial and ethnic discrimination; a price to be paid by … the colonised selves' - K Chen *Trajectories: inter-Asia cultural studies* (1998) 14.

tend to replicate patterns of separating 'insiders from outsiders', which have been installed by colonialism.[24]

Significantly, Derrida has advanced a strategy of deconstruction from which postcolonial theory draws, asserting that when confronted with such binaries:

> 'we are not dealing with the peaceful coexistence of a *vis-à-vis*, but rather with a violent hierarchy. One of the two terms governs the other …, or has the upper hand. To deconstruct the opposition, first of all, is to overturn the hierarchy at a given moment.'[25]

But how does this occur? The binary oppositions are replete in narrative and for Derrida the first step is engage in a process of 'deconstructive reversal – to show that the property we ascribe to A is true of B and the property we ascribe to B is true of A.'[26] This is particularly apt when confronted with intractable ideological certitudes, to dislodge normalised orientation – the 'metaphysics of presence'.[27] Therefore for present purposes both labels, the white coloniser and the African, are constitutive of each other. Each signifies the presence of the other – mutually dependent on the other in the incessant process of description. Derrida has cautioned that:

> '[t]o overlook [the] … phase of overturning is to forget the conflictual and subordinating structure of opposition. Therefore, one might proceed too quickly to a *neutralization* that *in practice* would leave the previous field untouched, leaving one no hold on the previous opposition, thereby preventing any means of *intervening* in the field effectively.'[28]

Revealing unequal bifurcation and the mutual dependencies of existence is a first step. Conceptualising and inserting the reversal of hierarchy in the narrative is a crucial next step. In the context of decolonisation, this means articulating an African-centric relationship. Doing this enables the illumination of power dynamics and begins the systematic intervention in the underlying ideological, political and other machinations at play. But the ultimate goal is not to

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[24] S Ndlovu-Gatsheni 'Do "Africans" exist? Genealogies and paradoxes of African identities and the discourses of nativism and xenophobia' (2010) 8 *Journal of African Identities* 281-295, 282.
[25] J Derrida *Positions* (1972) (trans A Bass, 1981) 41.
[26] 'A's privileged status is an illusion, for A depends on B as much as B depends upon A. … Indeed, it is possible to find in the very reasons that A is privileged over B the reasons that B is privileged over A.' J Balkin 'Deconstructive Practice and Legal Theory' (1987) 96 *Yale Law Journal* 743, 747; J Derrida *Of Grammatology* (1967) (trans G Spivak, 1997) 48-51.
[27] Deconstructing the 'transcendental signified' the notion of an omniscient entity or authority from which truth or final resolution of conflict derives; '*[t]he thing itself is sign*.' – Derrida (note 26 above) 49.
[28] Derrida (note 25 above) 41.

replace the impugned ideas with others, but to disrupt the binary manner in which controlling ideas themselves are arrived at. This means an overturning of the 'conceptual order' of Eurocentrism.[29] By contrast, the practice of anti-colonial nationalism appears to repeat the very patterns of belief it seeks to refute because it often reacts defensively against Eurocentrism, trying to prove validity through distilling an indigenous (African) quintessence and culture.[30]

However, it is the innate mixedness of cultural formation in the colony which is a vital tool, in deconstruction, rather than a vice. One cannot discard western culture in its entirety without interrogating its pervasive manifestations in African thought and practice. Anderson reported that the logic of anti-colonial nationalism was forged through the receipt of colonial and other Eurocentric culture and its 'models of nationalism, nation-ness, and nation-state.'[31] In contrast, Chatterjee argued that in the context of nationalism Eurocentric templates were not copied wholesale, and that to say so is to continue the colonial narrative which has designated colonised people ahistorical and incapable of cultural production and always in the process of being refined or civilised.[32] Producing a nation was not accomplished by indiscriminately transposing foreign culture, but requires an unsettling 'contradictory process' where:

> 'two rejections, both of them ambivalent: rejection of the alien intruder and dominator who is nevertheless to be imitated and surpassed by his own standards, and rejection of ancestral ways which are seen as obstacles to progress and yet also cherished as marks of identity'.[33]

Shohat proposed that curing the disintegration of shared cultural life engendered by colonial brutality, whatever its multiplicity, rests on the revision of the past that reintegrates 'collective

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[29] J Derrida *Margins of Philosophy* (1972) (trans A Bass, 1982).

[30] Instead of retrieval the brutalised psyche (still located in Eurocentrism) merely accomplishes 'a caricature of cultural existence', because culture cannot be transposed 'piecemeal' but develops as life unfolds in particular ways and circumstances – F Fanon *Toward the African Revolution: Political Essays* (1964) (trans H Chevalier, 1967) 41-42. The so-called expressions of archetypal Africanness become exhibitions of fantasies which have been circumscribed by pervasive colonialism – 'botched acts of transcendence in the context of life lived in captive space' - A Sekyi-otu *Fanons Dialectic of Experience* (1996) 95-96; F Fanon The Wretched of the Earth (1961) (trans C Farrington,1963) 236-237; D LaCapra (ed) *The Bounds of Race: Perspectives on Hegemony and Resistance* (1991) 145-146, 150; Mbembe denounces nativism as 'a return to an ontological and mythical "Africanness"'- A Mbembe 'On the Power of the False' (2002) 14 *Public Culture*629-641.

[31] B Anderson *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2006) 116.

[32] P Chatterjee *The Nation and Its Fragments: Colonial and Postcolonial Histories* (1993) 5

[33] P Chatterjee *Nationalist Thought and the Colonial World: A Derivative Discourse* (1986) 2; Hall accounts for anti-colonial grounding in the restoration of shared colonized identity, a precursor of revolt stating '[i]t is something – not a mere trick of the imagination. It has its histories – and histories have their real, material and symbolic effects. That past continues to speak to us … always ready "after the break"' - S Hall 'Cultural Identity and Diaspora' in P Williams & L Chrisman (eds) *Colonial Discourse and Postcolonial Theory* (1994) 392-403, 395

identity.'[34] In this way the diffuse cultural fragmentation, a sequel of colonialism, will be recognised as such and harnessed for communal resurgence.

Post-colonial arrangements have been marked in their inability to account comprehensively for those outside the hegemony through access to legal protection – a legacy of colonialism. So the profile of oppression in the post-colony alters from coloniser and colonised to the accounted for, the recognized elites who include those actually contemplated in laws, juxtaposed on the unaccounted for, who are those whose being and access remains circumscribed. Revisory probing appears to have arrested at Derrida's first phrase of 'deconstructive reversal' and then hastened to grasp 'a *neutralization*', leaving the arena requiring reassessment largely 'untouched'.[35] A tenuous and superficial reversal of hierarchy, evinced by the ascendancy of elites, has occurred without engaging in overthrowing the dominion of Eurocentrism.[36] The process has not yet been taken to its completion through penetrating reading. Reading not what Eurocentrism hopes to convey but rather what it cannot help but demonstrate.[37] Accordingly, Shohat has correctly identified the need to reveal the nature and extent of the schisms, both material and conceptual, occasioned by the violence of colonialism, by revisiting and then revising past accounts in order to reintegrate disjointed communal understanding.[38] It involves approaching the 'split-brain society'[39] of the colonial milieu as an asset, integral to the process of reinscribing African accounts. This also opensthe range in the dialogue.

2.3. Postcolonial Theory: An Exposition

2.3.1. Introduction

The process of critically evaluating what is known in order to dispel deception and incorporate what has been excluded has continued to be situated in Eurocentrism, which in turn is mired in imperialist justifications of colonialism. Schwarz argues that 'large historical patterns only take on meaning when they can be shown at work in specific contexts;' that western compilation

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[34] E Shohat 'Notes on the "Post-Colonial"' (1992) 31/32 *Social Text* 99, 109.
[35] Derrida (note 26 above) 48-51; Derrida (note 25 above) 41; Balkin (note 26 above) 747.
[36] Derrida explained that 'the white man takes his own mythology … his own logos … for the universal form' – Derrida (note 29 above) 213.
[37] J Caputo 'Deconstruction in a Nutshell' (1997) available at http://garyrolfe.net/documents/deconstructioninanutshell.pdf, accessed on 8 December 2019.
[38] Shohat (note 34 above) 109.
[39] J Henderson 'Postcolonial Indigenous Legal Consciousness' (2002) 1 *Indigenous Law Journal* 1, 18.

has ensured that the knowledge generated 'is colonialism.'[40] To this end, Seth correctly explains that postcolonialism:

> 'signifies the claim that conquest, colonialism and empire are not a footnote or episode in a larger story, such as that of capitalism, modernity or the expansion of international society, but are in fact a central part of that story and are constitutive of it. The "post" does not mark the period after the colonial era, but rather the effects of this era in shaping the world that is ours. This world was not born out of the West having an impact upon and "awakening" a dormant non-West, but out of both of these being constituted in the course of multifarious (unequal, hierarchical and usually coercive) exchanges'.[41]

According to Prakash, '[t]he postcolonial exists as an aftermath, as an after – after being worked over by colonialism.'[42] Postcolonialism denotes the manifold multi-layered traits of colonial incursion from the time it was first encountered to the present. It has been used to describe the cultural relations of and within nation states which were formerly subjected to European colonialism and then decolonisation, denoting that *de facto* colonial control persists. It marks a reaction against the universalised colonial rationalisations, as well as a quest for more appropriate foundations of identity and culture, particularly with regard to colonised peoples. Apart from tangible material relations, postcolonialism describes a disjointed manner of thinking caused by colonial conditioning which continues to be reflected in intellectual and other dialogue.[43] These inclinations also remain apparent in socio-economic and political relations, which in effect closely resemble the state of things throughout colonialism. Moreover since formal decolonisation cannot, as it were, reinstate pre-colonial arrangements, and the numerous corollaries of colonialism continue, it signals a setting ripe 'for the production of theoretical work which, although indelibly marked by colonialism, transcends its cognitive modes.'[44]

From this vantage, the controlling ethos of examining knowledge ought to be to disrupt the certainties it may espouse. Stripped of uncontested authority, the uneasy heritage would then be susceptible to revision. Notably, postcolonial theory does not locate itself outside of

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[40] H Schwarz 'Mission Impossible: Introducing Postcolonial Studies in the US Academy' in H Schwarz & S Ray (eds) *Companion to Postcolonial Studies* (2005) 4-5.
[41] S Seth 'Postcolonial Theory and the Critique of International Relations' (2011) 40 *Millennium Journal of International Studies* 167, 174.
[42] G Prakash 'Postcolonialism Criticism and Indian Historiography' (1992) 31/32 *Social Text* 8.
[43] A Roy 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29 *Adelaide Law Review* 315, 317-318.
[44] B Parry 'The Postcolonial: Conceptual Category or Chimera?' (1997) 27 *The Yearbook of English Studies* 3, 4.

western discourse in its efforts to decentre prevailing logic. Foucault theorised that the process of assembling what shall be accepted as true is key to power and its devices. So truth is both generated and fortified by power.[45] In a similar way, Said declares:

> '… the Orient is not an inert fact of nature. It is not merely there, … men make their own history … what they can know is what they have made …Therefore as much as the West itself, the Orient is an idea that has a history and a tradition of thought, imagery, and vocabulary that have given it reality and presence in and for the West. … The relationship of the Occident and Orient is a relationship of power, of domination, of varying degrees of a complex hegemony'.[46]

Said describes imperial power as 'premised on the silence of the native', 'that takes the discursive form of a reshaping or reordering of "raw" or primitive data into the local conventions of European narrative and … systems of disciplinary order.'[47] The identification and interpretation of what was being communicated or displayed has been filtered not only according to western norms within its metropoles, but also in accordance with that view which best served the ascendancy of the coloniser *vis a vis* the colonised. Consequently, many peoples of the world continue to experience life in a manner that is not accounted for in mainstream hegemonic discourse – they 'live outside history [and] are ahistorical'. [48] To counteract this, Achebe recommends engaging in a 'process of re-storying peoples who [have] … been knocked silent by the trauma of all kinds of dispossession'.[49]

2.3.2. Identifying Postcoloniality

Appiah describes postcoloniality as a malaise of the westernised colonial intellectual, a select few, somewhat foreign in agency, 'who mediate the trade in cultural commodities of world

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[45] Foucault stated 'we cannot exercise power except through the production of truth' - M Foucault 'The political function of the intellectual' (1977) 17 *Radical Philosophy* 12-14, 12 cf: B Ashcroft G Griffiths & H Tiffin *The Empire Writes Back: Theory and practice in post-colonial literatures* 2 ed (2002) 165.

[46] 'There were - and are - cultures and nations whose location is in the East, and their lives, histories, and customs have a brute reality obviously greater than anything that could be said about them in the West. About that fact [the] … study of Orientalism has very little to contribute, except to acknowledge it tacitly - E Said *Orientalism* (1978) 4-5.

[47] Said (note 1 above) 99.

[48] Yet '[t]hey *do* have theories of the past; they do believe that the past is important and shapes the present and the future, but they also recognize, confront, and live with a past different from that constructed by historians and historical consciousness' - A Nandy 'History's Forgotten Doubles' (1995) 34 *History and Theory* 44-66, 44.

[49] C Achebe *Home and Exile* (2000) 79.

capitalism at the periphery.'[50] The elite clique of translators of the Euro-hegemony that has infiltrated and maintained dominance in apparently decolonised settings of Africa. Achebe explains that they inhabit a 'cross-roads of cultures' where their peculiarity has 'a certain dangerous potency'.[51] This group seeks distinction from scholars they liken to 'affranchised slaves,' who, despite denials, appear to display ill-concealed yearning for acceptance by the white society.[52] The afflicted postcolonial scholar, though valiantly aiming to 'escape the West', operates from within the African university whose knowledge systems and patronage come from the west.[53] Dirlik contends that postcoloniality has eclipsed the coloniser-colonised dynamic and has become a more generalised 'condition of the intelligentsia of global capitalism.'[54] That with being so ensconced, such scholarship appears slow to question its constitutive values, that is, world capitalism, in lieu of mulling over adjusting the account of colonialism as prerequisite for present-day remediation. For Dirlik this is an ill-conceived preoccupation with colonised subjectivity rather than with the overarching power structure.[55] The point about the importance of the operation of global capitalism is well made, but this view tends to reduce colonialism to a mere subplot of capitalism – economic in character to the exclusion of the politico-cultural and other elements involved.[56]

Postcoloniality as a space of critical conception calls long authenticated delineations into question by seeking to unearth the perspective of the oppressed without occluding how colonialism is implicated in such undertakings.[57] A further difficulty is revealed by the fact

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[50] K Appiah 'Is the Post- in Postmodernism the Post- in Postcolonial?' (1991) 17 *Critical Inquiry* 336, 348; postcoloniality does not arise separated from but is intimately connected and evolves in relation with the colonial era – Prakash (note 42 above) 8.

[51] It is 'dangerous because a man might perish there wrestling with multiple-headed spirits, but also he might be lucky and return to his people with the boon of prophetic vision' – C Achebe *Moring Yet on Creation Day: Essays* (1975) 67.

[52] F Fanon (note 30 above) 60; '[t]hey tell the story of … an aggression that is, in consequence, turned inward against other colonized subjects' – Sekyi-otu (note 30 above) 94.

[53] Appiah (note 50 above) 348.

[54] A Dirlik 'The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism' (1994) 20 *Critical Inquiry* 328-356, 356; Mignolo also links postcoloniality with the expansion into the global arena, stating that it 'would designate the transformation of coloniality into global coloniality' – W Mignolo 'The Geopolitics of Knowledge and the Colonial Difference' (2002) *MUSE* 57, 82.

[55] Dirlik (note 54 above) 356.

[56] As Said explained, '[n]either imperialism nor colonialism is a simple act of accumulation and acquisition. Both are impelled by impressive ideological formations'- Said (note 1 above) 9.

[57] Appiah (note 50 above) 353; according to Said '… the most interesting post-colonial writers bear their past within them – as scars of humiliating wounds, as instigation for different practices, as potentially revised visions of the past tending toward a new future, as urgently reinterpretable and redeployable experiences, in which the formerly silent native speaks and acts which include notions that certain territories and people *require* and beseech domination, as well as forms of knowledge affiliated with that domination' – Said (note 1 above)31.

that postcoloniality largely troubles heirs and successors to some colonial spoils – the educated middle class. This occurs while those suppressed under the full weight of colonial exploitation with no recognised political, economic or social agency appear to continue to be experiencing unmitigated denigration. This is an apt reminder that anti-colonial struggles for decolonisation have been partial in their representation, often propagating the replacement of the colonial population with erstwhile colonised elites. This postcolonial conceptual exercise highlights the discursive dominion of western motif and operates 'in a tangential relation to it', but is not divorced from it.[58] The intellectual recognises the ambivalence of being the embodiment of that which is the subject matter of the critique and so does not escape scrutiny.[59] Postcoloniality simultaneously occupies both spaces, feeding off the alterity[60] dwelling in the gap between what has been designated colonial and that which is labelled colonised.

Spivak describes postcoloniality as a location of reassessment where the detractor 'says "no" to the "moral luck" of the culture of imperialism while recognizing that she must inhabit it, indeed invest it, to criticize it.'[61] Spivak mulls over the sustained attack on the usage of the term post-colonial. For her the term signifies a situational experience of colonialism and its imperialist infiltration within those countries that have subsequently been formally decolonised. The intellectual experience draws from a commonality which facilitates reciprocal discussion, an 'impossible "no" to a structure, which one critiques, yet inhabits intimately, is the deconstructive philosophical position of, and the everyday here and now "post-coloniality" is a case of it.'[62] Shohat asks: 'When exactly, then, does the "post-colonial" begin? Which region is privileged in such a beginning? What are the relationships between these diverse beginnings?'[63] The answer is a resolute refusal to be hemmed in, whether spatially,

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[58] This is 'what Homi Bhabha calls an in-between, hybrid position of practice and negotiation' – Prakash (note 42 above) 8.

[59] This is a 'critique that does not take itself out of the equation[,] … "able to analyse and unveil while at the same time sharing and living out the very conditions which we are able to see through"' – K Kaitavuori, L Kokkonen & N Sternfeld (eds) *It's all Mediating: Outlining and Incorporating the Roles of Curating and Education in the Exhibition Context* (2013) 2-4.

[60] Alterity derives from the Latin *alteritas* which means 'the state of being other or different'. It denotes the condition or situation of being outside of the accepted norm, other than the norm, and therefore regarded as different. Alterity yields the position of being 'other,' or 'othered'. Being othered from the presumed archetypal standard of a European and colonial disposition. Alterity pertains to the personhood and the culture of the colonised African people that has been othered.

[61] G Spivak 'Poststructuralism Marginality Postcoloniality and Value' in P Collier & H Geyer-Ryan (eds) *Literary Theory Today* (1990) 228.

[62] G Spivak *Outside in the Teaching Machine* (1993) 66.

[63] Shohat (note 34 above) 103.

temporally or conceptually, into adherence to the established Eurocentric practice guidelines or directives.

Hegemonic western discourse has been premised on a worldview that ignores, subsumes, excludes or destroys what is outside the scope of its concern. In order to arrest this, Said proposed a contrapuntal re-reading[64] of events and text, wherein the salient and hidden or suppressed narratives, both historical and contemporary, are given due scrutiny so as to highlight dominance as well as marginalisation.[65] Here the controlling narratives converse with underrepresented non-western experiences. According to Said:

> 'if you read and interpret modern European and American culture as having had something to do with imperialism, it becomes incumbent upon you also to reinterpret the canon in the light of texts whose place there has been insufficiently linked to, insufficiently weighted toward the expansion of Europe. …[T]his procedure entails reading the canon as a polyphonic accompaniment to the expansion of Europe'.[66]

This process requires attentiveness to ensure that the Eurocentric is not merely replaced with an essentialist opposing reading that now centres in on an apparently native perspective marred in 'the emotional self-indulgence of celebrating one's own identity.'[67] While resisting facile and ill-fated rejection of all things western, the largely imperialist persuasion of chronicles and theory should be pointed out since 'colonial schemes begin with an assumption of native backwardness and general inadequacy'.[68] This analysis aims to point out the colonial 'blind-spots, silences and anxieties', as well as to show how anti-colonial elites have shrouded the marginality in mystery and ideology which wrests agency from the subaltern[69] through

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[64] Said explains that '[m]ost people are principally aware of one culture, one setting, one home; exiles are aware of at least two, and this plurality of vision gives rise to an awareness of simultaneous dimensions, an awareness that – to borrow a phrase from music – is *contrapuntal.*' Said advocates critical awareness of 'other contrapuntal juxtapositions that diminish orthodox judgment and elevate appreciative sympathy' – E Said 'The Mind of Winter Reflections on life in exile' in *Harper's Magazine* (1984) 49-55, 55; Said (note 1 above) 60,93.

[65] It is an effort to read 'with simultaneous awareness both of the metropolitan history that is narrated and of those other histories against which (and together with which) the dominating discourse acts' – Said (note 1 above) 51.

[66] Said (note 1 above) 60.

[67] Said (note 1 above) 229-230.

[68] Said (note 1 above) 80.

[69] The subaltern is the colonised person who has been absented from the record and stripped of adequate human agency to respond to the world that has been thrust upon him or her. The subaltern is not merely the colonised but denotes that section of colonised people who have been cast below or outside the established hierarchies of colonial order. There is diversity and heterogeneity in the forms of subalternity and Spivak has cautioned against creating taxonomies to definitively mark its arena, particularly because as Loomba has rightly and pertinently asked: 'In what voices do the colonised speak – their own, or in accents borrowed from their masters?'- G Spivak

'elite projects and positivist historiography.'[70] Postcoloniality indicates areas of scholarly dissonance which challenge the rootedness of colonial narrative in discourse formation, and it aims to reset the terrain by engaging with ignored and marginalised cultural experiences. It operates at the juncture of uncertainty which appears when normalised frames are questioned.

2.3.3. Defining Postcolonial Theory

Gqola aptly defines postcolonial theory thus

> 'Postcolonial writing/theory … not only subverts and resists what is associated with -(previously) colonising culture, it also recognises the inevitability of the contamination of the colonised with practices of the dominant imperial culture. Thus hybridity becomes crucial to the postcolonial project since there is no possibility of "purity" from the signs of the imperial power.'[71]

Having encountered the shared othered insider-outsider dilemma of the post-colonial intellectual community, postcolonial theory set about developing mechanisms to disrupt the contrived certainty of western discourse. Lebbady described the awkward predicament of trying to express herself 'though a predominantly imperialist and patriarchal medium that defined' her and those like her in essentialist and disparaging terms.[72] The task then has been to carve a niche of proximate authenticity whilst simultaneously acknowledging the embeddedness of the 'alienating' condition within the psyche. The sensitised postcolonial being, both interloper and member, 'translates white theory as she reads, so that she can discriminate on the terrain of the original.'[73]

The complexity of postcolonial posture requires that authenticity, whatever the guise, should find expression. It need not seek to respond to predetermined rationalities, be they

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'Can the Subaltern Speak? Speculations on Widow Sacrifice' (1985) cf; B Ashcroft, G Griffiths & H Tiffin *Post-Colonial Studies: The Key Concepts* (2007) 200-201; Loomba (note 3 above) 231.

[70] Prakash (note 42 above) 9.

[71] P Gqola 'Ufanele uqavile: Blackwomen, feminisms and postcoloniality in Africa' (2001) 16: 50 *Agenda* 11, 13.

[72] Lebbady asks

> '[i]n order to avoid being subsumed under rampant Westernisation, must one necessarily resort to extreme forms of traditionalism? Is it necessary to continue to valorise literacy at the expense of our rich oral traditions? Should we continue to operate within the binary logic, which is at the heart of these different oppositions?' –

H Lebbady 'Toward a Transgressive way of Being: Gender Postcoloniality and Orality' available at http://www.postcolonialweb.org/poldiscourse/casablanca/lebbady2 html, accessed on 18 April 2020.

[73] Spivak (note 62 above) 66.

western or supposedly emanating from aboriginal culture. The undisciplined metaphysical terrain that unfolds need not obey any established controls. In this way there is scope for the postcolonial subject to conceive of itself somewhat detached from the contrived other, forging and grappling 'with a new identity that transgresses the boundaries set by those in the center.'[74] The process ought not to be consolidated into a single narrative and should rather accept the many layered multiple postcolonial experiences; each should articulate their own reality.

Understanding comes with 'not only … what the contributors say – ideas, conflicts, agreements, cross-fertilization, etc – but also, and more importantly, how they **speak** their truth. The power of the contributions lies in the manner of **speaking**.'[75] Ruminating on Spivak's pertinent question of whether the subaltern can speak, Amkpa advances another query: 'can alterity be heard?'[76] Can it be heard as anything other than 'cries of hunger, rage, or hysteria'?[77] If humans by existing communicate in various ways, the issue then is whether there is sufficient 'political consciousness, and will, to listen to those voices which are daily reconfiguring their epistemologies and seeking contexts for maximizing their identities, despite their stated oppositions to the hegemony'.[78] Prakash contended that attempts to incorporate the subaltern into validated discourse animate the 'simultaneous possibility and impossibility in discourses of domination, [which] exemplifies the ambivalence of postcolonial criticism'.[79] Indeed the aim of this thesis is to determine the extent to which the view point or experience of Africans may be discerned from a reading of law and policy.

Spivak has demonstrated that there are, at best, limits to recovery or the introduction of the subaltern voice into what remains a Eurocentric discussion. In her essay 'Can the Subaltern Speak?' the Indian practice of *sati*, where a widow jumps to her death onto her husband's

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[74] Lebbady (note 72 above).
[75] O Nnaemeka 'Introduction' in O Nnaemeka (ed) *Sisterhood Feminism and Power: From Africa to the Diaspora* (1988) 1 cf: Gqola (note 71 above) 15.
[76] A Amkpa 'Drama in South Africa and tropes of postcoloniality' (1999) 9 *Contemporary Theatre Review* 1, 14; according to Ashcroft et al '[t]he self-identity of the colonizing subject, indeed the identity of imperial culture, is inextricable from the alterity of colonized others, an alterity determined … by the process of othering' – B Ashcroft et al (note 69 above) 9, 10. Alterity derives from the Latin *alteritas* which means 'the state of being other or different'. It denotes the condition or situation of being outside of the accepted norm, other than the norm, and therefore regarded as different. Alterity yields the position of being 'other,' or 'othered'. Being othered from the presumed archetypal standard of a European and colonial disposition. Alterity pertains to the personhood and the culture of the colonised African people that has been othered.
[77] J Ranciere 'Introducing Disagreement (translated by S Corcoran) (2004) 9 *Angelaki Journal of the Theoretical Humanities* 3, 5.
[78] Amkpa (note 76 above) 14.
[79] '[F]ormed in history, it reinscribes and displaces the record of that history by reading its archives differently from its constitution'- Prakash (note 42 above) 9.

funeral pyre, was at issue.[80] The actual debate in the 1800s was set up as a contest between whether Hindu tradition authorised the practice on the one hand, and on the other hand a colonial culture seemingly bent on saving Hindu women from brutal indigenous patriarchy. The manner of the debate did not make room for women in the impugned predicament to be heard at all. Such women had no part in the deliberation and their supposed concerns were raised through intermediaries, both British and Hindu, all of them men. Spivak described a location in the post colony so remote from accessing power that it has no ability to move beyond the socio-economic hierarchies devised through colonial incursion – subalternity. Madlingozi described the '"forgotten" … produced as "invisible, unintelligible or irreversibly discardable"'.[81] '[P]ure subalternity' (a subject of militant contestation) is not necessarily an ideal to be pursued, since her spectacular 'effort to speak did not fulfill itself in a speech act.'[82] Spivak emphasized that:

> '"the subaltern cannot speak," means that even when the subaltern makes an effort to the death to speak, she is not able to be heard, and speaking and hearing complete the speech act.'[83]

This is a pertinent caution by Spivak on seeking to inhabit, retrieve and articulate subalternity filtered from a location of postcoloniality, the privileged space which has prompted the critique. Such paternalism points to some shortfalls of postcolonial criticism which, though located in western hegemony, attempts to make room for the legitimation of oppressed cultures. The act of translating the subaltern will invariably dilute those subaltern sentiments with the colonial, because the interpreter is tainted 'by a certain kind of psychobiography'.[84]

To the extent that African mineworkers are defined and then compressed into the regulations examined, they do not inhabit the space of 'pure' subalternity. They at least are mentioned and corralled into designated spaces. Yet it is notable that all this was done to enhance the efficiency of their exploitation. Therefore their position cannot be easily

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[80] G Spivak 'Can the Subaltern Speak?' available at http://abahlali.org/files/Can_the_subaltern_speak.pdf, accessed on 9 December 2019.
[81] T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123, 126
[82] Whatever the 'speech' of the woman performing the ritual of *sati*, it remained undeciphered for purposes of mainstreamed debates that ensued. Roy explains that there is 'never simply a subject/subordinate/subaltern position, but several, and a multiplicity of hierarchies [exist] … within the colonized (and also colonizing) groups' – Roy (note 43 above) 343; Landry & Maclean (note 13 above) 299.
[83] Landry & Maclean (note 13 above)302.
[84] Landry & Maclean (note 13 above)302.

discounted as falling outside the subaltern realm, since the term itself has been defined in relation to the severity of colonial or elite dominion and repression.

With postcolonial criticism one expects that the thinking, language and nuance initially coming from the coloniser has been somewhat adapted, yet many issues remain unresolved. Can subjugated personhood and culture be sufficiently repaired within this arena? How much say does the multifarious subaltern have in conceiving the restoration of the colonised? To what extent does the residual controlling colonial rationale dictate critical thinking? Does the postcolonial thinker manage to scrupulously avoid being completely mired in western logic? So the strength in analysis lies in being cognisant of the pitfalls and uncertainties as well as highlighting the lacunae in the methods of recognised knowledge by avoiding the colonial trap of attempting to speak for and about an abstract subaltern. Moreover the postcolonial thinker should be mindful that subalternity is embedded in multiple ways along the layers of stratified power, being also present within the sites of colonial resistance. Indeed, Spivak has warned against taxonomies which attempt to 'fix' the place of subalternity. Prakash explained it thus:

> 'The project of retrieval begins at the point of the subaltern's erasure; its very possibility is also a sign of its impossibility, and represents the intervention of the historian-critic whose discourse must be interrogated persistently and whose appropriation of the other should be guarded against vigilantly.'[85]

Postcolonial theory purposefully interrupts the linear historiographic recount emanating from colonialism – that laws repealing formal colonialism mark its ending. Rather, the postcolonial stands for a shift in knowledge paradigm, instead of 'a chronological marker'.[86] It reveals the link between the present globalised structures of power and the historical method of imperialist expansion, since *de jure* decolonisation appears to have maintained functional European dominion. Hence the need to uncover and debunk the 'ideological formations which include notions that certain territories and people require … domination'.[87] Postcolonial criticism charts its course from a position of seeking to unearth and to an extent possibly understand the manner in which colonial violence along with its distortion of past and present events continues. The theory is resolved to draw lessons from the contradictory nature of its enquiry. While it behaves as a discursive nemesis to the Eurocentric hegemony, it is mindful

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[85] Prakash (note 42 above) 12.
[86] A Quayson *Postcolonialism: Theory Practice or Process?* (2000) 11.
[87] Said (note 1 above) 9.

that it has been birthed by operating in the margins of its privileged space, and continues to be somewhat sustained by the object of its critique.

The objective is to supply intellectual space 'for the widest possible convergence of critical forces'[88] which in turn decentres and reveals the parochialism and alienating nature of Eurocentrism because the nature of dominance produces significant blind spots in that it 'cannot exhaust all social experience'.[89] It does not cohere to rigid parameters of thought and method, since it does not seek to disassemble then replace the dominance of Eurocentrism, but to provide a range of other ideas and practices. This type of confrontation does not seek to overthrow, so cannot be wedded to particular ideology or political stance. It remains defiant against purportedly unassailable beliefs. Said proclaimed that 'criticism is most itself and, if the paradox can be tolerated, most unlike itself at the moment it starts turning into organized dogma', therefore '*oppositional*' criticism

> '… must think of itself as life-enhancing and constitutively opposed to every form of tyranny, domination, and abuse; its social goals are noncoercive knowledge produced in the interests of human freedom.'[90]

Said is explicit that the critique should not be generic, but ought to be specific to the situation at hand. Done appropriately, it should lay bare the limits in applicability of abstract ideas to problems. And so it matters not where a concept appears to have begun, instead it is the potential to harness and expose the othered experiences and thought processes which may activate its use in postcolonial enquiry.

2.3.4. Hybridity and Mimicry of Contrapuntal Reading

Chakrabarty describes an overarching belief system comprised of colonial and nationalist myths, assembled for consumption by colonial subjects, which yields exaggerated copies of the European.[91] Indeed, even the anti-colonial resistances regularly relied upon some learned

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[88] It does not fall neatly into what has been defined as theory since it consist of 'a collection of critical and conceptual attitudes' - R Sugirtharajah (ed) *The Postcolonial Biblical Reader* (2006) 9.
[89] R Williams cf: E Said *The World Text and the Critic* (1983) 29.
[90] On solidarity Said remarks 'I take criticism so seriously as to believe that, even in the very midst of a battle in which one is unmistakably on one side against another, there should be criticism, because there must be critical consciousness if there are to be issues, problems and lives to be fought for' – Said (note 89 above) 28-29.
[91] These renditions are fudged 'through a procedure that subordinates … narratives to the rules of evidence and to the secular, linear calendar that the writing of "history" must follow'; disqualifying the native who '… cannot

Eurocentric emancipatory notions like human rights, Marxism and socialism, in efforts to articulate an indigenous humanity or cultural legitimacy to contested colonial authority. Said has advanced 'contrapuntal' re-reading of Eurocentric culture which reveals the imperialism it peddles. Historical and socio-political expediencies that have interceded one's understanding of the racialisation of peoples are actually not fixed.[92] If no cultural core components may be sourced and referenced, the manifest psychological and material experiences of people and communities ought not to be discarded in favour of an imagined essence. Hence, once the accomplishment of purity has been abandoned, the ubiquity of mixedness, however uneven, needs to be acknowledged.

Though the colonial world for the most part reviles the native, its excesses are nonetheless enticing to the native, representing 'a paradise within arm's reach guarded by ferocious watchdogs.'[93] Becoming like the coloniser in order to breach and become located in the white domain has been touted as the precondition to achieving untrammeled humanity for the colonised. Proficiency in coloniser ways holds 'the promise of a vicarious participation in the world which … names and orders.'[94] To certifying intellectual prowess the indigenous thinkers have both consciously and unconsciously partly relinquished how and what they have known, replacing it with colonial dogma and becoming 'a kind of mimic man'.[95] Though skilled in repetition, anxiety remains in the colonised intellectual as he articulates the colonial notions that direct his thinking, while simultaneously designating him innately deficient.[96]

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speak itself as "theory" within the knowledge procedures of the university' - D Chakrabarty 'Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts?' (1992) 37 *Representations* 1, 18-19.

[92] Hall states '[i]f the black subject and black experience are not stabilized by Nature or by some other essential guarantee, then it must be the case that they are constructed historically, politically, culturally' – S Hall 'New Ethnicities' in B Ashcroft, G Griffiths & H Tiffin (eds) *The Post-Colonial Studies Reader 2 ed* (2006) 201; the ubiquity of supposed homogeneity with regard to colonised people abounds in text and narrative. A shroud of strange unknowability has been their lot, in colonial portrayal – an illegible collective of bodies. Memmi's 'mark of the plural' signifies that the western knowledge has branded colonised people as lacking identifiable individual personhood - A Memmi *The Colonizer and the Colonized* (1957) (trans H Greenfeld, 1965) 85 cf: M Davidson 'Albert Memmi and Audre Lorde: Gender, Race, and the Rhetorical Uses of Anger' (2012) 20 *Journal of French and Francophone Philosophy* 87, 90.

[93] In the context of colonialism '[t]he native town is a crouching village, a town on its knees, a town wallowing in the mire. …The look that the native turns on the settler's town is a look of lust, a look of envy' - Fanon (1961) (note 30 above) 39; 'the Other, far from signifying a frightening hell, is … and alluring object, his "forbidden city [les villes interdites]" is an earthly paradise' – Sekyi-otu (note 30 above)97.

[94] Sekyi-otu (note 30 above) 91; creating as Macaulay put it 'a class of persons, Indian in blood and colour, but English in taste, in opinion, in morals and in intellect' cf: Loomba (note 3 above) 173.

[95] And while the colonised intellectual ascents to assimilation and accepts as universal the colonial 'truth', the seemingly lower colonised continues to embody harsh realities which belie this claim - F Fanon *The Wretched of the Earth* (1963) (trans R Philcox, 2004) 13.

[96] Fanon (note 95 above) 13.

Psychological trauma, which is attributable to the overpowering structural edifice of racist colonialism and the futility of self-erasure, ensues. In a counterproductive effort to rid themselves of their diminished racial status, the colonised have resorted to emulating colonial form by taking on its values.[97] But this absorption, a 'project of self-alienation', is only ever partial since 'the oppressor quantitatively and qualitatively limits' the process.[98] Ironically, for colonialism to work, the native, though striving to correct itself, has to be permanently locked to an underling position.

Bhabha explained that colonialism expresses itself and replicates its control through a series of endless repetition embodied in 'figures of farce.'[99] The 'high ideals' of bringing underling races to fruition of full humanity, so affixed to colonial mystique and morality, produces a cycle of incessant imitation which maintains the lopsided power dynamic.[100] On the one hand, the identity of the coloniser *vis a vis* the colonised has been fixed in immovable and immutable binary opposition, which therefore rationalises the legitimacy of conquest and the suspension of western law and ethics with regard to the native, whose personhood is designated innately substandard. On the other hand, the narrative of chronological, incremental human development toward the western perceived fulfillment of humanity demands progress in the native through regular evidence of tutelage. However, colonialism is plagued with anxiety that, should the native accomplish full personhood (deemed innate to the coloniser), he will rebel against the status quo.[101] Thus 'colonial mimicry is the desire for a reformed, recognizable Other, as *a subject of a difference that is almost the same, but not quite*.'[102] Being colonised, the environment militates against either full rebellion or total submission. Both conditions inhabit all subjects to varying degrees.

The mimicry does not produce an exact replica of the colonial narrative, but instead the copying imparts something of the absurdity of the entire frame. Since the image is 'not quite',

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[97] According to Fanon '[t]he oppressor, through the inclusive and frightening character of his authority, manages to impose on the native new ways of seeing, and in particular a pejorative judgment with respect to his original forms of existing' - Fanon (1964) (note 30 above) 38.
[98] Fanon (1964) (note 30 above) 38; the constitutive racism of the structure entails that '[n]o matter what material, communicative, and affective exchanges are opened between the colonizer and the colonized, no matter the class or gender of the agents of these exchanges, there is inevitably a frontier proscribing anything like reciprocity, to say nothing of equality' - A Sekyi-otu (note 30 above) 92.
[99] H Bhabha 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' (1984) 28 *Discipleship: A Special Issue on Psychoanalysis* 125.
[100] Bhabha (note 99 above) 126
[101] Bhabha (note 99 above) 127.
[102] Bhabha (note 99 above) 126-130

something is awry. The distorted copy may appear derisive of the original. Because it cannot be replicated to (mythical) perfection, colonialism fails to solidify its control. Through imitation, '[i]ts discriminatory effects [become] …visible in those split subjects of the racist stereotype[,] … the colonial text occupies that space of double inscription'.[103] Nothing is ever certain or settled because of the continual overflow of the tread of the imitator which creates ambivalence. Indeed Bhabha carries forward the post-modernist challenge to notions of unalloyed concepts and practices. Bhabha refers to Derrida's rendering of *difference*, where, because of the 'double mark' authoritative truth has been displaced, though not overturned.[104] The conveying of discourse produces difference because the murky presence of the replicator is always there. It spills into the 'purity' of the material and thus changes it slightly. So 'mimicry emerges as the representation of a difference that is itself a process of disavowal.'[105] Bhabha explained that this subtle form of distortion, as meaning is conveyed, is a mechanism for transformation. It threatens the established order of knowledge and its content. Therefore the fact of the existence of the oppressed colonial subject undermines the legitimacy of Eurocentric triumphalism of human rights as justice. The underbelly of these lofty notions should appear as the cultivated native skirts on the margins of fully realised humanity, never quite attaining it. Though somewhat occluded, the spectre of the subdued other haunts the normalised colonial narrative and heightens its uncertainty. Since the westernised theorist is *'[a]lmost the same but not white*'; it is at the place where ratified discourse negates the native attendance where mimicry performs its 'menace'.[106] At this intersection 'of what is known and permissible and that which though known must be kept concealed; a discourse uttered between the line and as such both against the rules and within them' is articulated.[107]

The narrative of colonialism is not then merely used to assert the personhood of the colonised, while adhering to the philosophical template of colonialism to recover and assimilate the colonised. Instead, this deliberate 'strategic confusion' of mimicry does not seek to meld with colonial pattern, but to create difference that signals the appearance of the other.[108] It also addresses the historical failing of a colonially contrived acceptance of the colonised as an entity

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[103] H Bhabha 'Signs Taken for Wonders: Questions of Ambivalence and Authority under a Tree outside Delhi, May 1817' (1985) 12 *Critical Inquiry* 144, 150.
[104] J Derrida *Dissemination* (1972) cf: H Bhabha (note 103 above) 150.
[105] Bhabha (note 99 above) 126.
[106] Bhabha (note 99 above) 129-130.
[107] '"[P]artial" representation rearticulates the whole notion of identity and alienates it from essence' – Bhabha (note 99 above) 129-130.
[108] Bhabha (note 99 above) 130-131.

upon which power in the form of racial and cultural oppression may be exercised. Nonetheless the analysis moves along a tight-rope, articulating colonially emancipatory discourse in unveiling Eurocentric biases, using some Eurocentric mechanisms.

The material surveyed by this thesis emanates from the management of South Africa's colonial exploits and is steeped in obviously imperialist jargon and Eurocentrism. Postcolonial theory operates within boundaries of such European venture. Determinedly self-aware of its precariousness, yet unable to fully rid itself of the western ties. The process of articulating being othered highlights 'the complex of intersecting "peripheries" as the actual substance of experience.'[109] Bhabha's logic suggests that the will to disrupt on the part of the colonised may be dispensable; that even should the colonised subject aspire to full integration through meticulous imitation the ambivalence shall appear. Basically

> '[t]he desire to emerge as "authentic" through mimicry – through a process of writing and repetition – is the final irony of partial representation[;] … they emerge as "inappropriate" colonial subjects.'[110]

Moreover Bhabha has stated that:

> '[r]esistance is not necessarily an oppositional act of political intention, nor is it the simple negation or exclusion of the "content" of another culture, as a difference once perceived. It is the effect of an ambivalence produced within the rules of recognition of dominating discourses as they articulate the signs of cultural difference and reimplicate them within the deferential relations of colonial power'.[111]

Indeed reading definitions of 'native' as opposed to 'coloured', other non-white aboriginal Africans (such as 'Moors, Algerians and Egyptians') and white people in South African law shows some of the absurdity.[112] The detailed repetition to follow as the thesis unfolds, which

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[109] Ashcroft et al (note 45 above) 77.
[110] Bhabha (note 2 above) 88.
[111] Bhabha (note 103 above) 153.
[112] Those from Northern Africa were deemed obviously not 'native' but Asiatic - *Rex v Kogan* 1918 AD 521, 522; however though middle eastern and 'belonging to an aboriginal tribe of Asia' Syrians and Jews from Palestine were considered members of the white race – *Gandur v Rand Township Registrar* 1913 AD 250, 254-256; coloured people were tested for 'appearance, habits and associations' and 'preponderance of blood' – *Rex v Radebe and Others* 1945 AD 590; *Fakiri V Rex* 1938 NPD 454, 459-460.

highlights specific aspects of the mode of labour regulation arguably creates the anticipated 'strategic confusion'.

Butler explains that 'one is, as it were, in power even as one opposes it, formed by it as one reworks it, and it is this simultaneity that is at once the condition of our partiality, the measure of our political unknowingness, and also the condition of action itself.'[113] Yet, the operation of sanctioned strictures of power nurtures possibilities of rebellion by those subject to it, since it is the dominant mainly who benefit from given arrangements. Said reminds that 'there is always something beyond the reach of dominant systems, no matter how deeply they saturate society, and this is obviously what makes change possible.'[114] The unheeded or misunderstood predicament of the less powerful and the marginal (ruled out realities) cannot be totally eclipsed by a forceful masternarrative.

But could the process of mimicry in fact reinforce instead of destabilise the accepted standards? To imagine oneself outside of (while still within) the established normative framework is fraught, in that the supposedly rejected framework remains central to identifying alternative space and the contemplated escape. In reality there cannot be any intercession which is completely external to the way 'discursive practices' have been configured.[115] However reluctant, one remains immersed in the norm, but one may 'occupy, reverse, resignify to the extent that the norm fails to determine us completely.'[116] Retelling some of the recorded experiences of African mineworkers resulting from the implementation of labour and related law will occur in a manner that aims to revisit the actual intent as well as the effect of law and policy on labour.[117] Establishing the nexus between the text of the law and its tangible experience on application, undermines avowals of neutrality.

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[113] J Butler *Bodies That Matter: On the Discursive Limits of 'Sex'* (1993) 241; 'the "I" that might enter is always already inside' – J Butler *Gender Trouble: Feminism and the Subversion of Identity* (1990) 148.
[114] E Said *The World Text and Critic* 247-247 cf: J Cocks *The Oppositional Imagination (RLE FeministTheory): Feminism Critique and Political Theory* (2012) 64-65; 'all social systems are vulnerable at their margins … and … all margins are accordingly dangerous' – Butler (1990) (note 113 above)132.
[115] Butler (1990) (note 113 above) 148.
[116] Butler (1993) (note 113 above) 120-121, 128 – 'what is displaced … is the notion that there might be pleasure, desire, and love that is not solely determined by what it repudiates.'
[117] *Transvaal Colony Department of Native Affairs Annual Report* 1902-1903 available at https:///.wiredspace.wits.ac.za/.../TRANSVAAL%20COLONY%20DEPT%20OF%20NATIVE, accessed on 6 June 2019; (Stallard Commission) *The Transvaal Local Government Commission* (T.P. 1-1922); UG 37 of 1914 *Report of Native Grievances Inquiry*; *Native Economic Commission Report* UG 22 of 1932 available at http://uir.unisa.ac.za/handle/10500/5028, accessed on 16 August 2019.

Pertinent criticism of postcolonial theory requiring consideration and response has been expressed. This study heeds Loomba's warning that Bhabha to an extent homogenises the colonial experience by projecting ambivalence without particularity regarding gender, class and other positionality.[118] Hence explicating ambivalence should be mindful of the specificities of the situation at hand, as well as the multiplicity of factors that require scrutiny during analysis. This study is primarily concerned with African mineworkers who have been predominantly male. Thus a glaring shortfall of this study is that the replication of colonial text shall not probe its gendered nature – the 'double oppression' it has occasioned on African women who have also worked and been significantly affected by the regulations.[119]

JanMohamed disputes the assertion of Bhabha, that the one occupying the othered liminal spaces where hybridity finds expression is a 'colonial subject (both colonizer and colonized).'[120] He argues that such abstract amalgamation cannot be assumed to reflect real life because of the mental, physical and material brutality wrought on the colonised by conquest.[121] Whatever its artificiality and permeability, the outright binary division has been implemented and experienced as real by both the coloniser and the colonised – as evidenced by the genocides of colonial wars, colonial arrangements and colonial rule in general. The knowledge and livelihoods of indigenous people have been vilified and subjected to ruin; therefore it may be simplistic to assume the presence of substantial residual control on the part of the colonised with sufficient potency to unsettle Eurocentrism.[122] So JanMohamed argues that if one focuses too much on the ambivalence which marks colonial discourse, the intentionality of colonial dogma and rule may unwittingly escape explicit denunciation because its hegemony would then be masked by a fixation on the inconsistencies it presents.[123]

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[118] Loomba (note 3 above) 178-179.
[119] Mushonga and Seloma have noted the 'double-oppression' of South African women consequent on the gender roles placed on them as 'sexed subaltern subjects' – M Mushona and T Seloma 'Women's Voices, Women's Lives: QwaQwa Women's Experiences of the Apartheid and Post-Apartheid Eras' (2018) 43(1) *Journal of Contemporary History* 196-214.
[120] H Bhabha 'The Other Question – The Stereotype and Colonial Discourse' (1983) 24 *Screen* 19 cf: A JanMohamed 'The Economy of Manichean Allegory: The Function of Racial Difference in Colonialist Literature' (1985) 12 *Critical Inquiry* 59, 59-60.
[121] It downplays 'the epistemic (and literal) violence of colonialism [while] … negating the subjectivity and agency of the colonized, [who are relegated to] … textually replicating the repressive operations of colonialism' – H Gates 'Critical Fanonism' (1991) 17 *Critical Inquiry* 457, 462; Fanon describes violence on the colonised thus: '[t]he native is declared insensible to ethics; … the negation of values[;] … he is the absolute evil', '…the quintessence of evil' – F Fanon *The Wretched of the Earth* (1961) (trans C Farrington, 1963)41.
[122] JanMohamed (note 120 above)60.
[123] JanMohamed (note 120 above)60.

For Dirlik there is a danger in fixating on localised ambivalences occasioned by the enduring colonial encounter in that it decentres the materiality of the imperial edifice in forming and directing the exploitative master-slave colonial dynamic.[124] While specific nuance abounds in colonial engagement, the massive worldwide ramifications of imperialism seem inadequately explained by the restrained seepages from the conflicted postcolonial subjects who straddle its dichotomous extremes. Dirlik argues that local accounts understate the harms experienced and thereby the problems of Eurocentrism, whereas focusing on the globalised apparatus used to effect the generalised subjugation of colonised people affords a better reckoning of colonial repercussions and Eurocentrism.[125] Since postcoloniality is largely an affliction of those already within the Eurocentric realm, when analysis is done this way, there is the danger that those who are so liminal as to be unaccounted for by even postcoloniality are likely to disappear from view and consideration.

Well-made though the critiques of JanMohamed and Dirlik are, they fall short in certain respects. Both adhere to some generalisation about the effect of colonial conquest. JanMohamed negates or downplays the ability of the colonial subjects, especially the colonised, to have retained a measure of autonomy (residual control) in thinking and practice. This too advances the notion of homogeneity of experience. Pervasive as the colonial encounter has been, this study posits that it has not exhausted 'all social experience'.[126] The postcolonial theoretical paradigm inhabits a philosophical space which articulates an 'impossible "no"'[127] to the set structures of control by refusing to be directed by accounts of total annihilation. The theory advocates illuminating notable falsehoods in Eurocentric canon, as an effective method to dismantle rather than to reinforce its validity. Moreover, Dirlik fails to adequately recognise that an exclusive focus on the vast imperial edifice also risks diminishing the importance of revealing the localised manifestations of colonial power.

Parry complains further that the inwardness of postcolonial critique all but negates the possibility of dismantling Eurocentrism from outside of its area of influence, mounting an

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[124] Dirlik rejects the focus on subjectivity and knowledge, arguing that since 'capital in its motions continues to structure the world, refusing it foundational status renders impossible the cognitive mapping that must be the point of depature for any practice of resistance and leaves such mapping as there is in the domain of those who manage the capitalist world economy' - Dirlik (note 54 above) 336, 356.
[125] Dirlik (note 54 above) 336, 356.
[126] Williams (note 89 above) 29
[127] Spivak (note 62 above) 66.

assault through non-Eurocentric knowledge which resides outside colonial dominion.[128] She advances that postcolonial criticism does not appear to conceive of spaces that operate unsubdued by omnipresent colonialism. There appears to be incredulity that the colonised could or would, in the context of pursuing and modifying subjugated knowledge, bring forth viable non-Western theory. In response Spivak rightly advises against indulging in the fantasy of conceiving a native quintessence devoid of colonial acculturation; after all, 'all discourse is colonial discourse.'[129]

Though genocide and epistemic violence are replete in the conquest of South Africa, it does not necessarily follow that there was complete destruction.[130] Indeed the sheer numbers of Africans has militated against the total infiltration and consumption of all cultural spaces.[131] Even while recognising the colonial disfiguring of traditional and other evolving cultural features of the lives of the South African oppressed, it must be noted that, within those confined assigned spaces, thinking and living occurred in ways not wholly anticipated and controlled by colonial rule. Thus one cannot extrapolate wholesale either what Bhabha describes or JanMohamed's misgivings of such. Hybridity does find expression in both sides of the divided colonial zones. For the coloniser, Eurocentrism in dominant culture has been ratified in juxtaposition to the displaced humanity and knowledge of the colonised. For the colonised in South Africa, legitimated African culture was consigned to unfold in a manner subordinated to and in conformity with methods of Euro-normative control.[132] Nonetheless the unequal hybridity should be approached with caution, ever alive to calculated obfuscations that function to maintain the incomplete bifurcation.

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[128] B Parry 'Signs of our times: Discussion of Homi Bhabha's the location of culture' (1994) 8 *Third Text* 5, 9; B Parry 'Problems in Current Theories of Colonial Discourse' (1987) 9 *Oxford Literary Review* 27, 43; Loomba and Kaul also underscore the tendency of postcolonial theory 'to conceive of colonial subjects as resisting or acting only within the spaces made available by colonial discourse' – A Loomba & S Kaul 'Introduction: Location Culture Post-Coloniality' (1994) 16 *Oxford Literary Review* 3, 8.

[129] Spivak is concerned with the convoluted mixedness of power and 'critical of the binary opposition Coloniser/Colonised. … to disclose the complicity of the two poles of that opposition as it constitutes the disciplinary enclave of the critique of imperialism' – G Spivak cf: Gates (notes 121 above) 466.

[130] The 1774 extirpation edict and the 1795 Proclamation of the Earl of Macartney authorized the extermination of African people. The traditions of Africans were characterised backward and disposable, only to be re-purposed in ways that aligned with colonial repression - J Comaroff & J Comaroff 'Colonialism Culture and Law: A Foreword' (2001) 26 *Law & Social Inquiry* 305, 306-307.

[131] Comaroff & Comaroff (note 130 above) 306-307.

[132] S 2 of Law No. 4 of 1885 stated that 'laws, habits and customs hitherto observed among the natives shall continue to remain in force … as long as they have not appeared to be inconsistent with the general principles of civilisation recognised by the civilised world'; *Mokhatle & Others v Union Government* (Minister of Native Affairs) 1926 AD 71; s 147 South Africa Act, 1909.

Dirlik has also importantly observed that being so involved in Eurocentric institutions affects the critical representation of ambivalence by intellectuals, with the first world postcolonial academic renderings controlling the logic of explicating the concept – 'not all positions are equal in power'.[133] Indeed, Grosfoguel and other decolonial thinkers have pointed out that it is important to seek out, deconstruct and integrate more voices into the discussion of the native and subaltern speech, than has been the case in postcolonial theory.[134] The complaint has been made that postcolonial critical canon has relied too heavily on post-modern deconstruction and Marxist theory, to the exclusion of many thinkers, particularly women, from the African and Latin American postcolonial settings. Moreover, this has led to the continued marginalisation of critical postcolonial writing emanating from so-called third world locales – a decidedly colonial pattern of ratifying knowledge.[135] This thesis agrees that, in order to dispel dominion of European point of departure in the discourse, theory emanating from the colonised peripheries of the world ought to be weighted, at least in corresponding measure to western located thought on these issues.

2.4. Conclusion

Regarding the use of postcolonial theory, this study affirms the pertinence of Amkpa's adaption of Spivak's galvanising appeal, 'can the subaltern speak?' to: can alterity be heard? Following decolonisation, inadequate dissection of the ubiquity of Eurocentrism, with its attendant suppression of othered worldviews, has yielded stunted development in cultural, social and political awareness. This study agrees that the existing model, replete with colonial strata, remains fundamentally blind to that which it can neither detect nor understand – things still outside its area of concern.[136] Therefore identifying the intellectual dissonance expressed in postcoloniality – 'the in-between, hybrid position of practice and negotiation'[137] – is a crucial step in discerning the orientation of critical perspective. Postcolonality is a state of mind that recognises the embeddedness of prevailing culture. It relinquishes simplistic coloniser-colonised binaries as it endeavours to discern the occluded historical narratives as well as

[133] Dirlik (note 54 above) 342-343.
[134] R Grosfoguel 'The Epistemic Decolonial Turn: Beyond Political-economy Paradigms' (2007) 21 *Cultural Studies* 211-233.
[135] Grosfoguel (note 134 above).
[136] Spivak has poignantly observed that 'even when the subaltern make an effort to the death to speak, she is not able to be heard' – Landry & MacLean (note 13 above) 302; Madlingozi (note 81 above) 126.
[137] Prakash (note 42 above) 8.

obtainable knowledge and experience from the vantage of the marginalised colonial majorities. Postcoloniality has generated postcolonial theory, an analytical approach that expressly resists the restraints of settled ideology and practice because its purpose is to reveal those very controlling tenets within localised discourse without attempting to overthrow and replace them. Surrounded as it is by Eurocentrism, postcolonial theory accepts the inevitability of dilution and unwitting distortion in deciphering formerly stifled dialogue; seepage of colonial rationale results from the 'psychobiography'[138] of postcolonial narrators. This seemingly self-contradictory process of analysis is, in fact, the substantial core element of postcolonial theoretical examination. Indeed contrapuntal reading entails becoming concurrently aware of the other visions and versions 'against which (and together with which) dominant discourse acts', when reading conventionally accepted reports.[139] Both the prominent account and the experiences its dominance has redacted are subject of examination and a dialogue is facilitated between the versions.

This study asserts that this is accomplished by deploying the device of mimicry, which exploits the hybridity of colonial subjects and spaces, to translate the layered terrain. Here the analysis accepts that the postcolonial intellectual, steeped in Eurocentric learning, imperfectly replicates the limits of colonial patterns.[140] The ripple is initiated through reading selected law and focusing on certain sections. The distorted copy produced by slippage (failure to reach the mark) during imitation does create an important 'double inscription'; a 'double mark' which interrupts aspiration toward certitudes.[141] The recount and spotlighting of the marginalised African experience does to a degree unsettle and perform a 'menace' on normalised structures; performing measured 'strategic confusion' without ousting Eurocentrism.[142] This thesis posits that resisting the hegemony through resignifying its accepted rules is a complex and painstaking task. It endorses the validity of tackling perceptual awareness of Eurocentric control in specific localised presentation. Indeed, given the many layers of hierarchy and experiences, the disruptions may and should occur in differing and unanticipated ways.[143] This study accepts that the relatively privileged position of scholars who have conceived and utilise

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[138] Landry & Maclean (note 13 above) 302.
[139] Said (note 1 above) 51.
[140] The colonised is engages in mimicry which renders him 'almost the same but not quite' – H Bhabha 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' (1984) 28 *Discipleship: A Special Issue on Psychoanalysis* 125, 126-130.
[141] Bhabha (note 103 above) 150.
[142] Bhabha (note 99 above) 126-130.
[143] JanMohamed (note 120 above) 50-60.

this kind of postcolonial query may limit their ability to access and articulate fully the circumstances and psyche of the very marginalised.

Even so, the ability of the colonised to ascend completely to self-determination within the strictures of colonial or westernised discourse is questionable.[144] The reach to etch a completely separate history, untamed by colonial accounts, has been somewhat simplistic, given that the European norm remains the basis, or at least comparator, upon which the alternative inscription could be made. It would require using Eurocentrism to conceptualise subaltern emancipation – deceptively transposing him or her from real life experience and ignoring fixed barriers to access, where no rights are obtained. Therefore instead of focusing on deposing dominant discourse and logic completely, Butler correctly suggests adopting the attitude of acknowledging that one is integral and thus 'implicated in that which one opposes'.[145] So positioned, the analysis then endeavours to use the oppressive power structures to chart ways of constituting and deploying authority. Having discarded aspiration toward 'pure subversion' of existing power, this process accepts that terrain being forged will also be somewhat blended and unpredicted. The effort requires performing the imitation so as to blight the clarity of accepted normality – 'to redescribe those possibilities that *already* exist, but which exist within cultural domains designated as culturally unintelligible and impossible.'[146] This includes attempts to salvage the culture and practice of indigenous traditions, both real or assumed, in order to avoid encroaching assimilation.[147]

The next chapter will give a detailed account of the development of ideas on labour, following colonial invasion. How the overall objectives of colonialism aligned with evolving labour prescripts will be explored.

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[144] D Chakrabarty 'Postcolonial Studies and the Challenge of Climate Change' (2012) 43 *New Literary History* 1, 4.

[145] Butler (1993) (note 113 above)240-241.

[146] Butler (1990) (note 113 above)148-149.

[147] According to Shohat '[t]he question … is not whether there is such a thing as an originary homogenous past, and if there is whether it would be possible to return to it, or even whether the past is unjustifiably idealized. Rather, the question is: who is mobilizing what in the articulation of the past, deploying what identities, identifications and representations, and in the name of what political vision and goals?' - Shohat (note 34 above) 110.

CHAPTER 3

THE CONCEPT OF LABOUR IN SOUTH AFRICAN LAW

3.1. Introduction

This chapter will consider the evolution of notions of labour from the manner of its inscription in South African law and practice throughout the nineteenth and early twentieth centuries. The journey begins in 1652 with establishment of the Cape Colony where the patterns of the dominant ideology (which were palpable in the ZAR on its subsequent formation) were first translated into law. Then it will shift to the ZAR (later Transvaal) to chart the laws promulgated thereat which supported extracting labour from Africans. This part endeavours to illustrate that labour laws encompass much more than the Master and Servants laws, which should occupy more minimal status in the study of historical labour regulation because they did not manage the bulk of labour.[1] The prescripts of law regulating *inter alia* personhood, citizenship, possession or ownership of fixed property, civil liberties such as free movement, residential occupation and the ability to choose an occupation or trade, as well as the liberty to travel from place to place, will be assessed as part of the erected labour law edifice. So too the relevant portions of laws regulating the mining of diamonds and gold deposits from the mid-1800s onward will be assessed. The study revisits the shared unequal labour culture so as to divulge the scale of the alienation wrought.[2]

The analysis aims to show how the laws operate in a cyclical two-tiered fashion which at once disparages and downgrades the humanity of Africans while etching concrete methods of maximally exploiting them as disposable labour. The reading of laws from the period of colonial invasion will be done contrapuntally, in a manner that isolates the positioning of Africans as people and as a source of labour, the purpose being to underscore that the separations generated by law denote a 'violent hierarchy' rather than 'peaceful coexistence'.[3]

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[1] Masters and Servants Ordinance No.1 of 1841 (Cape Colony); Masters and Servants Act No. 15 of 1856 (Cape Colony); Masters and Servants Law No. 13 of 1880 (Transvaal); Master and Servant Ordinance 2 of 1850 (Natal).
[2] Shohat argues that '[f]or communities which have undergone brutal ruptures, now in the process of forging a collective identity, no matter how hybrid that identity has been before, during, and after colonialism, the retrieval and reinscription of a fragmented past becomes a crucial contemporary site for forging … identity' - E Shohat 'Notes on the "Post-Colonial"' (1992) 31/32 *Social Text* 99, 109.
[3] The contrapuntal reading is cognisant of both the colonial legitimation of material reality which conceals the perspective and situation of the colonised, 'the weight behind the presence' – E Said *Outside in the Teaching*

The contrived racial categories, white versus African being the most prominent in these laws, depend on each other – the presence, obvious or occluded, of one indicates the other. Arguably this is where any ideological intervention regarding labour and labour law should commence.[4] The effort seeks to unsettle the 'conceptual order' rather than validating the defensive resort to inserting Africans within a system designed primarily to enchain them.[5] Indeed Cooper and Stoler have discerned correctly that 'systems of production did not just arise out of the impersonal workings of a world economy but out of shifting conceptual apparatuses that made certain kinds of action seem possible, logical, and even inevitable to … agents of colonization while others were excluded from the realm of possibility.'[6]

3.2. Development of Labour and Law in the Cape

3.2.1. Background

During the mid-1600s the Dutch East India Company (VOC), a merchant company, established a colony initially intended as a replenishing station for ships sailing round the African continent to the Far East.[7] The conduct of the outpost business and that of its inhabitants, of Dutch, German and French origin, was regulated primarily in line with Dutch law, which was Roman-Dutch law.[8] The Africans encountered upon arrival were not incorporated into the legal system of the colony, but were rather considered alien and obstructive to the European incomer interests.[9] With a view to making the colony self-supporting, the inhabitants were encouraged

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Machine (1993) 51; L Ferriter 'Contrapuntal Reading or Analysis' available at https://academics.hamilton.edu/english/ggane/contrapuntal.html, accessed on 17 June 2019; J Derrida *Positions* (1972) (trans by A Bass, 1981) 41;

[4] Shohat describes a process, 'simultaneously privileging and distancing the colonial narrative' in order to move 'beyond it,' as intrinsic to the in-betweenness post-colonial analysis – Shohat (note 2 above) 107; G Prakash 'Postcolonialism Criticism and Indian Historiography' (1992) 31/32 *Social Text* 8; R Young *Postcolonialism: An Historical Introduction* (2001) 57-69.

[5] J Derrida *Margins of Philosophy* (1972); postcolonial analysis encourages the examination 'in empirical detail' why historically identities, inclusions and rights were advanced in certain ways – enquiring into motivations at play in particular situations but never losing focus of the 'larger patterns' which gave rise to the situation – H Schwarz 'Mission Impossible: Introducing Postcolonial Studies in the US Academy' in H Schwarz & S Ray (eds) *Companion to Postcolonial Studies* (2008) 5.

[6] F Cooper & A Stoler (eds) *Tensions of Empire: Colonial Cultures in a Bourgeois World* (1997) vii

[7] R Ross 'Oppression Sexuality and Slavery At the Cape of Good Hope' (1979) 6(2) *Historical Reflections* 421, 423; S Pooley 'Jan van Riebeeck as Pioneering Explorer and Conservator of Natural Resources at the Cape of Good Hope (1652-1662)' (2009) 15(1) *Environment and History* 3-33.

[8] J Hilton 'The Influence of Roman Law on the Practice of Slavery at the Cape of Good Hope (1652-1834)' (2007) 50 *Acta Classica* 1-14.

[9] *Report of the Parliamentary Select Committee on Aboriginal Tribes* (British settlement) House of Commons Select Committee on Aboriginal Tribes Report (1837) 32; N Penn 'The British and the "Bushmen": the massacre of the Cape San, 1795 to 1828' (2013) 15 *Journal of Genocide Research* 186; J Parada-Samper 'The Forgotten Killing Fields: "San" genocide and Louis Anthing's Mission to Bushmanland' (2012) 57 *Historia* 172-187

to acquire farms and to engage in some commercial production and enterprise. Slaves are reported to have first been received by these white inhabitants in 1658 from a colonial region in Angola, and were set to work in wine production, cultivating wheat, and other work.[10] More imported slaves followed over a period of more than a century for ownership and use by the inhabitants.[11]

The arrival of the Europeans in the Cape proved costly for Africans, firstly for Africans now commonly referred to as the Khoi and the San, then labelled Hottentots and Bushmen, and, over time, for other Africans found present in areas which were declared part of the colonial territory which was to become present-day South Africa. Tarifa and Ndlovu-Gatsheni asserted that the territorial grabs which went hand-in-glove with the need for labour 'would define and re-define African subjectivities' under the rubric of 'shortage of labour.'[12] Encroachments into the pastoral agricultural life of the Khoi by the land seizures of the white arrivals disrupted subsistence while also gradually dispossessing them of both their livestock and land. With few exceptions, over time the Khoi residing within the boundaries of the ever expanding Cape colony found themselves unable to mount prolonged resistance to the territorial, cattle and other livestock dispossession by the white community. As a result there was a sizable depletion of their numbers, with many of the remaining absorbed as a 'free' African labour component of the Colony.[13] Of the Khoi, Tannenbaum explains that these Africans, considered slaves 'by nature', perpetually remained unequal in 'moral status in the sight of the white community' despite being free from formal slavery.[14]

From recorded accounts, the semi-nomadic San proved more difficult to subdue and were more resistant to the encroachments and appropriations of land which they occupied and within which they hunted. A 1774 edict for the 'extirpation' of the San, characterised as a savage '*schepsel*' (creature), was issued and progressively executed by commando expeditions

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[9] G Williams 'Slaves Workers and Wine: the 'Dop System' in the Historyof the Cape Wine Industry 1658-1894' (2016) 42 *Journal of Southern African Studies* 893, 895.
[10] Williams (note 9 above),895.
[11] Williams (note 9 above),895.
[12] C Tafira & S Ndlovu-Gatsheni 'Beyond Coloniality of Markets: Exploring the Neglected Dimensions of the Land Question from Endogenous African Decolonial Epistemological Perspectives' (2017) 46 *Africa Insight* 9-24, 12
[13] P Delius and S Trapido 'Inboeksellings and Oorlams: The Creation and Transformation of a Servile Class' (1982) 8 *Journal of Southern African Studies* 214, 218
[14] F Tannenbaum *Slave and Citizen* (1947) (1992) 4, 107, 112 cf: A de la Fuente 'From Slaves to Citizens? Tannenbaum and the Debates on Slavery Emancipation and Race Relations in Latin America' (2010) 77 *International Labor and Working-Class History* 154, 155.

of white residents.[15] Western mores routinely belittle the hunting and foraging way of life of the San, 'depicting them as merely inhabiting the land, much as animals do, rather than making productive use of it'.[16] By contrast, the white incomers have been depicted as intrepid 'pioneers' fixed on cultivating more advanced systems in the face of backwardness.[17] Concerned with decoding the objectives of labour law in South Africa, Vettori delineates four temporally linear and consecutive stages of the development of human societies, as enunciated in western thought as foundational, namely, 'the hunter-gatherer era, the agricultural era, the industrial era and the information era'.[18] Such depictions have lent credence historically to colonial plunder. Goddard discussed sociological theory which outlines such an unwavering trajectory followed by societies as they supposedly progress from primitive to modern status.[19] Such theory routinely ascribes to primitive man, first 'pre-logical', and then 'mythopoeic' consciousness, 'where the distinctions between self and others, nature and culture, men and gods are … fluid.'[20] But assessment on the primitive or otherwise, 'on which 'evolutionary constructions' are based is mired with presupposition which then removes prospective objectivity.[21] Therefore arguably there is no genuine or unaffected basis upon which to judge progress between societies and then make comparisons.

With the inception of initial British occupation, a 1795 Proclamation of the Earl of Macartney authorised further deadly expeditions when they were deemed warranted (by magistrates).[22] Methodical periodic militia slaying of the San, as well as hunting expeditions

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[15] *Report of the Parliamentary Select Committee on Aboriginal Tribes* (note 9 above) 32; Penn (note 9 above); Parada-Samper (note 9 above).
[16] M Adhikari *The Anatomy of a South African Genocide: The Extermination of the Cape San Peoples* (2010) 19
[17] J Lopes *Colonialism Liberation and Structural-adjustment in the Modern World-Economy: Mozambique, South Africa, Great Britain and Portugal and the Formation of Southern Africa* (unpublished PhD thesis, Binghamton University, 2005) 258.
[18] M Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* (unpublished LLD thesis, University of Pretoria, 2005) 28-43; J Davidson and W Rees-Mogg *The Sovereign Individual: How to Survive and Thrive During the Collapse of the Welfare State* (1997);
[19] This thinking was popularised in the nineteenth century (Enlightenment era) by social Darwinists who identified the fittest/most civilised within the meta narrative of Western imperialism - A Mukhtar *Ancient Pakistan – An Archaeological History: Volume IV* (2014) 36; D Goddard 'The Concept of Primitive Soceity' (1965) 32 *Social Research* 256.
[20] Goddard (note 19 above) 256.
[21] 'We make objective predicates out of ethnocentric prejudice … [w]e can never be sure that the intrinsic differences we seem to find are not relative to our own cultural perspective' – Goddard (note 19 above), 271-275.
[22] In evidence before the Parliamentary Select Committee on Aboriginal Tribes' commission of inquiry, Maynier a former Landrost of Graaf Reynet told of 'Hottentots' being ordered to 'dash out against the rocks the brains of infants (too young to be carried off by farmers for the purpose to use them as bondmen), in order to save powder and shot' - *Report of the Parliamentary Select Committee* (note 9 above) 32-33; according to Penn the Dutch incomers appear to have wanted to wipe out the indigenous African (San) peoples of the Cape – Penn (note 9 above) 183.

to kill their livelihood, had the deliberate purpose of eradicating them while taking possession of the land they occupied.[23] In tandem with the mission to diminish the San population, the capture and enslavement of San women and children within the colony were also spoils of the attacks.[24] By 1798 the outpost had developed into a colony numbering 21 746 white people, 25 754 slaves and 14 447 Khoi as well as unregistered Xhosa and San within it.[25] Gradual inland invasion caused friction as the white community systematically seized land of the San to the north and the Xhosa as well as other Africans or 'heathen peoples' to the east in the late 1700s.[26]

Africans were marked as savage and incapable of equitable incorporation into the society of the Cape. It is from this basis that knowledge of human subjectivity takes shape. Narration of this past often tends 'to become variations on a master narrative' which incorporates within it assertions of the backwardness of the African, Europe being the 'silent referent'.[27] The story of South African labour policy and law begins with the decree to kill Africans to make way for settlement along with the practice of kidnapping African women and children to work as domestic labour for the white arrivals. Law consigned the encountered African to peripheral existence which gave way to coerced assimilation at diminished rank. The mission of this study is to document 'through what historical process' reasoning, that is 'not always self-evident to everyone, has been made to look "obvious" far beyond the ground where it originated.'[28]

3.2.2. Early Labour Law at the Cape Colony

On reclaiming the Cape colony in 1806, British law set the tone on the kind of labour relations which were to follow. The prevailing British sentiment was that the 1806 annexation would secure 'relief and justice' or more humane subjection of Africans.[29] It occurred at a time when the importation of slaves was drawing to a close, but slavery was still continuing, available to

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[23] Adhikari (note 16 above) 19; Penn (note 9 above) 183.
[24] J Parada-Samper 'The Forgotten Killing Fields: "San" genocide and Louis Anthing's Mission to Bushmanland' (2012) 57 *Historia* 172-187,
[25] A Du Toit & H Giliomee *Afrikaner Political Thought: Analysis and Documents Volume 1: 1780-1850* (1983) 1.
[26] Du Toit & Giliomee (note 25 above) 3.
[27] D Chakrabarty 'Postcoloniality and the Artifice of History: Who Speaks for the "Indian" Pasts?' (1992) 37 *Representations* 1-26, 2
[28] Chakrabarty (note 27 above) 20.
[29] The thinking was that the noted excessive brutality ascribed to Afrikaner burghers would be curbed - P Brantlinger *Dark Vanisings: Discourse on the Extinction of Prmitive Races 1800-1930* (2003) 75.

those who could afford their purchase and up-keep. Indeed Proclamation of 30 October 1806 permitted the disembarkation and disposal at public sale of Negro slaves arriving on a distressed Portuguese vessel, the Dido.[30] In 1807 the permit to import slaves from outside the colony was discontinued.[31]

A significant legal measure pertaining to Africans at the Cape during that time is to be found in Proclamation 1 of 1809 (the Caledon Code).[32] The Caledon Code stands out as emblematic and foundational in South African codification which embodies the imperial attitude to Africans, first as human beings and also as a source of labour. This code aimed to manage 'Contracts of Hire between the Inhabitants [white people] of [the] … Colony and Hottentots' – the Africans of the area. Apart from attaching to Africans compulsory 'places of abode and occupations,' the desired intent of this law was:

> 'that they should find an encouragement for preferring entering the service of the Inhabitants to leading an indolent life, by which they are rendered useless both for themselves and the community at large.'[33]

Toward the end of the nineteenth century the sentiments of this law were echoed by Cecil John Rhodes during deliberations on how to force Africans into wage labour, when he remarked: '[b]y the gentle stimulant of labour tax to remove from them the life of sloth and laziness; you will thus teach them the dignity of labour'.[34]

In terms of the Caledon Code, when hiring an African for more than a month, a white person ('Inhabitant') was to register with the designated official along with the stipulations of

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[30] The white community 'Inhabitants' were to be granted the opportunity to purchase said slaves, a contribution to their 'welfare' on the part of the government. In 1809 a proclamation of 23 June offered pardon to escaped slaves who would then 'not be liable to any punishment whatever, domestic or otherwise, in consequence of their having deserted their Masters or Mistresses'; this decree only extended to slaves that had not committed serious crimes. A Proclamation of 1 January 1813 provided for intervention in the punishment of slaves by confinement. Such detention was limited to a period of one month unless administered by proper authorities after prosecution of a criminal charge. Furthermore, a Master could incur a 10% deduction on the sale price of a slave subjected to serious cruelty - R Plaskett & T Miller (compiler/eds) *Proclamations Advertisements and other Official Notices Published by the Government of the Cape of Good Hope From January 10th 1806 to May 21st 1825* (1927) 42.*Cape of Good Hope* (1927) 42, 111, 225.

[31] Abolition of the Slave Trade Act 1807 abolished the slave trade in the British empire.

[32] Proclamation 1 of 1809 (1 November 1809) - Plaskett & Miller (note 30 above) 119.

[33] Hottentots were to be allocated a 'fixed Place of Abode' recorded by district officials or the Landdorst (article 1) – Plaskett & Miller (note 30 above) 119.

[34] Cecil John Rhodes cf: C Tafira & S Ndlovu-Gatsheni 'Beyond Coloniality of Markets: Exploring the Neglected Dimensions of the Land Question from Endogenous African Decolonial Epistemological Perspectives' (2017) 46 *Africa Insight* 9, 12

the contract which had to include the name of the servant and in whose service he had entered, the wages to be paid, and when payment would be due.[35] This law assigned the white person the position of master and the African that of servant, with a Committee of the Court of Justice empowered to ensure that contractual terms were fulfilled.[36] Serious dereliction of prescribed duties by a servant could, if found as alleged, lead to withholding of wages, imprisonment or 'severe domestic corporal punishment … independent of their being bound to serve out their full time according to agreement.'[37] Article 16 of the Caledon Code mandated the carrying of a Pass by 'Hottentots going about the Country … on penalty of being considered and treated as Vagabonds.'[38]

The Code has aptly been described as introducing serfdom in South Africa.[39] These contracts have been described as the preferable official method of controlling and suppressing Africans usinglaw to order relations between masters and servants, rather than the private less generalizable mechanisms of slavery.[40] Arguably the labour contract did not denote a departure from the ideological underpinnings of slavery as such, but its apparent refinement and adaptation to the South African context. In effect the servant was bound to the service of his master or employer, whose written consent (Pass) was required in order for the servant to leave the premises and to get a pass from the district authorities to travel anywhere. The pass enabled tight surveillance on the movement of Africans within the colony, restricting them to their recorded 'fixed abode' since the Code branded unrestricted movement as punishable vagrancy. These African servants were granted access to colonial courts, mainly in relation to their ill treatment at the hands of white masters.[41] Nonetheless, the Code sanctioned strict and at times harsh discipline at the hands of masters, allowing for whipping and criminalising contractual breaches on penalty of incarceration.[42] The only option left to the Africans referred to in the

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[35] Article 2 Caledon Code 1809.
[36] Article 6 of the Code anticipated possibility of ill-treatment of servants by Masters, which carried the penalty of the servant being 'discharged from his service, and the Master be[ing] fined in a fine not exceeding 50 Rds. and not less than 10 Rds. according to the nature of the ill-treatment'. In cases of severe mutilation, serious or permanent injury the common law was to be applied to wayward Masters.
[37] Article 13 Caledon Code 1809.
[38] Africans failing to produce a Pass were to be apprehended and handed over to the designated officials – Field-Cornets or Landdorsts - since their so-called vagrancy was now a crime.
[39] E Walker *The Great Trek* (1934) 79; serfs were poor labourers akin to slaves who were bound to the property of their landlords and were not permitted to relocate without permission from their landlords.
[40] K Breckenridge 'Power Without Knowledge: Three Nineteeth Century Colonialisms in South Africa' (2008) 26 *Journal of Natal and Zulu History* 3, 5.
[41] Article 6 and 13 CaledonCode.
[42] Article 6 and 13 CaledonCode.

Caledon Code was either to enter into colonial service and submit to restricted movement control, or to leave the territories under the control of the Cape authorities.

Following on from the Caledon Code, the Proclamation of 23 April 1812 (Apprentice Proclamation) ratified the practice of 'apprenticing' African children.[43] Article 4 of the Apprentice Proclamation stated that children born to servants could be apprenticed on reaching the age of eight years for a period of 10 years. This applied to children of African servants regulated under the Code. If the Master was not willing to apprentice the eight-year-old child, the *Landdorst* was permitted to bind the child 'unto such other humane person within his District as he [should] think fit' for the 10 year period.[44]

With the enactment of the Caledon Code, Africans were being fashioned in law to a race of servants; their presence within the colony was only tolerable when they were attached in service to white people. Because of the Apprentice Proclamation, from the age of eight years an African child would officially become a bonded child labourer. Colonialism's governing fiction of a race-based dividing line was being constructed.[45] Subsequent discussion of Ordinance 50 of 1828 follows the trajectory of labour management, assessing whether there was any notable intervention to contradict established practice.

3.2.3. Separating African Identities in (Cape) Labour Regulation

To grasp the import of Ordinance 50 it must be read in conjunction with other pertinent law. Ordinance 49 of 1828, which referred to the Xhosa and other nearby African groupings as 'native foreigners', made provision for the recruit of their labour under conditions of Pass-holding and other regulations.[46] Then Ordinance 50 of 1828 temporarily eradicated the Pass

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[43] The apprenticeship of children was mainly produced through taking women and children after commando expeditions (which had been officially sanctioned since the 1700s), whereat African men were killed, to work as servants in white households - W Dooling 'The Origins and Aftermaths of the Cape Colony's "Hottentot Code" of 1809' (2005) 31 *Kronos* 52; Parada-Samper (note 9 above) 172-187.

[44] Article 4 Apprentice Proclamation of 12 April 1812; Proclamation of 8 August 1817 saw fit to discourage the inducement by Inhabitants of 'savage Parents' of 'savage tribes' to relinquish their children through sale, fraud or force (including murder); nonetheless the Proclamation of 9 July 1919 reiterated provision for registration and indenturing such children as apprentices – Plaskett & Miller (note 30 above) 189, 395,449.

[45] F Fanon *The Wretched of the Earth* (1961) (trans R Philcox, 1963) 6; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123, 126.

[46] It was entitled: 'Ordinance for the Admission into the Colony, under certain restrictions, of Persons belonging to the Tribes beyond the Frontier thereof, and for regulating the manner of their Employment as Free Labourers in the Service of the Colonists' – Ordinance No. 49 of 1828 (14 July 1828). This law managed the limited entry

stipulations and vagrancy offences of the earlier Caledon Code pertaining to 'Hottentots'.[47] Apart from abolishing vagrancylaws and Pass stipulations, it pronounced that 'Hottentots and other free persons of colour are … entitled to all the rights of law to which any other of His Majesty's subjects … are entitled'.[48] Ordinance 50 has been offered as exemplifying the implementing of equality in law, a seeming attempt to put these Africans on an equal footing with their white counterparts – at least for a time.[49] However, this proposition is shaky, given the culture at the time.[50] Cape Colony law-making at this time occurred by proclamation, without a legislature or even an advisory council. The white community as well as its *landdrosts* (magistrates) 'shared the fundamental assumptions … that Khoi, as an inferior order of humanity, enjoyed an inferior order of natural rights, and in consequence had an obligation to render service to the colonists. The rule of law … did not imply that all enjoyed equal legal status.'[51]

By this time, the Africans living within the boundaries of the Colony had been divested of land, livestock and other means of subsistence, making employment by white people the most viable option for many. The master and servant regime could not easily be dislodged. In reality, 'since most masters were white and most brown people were servants, the effect of this apparently race-free law was to consolidate rather than weaken race domination.'[52] The 'free persons of colour' in Ordinance 50 were manumitted slaves and other mixed race people who

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and movement of 'foreign' Africans inside the colony, their stay was authorised only for employment, in the manner like that created in the Caledon Code which required contracts of service and passes.

[47] It was entitled: 'Ordinance for improving the Condition of Hottentots and other Free Persons of Colour at the Cape of Good Hope, and for consolidating and amending the Laws affecting these Persons' – Ordinance 50 of 1828 (17 July 1828). Hottentot refers to the Khoi living within the colony who had up to that point been managed through the Caledon Code.

[48] Ordinance 50 further declared that

'whereas by usage and custom of this Colony, Hottentots and other free persons of color have been subjected to certain restraints, as to their residence, mode of life and employment, and to certain compulsory services of which other of His Majesty's subjects are not liable … no Hottentot or other free person of color, lawfully residing in this Colony, shall be subject to any compulsory service to which other of His Majesty's subjects are not liable' - J McDonald 'Loyalism in the Cape colony: Exploring the Khoesan Subject-citizen Space, 1828-1834' (2015) 73 *New Contree* 106, 120; V Malherbe 'Colonial Justice and the Khoisan in the Immediate Aftermaths of Ordinance 50 of 1928: Denouncement at Uitenhage' (1997) 24 *Kronos* 77.

[49] H Simons & R Simons *Class and Colour in South Africa 1850-1950* (1969) 17; W Dooling *Slavery Emancipation and Colonial Rule in South Africa* (2008) 93; W Gebhard 'Changing black perceptions of the Great Trek' (1988) 33 *Historia* 38-50, 40

[50] Apart from the notable efforts of the London Missionary Society, there was no wide-ranging revision of colonial mores leading to acceptance of the Khoi as equal them – McDonald (note 48 above). Slavery continued to subsist (hence the distinction free persons of colour) and even though Ordinance 50 repealed the Apprenticeship Act of 1812 the system of bondage continued.

[51] T Keegan *Colonial South Africa and the Origins of the Racial Order* (1996) 55-56.

[52] A Sachs *Justice in South Africa* (1973) 40.

had become a significant demographic in the colony. Moreover, Ordinance 49 of 1828 had, three days prior to the issuing of Ordinance 50, just opened the door to wider utilisation of the mobility restrictions (Passes and vagrancy regulations) for other Africans labelled 'Tribes of beyond the frontier' entering the colony, making it clear that their lawful presence was contingent on their employment as servants to the white residents. It bears noting that Ordinance 49 of 1828 (its operations having been amended and extended several times) was subsequently only repealed by the Native Pass Law Act No. 22 of 1867.[53] At no time during the 1800s did Africans in general obtain a reprieve from the Pass laws and compulsory employment contracts in the Cape Colony. The temporary, if questionable, *de jure* reprieve was only applicable to the Khoi together and those regarded as persons of colour. Therefore the reading of eventual enacting of the Masters and Servants Ordinance in 1841, followed by the Masters and Servants Act of 1856, ought to recognise that these laws applied only to the 'free' Africans and other non-whites of the colony, as well as the newly emancipated slaves, but not to the general African population (classified 'Native Foreigners'[54]) deemed to be emanating from and beyond the borders of the Cape Colony. A parallel regime of population control, recruitment, and conditions of service, which applied to most Africans, continued to be in force.[55]

A series of enactments which were engendered by the abolition of slavery charted the journey toward the eventual passing of Masters and Servants Acts. Following the abolition of

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[53] Native Pass Law Act No. 22 of 1867 – H Tennant & E Jackson (eds) *Statutes of the Cape of Good Hope 1652-1895* (1895) 1070; following Ordinance 49 of 1828 the following laws were enacted to regulate the entry into movements of Africans in the Cape: Act No. 23 of 1857 intituled '[a]n Act for more effectually preventing Kafirs from entering into the Colony without Passes'; Act No. 27 of 1857 intituled '[a]n Act for regulating the terms upon which Natives of Kafirland and other Native Foreigners may obtain employment in this Colony; Act No. 24 of 1859 intituled '[a]n Act to amend the Laws for regulating the admission of Kafirs and other Native Foreigners into the Colony'; Act No. 23 of 1860 intituled '[a]n Act for preventing unauthorised Persons from granting to Kafirs or other Native Foreigners Passes or Papers pretending or supposed to be such , and for preventing Kafirs or other Native Foreigners from being harboured on the premises of persons who do not employ such Kafirs or other Native Foreigners'; Act No. 17 of 1864 intituled '[a]n Act for amending te Law regarding Certificates of Citizenship'.

[54] Native Pass Law Act No. 22 of 1867 – Tennant & Jackson (note 53 above) 1070.

[55] Act No. 23 of 1857 intituled '[a]n Act for more effectually preventing Kafirs from entering into the Colony without Passes'; Act No. 27 of 1857 intituled '[a]n Act for regulating the terms upon which Natives of Kafirland and other Native Foreigners may obtain employment in this Colony; Act No. 24 of 1859 intituled '[a]n Act to amend the Laws for regulating the admission of Kafirs and other Native Foreigners into the Colony'; Act No. 23 of 1860 intituled '[a]n Act for preventing unauthorised Persons from granting to Kafirs or other Native Foreigners Passes or Papers pretending or supposed to be such , and for preventing Kafirs or other Native Foreigners from being harboured on the premises of persons who do not employ such Kafirs or other Native Foreigners'; Native Pass Law Act No. 22 of 1867.

slavery in the Cape which came into force on 1 December 1834,[56] Ordinance 1 of 5 January 1835 re-designated the emancipated persons as apprentices.[57] These apprentices were obliged to remain in service of their erstwhile owners (now masters) under much the same terms, however the relations were now based on a contract of service lapsing on 1 December 1838.[58] Ordinance 1 of 1835 set out working hours, sustenance, permissible punishment and added detail on the duties of apprentices as well as appointing a magistrate responsible for receiving complaints from the apprentices.[59] Following full freedom, and in light of Ordinance 50 of 1828, which had repealed the vagrancy laws of the Caledon Code, the ex-slave apprentices were able to move freely and seek employment. This was unsatisfactory from the perspective of white employers. From August 1838 a Master and Servant Bill was introduced and debated in the Cape Legislative Council which had been convened in 1835 under a Governor, and, following approval Ordinance 1 of 1841 (5 March 1841), came into force in December 1842.

The 1841 Masters and Servants Ordinance repealed Ordinance 50. The length of a contract of employment (where unstipulated) would be one month and where quantified could last no longer than a year. When entered into before a magistrate, a contract could be up to three years in duration.[60] Dispute resolution, regarding wages and other discord between master and servant, was to be settled by magistrates in the case of smaller amounts of money or contracts up to one year and Supreme or Circuit courts in the case of higher amounts. The 1841 Masters and Servants Ordinance and the subsequent Masters and Servants Act 15 of 1856 seemed to be race-neutral, as if covering workers of all races in the same manner, in their designation of a servant. However, as noted, parallel legislation which managed the procurement of African labour generally was developing in the Cape. Therefore it is misplaced to presume that Masters and Servants laws and therefore labour law have been essentially race- neutral.

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[56] Abolition of Slavery Act of 1833.
[57] This followed a longstanding practice of bonding a slave for a number of years as an apprentice before ultimately granting full freedom.
[58] Ordinance 3 September 1838 declared it unlawful to retain former slaves and their children as apprentices past 1 December 1838.
[59] 'Indolence or careless work, disobedience, insolence, insubordination, and unlawful conspiracy' incurred the penalty of 15 stripes for a first offender and one months' imprisonment for second offenders 'if committed within two months. A labourer was to receive ten stripes for every hour of unlawful absence up to a maximum of 39 stripes' – H Simons 'Masters and Servants' (November 1956) 12(11) *Fighting Talk* 3.
[60] Unwritten contracts could last only three months whereas written contracts could be up to one year - Ordinance 1 of 5 March 1841.

This notion of asymmetrical segregation using law, between African and white people, was carried forward from its Cape beginnings to the ZAR in response to the vast amount of labour which congregated at the newly established mines. The next section examines developing labour management as the ZAR came into being and mineral deposits were uncovered, which led to large-scale mining.

3.3. Mid-1800s Labour Management in the ZAR and the Transvaal

3.3.1. The Outlook of Founding Law

The story of the African in the ZAR begins well before the formation of the Boer Republic when there were various African settlements throughout the South African landscape; territory which was to be commandeered by the white Afrikaner on the invasion.[61] The inland migration of the Afrikaners led to the formation of colonies of Natal, the ZAR and then the Orange Free State. Integral to this combative process has been the abstraction of Africans as 'the natives' in a process of defining and then ruling over them.[62] Indeed, at the outset the fledging settlement later to become the ZAR established founding rules in 1844 – the Thirty-Three Articles – which announced a gap of at least ten degrees of separation in human civic advancement between the Africans and their burgher[63] counterparts.

The power to make laws was vested in the *Volksraad*, made up of eligible male citizens of the ZAR - burghers. *Volksraad* Resolutions, Proclamations, Ordinances and Government Notices comprised the laws enacted by this legislative body.[64] The *Volksraad* was convened by the 'Thirty-Three Articles Being General Regulations and Laws for the Law Sessions' (The

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[61] As early as the first century AD African communities were living and engaged in agricultural activity throughout what is now South Africa - T Maggs 'African Naissance: An Introduction' (2000) 8 *Goodwin Series* 1-3; T Huffman 'Mapungubwe and the Origins of the Zimbabwe Culture' (2000) 8 *Goodwin Series* 14-29; B Ramose '"To Whom Does the Land Belong?" Mogobe Bernard Ramose Talks to Derek Hook' (2016) 50 *Psycology in Society* 86-98.

[62] '[T]he native is pinned down, localized, thrown out of civilization as an outcast, confined to custom, and then defined as its product' - M Mamdani *Define and Rule: Native as Political Identity* (2012) 2-3

[63] Burgher is a Dutch and Afrikaans term meaning townsman or civilian which came to denote white male Afrikaner citizen of the ZAR and the other colonies.

[64] Later to quell brewing uncertainty at the time, an appendix to the 1958 Grondwet specifically stated that '[e]very court shall observe all resolutions of the Volksraad as law', furthermore courts 'shall be entitled to make no remark and pass no judgment about them, and what has been decided or approved of by the Volksraad may not again be subjected to the cognizance of any court of law' – Resolution No. 185 Addenda to the Grondwet Article 1(2) (No. *2)* 19 September 1859 – G Eybers *Select Constitutional Documents Illustrating South African History 1795-1910* (1918) 417-418.

Thirty-Three Articles) on 9 April 1844.[65] They became founding law for what was to become the ZAR until they were superseded by the *Grondwet* (Constitution). Article 6 of the Thirty-Three Articles stated that 'no half-castes [*'Bastaarden' Basters*][66], down to the tenth degree' would be entitled to membership or to participate in meetings of the *Burgerraad* (citizens' council).[67] The reference resembles a Christian Biblical verse '[a] bastard shall not enter into the congregation of the Lord; even to his tenth generation shall he not enter into the congregation of the Lord.'[68] This reference was likely aimed at fortifying justification for the obvious discrimination and withholding of civic rights based on racial categories and to forge a 'more rigid racial hierarchy than had ever existed at the Cape'.[69] At first glance the African appears not to be the direct subject of the provision, but its wording illustrates the level at which the personhood of Africans had been dismissed. Article 6 seems to indicate that it was unimaginable that an African might be considered eligible for citizenship.[70] As becomes apparent, African peoples were found already living within the boundaries of the territory appropriated by the burghers. Indeed, Article 29 prohibits the settlement of 'natives' near 'town-lands' without the express approval of the *Raad* (legislating council). An oblique reference to African people is gleaned in Article 23 which provides that refusal to heed the lawful call and participate in the activities of a commando was an offence punishable by a fine. These were paramilitary excursions, battles against African societies which involved the

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[65] Approved by Volksraad Resolution of 23 May 1849.

[66] Bastaarden (bastard in Dutch) or Baster (bastard in Cape Dutch/Afrikaans) or 'half-caste' 'half-breed' 'crossbreed' were sizeable population, that came from relations between the white burghers and the San, the Khoi, other African groupings and the imported slaves; described by Van Reenen and Riou as 'those Hottentots, bastard Hottentots, whose race has been intermixed with the slaves brought from the East Indies'; over time it came to denote a community of mixed race people – J Van Reenen & E Riou *A Journal of a Journey from the Cape fo Good Hope Undertaken in 1790 and 1791* London: G. Nicol (1792) 28.

[67] Eybers provides a literal translation of words of the Grondwet: '[g]een Bastaarden zullen in onze vergaderingen als lid of regter mogen zitten tot het tiende gelid' – Eybers (note 64 above) 350; S Barber W Macfadyen & J Findlay *The Statute Law of the Transvaal* (1901) 2.

[68] Deuteronomy 23: 2 Bible (King James Version); this in turn originates from the Jewish holy book the Torah which reads: '[a] bastard shall not enter into the assembly of the Lord; even to the tenth generation shall none of his enter into the assembly of the Lord' - Deuteronomy 23: 3 *The Holy Scriptures According to Masoretic Text* (1917) available at https://jps.org/wp-content/uploads/2015/10/Tanakh1917.pdf, accessed on 22 April 2020; Christianity was the recognised religion of the ZAR.

[69] G Fredrickson *White Supremacy: A Comparative Study of America and the South African History* (1982) 177. The sentiment was to be echoed in the 1877 British Annexation Proclamation of Shepstone which stated that: '[e]qual justice is guaranteed to the persons and property of both white and coloured; but the adoption of this principle does not and should not involve the granting of equal civil rights, such as the exercise of the right of voting by savages, or their becoming members of a Legislative Body, or their being entitled to civil privileges which are incompatible with their uncivilized condition' – Annexation of the South African Republic to the British Empire Proclamation (12 April 1877) in Eybers (note 64 above).

capture of young children who were then bonded as labour.[71] Thus seeming silence on African status in the burgher polity ought to be read in light of what has been said about their mixed race descendants, the hostility of commandos, as well as the established legal framing of the Africans of the time.[72]

The formation of an independent country, the Zuid-Afrikaansche Republiek (ZAR), was enabled by the agreement concluded between the British government and the Boers at the Sand River Convention of 1852. The agreement gave burghers north of the Vaal River the right to govern themselves without British interference, Britain would instead 'promote peace, free trade and friendly intercourse' with the new state.[73] The agreement ended off by stating that: 'It is agreed that any and every person now in possession of land and residing in British territory, shall have free right and power to sell his said property and remove unmolested across the Vaal River, and *vice versa*'. It is notable that 'person' in the agreement by implication refers to whites, whether English or Afrikaans. The convention did not contemplate recognising legal personhood of the African residents of the land being declared in the 'possession' of the whites. The presence of Africans appears to have been overlooked. Apart from the passing reference to the prohibition of formal slavery[74] 'in the country to the north of the Vaal River' – theZAR – the African was wholly unaccounted for and so existed outside the operation of the agreement, which in effect presided over the violent dispossession and oppression of Africans. But if the African is not a person what is he or she? Conceiving the white man as a person or *the* person necessarily evokes the presence of the liminal African, since a person is not white but for the black person being tarred black.

From the beginning the *Volksraad* pronounced upon entitlement to equal consideration in a decidedly discriminatory manner. As to citizenship, any white male 'no matter to what European nation they may belong' was welcomed to purchase citizenship which bestowed among other equal rights: rights to vote, stand for public office and own immovable property.[75]

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[71] F Morton 'Slave-Raiding and Slavery in the Western Transvaal after the Sand River Convention' (1992) 20 *African Economic History* 99-104.
[72] Cape Ordinance 49 of 1928 considered Africans aliens whose entry and mobility within the Colony was to be outlawed save for the purpose labour for white inhabitants, under the strict policing of Pass and Vagrancy rules.
[73] Sand River Convention (17 January 1852) – Eybers (note 64 above) 358-359.
[74] According to Morton, despite legal prohibition, slave raids captured thousands of women and children, to work as domestic servants and farm labourers – Morton (note 71 above).
[75] Article 159 Volksraad Resolution No. 181 18 June 1855 – and a wife to the new burgher would then automatically be deemed a 'burgheress' of the ZAR.

Article 159 made clear that anyone who could not obtain citizenship could not have the entitlement to 'possess immovable property.'[76] Then it declared explicitly that: 'All coloured people are excluded from this provision (in accordance with the *Grondwet*) … they may never be given or granted rights of burghership.'[77] In this way all non-white people including Africans were barred not only from owning land but also from occupying and using land, in the absence of receipt of special permissions. This occurred even though African people were already in possession of the coveted land. Therefore, as at 18 June 1855 the formal proscription of citizenship and land ownership was inscribed in the ZAR. These prohibitions (which could also be found to varying degrees in the other three colonies) would later extend into the Union of South Africa and the subsequent Republic that came to being in 1961. The prohibitions on landownership and citizenship were to be fully abolished only at the end of the twentieth century by the Abolition of Racially Based Land Measures Act 108 of 1991 and the Constitution of the Republic of South Africa Act 200 of 1993 respectively. Withholding citizenship and property possession and ownership rights from Africans was the bedrock of the subsequent labour regulation that characterised the ZAR and the future South Africa of the twentieth century.

The question of which kind of human was entitled by law to the full complement of enforceable rights was set out in a comprehensive Constitution, the *Grondwet* (the ZAR Constitution) of 1858. Even though Article 6 stated that the Republic is open to all who submit to its laws and that everyone within its boundaries will have 'equal claim to protection of person and property' subsequent articles belied this promise.[78] While Article 7 stated that land which has 'not yet been given out' belongs to the state, it neglected to acknowledge that African people were occupying parts of these lands. So it is the claiming of land by whites that is in issue here, because Article 7 had the proviso that members of the public could still obtain such lands.[79] So 'public' by necessary implication excludes Africans – a pattern to be followed in expressing other laws.

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[76] '[N]o person who is not recognised as a burgher shall have the right to possess immovable property' - Article 159 Volksraad Resolution No. 181 18 June 1855 – Eybers (note 64 above).
[77] Article 159 Volksraad Resolution No. 181 18 June 1855 – Eybers (note 64 above) 361-362; later article 14 Law No. 4 1890 which established the power to legislate to two Volksraads explicitly barred 'coloured people, half-castes, persons of open bad behaviour, and unrehabilitated bankrupts' from eligibility to sit in the Raads.
[78] Article 6 The Grondwet of the South African Republic (February 1858) – Eybers (notes 64 above) 364.
[79] The Grondwet did not repeal article 159 Volksraad resolution of 1855.

Article 9 of the *Grondwet* read: '[t]he people desire to permit no equality between coloured people and the white inhabitants, *either in Church or State*.'[80] This statement echoes the Thirty-Three Articles and re-inscribes the criterion 'coloured people' as deviating or deviated from the norm. Thus equality of people was anathema to the framework of law inthe ZAR. Over time the question of what other race groups, apart from Africans, should also be designated coloured was presented to courts of law. Courts confirmed the superiority of white people and the humblest human condition for Africans, while also affirming the existence of race groups below the white but above Africans.[81]

When Britain annexed the ZAR in 1877, the annexation proclamation of Shepstone pointed to dysfunctional governance and military defeats at the hands of African tribes, having imperilled white communities in the ZAR and beyond, as among the reasons for the intervention. Circumstances having 'imposed the duty upon those who have the power to shield enfeebled civilisation from the encroachments of barbarism and inhumanity'.[82] Furthermore it announced:

> The laws now in force in the state will be retained until altered by competent legislative authority. Equal justice is guaranteed to the persons and property of both white and coloured; but the adoption of this principle does not and should not involve the granting of equal civil rights, such as the exercise of the right of voting by savages, or their becoming members of a Legislative Body, or their being entitled to other civil privileges which are incompatible with their uncivilised condition.[83]

Whatever concessions Britain made in principle regarding promoting the equality of non-white persons, it did not extend them to Africans. The resumption of independence of the ZAR, renamed Transvaal, introduced a dubious concession allowing Africans to 'acquire' land

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[80] Article 9 The Grondwet of the South African Republic (February 1858) – Eybers (note 64 above) 364. These sentiments were reiterated in the modified Grondwet of 1889 and that of 1896. Grondwet Law No.2 of 1896 which reads: at Article 6 '… All persons who are within the territory of this Republic shall have an equal claim to protection of person and property'; at Article 9 'The people will not permit any equalisation of coloured persons with white inhabitants'; at Article 43 'No coloured person or bastard, no persons of notoriously bad conduct … shall be eligible as Members of the Volksraads' - Barber Macfayden & Findlay (note 67 above)725.

[81] *Ismail Suleiman & Co v Landdrost of Middleburg* (1885-1888) 2 SAR TS 244; *Tayob Hajee Khan Mohamed v The Government of the South African Republic* (1898) 5 Off Rep 168; *George & Others v Pretoria Municipality* (1916) TPD 501; *Gandur v Rand Township Registrar* 1913 AD 250

[82] Resolution No. 198 Annexation of The S.A. Republic to the British Empire [12 April 1877] – Eybers (note 64 above) 450.

[83] Natives tribes residing within the boundaries of the state were to be 'taught due obedience to the paramount authority, and made to contribute their fair share towards the support of the state that protects them' - Resolution No. 198 Annexation of The S.A. Republic to the British Empire [12 April 1877] – Eybers (note 64 above) 453.

which was to be registered under the Native Location Commission 'in trust' for them.[84] The Pretoria Convention mandated adherence of Africans to the existing laws which severely curbed their movements and designated the boundaries of property which could be utilised by them.[85] Clause 26 of the Convention stated unequivocally that 'all persons other than natives' are guaranteed full rights of citizenship in the Transvaal.[86]

3.3.2. Child Stealing and Apprenticeship: Inboekselings

Inboekselings (bonded servants) were usually children (and sometimes women) attached to service to Afrikaner burghers through violent capture, at times as symbols of political agreement with African polities, or as commodities acquired in a sale.[87] The registration of *inboekstelsel* has historically been misrepresented as a method of involuntary 'apprenticeship' of children bartered off or deserted by parental caregivers.[88] In reality, the reputed desertion was as a result of the killing of parents during commando raids. Duress routinely effected the 'transition from African child to *inboekseling*.'[89] But rather than being characterised as disposable property, as in the case of formal slavery, the practice has been justified as a protective method of assimilating these people within the society as a servant class – 'unfree servants of white households.'[90] However, the commando exploits which incorporated taking African women and children in their spoils were well known and documented. In fact, part of the justification of the 1877 annexation of the ZAR rested on British public discontent at the ongoing practice.[91]

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[84] Clause 13 Pretoria Convention 1881 – Eybers (note 64 above) 459.
[85] Article 22 established the Native Location Commission headed by the State President to decide on the location and size of land set aside for occupation by Africans - Clause 14 & 22 Pretoria Convention Eybers (note 64 above) 459, 461.
[86] The London Convention (1884) restored the name ZAR instead of Transvaal and at Clause 16 re-stated the prescripts of article 26 Pretoria Convention – London Convention (27 February 1884) Eybers (note 64 above) 470.
[87] P Delius and S Trapido 'Inboekselings and Oorlans: The Creation and Transformation of a Servile Class' (1982) 8 *Journal of Southern African Studies* 214; P Delius *The Land Belongs to Us: The Pedi Polity the Boers and the British in the Nineteenth-Century Transvaal* (1983) 137.
[88] F Morton 'Slave-Raiding and Slavery in the Western Transvaal after the Sand River Convention' (1992) 20 *African Economic History* 99-118, 100
[89]Delius & Trapido (note 13 above) 227.
[90] P Delius & S Trapido 'Inboekselings and Oorlams: the Creation and Transformation of a Servile Class' in B Bozzoli (ed) *Town and countryside in the Transvaal: Capitalist Penetration and Populist Response* (1983) 53-81; J Agar-Hamilton *The Native Policy of the Voortrekkers: an Essay in the History of the Interior of South Africa 1836-1858* (1928) 93, 169-193; W Kistner 'The Anti-slavery Agitation Against the Transvaal Republic 1852-1868' in *Archives Yearbook for South Africa History* (1952) 197-278.
[91] Despite article 28 of the Thirty-Three Articles prohibiting the stealing of African children, when Africans living near or within range of the ZAR were attacked by the commandos, the confrontations routinely ended with the

From early days, to avoid charges of widespread slavery, the Apprentice Act issued from the *Volksraad* in 1851 embodied a code for the ongoing practice of apprenticeships (bonded labour) which were to be terminated when a child reached 25 years of age.[92] During this time the transience and inadequacy of the labour supply meant that *inboekselings* were a critical source, amounting to the majority of labour in most instances.[93] The Proclamation of 24 March 1858 recognised and rebuked 'some reckless and licentious persons' who had taken to kidnapping African children, crossing back into the ZAR and selling such children. The practice was declared an offence punishable by a fine. Furthermore apprenticeships were to be approved and registered by the *Landdrost*. Then, following similar instructions of 1849, Article 54 of the Instructions to the Field-Cornets issued in 1858 stated that persons 'guilty of carrying off coloured persons or their children across the boundaries of the Republic, or who shall dispose of or sell such young coloured persons, … shall be punished by being dispossessed of such coloured persons' and also fined between £100 and £500, or imprisoned if they could not pay.[94] The Master and Servants law of 1880 continued to provide for the involuntary indenturing of labour through this system of apprenticeship.[95] This law altered the permissible age and duration of indenture as well as adding provisions regulating the manner in which the children were to be kept under supervision.

Morton pointed out that regardless of inscriptions in *Volksraad* resolutions on permissible behaviour and punishment, in reality such laws were disregarded and *inboekseling* were really chattel of the burghers.[96] Furthermore, while abuse was rife 'only one example exists of an owner who was divested of his servants' after his particularly horrific conduct.[97] Campbell *et al*. noted the same single instance where a master was punished for ill-treatment

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kidnap of children who were then registered and 'apprenticed' – Article 28 Thirty-Three Articles Eybers (note 64 above) 355-356; Delius & Trapido (note 90 above) 53-81.

92 Volksraad Resolution 9 May 1851 dealt with 'the orphan children, or so-called apprentices, brought in by the Kaffir nations round about us' – Article 1 Apprentice *Wet* 9 Mei 1851 in F Jeppe & J Kotze *De Locale Wetten der Zuid Afrikaansche Republiek 1849-1885* (1887) 8.

[93] By 1866 approximately ten per cent of the Transvaal Trekker population comprised the bonded children – K Breckenridge 'Power Without Knowledge: Three 19th Century Colonialisms in South Africa' (2008) *Journal of Natal and Zulu Studies* 3, 24; Morton (note 71 above) 104.

[94] Resolution No. 183 Instructions to Field-Cornets (17 September 1858) superseded the Instructions of 1849 – Eybers (note 64 above) 415; Article 28 of the Instructions to Field-Cornets of 9 April 1849 states a similar prohibition on the illegal taking of African children – Veldcornet-Instructien 9 April 1849 in Jeppe & Kotze (note 92 above) 5.

[95] Law No. 13 of 1880 defined as 'apprentice' as 'any person indentured or bound by any contract of apprenticeship made according to law as apprentice to any other person' - Barber Macfayden & Findlay (note 67 above) 156-183.

[96] Morton (note 71 above)105.

[97] Morton (note 71 above)105.

of child servants.[98] At Rustenburg Fitzgerald, a British man, was found to have tortured two eight-year-old girls 'by inserting a hot poker into their vaginas.'[99] Fitzgerald's sentence of one year's imprisonment was commuted to a nominal fine.[100]

Bhabha's argument that '[i]t is only when we understand that all cultural statements and systems are constructed in this contradictory and ambivalent space … that we begin to understand why hierarchical claims to the inherent originality or "purity" of cultures are untenable', resonates in this context.[101] The recorded believed excesses of the burghers regarding the procurement and treatment of children for prolonged service show the attitude of the burgher culture, buttressed by law, toward the surrounding Africans. Here ideas of supposed civilisational superiority mix with the real-life effect of white occupation on Africans to create the culture of the ZAR.

3.4. Early ZAR Labour Law: Residential Restrictions and Taxation

During the inland migration, some of the burghers travelled with non-white servants and apprentices in their midst.[102] In 1848 the *Volksraad* resolved to issue two farms to each citizen, which therefore increased the labour demands of the burghers.[103] Article 34 of *Volksraad* Instructions to Field-cornets 1850 made Cornets responsible for getting African labourers who would work under prescribed contract periods of one year, or for 14 days without

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[98] G Campbell S Miers & J Miller *Women and Slavery: Africa the Indian Ocean and the medieval north Atlantic* (2007) 203; F Morton 'Female Inboeklinge in the South African Republic 1850-1880' (2005) 26 *Slavery and Abolition* 199, 208

[99] Their bodies were observed to be covered in burns and badly bruised Morton (note 98 above); Campbell (note 98 above) 203.

[100] *Natal Mercury* 14 March 1867; 6 October and 14 November 1868; *Natal Mercury* 24 March 1868; 31 May and 31 December 1870. *Transvaal Argus* cf: Morton (note 98 above).

[101] H Bhabha *The Location of Culture* (1994) 37.

[102] It was largely to these and acquired Africans that Article 33 of the Thirty-Three Articles applied, stating:In the matter of master and servants, every master shall have the right to maintain discipline properly among his servants. But there shall be no ill-treatment; if that does take place, the servant shall be taken away and the master shall be punished according to the nature of the case.'

[103] Volksraad Resolution No. 15 of 5 May 1851 stated that it would adhere to its decision of 21 April 1848, that those burghers present at the time (having crossed Oliphant's River as at 21 April 1848) who had remained continuously resident were entitled to be awarded two farms. Volksraad Resolution 28 September 1860 (article 149) extended the two farms rule to people who arrived up to and inclusive of 1852, granting 'one agricultural and one cattle farm.' - Barber Macfadyen & Findlay (note 67 above) 6, 29.

compensation, for the burghers.[104] Enough sustenance was to be provided to the African workers and disciplinary measures were not to exceed twenty-five lashes.[105]

Early on the ill-treatment of 'coloured servants' was observed, prompting Resolution of 24 March 1853 in which the *Volksraad* intervened by prohibiting the holding of servants 'in chains or handcuffs'.[106] All persons were directed to hand over wayward servants to thecourts for punishment. Field-Cornets were instructed to monitor the treatment of servants and transgressors (including 'negligent' Field-Cornets) would be liable to a fine. In September 1853 licence to extract a yearly tax on 'the small Kaffir tribes' for the ZAR public coffers was granted.[107] Then in November it was resolved that land be allotted for occupation by African tribes, contingent upon such tribes adhering to the laws of the ZAR – non-compliance could result in lapse of tenure.[108]

Following the *Grondwet,* more comprehensive instructions were issued on the usage of Africans for labour in Instructions to Field-Cornets (1858).[109] Article 37 stated that all Africans had to carry a signed pass signed by the Field-cornet when 'moving about', and Article 46 prohibited the issuance of passes to Africans in order to exit the ZAR. Articles 39 and 40 required applications for African servants to be made to Field-cornets and made the procurement of such servants without his knowledge punishable by a fine.[110] Significantly, Article 45 obliged Africans to be subordinate to 'native captains', failing which they would have to be in the service of the Field-cornets.[111] Native captains were usually African leaders.[112] Field-cornets were responsible for overseeing contracts of hire of Africans and a farm owner on whose property there was 'a Kaffir kraal' was entitled to the services of 'four

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[104] Article 34 Volksraad Instructions to Field-Cornets of 23 January 1850 - Breytenbach & Pretorius *Archival Records Transvaal No. 1* p117 – Minutes of Volksraad cf: J Bergh 'White famers and African labourers …' (2010) 55 *Historia* 18-31

[105] Bergh (note 104 above).

[106] Volksraad Resolution No. 77 of 24 March 1853 - Barber Macfadyen & Findlay (note 67 above) 9.

[107] Volksraad Resolution No. 68 of 19 September 1853 - Barber Macfadyen & Findlay (note 67 above) 11.

[108] Volksraad Resolution No. 124 of 28 November 1853 - Barber Macfadyen & Findlay (note 67 above) 12; Later article 17 Government Notice No. 212 of 20 October 1885 - referring to Resolution No. 124 of 1853 reminds that 'all grounds on which there are large Kaffir kraals belong to the Government and shall therefore be inspected for the Government.'

[109] Resolution No. 183 Instructions to Field-Cornets (17 September 1858) superseded the Instructions of 9 April 1849 Eybers (note 64 above) 410.

[110] Articles 42 & 43 prescribed that the servants be treated well on penalty of a fine – should ill-treatment occur. That said, false claims of ill-treatment by servants would incur punishment (article 44) -

[111] Land was assigned to these captains for their permanent uninterrupted use – article 47 & 48. Under article 50 lands were to be identified and assigned for occupation by 'Kaffir tribes' – Eybers (note 64 above) 414.

[112] Bergh (note 104 above) 21.

coloured persons who are heads of families,' provided he paid them.[113] A pass and vagrancy system which was to be modified with ever increasing restrictions had thus been inaugurated.

Ordinance 2 of 1864 was titled '[f]or the prevention of vagrancy, thieving and other irregularities of the Kaffirs, for the protection of person, property and possessions, for the regulation and management of the Kaffir tribes, and the imposition of a tax on the Kaffirs and other coloured persons.'[114] Article 5 created more severe penalties for Africans found residing in non-designated areas near the towns or moving about without passes – they could be punished by being forced to enter labour contracts of up to two years in duration. Taxes were levied to provide for servitude to whites. Article 18 decreed that '[f]or the privileges and protection the natives enjoy …the native shall annually pay a tax for the benefit of the Government of this Republic.' Burghers were now entitled to five African households as labour and Africans residing within the ZAR, not labouring on a burgher farm, were forced to work for twelve months - six months of which was without pay, for an assigned white master.[115]

When Law No. 9 of 1870 replaced Ordinance No. 2 of 1864, it retained the taxation and pass law provisions.[116] Non-compliance with pass laws, when defaulting from within the ZAR or on entry from outside, forced Africans to enter into contracts of labour.[117] Article 16 continued the practice of charging hut taxes: two shillings and sixpence each to African head of household living on the farms of the burghers for whom they worked; Africans having landlords other than their employer had to pay five shillings and those not working for burghers at all had to pay ten shillings.[118] The Native Pass Law No. 3 of 1872 provided for the purchasing of passes for Africans issued by the designated official (*Landdrost* or Field-Cornet) at a rate of £1 sterling, on penalty of at least £10 but no more than £20 for a first offence, no

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[113] Articles 56 & 57 Instructions to Field-Cornets (17 September 1858) – Eybers (note 64 above) 415-416.
[114] Ordinance No.2 of 1864 (5 October 1864) - Barber Macfadyen & Findlay (note 67 above) 36; Bergh (note 104 above) 21.
[115] Articles 20 & 16 Ordinance 2 1864 (5 October 1864) - J Breytenbach & D Joubert (eds) *South African Archival Records, Transvaal No. 5* (1953) 271–27 cf: Bergh (note 104 above) 21.
[116] This law was intituled: 'Law for the prevention of vagrancy, theft and other irregularities among Kaffirs, for the protection of persons, property and possessions, for the better regulation and management of Kaffir tribes, and for the levying of a tax on Kaffirs and other coloured persons' – Law No.9 of 1870 (3 June 1870) in Jeppe & Kotze (note 92 above) 378.
[117] Articles 3, 23 & 13 Law No.9 of 1870 (3 June 1870); article 15 restated the prescripts of article 18 Ordinance No. 2 of 1864 mandating the payment of a tax and article 17 retained the entitlement of burghers to five laboring African households - Jeppe & Kotze (note 92 above) 379-380, 381.
[118] Article 16 Law No.9 of 1870 (3 June 1870); this was followed by Law No. 3 of 1876 regulated the registration of locations for Africans and the taxation of huts.

less than £20 no more than £40 for a second offence, and, in default, no less than 12 months no more than 24 months imprisonment.[119]

Following the British annexation, the Taxation of Natives Law No. 6 of 1880 was enacted to continue the regulation of taxation and issuance of passes to Africans. Articles 3 to 5 required an annual ten shilling levy on a hut or lodging of an African within the Transvaal; Article 7 stipulated that 'foreign' Africans had to apply for passes upon entry into the province and pay a fee of 10 shillings, and a pass had to be produced on demand, failing which there was the penalty of a fine or imprisonment.[120]

It is in the context of the existing regulations pertaining specifically to Africans that the Master and Servants Law (Law No. 13 of 1880) was enacted. This law repeated many of the provisions of the Cape Master and Servants Ordinance 1841 and those of the Master and Servants Act No. 15 of 1856 verbatim. Similar to the position in the Cape, this law did not repeal the laws directed at drawing out and controlling African labour. Therefore the extent of applicability of the 1880 Master and Servants Act should be read in light of this;[121] especially because the quantity of wide-ranging laws on African labour continued to increase.

Another significant development was the Management of Natives Law No. 4 1885, enacted 'to provide for the better management and the better administration of justice among the native population'.[122] This law explains its purpose as follows:

> 'Whereas the ignorance and the habits and customs of the native population of this Republic render them unfit for the duties and the responsibilities of civilised life, and, further whereas it is necessary and desirable to provide for their better treatment and management by placing them under special supervision, and for the proper administration of justice amongthem'.[123]

Articles 3 and 4 provided for the appointment of Native Commissioners to administer this law and have jurisdiction over all civil disputes between natives, and 'civil matters referred to him

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[119] Articles 1, 3, 5, 6 & 11 *Wet* No. 3 1872 Jeppe & Kotze (note 92 above) 473; Pass Law No. 4 of 1874 mandated the carrying and presenting of annually renewable passes by Africans ('natives') within ZAR on similar penalties of fines and imprisonment.

[120] Article 10 defined 'native' as 'any person belonging to or being a descendant of the Native Tribes of South Africa' - Law No. 6 1880 146 Barber Macfadyen & Findlay (note 67 above) 148.

[121] Law No. 13 of 1880 defines 'servant' thus: 'any person employed for hire, wages, or other remuneration, to perfrom any handicraft or any other bodily labour in agriculture or manufactures, or in domestic service, or as a boatman, porter, or other occupation of a like nature' – which appears to apply in the same manner to all people.

[122] Law No. 4 of 1885 Barber Macfadyen & Findlay (note 67 above)251.

[123] Law No. 4 of 1885 Barber Macfadyen & Findlay (note 67 above)251.

by white persons against any native belonging to a large savage tribe within his district or division.'[124] There was explicit separation of justice pertaining to Africans from that of the rest of the population, including other non-whites, predicated on their supposed less evolved human attributes. This law was referred to as authority for the manner in which Africans were to be administered as devoid of civilisation in subsequent cases.[125]

Thus far this chapter has logged the manner in which laws pertaining to the procurement and usage of labour began to develop, first in the Cape and then in the ZAR. The founding mythology[126] embedded in provisions of law has been that Africans are 'savage' expendable beings that may be exterminated, displaced, kidnapped and corralled into wage labour. What follows is exploration of labour management as mining law developed from the mid-1800s onward, starting in Griqualand West and then in the ZAR.

3.5. Developing Mining Law as Labour Law

3.5.1. Mining at Griqualand West

In South Africa the wealthiest and most labour intensive sector of employment has been the mining sector. This industry, often called the Minerals Energy Complex (MEC), includes gold, diamonds, coal, 'petrochemicals, electricity generation, processed metal products, and mining machinery.'[127] The revenue generating industry has historically been the bulwark of the South African economy. The discovery of diamonds in 1867 followed by that of massive gold deposits was to reorganise economic activities and the labour recruitment strategies in the ZAR. The recount to follow rebuts the notion that the racism – so integral to development of South African law – may be 'hived off to "specialist"' discourse on social intercourse.[128] This part illustrates the narrowing of possibilities for a wider partaking in economic activities and social

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[124] Law No. 4 of 1885 Barber Macfadyen & Findlay (note 67 above) 252; this was carried forward by Proclamation 21 of 1902 stated that a Native Court would 'have jurisdiction to try all contraventions by coloured persons of the provisions of any law or regulation applicable exclusively to such persons against any provisions of the Laws relating to Masters and Servants, and all matters of dispute of a civil nature between coloured persons falling with the jurisdiction of a Court of Resident Magistrate - Article 57 Proclamation 21 of 1901 *Transvaal Colony Proclamations from 1900-1902* (1902) 326.

[125] *Mokhatle and Others v Union Government* 1926 AD 71; *Rex v Hildick-Smith* 1924 TPD 69.

[126] Derrida describes a 'White mythology' that 'the white man takes his own mythology … for the universal form … inscribed in white ink, an invisible design' - J Derrida *Margins of Philosophy* (1972) (trans A Bass, 1982) 213;

[127] Z Magubane 'The Revolution Betrayed? Neoliberalism, Globalisation and the Post-Apartheid State' (2004) 103 *The South Atlantic Quarterly* 659

[128] A Brah Cartographies of Diaspora: Contesting Indenties (1996) 224.

systems by Africans. It detects and iterates the muted narratives embedded in labour regulation. Concerted examination of the way in which law created separations is made because each inscription also signifies a silencing. It provides an unconventional evaluation of historical mining and other law as core labour law. Importantly, Bhabha has explained that overcoming is not accomplished through detaching from the past or by finding newness, but in the 'sense of disorientation' brought on by complicating largely unchallenged polarity.[129] The resultant confusion initiates an opportunity to disengage from known classifications and to discover what may appear when incongruences are exposed. Spivak likens the gravity of this process, a mimicry that articulates the underbelly of the hegemony, to handling a fire which can either illuminate or incinerate, depending on its use.[130] Hence the necessity for a methodical reveal of the constituent parts of the system.

The story of more industrialised mining began with the detection of diamonds in Kimberley at Griqualand West. Following the discovery, claims were made on multiple fronts for dominion over the diamondiferous area by the Orange Free State, the Griqua people, the ZAR and other surrounding groups.[131] The area attracted Africans, whites from other Southern African colonies, and miners emanating from Europe, Australia and the California area of the United States.[132] The legal enactments of the Griqualand area were influential on the largely concurrent measures that were implemented in the ZAR when gold was discovered. Soon after diamonds were discovered, Griqualand West was an annex to the Cape Colony. The diggers of Kimberley played a significant role in mapping the path of job reservation in the Transvaal and later throughout South Africa.[133]

The ZAR state inserted itself in the working of the newly discovered diamond diggings by purporting to grant exclusive mining rights to a particular company in June 1870 for twenty-one years.[134] In response the small scale white diggers (including those from Europe, Australia

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[129] The separations evident in depiction of 'difference and identity, past and present, inside and outside, inclusion and exclusion' – Bhabha (note 101) above) 1.
[130] Spivak (note 3 above) 283.
[131] A Higgs *The Historical Development of the Right to Mine Diamonds in South Africa* (unpublished LLD thesis, North-West University, 2017) 30-51.
[132] P Lawrence Class Colour Consciousness and the Search for Identity: Blacks at the Kimberley diamond diggings 1867-1893 (1994)
[133] J Smalberger 'The Role of the Diamond-Mining Industry in the Development of the Pass-Law System in South Africa' (1979) 9 *The international Journal of African Historical Studies* 419-434,
[134] B Roberts *Kimberley: Turbulent City* (1976) 29; E Walker (ed) *The Cambridge History of the British Empire Vol 2* (1963) 443

and California) revolted *en masse* and declared an independent Diggers' Republic – the Diamond Diggers' Protection Association in July.[135] The Diamond Diggers' Protection Society, which barred African membership, drew up 'Rules and Regulations for the Vaal Diamond field' alluvial claims.[136] Rule 13 of the rules stated that a claim holder would be permitted no more than five 'niggers' to work on their claim.[137] The ZAR per 10 September 1870 Proclamation unsuccessfully tried to reassert its authority and relented by withdrawing the exclusive grants of claims. But the Diggers' Committee remained.[138]

Following protracted territorial dispute and arbitration, the British annexed the territory of Griqualand West in October 1871 and enacted rules and regulations for diggers which did not ban African digging licences. Proclamation No. 71 of 1871 was intitled 'Proclamation establishing Diamond Diggings, Office of Inspector of Claims, Diggers' Committees, and their Duties and Powers.'[139] Article 2 appointed an Inspector of Claims[140] *inter alia* to record the 'number of hands' a claim holder intended to employ in working the claim (Article 17). No specific prohibitions on African licences were made by this Proclamation and in fact some licences were granted to Africans. During this time the hostility of white diggers was manifest in their harassment of African and other non-white diggers, periodic attacks and accusations that they were responsible for large-scale thefts and illicit illegal trade in diamonds.[141]

A meeting of diggers on 19 July 1872 yielded the following demand from Coleman (chairman of the diggers' committee):

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[135] Smalberger (note 133 above).
[136] Rules and Regulations for the Vaal River Diamond Fields; H Simons & R Simons *Class and Colour in South Africa 1850-1950* (1969)37; H Mostert *Mineral Law: Principles & Policies in Perspective* (2012).
[137] Rule 13 - *Rules and Regulations for the Vaal River Diamond Fields.*
[138] Higgs (note 131 above) 38.
[139] Proclamation No. 71 of 1871 (27 October 1871) *The Statute Law of Griqualand West: Comprising Government Notices* (1882) 12-21.
[140] The task of the Inspector of Claims was to: keep a register of claims, and 'to receive the licence money , or royalty, or rent which may be payable for the right to search for diamonds within such claim' (article 3), to register the number of claims of each person (article 4), to mark out the claim with pegs (article 5), resolve *inter alia* encroachment disputes (article 6), register transfer of claims (articles 7 & 8) - Proclamation No. 71 of 1871 (27 October 1871).
[141] S Trapido 'Imperialism Settler Identities and Colonial Capitalism: The Hundred Year Origins of the 1899 South African War' (2008) 53 *Historia* 45, 51-52.

> 'What the masters want was that no claims should be held by natives; that all native servants should be registered; name, number and claim; that right of search should be given tomasters; … that natives should not reside in the camp more than twenty-four hours without a master.'[142]

The local British Commissioner on 23 July 1872 suspended digging licences held by Africans and other non-white persons through Proclamation No. 49 of 1872.[143] On the same date of 23 July 1872, a notice was issued which had major implications for African mobility, occupational freedom, titled: 'Government Notice establishing Servants' Registry and publishing Regulations'.[144] A registry 'for the purpose of assigning or contracting all the natives who come for the purpose of seeking employment' was to be established; all Africans employed by diggers ('persons in this field') were to carry a 'document' permitting police and any employers 'to search at any time the persons or premises occupied by said servants'; Africans 'seeking employment' were to report to the designated depot to obtain a daily pass; no African was to be permitted to be in the diamond fields 'without a pass, or without registering … at the depots, and shall be compelled to exhibit such pass to anyone who may demand it'; all African ('labourers or servants') who wanted to leave after their contract expired had to apply for a pass to leave the diamond fields; the registration fee was to be deducted from the wages of the employee when he applied to leave the fields; and a nine p.m. curfew was set for the presence of Africans in the diamond fields.[145]

The Proclamation amending Master and Servant Proclamation 14 of 1872 applicable in Griqualand West was announced on the same day as the Proclamation cancelling the suspension of issuing licences to Africans (10 August 1872).[146] It required an applicant for a claim licence to first obtain certification of his good character (Article 2). It also required the registration of servants by masters to a prescribed 'register of servants'. It limited oral contracts to one month (Article 5). A written contract of more than a month had to be registered (Article

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[142] *Diamond News* (24 July 1872) cf: Smalberger (note 133 above) 430.
[143] Indeed 46 non-white digger claim licences were suspended. A purported restorative condition being that Africans had to obtain a certificate of good character from the Diggers' Committee or seven white claim holders to obtain a licence – Proclamation No. 49 (23 July 1872).
[144] Government Notice No. 68 Servants' Registry *The Statute Law of Griqualand West: Comprising Government Notices* (1882) 63-64.
[145] Articles 1, 2,3, 4, 5, 6, 7 & 9 Proclamation No. 68 Servants' Registry. Even though Proclamation No. 16 of 1872 cancelled the suspension of granting of Claim Licenses to Africans, by then the Servant's Registry had been established and the stipulation of a certificate of good character per the diggers' committees ensured that no non-white person would ever be granted license to dig.
[146] This law amended the Cape Colony Masters and Servants Act No. 15 of 1856 in the Griqualand West – Article 1 Proclamation No. 14 of 10 August 1872.

6). There was issuance of a certificate of registration (Article 10) to be produced on demand to (among others) claim holders (article 11). Claim holders were entitled to search their servants for diamonds (Article 13), and loiterers without passes could be arrested without warrant and punished – fined or imprisoned for up to three months (Article 21).

The requirement to obtain a fit and proper certificate (Article 2), from a 'magistrate' or 'justice of the peace specially authorized by the Governor to grant such certificates', was a mammoth huddle for non-white applicants, and virtually impossible for Africans. This was especially because the Government Notice 68 of 1872 prescripts on a Servants' registry had already removed Africans from the arena of prospective claim holders.[147]

Throughout the 1870s the Diggers' committee, comprised of white miners, continued to exert influence on the formulation of mining policy and law. The white miners' revolt of 1875 sought to exclude Africans from all forms of mining except that of labourers supervised by white miners. According to Sutton, the 'revolt was the first step in the growth of the South African white trade union movement.'[148]

3.5.2. Mining, Land Occupation and Pass Laws in the ZAR

3.5.2.1. Gold Laws up to the 1880s

Harris explained three interlinked components used to structure the extraction of gold deposits on the Witwatersrand, namely, 'capital, skill and cheap labour.'[149] Like the early commercial

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[147] Subsequently the Master and Servant amendment Proclamation (1872) was solidified by Ordinance No. 10 of 1876 Native Labour Regulation Ordinance, a African specific modification of the Regulations under Government Notice 68 of 1872 (operating parallel to the Master and Servant amendment), which defined 'native' as 'any member of any South African tribe' (article 2); natives had to carry a pass when entering the Griqualand West Province signed by the designated functionary – on penalty of *inter alia* imprisonment (article 3); article 3 punishment also applicable to breaches of employment/labour contract by Africans (article 20); Ordinance No.11 of 1879 Native Locations Ordinance (13 June 1879) – provided for the supervision of native locations in Griqualand West which had been established by Act No. 6 of 1876 and Act No. 8 of 1878 of the Cape of Good Hope - Native Labour Regulation Ordinance No. 10 of 1876 (6 November 1876). Commenting on the above laws Smalberger, who credits Government Notice No. 68 (23 July 1872) and Proclamation No. 14 of 1872 (10 August 1872) with introducing the modernised version of the pass-law sytem, states that '[b]lacks not only suffered under the constraints, they paid for maintaining them' – Smalberger (note 133 above) 432.

[148] I Sutton 'The Diggers' Revolt in Griqualand West 1875' (1979) 12 *The International Journal of African History* 40-61, 40; R Turrell 'The 1875 Black Flag Revolt on the Kimberley Diamond Fields' (1981) 7 *Journal of Southern African Studies* 194-235, 200-201; Smalberger (note 133 above) 419-434.

[149] 'The vast amounts of capital needed for shaft sinking, timbering, stoping, lashing, hauling, crushing and chemical processing was supplied primarily by wealthy entrepreneurs from overseas…, with the overwhelming percentage coming from Great Britain. These investors amalgamated their claims, founded groups and formed a centralized organization (The Chamber of Mines) which made for highly monopolised financial control' - K

farmers, from its inception the industry has been reliant on policy and law-making efforts to draw out and control a steady supply of African labour on the cheap. Political investment in and support of the state has been evinced in law and policy. Initially much of the skilled and experienced labour came from Britain and other parts of Europe, whereas cheap labour was sourced in abundance from African workers. Due to their skills the European miners were in high demand and able to attract high wages.[150]

The first and second Gold Laws, Law No.1 of 1871 and Law No. 2 of 1872, reserved the right to mine precious stones and metals on land for the state, conditional on taking into account the rights of land owners and other private property entitlements.[151] Once minerals were detected the state could then declare a site open by lawful process for prospecting and mining (digging) – public diggings. Prohibition of equitable African participation in mining was announced in Article 16 of Law No. 7 of 1874, which provided that 'every white person' who subjected himself to the laws of the land would be entitled, on following prescribed process and tendering payment, to a digger's licence and the right to prospect.[152] This was reiterated in Article 18 of law No. 6 of 1875, which in Article 2 described a person (for purposes of the law) as a holder of a diggers' or trading licence 'or any other individual'.[153]

Harris 'Early Trade Unionism on the Gold Mines in South Africa and Australia: A Comparision' (1990) 35 *HIstoria* 76, 83

[150] On the Rand 'the ore was the lowest grade of any major gold field. In order to obtain twenty-one grams of gold, two tons of ore had to be unearthed … Much of the gold was located deep in the earth and its recovery required extensive (and expensive) machinery which had to be imported from overseas. … the mine owners also needed skilled deep-level miner in order to begin mass production of gold' - J Nauright 'Cornish Miners and the Witwatersrand Gold Mines in South Africa 1890-1904' in *Cornish History* 1-2 available at https://www researchgate.net/publication/285584537_Cornish_Miners_and_the_Witwatersrand_Gold_Mines_in_South_Africa_c_1890-1904, on 22 April 2020; Harris (note 149 above) 88; H Giliomee '"Wretched folk, ready for mischief": The South African state's battle to incorporate poor whites and militant workers 1890-1939' (2002) 47 *Historia* 601, 611,

[151] In this context such rights could only be held by burghers and/or other juristic persons. Article 6 provided that the Mining Commissioner would select a diggers' committee comprising five members (article 7) and make regulations for its operation – Articles 1, 6, 7 Law No. 1 of 1871, Article 1 Law No.2 of 1872 (26 October 1871) Jeppe & Kotze (note 92 above) 465-468; Higgs (note 131 above) 201-202. When minerals were first discovered and with that the prospect of mining being entertained in the ZAR, the *Volksraad* Resolution of 1858 stated that the owners of properties on which minerals were found, were obliged to sell or lease the farms to the Government 'at a fair price' - Article 29 Volksraad Resolution from 14th to the 23rd September 1858 - Barber Macfadyen & Findlay (note 67 above) 22. This decision was soon revoked and no expropriations of white farms were enforced - Article 68 Volksraad Resolution 21 September 1859. Then Ordinance 5 of 1866 (31 October 1866) enacted law for mining in the ZAR and the manner in which mining companies were to be constituted. These mining companies were to declare the minerals extracted to the state, as well as pay a portion of the value of what was mined to the state - Article 2 & 3 Ordinance No. 5 1866 (31 October 1866).

[152] Law No. 7 of 1874 - Jeppe & Kotze (note 92 above) 591-593.

[153] The law also provided for a diggers' committee convened at the behest of the Gold Commissioner (article 9) - Law No. 6 of 1875 Jeppe & Kotze (note 92 above) 622-632.

Gold Law Law No.1 of 1883 ushered the temporary usurping by the state of ownership of land in which metal and stones were mined, with certain concessions to erstwhile title holders.[154] Thus the state gave itself all mineral rights and doled out compensation for the claim holder, prospector, owner of land and other private rights holders. Article 13 pronounced the selection of a Diggers' Committee of licence holders by the mining commissioner which would, together with the commissioner determine mining regulations. Once again the law pronounced that every white person had the right to apply for a licence to prospect and pay a fee of 10 shillings per month (Article 22). Furthermore no 'coloured' person was capable of holding a licence of any kind or in any manner to work on a gold field, unless labouring in service of a white person (Article 26); no one was to pay a 'coloured' servant with raw gold or buy raw gold (or uncut precious stones) from a 'coloured' person (Articles 27 and 28);[155] a 'coloured' servant who failed to perform properly in terms of his labour contract would be guilty of an offence and pay £2, or face one month imprisonment with hard labour and a maximum of 25 lashes (Article 39).

Gold Law Law No. 8 of 1885 returned to the original arrangement, where the state did not claim ownership of the land and its product (the stones or metal), but merely gave itself mining rights.[156] This law defined 'coloured' as every African, Asiatic or coloured person, Coolie or Chinese (Article 89). Article 61 stated that a white person could get a diggers' licence for £1 a month where a public digging had been declared, and also a prospector's licence for 10 shillings a month. No Coloureds, Coolies or Chinese people were to be deemed capable of holding a licence of any kind in any manner connected to being able to work in a gold field, except as a labourer under white people (Article 76). Articles 77, 78 and 79 reiterated the prohibition of the payment in raw gold or uncut diamonds to coloureds, as well the possession or dealing in these mineral by such coloureds. Again coloured servants that did not fulfil their contractual duties were liable to a fine, and or imprisonment and corporal punishment, andthe servants had to be registered with the Mining Commissioner (Articles 83 and 84). Articles 85 and 86 provided for the compulsory granting of permits to coloured workers at themines.

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[154] Article 2 Law No. 1 of 1883 - Jeppe & Kotze (note 92 above) 1156.
[155] Paying a coloured servant with raw gold or buying raw gold (or uncut precious stones) from a coloured person was punishable by £500 and £1 000 respectively, while a coloured person found selling or handling the same would be punished with imprisonment and/or hard labour for twelve months – Article 27, 28, 29 Law No. 1 of 1883 Jeppe & Kotze (note 92 above) 1161.
[156] Law No. 8 of 1885 Jeppe & Kotze (note 92 above) 1377-1395.

3.5.2.2. Occupation and Pass Regulation 1890-1900

Throughout the 1890s residential and mobility restrictions became more pronounced. The Squatters Law of 1895 (Law 21 of 1895) echoed earlier law prescribing reserves for African occupation, stating that in order to prevent the spread of disease in the ZAR as well as to stimulate availability of labour while protecting property, 'the squatting, living or congregating of natives or other coloured persons in places other than those appointed for them' was being curbed.[157] Africans were to occupy 'locations or places already appointed', except that 'five native households at the most [could] … live together on private properties' as long as they were working under white people (Article 2). Articles 3 and 4 gave white land owners, lessees, tenants or residents 'the right to keep five coloured families as servants' per farm. Article 8 provided that Africans wishing to leave had to give prior notice of three months or be liable to a maximum £10 fine or up to one month imprisonment.[158]

A Native Pass Law (Law 22 of 1895) followed on from the Squatter Law to enforce stringent adherence to enforced carrying of passes.[159] Article 16 described a native as 'any person belonging to, or being a descendant of any native races of South Africa whatever.' Any African moving within the ZAR had to first make sure he had obtained a pass granted by his master, the captain of a location or a missionary of the station where he lived, and the purpose of the journey had to appear thereon (Article 2). Africans journeying outside their designated residential district for business other than that of a master still had to get a permit at a cost of 1 shilling (Article 3). Those entering from outside the ZAR needed to get a pass on arrival and those leaving the ZAR also needed to have a pass to do so (Article 4). Failure to carry the required passes resulted in Africans being treated as vagabonds and arrested 'by order of any white person, in order to be brought to such nearest official office' (Article 6).[160] Employers first had to require the pass of the African prior to hiring him or her and then keep the pass until

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[157] Squatters Law Law No. 21 of 1895 (16 September 1895) C Jeppe & J Van Pittius *Statute Law of the Transvaal 1839-1910: In force on 31 May 1910 Vol. 1* (1910) 329-330.

[158] Law No. 21 of 1895 repealed the Squatters Law Law No. 11 of 1887; moreover Volksraad Resolution of 10 June 1891 determined that Commissioners for Natives 'see that henceforth no natives shall reside on Government ground which is not intended for location purposes, on pain of'a fine – Barber Macfadyen & Findlay (note 67 above) 380.

[159] Native Passes Law No. 22 of 1895 (2 October 1895).

[160] In terms of article 8 the penalty for being found vagabond was a fine or imprisonment with hard labour for up to 14 days or up to 15 lashes - Native Passes Law No. 22 of 1895 (2 October 1895).

the work contract was fulfilled (Article 11). A penalty for a master who retained the pass of an African unlawfully was a fine not exceeding £50 (Article 12).

Within a day of the passing of the Native Pass Law, the Native Pass Law for Gold Fields (Law 23 of 1895) was issued,[161] and that was soon replaced by Law No. 31 of 1896 which mandated the carrying and presentation of district passes and wearing of metal badges, as well as the usual travel passes, for African men working at the mines. On the same day, the Native Law for Gold Fields was passed, and another Hut-tax law (Law 24 of 1895) was approved.[162] An annual ten shilling hut tax was due from every African male over the age of 21 years – 'unmarried or married to one wife [to be] … accessed as one hut, and each additional wife as one hut more.'[163] A further annual £2 'road tax' (Poll tax) was levied.[164] These controls directed at Africans were endorsed by Article 5 of the 1896 Gold Law (Law No. 21 of 1896) which read as follows:

> '[t]he State President shall also have power, with the advice and consent of the Executive Council, to make provisions and regulations, whether general or special … for the regulation of matters mentioned in this law or connected therewith, provided they are not in conflict with this law, as, for instance, regulations with regard to the method of digging and mining, … and such other subjects as shall appear to him to require further regulation, under which may also be included the registration of and the issue of passes to coloured people.'

Goldfields Pass Law (Law No. 31 of 1896) installed amended regulations '[f]or the purpose of facilitating and promoting the supply of native labour on the public diggings of the Republic, and for the better controlling and regulating of the natives employed, and the relations of employer and native labourer.'[165] Article 4 described 'native' as 'males of all the native and coloured races of South Africa.' All Africans entering the districts covered had to have passes. An African servant moving about in the district designated in the pass on his employer's service would only be protected when he carried an additional pass – as required by Article 1 of Law 22 of 1895 (Article 4). When entering the gold field, the African was to report to the Mining Commissioner to swap his travel pass for a district pass (Article 5). A

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[161] Native Pass Law for Gold Fields Law No. 23 of 1895 (3 October 1895).
[162] Law No. 24 of 1895 (3 October 1895) superseded Law No. 6 of 1880.
[163] Article 1 Law No. 24 of 1895 (3 October 1895).
[164] Africans living at the premises white people as servants, the elderly and infirm and those in the employ of Native Commissioners were exempted from the 'road tax' – articles 2 & 3 Law No. 24 of 1895.
[165] Native Pass Law Law No. 31 of 1896 (15 May 1896).

native who failed to find employment within three days had to return to the Mining Commissioner for an extension on the pass (Article 9). Article 11 read as follows:

> 'A native working on a proclaimed goldfield, and wishing to remove from one labour district to another, on such or any other proclaimed goldfields, or to his home, or to any part of the Republic, if beyond the labour district, shall first apply for leave to do so from the Mining Commissioner or other appointed pass officer in his district, and such leave shall be granted him, provided he then holds a district pass, in clear order, with metal badge, and that his last employer, if any shall have filled in the full discharge required on the district pass, form A. Thereupon the Mining Commissioner … shall issue a travelling pass of the form set out in schedule C, in exchange for the district pass and the metal badge held by such native, on the payment by the native of a fee of one shilling.'

Under Article 14, any African found without the required pass or passes could be punished with a fine of up to £3, imprisonment of up to three weeks with hard labour (first offender); a fine of up to £5, or four weeks imprisonment with hard labour and lashes.[166] In terms of Article 27, special labour inspectors were to be appointed to enforce pass laws, tasks which included *inter alia* checking passes. Article 32 read:

> 'All contraventions of these regulations and of any of the provisions thereof shall be cognisable by any Court having jurisdiction under the Master and Servants Law, No. 13 of 1880, and under Law No. 22 of 1895 (Native Pass Law), and in whose jurisdiction the offender may be found. And such Courts are authorised to adjudicate on all such contraventions, and to impose the fines and penalties in these regulations and the schedules thereof provided for.'[167]

This provision shows further complementarity of these labour regulations with the Master and Servants Act. It is the context of these regulations that the Gold and Diamond laws of 1898 were poised to complete the overarching labour structure for mineworkers.

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[166] Article 16 stated that possession of counterfeit passes was punishable by up to £5 fine with imprisonment of up to a month and lashes not exceeding 25. Article 19 prohibited 'any person' meaning any white male (employer) from using African (and other 'coloured') labour in contravention of the pass laws. Article 20 mandated the registration of African labour by all employers in line with district pass law prescripts. Article 21 provided that the district pass was to remain in the employer's possession for the duration of employment. Article 22 stated that breach of Articles 19-21 by employers was punishable by up to £100 fine in respect of every native employed, or 'in default imprisonment of up to six months with hard labour - Native Pass Law Law No. 31 of 1896 (15 May 1896)

[167] As amended by Law No. 23 of 1899.

3.5.2.3. Key Mining Law 1890s

The Gold Law of 1898 (Law No. 15 of 1898) used the term 'coloured person' to denote 'any African, Asiatic Native or coloured American person, Coolie or Chinaman.'[168] As per Article 22, a landowner could prospect on his land and employ coloured persons for doing so. Even on African locations (areas reserved for African occupation) prospecting was to be carried out by white persons having government authorisation.[169] Once more, law specified that every adult white male was entitled, on application and submission of relevant documentation, to obtain a digger's licence to mine once a public digging had been declared.[170] Furthermore, white persons wanting to build shops or houses in the declared digging area could seek a permit to do so from the Mining Commissioner.[171] Article 133 explicitly announced that 'no coloured person may be a licence holder, or in any way be connected with the working of the diggings, but shall be allowed only as a workman in the service of whites.'[172] Article 150, which acknowledged the operation of Law 31 of 1896 stated that '[e]very coloured person of African origin' within the boundaries of a public diggings had to get a month pass from the Mining Commissioner.[173] Arguably formalisation of pervasive workplace colour bar was evident in this law as well as in the Mining Regulations of (Law 12 of 1898) where it was stated that engine driver certificates could not be awarded to coloured persons.[174]

Following the Gold Law (Law 15 of 1898), the Diamond Law (Law 22 of 1898) was also approved. The Diamond law also used 'coloured person' to encompass non-white people,

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[168] Article 3 Law No. 15 of 1898 (6 October 1898).
[169] If minerals are found the State President could proclaim public diggings on (a portion or the whole of) the identified African location. The white person who had been granted prospecting rights could then be given digging rights. Compensation of ¼ or ⅓ of the proceeds of the licence would be given to the Chief and his people – plus a further compensation to the chief. Thus Africans were not permitted either to prospect for to dig for precious metals on the lands they occupied – Article 49 Law No. 15 of1898.
[170] Article 59 Law No. 15 of 1898.
[171] Article 92 Law No. 15 of 1898; in contrast Africans were required to carry passes and be out of the vicinity and in assigned locations by the set curfew times.
[172] Article 133 Law No. 15 of 1898; buying unwrought precious metals from coloured persons was punishable by up to '£1 000, or imprisonment, with or without hard labour, for a period not exceeding the term of five years' (article 148); article 149 stated that a coloured person found in possession of or selling unwrought precious metal would be liable to up to fifty lashes and up to five years imprisonment 'with or without hard labour' (article 149).
[173] Article 151 stated that a coloured person in a contract of service to a master (whether written or verbal) who contravened it or left without permission or failed to perform duties properly was liable to punishment of a fine up to £2 with or without hard labour, or imprisonment of up to a month, or up to 25 lashes - Law No. 15 of 1898. [174] The engine driver's certificates in the mine was 'used for raising and lowering persons in a shaft, or drawing the same along an engine-plane' and required a certificate of competency prior to use – Article 104 Law No. 12 of 1898.

while limiting the quantity of white employees per landowner to four.[175] White males who had reached the age of sixteen years as well as white women legally permitted to act for themselves, had a right to obtain digger's licences (Article 25). The State President had power to regulate the workings of digger's committees on diamond diggings (Article 82). Article 83 made provision for 'Kafir Dwellings' whereat Africans would be 'kept' 'without being allowed to leave such compounds for any other purpose than to perform mining work' until the expiry of their six month contract of work (Article 84).[176] The Native Pass Law on the Goldfields, Law No. 23 of 1899 went so far as to make provision for guard rooms to be built so that Africans contravening regulations could be confined there.[177] The handling of and trade in diamond was prohibited for all coloured people (Article 122), while 'Pass Laws for public diggings' were extended to cover precious stone sites (Article 126).[178] Article 127 reiterated that '[a] coloured person shall not be capable of being a licence holder or in any way connected with the working of the diggings, but shall only be allowed as a servant in the service of whites.'[179]

According to the 1904 census of the Transvaal colony, the total population was 1 269 951 people. It consisted of 937 127 African people (73.79%), 297 277 White people (23.40%), 24 226 Coloured people (1.90%), and 11 321 Asian people (0.89%).[180] At all times Africans were the most populous and worst affected group in labour relations.

3.5.3. British Annexation of Transvaal, 1900

The British Annexed the ZAR in 1900 during the Anglo-Boer War and the Transvaal Colony was reinstated. Proclamation 37 of 1901 aimed to modify laws on the entry and exit of Africans

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[175] '"Coloured person" shall signify every African, or Asiatic native, or coloured American person, Coolie or Chinaman' (article 3), landowners could prospect within their property without a licence and could employ no more than four white persons, 'besides coloured persons' for the task (article 4) - Diamond Law Law No. 22 of 1898 (8 December 1898) Barber Macfadyen & Findlay *The Statute Law of the Transvaal* (1901) 983

[176] Article 83 & 84 Diamond Law Law No. 22 of 1898 (8 December 1898); sale of liquor to coloureds housed in compounds is prohibited (article 90).

[177] In Johannesburg, Boksburg and Krugersdorp guard rooms were to be constructed and Africans/other non-white people, found without passes or having contravened this law, were to be kept there for 6 days (article 38); all employers needing labourers could notify the Pass Officer and if 6 days passed without a master claiming the apprehended African, punishment would be meted out and the African would have to select or be given an employer from the list, failing which he would be handed over to the Landdrost who will punish criminally using article 16 – article 38 & 40 Law No. 23 of 1899.

[178] Soon thereafter the Native Pass Law 1899 also reminded that 'unless otherwise provided in these Regulations, in no way be considered to be in conflict with Law No. 13 of 1880 [Master and Servant Act], No.3 of 1876, and No. 6 of 1880, or with Law No.22 of 1895 (Native Pass Law)' – Law No. 23 of 1899.

[179] Diamond Law Law No. 22 of 1898 (8 December 1898).

[180] The Union census report 1911 estimated the total population of South Africa to be 5 973 394 – A Christopher 'The Union of South Africa census 1911-1960: An incomplete record' (2011) 56 *Historia* 1-18, 5

to the colony, regulate movement of Africans inside the Transvaal, 'and for the control and regulation of Native labourers on Public Diggings'.[181] The proclamation repealed law No. 22 of 1895 and Law 23 of 1899 only to the extent of their incoherence with the proclamation. This law more deliberately criminalised being an African without possession of a pass in the Transvaal. Article 2 encouraged the reporting of such Africans, stipulating that half of the up to £10 fine for contravention would be awarded to informants; Articles 5 and 6 appointed a Native Inspector for a designated labour district to inquire 'into and determine grievances, disputes, breaches of discipline and contraventions of regulations'. A 'Pass Office' was to be established in each labour district. Schedules entitled 'General Pass Regulations and Regulations for Labour Districts' marked 'A' and 'B' respectively were also appended to proclamation 37 of 1901 for the implementation of pass law.[182] A copy of the Pass Form No. 1 G may be found in Appendix A of this thesis. Later the Native Passes Amendment Ordinance No. 27 of 1903, was enacted to amend Proclamation 37 of 1901 by extending the application of the Pass proclamation to Africans generally, not just 'on public diggings'.[183]

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[181] '[N]ative' was defined as inclusive of 'any male person above the age of fourteen years belonging to any of the aboriginal races of Africa south of the Equator and every male person one of whose parents belongs to any such race' – article 4 Transvaal Proclamation No. 37 of 1901 (10 December 1901).

[182] Entry and exit of Transvaal by an African required a specific pass (art 1); on entry (from outside) an African carrying a pass required the endorsement of the Transvaal Pass Officer before proceeding to his destination (art 2); inside the colony the African needed the permit from the employer (farm owner) or appointed official (art 3); an African seeking work had to get a pass from the Pass Office and pay 1 shilling (art 4); an African without a pass would be arrested (art 6); no employment without passes was permitted (art 7); the pass officer had the power/discretion to refuse to grant a pass 'for any reason appearing to him sufficient'(art 13); such refusal was forwarded to the Magistrate (art 14) or to the Native Commissioner who had final authority on issuance (art 15); Schedule B 'Regulations for Labour Districts' in terms of Proclamation 37 of 1901 stated that Africans had to have an Identification Labour Passport in which were recorded all his movements (art 1); licensed Labour Agents bringing in Africans had to present the African along with the labour contract to the pass officer (art 3); African under a Labour agent had 3 days to get to Pass Office (art 4); passport obtained from pass office on payment of 1 shilling by the African; an African without agent had to report to pass office within 24 hours of arriving at the district (art 5); moreover '[a] labour contract or agreement with any Native shall not, unless with the special sanction of the Commissioner for Native Affairs, extend beyond one year' – '313 working days' – after which it had to be renewed. But the native needs to have worked the full 313 day for the contract to exprire (art 9). Desertion was an offence punishable by up to £10 or up to three months imprisonment with or without hard labour – moreover the African had to complete the term of employment if the employer so wished (art 13) – Schedule A & B Proclamation No. 37 of 1901 (10 December 1901) General Pass Regulations.

[183] Native Passes Amendment Ordinance No. 27 of 1903; the Urban Areas Native Pass Act No 18 of 1909 regulated issuance of passes to Africans males, who were above the age of fourteen years, in urban areas. The Act empowered the Governor to 'make, alter, or rescind regulations' which administered matters which included: '(a) … the issue of passes to and the compulsory carrying of passes by natives in urban areas, and imposing a charge on the issue of the pass not exceeding one shilling per month payable in advance by the native; (b) the supervision and control of natives and their sojourn in urban areas; (c) the conditions under which contracts of service entered into by natives in urban areas shall be regulated and enforced; … (e) prescribing penalties for a breach of any such regulations' - Urban Areas Native Pass Act 18 of 1909 (Transvaal Colony).

Ordinance 20 of 1902 was entitled 'Ordinance to Amend certain Laws relating to the Taxation of Natives' (repealed Law 6 of 1880 and Law 24 of 1895) and raised the annual tax to £2 sterling payable 'by every adult male aboriginal native domiciled in the Transvaal' – a 'consolidated tax'[184] – and again for every additional wife the African had to pay £2. Default of payment was punishable by a fine of up to £10 or up to three months imprisonment with or without hard labour (Article 5). The ordinance was much the same in spirit and substance as the Hut taxes of 1880 and 1895.[185]

The Precious Stones Ordinance No. 66 of 1903 amended the Diamond Law of1898.[186] The law still limited licenses to prospect and dig to white men (Articles 4, 45 and 46). It now fell to the Lieutenant Governor to appoint a digger's committee and set out its powers and functions, and abolish or dissolve it (Articles 56-58). Chapter 8, headed 'Compounds and Searching of Natives', provided that 'coloured' persons were to be employed at mines or diggings under renewable voluntary contracts of no more than three months (Article 59). The building of compounds to house these labourers was to be done once submitted plans were approved by the Inspector (Article 60). Article 68 empowered the Commissioner to issue regulations for the proper process of searching Africans at mines or diggings.[187] Despite the extensive clauses of the ordinance, Africans were only referred to directly as it pertained to the manner of restriction to compounds and the enabling of routine searching. At all other times it is clear that where the Ordinance referred to a 'person' this signified a white maleperson.

3.5.4. Codified Collective Bargaining: Industrial Disputes Act PreventionAct

By the end of the late 1800s the idea of a single colony incorporating the whole SouthAfrican land mass belonging to people of European descent had taken root – 'a white man's country'.[188] The Diggers' Committees, now fully integrated into the scheme of mining relations, were the precursor to the peculiar kind of collective bargaining that arose. These committees were

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[184] Article 2 Transvaal Ordinance No. 20 of 1902; exemptions were granted for the chronically ill and indigent (article 4).
[185] Subsequently the Native Tax Act 9 of 1908 amended tax amounts thus: every farm labourer – one pound; a municipal location resident – one pound; an adult not domiciled in the Colony but residing for 12 months – two pounds (section 3) - Native Tax Act 9 of 1908 (Transvaal Colony).
[186] Precious Stones Ordinance No. 66 of 1903 (Transvaal Colony).
[187] Precious Stones Ordinance No. 66 of 1903.
[188] After the Anglo-Boer War the British High Commissioner Milner stated '[w]e do not need a white proletariat … The position of the whites … requires that even their lower ranks should be able to maintain a standard of living far above that of the poorest section of a purely white community' - C Headlam *Milner Papers* Vol 2 (1931) 459.

committed to the exclusion of Africans from the moulding of developing industrial relations. When trade unions were formed they were convened on the basis of strictly white membership. The Witwatersrand Mine Employees' and Mechanics' Union (WMEMU) 1892 was formed by skilled white immigrant miners and was the first major trade union on the Rand. The formation of the union was prompted by the looming possibility of widespread recruitment of European miners, which would lower wages and employment for existing white miners.[189] Furthermore, there was a fear of replacement by the numerous low-wage African workers. The WMEMU lasted until 1895. The Transvaal Miners' Association, which morphed to Mine Workers Union (MWU) in 1913, was formed in 1902 and it endured.[190] Development of legally sanctioned collective bargaining to shape in the Transvaal colony, where mediation of industrial disputes to avert strike action through conciliation, was instated.

Following the labour unrest of white workers in 1907, the Industrial Disputes Prevention Act 20 of 1909 created a department of labour to prevent strikes among employees or lockouts by employers 'and to make provision for the settlement of Industrial Disputes by Conciliation after Investigation'.[191] For purposes of curbing strikes and lockouts the Act was applicable to the mining industry, work done by local authorities, and 'any other undertaking, trade or industry to which the Governor may, by proclamation in the *Gazette*, apply those provisions.' The Act defined 'employee' as 'any white person engaged by an employer to perform, for hire or reward, manual, clerical, or supervision work in any undertaking, trade, or industry to which this Act applies'; and 'employer' as 'any person or body of persons, whether corporate or unincorporated, employing ten or more white persons upon any undertaking or at any trade or industry to which this Act applies'.[192] Engagement was clearly valid only as it applied to white workers. Even non-whites, other than Africans were excluded from theambit

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[189] D Clark J Fage, R Oliver, RA Oliver & G Sanderson *The Cambridge History of Africa Vol 6* (1975) 469; Simons & Simons (note 136 above) 53.

[190] The Transvaal Miners' Association was formed in response to the allocation of skilled and semi-skilled work to Africans by mining companies – in an effort to cut costs. The demand and formal installation of a colour bar has been somewhat misleadingly interpreted as a form of 'craft unionism.' These unions were convened on the basis of strictly white membership.

[191] The Act defines a 'strike' as 'the cessation of work by a body of employees acting in combination, or a concerted refusal, under a common understanding, of any number of employees, to continue to work for an employer in consequence of a dispute, when such cessation or refusal is for the purpose of compelling their employer, or of aiding other employees in compelling their employer, to accept specific terms of employment'; whereas a 'trade union' is defined as 'any lawful organization of employees formed for the purpose of regulating the relations between employers and employees' - Industrial Disputes Prevention Act 20 of 1909 (Transvaal Colony).

[192] Section 2 Industrial Disputes Prevention Act 20 of 1909 (Transvaal Colony).

of the Act. The 'Inspector of White Labour' was to be appointed to manage the dispute resolution process by *inter alia* receiving disputes and convening a board for purposes of resolving disputes. Moreover, the Inspector was tasked with investigating 'the causes of lack of employment in [the Transvaal] … Colony among white persons, and matters connected therewith', as well as to 'investigate … on behalf of, white employees as to their treatment by employers and the conditions of their employment and report the result to the Minister'.[193] Section 6(1) of the Act outlawed strike action or lockout related to an industrial dispute until the board had investigated and made recommendations which had been published for atleast a month.

3.6. Conclusion

The law pinpointed in this part has shown expansion of the established pattern regarding the depiction of Africans in the labour relations scheme. Though characterised substandard and peripheral, the laws show that the presence and efforts of Africans in the establishment and operation of the colonies has been indispensable. It remains then to ponder whether the intent of labour laws may be changed while retaining substantially the same overall constituents. The following question has been posed: Has 'the bitterness and humiliation of the experience that virtually enslaved … [Africans] nevertheless delivered … benefits over time that seem to have turned colonialism into a much less unpleasant thing'?[194] Have *they* nonetheless given *us* 'progress and modernization [,] … order and a kind of stability'?[195] These kinds of questions serve to draw essences where none really exist – us and them. They provoke totalising arguments along the lines of good versus bad, weak versus strong or right versus wrong. They leave no room for ambiguities. Cognisance of a speaker's location and paradigm of thought is more important. It exposes that it is fruitless to look 'for non-imperialist alternatives in a system that has simply eliminated, and made unthinkable, all other alternatives to it.'[196] Instead, a penetrating reflection on colonialism should begin to illuminate the cracks or flaws within

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[193] Section 4(i) & (j) Industrial Disputes Prevention Act 20 of 1909 (Transvaal Colony).
[194] E Said 'Intellectuals in the Post-Colonial World' (1986) 70/71 *Salmagundi* 44, 45; South African politician Helen Zille has famously asserted that colonialism introduced some positive things such as infrastructure modernisation, the judiciary in its current form and healthcare – '"Colonialism wasn't only negative" Helen Zille' (16 March 2017) available athttps://businesstech.co.za/news/general/164777/colonialism-wasnt-only-negative-helen-zille/, accessed on 13 December 2019.
[195] '[T]he colonial encounter continues, as much in the drawing of lines and the defending of barriers, as in the enormously complex and interesting interchange between former colonial partners' – Said (note 194 above) 47, 50.
[196] Said (note 194 above) 49.

idealised formations such as eurocentrism, democracy and so-called advanced economic arrangements.[197] The incessant reinscription in law of the exclusion of Africans on the one hand and the primacy of white people on the other hand, is indicative of Bhabha's cyclical pattern which denotes the instability of colonial dominion. A 'process of ambivalence, central to the stereotype'.[198] The repetition of the similar provisions in this chapter has been deliberate. Slippage happens with the recurring reference to the labelling of Africans. It inevitably affects the reading and the reader, consciously and unconsciously, by evoking the context surrounding the enactments as well as an excess of the ideology represented.[199]

Looking back in this way a thinker becomes open to considering that the conventional discourse of human rights, so prevalent in current South African legal reasoning, is as much about concretising distinct entitlements as it is an exercise in dispensing those entitlements to the chosen.[200] With this in mind the next chapter discusses the labour policy and the industrial relations model which was installed in the Union of South Africa in 1910 and the how it compares to conventional understandings on the purposes of labour law.

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[197] Said (note 194 above) 45.

[198] Bhabha discloses 'dependence on the concept of "fixity" … as the sign of cultural/historical/racial difference in the discourse of colonialism … [which] connotes rigidity and an unchanging order as well as disorder, degeneracy and daemonic repetition' – Bhabha (note 101 above) 66. Asserting superiority and control over the African was been constantly reaffirmed in the laws over the period examined, because colonial dominion is by nature volatile - the desired stasis cannot be accomplished.

[199] Found in the constitutional law, treaties, conventions, property laws, occupational restrictions and Pass laws, mining regulations which have all been shown to express labour law. It is a 'sign of the inappropriate … recalcitrance which coheres the dominant strategic function of colonial power, intensifies surveillance, and poses an immanent threat to both "normalized" knowledges and disciplinary powers' - Bhabha (note 101 above) 86.

[200] G Spivak 'Righting Wrongs' (2004) 103 *The South Atlantic Quarterly* 523-581, 523-524; Madlingozi (note 45 above); B de Sousa Santos 'Beyond Abyssal Thinking From Global Lines to Ecologies of Knowledges' (2007) 30 *Review* 45.

CHAPTER 4

THE FUNCTIONS OF LABOUR LAW, POLICY AND INDUSTRIAL RELATIONS MODEL

4.1. Introduction

Mining on the Witwatersrand was labour intensive. By the end of the nineteenth century deep-level mining which yielded a higher density of gold had been developed.[1] As the mining sector grew an acute shortage of low-wage labour was experienced. Hence a concerted effort was made at the beginning of the twentieth century to resolve the 'native question' once and for all. This chapter examines the labour policy which was formulated and instated in the laws of the amalgamated colony that was established in 1910. It does so cognisant that while the surrounding socio-political and economic environment is important, it is the components of the structure which was assembled to manage labour that is likely to be most revealing. The observable 'policies, institutions, regulations [and] laws' will be examined, mindful that the ideological slant of these arrangements looms as a kind of super-structure.[2] The first part enquires into some doctrine regarding the purpose or purposes of labour law, definitions of law labour and the effects of unionised collective bargaining as they pertain to the South African milieu. Thereafter the fashioning of the labour policy along with the particular kind of industrial relations model it inaugurated at the time of union is discussed. The chapter considers that dogmatic application of conventional definitions, theories and models of labour (the so-called canon) to South African circumstances may continue to render 'unspeakable things unspoken'.[3] Pointed re-evaluation would show that Africans have not merely been 'the ghost in the machine' but the machine itself.[4]

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[1] This involved 'the sinking of shafts and the driving of horizontal and vertical tunnels … [then] actual excavation of the gold-bearing ore' – E Katz 'The Underground Route to Mining: Afrikaners and the Witwatersrand Gold Mining Industry from 1902 to the 1907 Miners' Strike' (1995) 36 *The Journal of African History* 467-489,468

[2] S Taylor 'Structural Violence Oppression and the Place-Based Marginality of Homelessness' (2013) 30 *Canadian Social Work Review* 255-273, 256-257

[3] By this Morrison calls out the manner in which dominant western discourse has asserted transcendence and has thereby silenced or completely ignored 'inferior' voices of those outside of its ratified scope - by T Morrison 'Unspeakable Things Unspoken: The Afro-American Presence in American Literature' *The Tanner Lectures on Human Values* (1988) 136 available at https://tannerlecturers.utah.edu/_documents/a-to-z/m/morrison90.pdf, accessed on 29 June 2019.

[4] Morrison (note 3 above).

4.2. Evaluating the Functions of Labour Law

4.2.1. The Functions of Labour Law

The doctrinal 'black letter' study of law is generally more concerned with how framers believe things ought to be, not why, and has focused mostly on the intent of legislators.[5] This has decontextualised the law from the norms that underwrite its content. Law does not stand apart from the socio-political and economic machinations, but has instead been the driving force behind the creation and dissemination of norms. As such,

> 'law constantly constructs reality, that can be described as the world economic system or politics. Law constructs centers and peripheries. It is not outside of them, in the background, offering to construct their interaction.'[6]

Thus far the conception of labour and its management has revealed values which were established and reinforced consequent colonial incursion. Historically in South African law, Africans have arisen as the mechanism by which the colonial order exerted conquest.[7] This study contends that '[c]olonialism, inherently a process of domination and extraction of value, was the constitutive field for the emergence of mercantile capitalism in Europe'.[8] So far from a straightforward inevitable economic process, capitalism has developed by means of violent force and repressive laws which stripped the majority of people of meaningful agency over the control of their labour.[9] The standard understanding of labour and its regulation does not adequately account for this. There have been two main approaches on the appropriate functions of labour law.

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[5] The idea of 'law pure and simple' generates pursuing accurate representation of set principles and then applying them to given facts – S Chaplin 'Written in the Black Letter' (2005) 17 *Law and Literature* 47-68; J Miles 'Black Letter Law with a Hint of Grey' (2008) 67 *Cambridge Law Journal* 17-20.

[6] The distinction between the center and the periphery 'make[s] sense only with reference to a mediating boundary that strives for stability' - D Kukovec 'Hierarchies as Law' (2014) 21 *Columbia Journal of European Law* 158; 'this stability, this coherence, is determined in large part by cultural orders that sanction the subject and compel its differentiation from the abject. Hence "inner" and "outer" constitute a binary distinction that stabilizes and consolidates the coherent subject' – J Butler *Gender Trouble Feminism and the Subversion of Identity* (1990) 134.

[7] The African 'subject does not exist prior to subjection' - T Mahmud 'Cheaper Than a Slave: Indentured Labor Colonialism and Capitalism' (2013) 34 *Whittier Law Review* 215, 216; 1774 extirpation edict; Caledon Code; Ordinance 49 of 1928 (Cape); Thirty-Three Articles (1844); *Grontwet* (1858); South Africa Act, 1909.

[8] T Mahmud 'Law of Geography and the Geography of Law: A Post-Colonial Mapping' (2010) 3 *Washington University Jurisprudence Review* 64, 71 & 72

[9] Mahmud (note 8 above).

The libertarian or market outlook gives primacy to the employment contract and the ability or freedom of persons to negotiate their own terms of service and reward. In this view, facilitating the least fettered exercise of the freedom of contract by the parties concerned is the main objective of labour law.[10] According to this logic, laws which intervene to protect employees in the reciprocal bargaining process privilege employed workers artificially at the expense of their unemployed counterparts. Moreover, these protective measures interfere with free enterprise and may jeopardise the profitability of the business and the employment it sustains. Brassey has argued that people are not forced into employment, that 'consensus' is the core feature of these contractual relations, therefore justice ought not to require preferential treatment for employees.[11] Without labour law safeguards, in an effort to maximise profit, the employer would be at liberty to lower wages and demand higher productivity as and when the need arises, and the unemployed would be able to compete for jobs on the basis of their willingness to accept lower wages.[12] More recent calls for deregulating the labour markets in order to become more globally competitive also advanced similar reasons for allowing employer flexibility in making changes in workplace agreements.[13] Minimal regulatory interference with market operations of free enterprise is proposed. Labelled neoliberal, this view rejects any intervention in a presumed inevitable market efficiency. The view does not account for the reality that apparent consent is mediated by the situation of stark inequality between employers and employees. Davidov has described the regulation and resolution of issues involving labour and the labour market as the purpose of labour law, the need for legal intervention created by the particularly weakened position of employees *vis-à-vis* employers, requiring law to ameliorate this diminished status.[14]

Alternatively, industrial relations regulation has been proposed as the possible vehicle for social redistribution coming from or operating in the workplace, a way to overturn

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[10] A van Niekerk & N Smit (eds) *Law@work 3rd Edition* (2015) 6-7

[11] M Brassey 'Fixing the Law that Govern the Labour Market' (2012) 33 *ILJ* 1, 12

[12] This Brassey deems justifiable when considering the higher levels of employment and productivity in China and India. – Brassey (note 11 above) 12; it is notable that these measures 'ultimately serve … a labour aristocracy (the insiders) who [it has been argued] are kept in employment at the expense of the outsiders, the unemployed' - A van Niekerk 'Is the South African Law of Unfair Dismissal Unjust? A Reply to Brassey' (2013) 34 *ILJ*28.

[13] While conceding that rigid standards may inhibit economic activity Van Niekerk explains that in reality there is no evidence that less regulation correlates with higher investment and global competitiveness – Van Niekerk & Smit (note 10 above) 7-8.

[14] The unequal bargaining power caused by: 'first, the prevalence of market failures that give some power to the employer to set the terms of the employment contract unilaterally; and second, the existence of subordination as an inherent part of that contract' – G Davidov *A Purposive Approach to Labour Law* (2016) 48, 55

the imbalances in power and achieve more equitable profit sharing between labour and capital.[15] Hugo Sinzheimer, a seminal specialist in labour law, saw labour law as 'a tool to be manipulated to right the injustices inherent in the capitalist mode of production'.[16] Sinzheimer espoused notions of social justice and human dignity, owed to the working man of the industrialising enterprises. This social justice or protective outlook considers law to be a vehicle for the propagation and achievement of societal fairness.[17] At the outset is the recognition of inequality of power in the negotiating arena of labour. Even while advocating for nominal regulation Khan-Freud has famously stated the position as follows:

> 'the main object of labour law has always been, we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.' [18]

Khan-Freud proposed that, managed properly through law, collective bargaining would assist in equalising the disparate positions. The law curbs some of the employer's power over employees, but it is market forces and the strength of labour organisations that has been argued ultimately to determine overall welfare.

Dukes on the other hand questioned who defined the purposes of labour law. There has been some shift on the traditional notions of labour law. An awareness that labour law works within specific economic matrices and in fact, according to some, ought to work 'with and not against the logic of the markets. Labour law should regulate for competitiveness or flexibility and should increase access to labour markets.'[19] It is argued that in the context of widespread political acceptance of 'a market logic forcefully resistant to regulatory "interference"', labour law can no longer be thought to be geared at attaining a measure of fairness in the employment setting for employees.[20] It would seem the traditional protective role exercised by labour law has had partial success – if at all. Silver has claimed that whatever gains were made by labour

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[15] R Dukes 'Constitutionalizing Employment Relations: Sinzheimer Kahn-Freund and the Role of Labour Law' (2008) 35 *Journal of Law and Society* 341, 343
[16] Dukes (note 15 above) 345.
[17] Van Niekerk & Smit (note 10 above) 9.
[18] Labour law functions 'to regulate, to support and to restrain the power of management and the power of organized labour' – P Davies & M Freedland *Kahn-Freund's Labour and the Law* (1983) 15.
[19] R Dukes The Labour Constitution The Enduring Idea of Labour Law (2016) 2.
[20] Dukes (note 19 above).

were in reality 'concessions made to bring labor movements under control.'[21] Wallerstein has described a characteristic 'system-level problem' in capitalist development, namely that:

> 'profits can be made – even with the partial decommodification of labor and the establishment of expensive social contracts – as long as those concessions are made to only a small percentage of the world's workers'.[22]

The incremental enhancements in conditions of service and wages for workers is thought to be a temporary stop-gap boon for those employed, until it begins to interfere with the attainment of desired profits – profitability being key in capitalistenterprise.[23]

Davis agreed that the employee generally cannot individually resist the power of management in negotiating employment terms, thus law is marshalled to protect the weaker party through trade union recognition and the social power it draws from.[24] But for Davis, in a large-scale capitalist industry where workers are invariably dissatisfied with conditions, leading to ongoing strife evident in strikes and other displays, the purpose of law is:

> 'essentially that of control and regulation in order to preserve the essential socio-economic structures of society. The state as the author of the law has as its major role the preservation of the very coherence of the society so as to protect the interests of those who essentially rule society.'[25]

Davis described a ruling 'coalition of classes with an employer hegemony', presiding over the continuing maintenance of societal arrangements. So the formal recognition of trade unions serves 'to integrate their members into the larger body public and give them a basis for loyalty to the system'.[26] Thus labour law constrains dispute resolution to prescribed structures inside the social system, thereby neutralising worker discontent and garnering industrial efficiency so as to preserve the continuity of established hierarchies. Historically South African law has achieved this 'industrial tranquillity' by making laws which segregated white workers from

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[21] B Silver *Forces of Labor: Workers' Movements and Globalization Since 1870* (2003) 20.
[22] I Wallerstein 'Response: Declining States Declining Rights?' (1995) 47 *International Labor and Working Class History* 24, 25 cf: D Porta & M Diani *The Oxford Handbook of Social Movments* (2015) 140.
[23] Porta & Diani (note 22 above) 140.
[24] D Davis 'Functions of Labour Law' (1980) *CILSA* 213.
[25] Davis (note 24 above) 214.
[26] N Haysom 'Introduction to Industrial Conflict' (unpublished paper) cf: Davis (note 24 above) 214.

their African and other non-white counterparts, thereby quashing the possibility for a presumably non-racial 'unified worker front.'[27]

Neither the libertarian nor the social justice perspective could have wholesale application as both of these broad categories project idealised extremes which are not based in complete realities. The two approaches do not take into account the colonially contrived stratification of work and workers, which has been wedded to racism and compulsion in South Africa. The core operational elements of the South African workplace entailed the coercive creation of waged labour for Africans in order to service the accumulative avarice of the main beneficiaries.[28] From this has emerged the irony of free enterprise, serviced by ostensibly voluntary free labour exchanges, itemised in labour contracts.

4.2.2. Definitions of Labour Law

Creighton and Stewart distilled three essential components of labour law, which include regulating the employer-worker relationship, the relations between collective labour, the state and employers (three major stakeholders), and mediating competing interests of all stakeholders to enhance public welfare.[29] Venter and Levy situated the definition of labour relations (as opposed to the narrower employment relations) within particular social and economic settings that apply. The relations are construed as tripartite in nature, consisting of the state, employers and labour (a collective of employees) – 'it must be contextualised within an environment'.[30] The resultant law mediates and manages the interactions that ensue. Of note, the definition relies on the arrangements being reflective of the wider societal norms and formations.[31] Labour laws together with policy administer and enable the relations. So labour law 'concerns itself directly with legal aspects related to labour relations.'[32] Ultimately Vettori contended that, however limited the scope, labour laws should adjust to societal conditions and meet variances in socio-economic conditions so as to advance fairness and equality.[33]

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[27] Davis (note 24 above) 215-216.
[28] M Perelman *The Invention of Capitalism: Classic Political Economy and the Secret History of Primitive Accumulation by Dispossession* (2000) 15-16.
[29] B Creighton & A Stewart *Labour Law: An Introduction* (2002) 2.
[30] R Venter & A Levy *Labour Relations in South Africa* (2011) 5-6.
[31] Venter & Levy (note 30 above) 6.
[32] B Swanepoel & J Slabbert *Introducing Labour Relations Management in South Africa: adding value to Africa* (2012) 25.
[33] M Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* (unpublished LLD thesis, University of Pretoria, 2005) 46.

The deficit of the explanation lies in the particularity of human beings that have traditionally formed part of the labour triumvirate – white people. Whether capital, state, or employees, the racial identity of the agreeing partners has been crucial. Historically only whites were deemed either labour, capital or the state for purposes of the social contract. Africans who historically have executed the bulk of the required labour in this system were written out of the mutually beneficial tripartite relations. A prohibitive process created legal subjects as well as 'abject beings' concurrently who lacked adequate subjectivity.[34] Without the downgrading and expulsion of so many, the *de facto* privileged recipients of worker rights could not have emerged as they did. Therefore the definitions itemised above are inadequate. As will become more evident, in South Africa Africans were systematically omitted from normative labour benefits which have aligned with the supposed European template of the management of labour relations.

4.3. The Utility of Unionised Collective Bargaining

Barcheisi pointed out that in South Africa paid labour stands out as a mechanism of oppression (bar none) of Africans.[35] He pondered whether 'a public imagination of work as the avenue to social virtue is in need of rescue.'[36] The utility of trade unions is investigated mindful that such institutions have historically ignored manifest deprivation, by in essence assisting in reformulating it as 'part of the natural ordering of economic affairs in a constitutional state.'[37]

Kaufman likened union activity to a levy imposed on employers, non-union members and buyers.[38] Nonetheless, while collective bargaining achieves private gains regarding wages and working conditions, it has an ancillary result (double aim) of safeguarding 'the uninterrupted flow of commerce' which continues when workers do not go on strike – arguably a public function.[39] This seeming public good is routinely contradicted by some, on the grounds that union activity actually creates significant economic burdens. Union activity is accused of

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[34] J Butler Bodies *That Matter: on the Discursive and Limits of "Sex"* (1993) (Routledge: New York & London) 3

[35] F Barcheisi 'The Violence of Work: Revisiting South Africa's "Labour Question" Through Precarity and Anti Blackenss' (2016) 42 *Journal of Southern African Studies* 875 883.

[36] Barcheisi (note 35 above) 884.

[37] L Stewart 'Rights Discourse and Practices Everyday Violence and Social Protests: Who Counts as Subject and Whose Lives Are Real in Neo-Colonial South Africa?' (2014) 18 *Law Democracy & Development* 4.

[38] B Kaufman 'What unions do: insights from economic theory' (2004) 25 *Journal of Labor Research* 351, 354.

[39] K Klare 'The Public/Private Distinction in Labor Law' (1981) 130 *U. Pa. Law Review* 1375; collective bargaining occurs between the employer(s) and employees as a collective (usually represented by trade unions) to negotiate settlement of disputes and matters of mutual interest through agreement.

inappropriately transferring resources to its members, diverting resources and thus causing distortions resulting in 'allocative inefficiency'.[40] It has been thought that this leads to higher wages for its members, who are employed in smaller numbers due to the wage bill and lower wages for the non-union surplus workers. The resultant reduced productivity is then thought to cause the employer to substitute more expensive labour-intensive elements with capital.[41] This theory assumes that prices, such as the cost of labour, are decided competitively and that this leads to proficient resource distribution in the employment setting and throughout the economy.[42] Arguments identifying trade unions as primarily damaging to business growth and economic efficiency appear at times biased in favour of employers or premised on romanticised beliefs in the operation of unbridled free enterprise. In fact, employers routinely pay workers far less than their contribution to production and accrue exorbitant profits.[43] Typically workers are in a weaker bargaining position to employers, the non-unionised worker being the most vulnerable.

The declared primary function of trade unions has been to safeguard their members from exploitation and to secure their entitlements while incrementally enhancing their welfare.[44] But, like Davis, critical legal thinkers view the collective bargaining process as functional to the larger objective of implementing specific ideology through law.[45] This critique has cast doubt on the effectiveness of trade unions, *vis-à-vis* their stated objectives. Law regulating trade unions is accused of diluting the intensity of worker discontent by building collective bargaining structures which make 'worker disarmament look like worker victory … sacrificing them to the illegitimate interests of management and union bureaucracy.'[46] Ensconced as unions become in the established industrial relations structures, they do not appear to escape the hegemony these institutions espouse.

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[40] Kaufman (note 38 above) 355; B Hirsch 'What Do Unions Do for Economic Performance?' (2004) 25(3) *Journal of Labor Research* 415-455.
[41] This means that the inflated wages of unionised workers become unsustainable which leads to the employer switching to (cheaper) technologies, in order to cut costs, which in turn means that the unionised workers will be reduced in number. This theory bemoans the workplace rules and practices that unions introduce to enforce the rights members, gain further benefits and increase security of employment as introducing 'technical inefficiency;' a waste of resources - Kaufman (note 38 above) 356-358.
[42] Kaufman (note 38 above) 355.
[43] C Backhouse 'Labour Unions and Anti-Combines Policy' (1976) 14 *Osggode Hall Law Journal* 113, 115.
[44] M Uys & M Holtzhausen 'Factors that have an impact on the future of trade unions in South Africa' (2016) 13 *Journal of Contemporary Mangement* 1137, 1141.
[45] Davis (note 24 above) 214.
[46] D Kennedy 'Critical Labor Law Theory: A Comment' (1981) 4 *Industrial Relations Law Journal* 503, 504.

Law in the labour setting has been challenged as impeding rather than enabling the meaningful engagement of workers in bargaining for better remuneration and working conditions.[47] At issue is the uneven manner that the law convenes collective bargaining – as a mechanism of maintaining control in the hands of management – so that it ratifies the subservience of workers.[48] This model questions the logic that the collective bargaining procedure accomplishes participatory workplace democracy, is a private process with minimal 'neutral' state involvement at the level of facilitation only, and is operated by parties with equivalent bargaining status to conclude fair collective agreements which the law merely enforces.[49] So pluralist notions of 'joint sovereignty', vested in both employer and employees, are disputed.

Critical labour thinkers reject the authenticity of voluntariness and thus overall validity of worker consent to collective bargaining agreements. Rather, consent is seen as artificially and coercively created through law because there is no parity in bargaining position between the parties. Klare described a doctrine of 'contractualism,' where 'justice consists in enforcing the agreement of the parties so long as they have the capacity and have had a proper opportunity to bargain for terms'.[50] In reality, according to this view, all real power always resides in management.[51] Thus law has been deployed to severely limit usage of the only effective arsenal to date of workers – industrial action.

In South Africa, the evolution of unionised collective bargaining has been atypical – different than that advanced by the colonial metropolis, Britain. The regulatory intent was not merely to subdue workers within an ostensibly liberal capitalist setting, using collective bargaining. Labour laws established an 'abyssal line' below which Africans have subsisted,

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[47] J Conaghan 'Critical Labour Law: The American Contribution' (1987) 14 *Journal of Law and Society* 334, 335
[48] K Klare 'Critical Theory and Labor Relations Law' in D Kairys *The Politics of Law: A Progressive Critique* (1982) 65.
[49] Conaghan (note 47 above) 336; T Lothian 'The Political Consequences of Labor Law Regimes: The Contractualist and Corporatist Models Compared' (1985) 7 *Cardozo Law Review* 1005-1010 - A 'countervailing' model, where trade unions wield collective strength on behalf of workers to negotiate conditions of employment. This pluralist model is exemplified by the individual choices of workers to for join unions, minimal government participation in union establishment and a range of trade unions. Here bargaining is thought confined to the parties, with the state remote from the entire process.
[50] K Klare 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1942' (1978) 62 *Minnesota Law Review* 265, 295; '…consent manufactured by the intellectuals of the ruling class … not only is consent manufactured but it is backed up by coercion-in-reserve, what Gramsci calls political society' - F Wilderson 'Gramsci's Black Marx Whither the Slave in Civil Society' (2003) 9 *Social Identities* 225, 228
[51] Conaghan (note 47 above) 340.

being deprived of the substantive collective bargaining entitlements provided for by law.[52] This 'abyssal thinking' is evident in the Industrial Disputes Resolution Act 1909 which made provision for collective bargaining and for mediation of industrial disputes while rendering Africans invisible through the definition of an employee; a pattern repeated throughout the twentieth century. They have inhabited 'the colonial zone.'[53]

Therefore contestations emphasised by critical legal thinkers have been less compelling at the 'zone of non-being' in the South African context. As will be seen in the next part, organised white labour, capital and the state collaborated to assure privileged status to white workers through ill-treating Africans. This move effectively withdrew the situation of white labour from that of an authentic proletarian domain – assuming such exists. Africans also could not claim the status of proletariat since the law had cast them far below that.[54] Wilderson likened the status of Africans to that of slaves, arguing that their erasure 'calls into question the legitimacy of productivity itself'.[55] The structure within which the systems of oppression have operated is therefore necessarily questionable. The presiding super-structure (Eurocentrism) tends to negate the very notion of *ex post facto* consent of those who remain unseen.

Consequently, it appeared not to matter that the jurisprudence on which laws rested yielded laws that have been inapplicable to the majority of the population. This was apparent in the industrial relations model which has been implemented historically. The next part considers labour policy of the early nineteenth century and deliberations of what was to be put in place when the colonies merged in 1910.

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[52] This 'abyssal thinking' fashions ratified reasoning to repudiate colonial spaces as conducive sites for 'the unfolding paradigm of regulation/emancipation' - B de Sousa Santos 'Beyond Abyssal Thinking From Global Lines to Ecologies of Knowledges' (2007) 30 *Review* 46; A Phipps 'Other Worlds are Possible: An Interview of Boaventura de Sousa Santos' (2007) *7 Language and Intercultural Communication* 92.

[53] It denotes '… the coexistence of both the civil society and the state of nature, separated by an abyssal line whereby the hegemonic eye, located in the civil society, ceases to see and indeed declares as non-existent the state of nature' Santo (note 52 above) 50.

[54] The 'black subject reveals marxism's inability to think white supremacy as the base' – Wilderson (note 50 above) 225-226.

[55] Wilderson (note 50 above) 231.

4.4. Labour Policy and the Industrial Relations Model

4.4.1. Creating Labour Policy for the Union of South Africa

Yudelman describes the emergent South African state as corporatist, 'complete with parastatals and institutionalized symbiotic relationship with private capital', dating the fashioning of the model back to well before the Union was incorporated.[56] How to detooth the militancy of white workers by including white organised labour within the state apparatus and continue to build a capitalist economy based on devalued African labour was a pertinent question at the beginning of the twentieth century. At the turn of the century the mining industry was a lucrative source of much needed revenue for the post-war reconstruction of the Transvaal. So the interests of mining profitability were intimately connected with state interests, in that by helping the mines in a way that was favourable to white workers the state could keep support from its electorate – 'its legitimacy and economic viability were dependent on [favourable] white employment and on gold mining revenue.'[57]

Following the Anglo-Boer War, the Transvaal (now a reacquired British colony) had to oversee the rebuilding of the colony as well as service exorbitant debt. The profitability of gold mines beckoned as a source of required revenue. A number of discussions were held. They yielded two main commissions of enquiry into the modalities of drawing a steadier supply of cheap African labour to the mines. The 1903 report by the Transvaal Commissioner for Native Affairs explained as follows:

> 'The war thus left South Africa with a heavy legacy in the shape of high wages which every common unskilled native labourer had learned to regard as normal, and further there was engendered a spirit of independence and apparent aggressiveness which was a new and regrettable feature in relations between black and white.'[58]

In 1903 the minimum monthly wages for Africans were increased by the Chamber of Mines from 30 shillings to 45 shillings, yet the supply of labour remained scarce.[59] The post war

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[56] D Yudelman *The Emergence of Modern South Africa: State Capital and the Incorporation of Organised Labour on the South African Goldfields 1902-1939* (1983) 2
[57] Yudelman (note 56 above) 38-39.
[58] *Transvaal Colony Department of Native Affairs Annual Report 1902-1903* available at https:///.wiredspace.wits.ac.za/.../TRANSVAAL%20COLONY%20DEPT%20OF%20NATIVE, accessed on 6 June 2019.
[59] *Transvaal Annual Report 1902-1903* (note 58 above).

scarcity of labour at the mines had prompted a rise in wages for Whites as well as Africans and the racialised wage inequality appeared to be diminishing.[60] Funnelling African labour to mines for remuneration at depressed exploitative rates would assuage the labour problem in a way that managed the perceived 'native question.' Bright argues that '[a]n obsession with turning the Transvaal into a "white" British colony governed the decision making process just as much, if not more so, as economic concerns.'[61]

The recruitment of Chinese labour was considered as a solution or possibly a stopgap measure.[62] Likewise white farmers experienced the scarcity of African labour, which was in part attributed to the higher wages on offer in the mining sector.[63] The Bloemfontein Customs Conference in March 1903 was held to discuss ways to remove barriers between the four colonies that now fell under British rule. Tariffs were removed, and during deliberation the keen shortage of African labour to service the mining sector was identified as a hindrance to rebuilding and rapid industrialisation. The Bloemfontein Conference in turn recommended a 'Native' commission to explore how to address the 'native question' decisively and expansively in South Africa as a whole. Accordingly, the Conference resolved that:

> 'in view of the coming Federation of South African Colonies, it is desirable that a South African Commission be constituted to gather accurate information on certain affairs relating to the Natives and Native administration, and to offer recommendations to the several Governments concerned, with the object of arriving at a common understanding on questions of Native policy'.[64]

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[60] The 'ratio of White to non-White labour contracted from 1: 8 in July 1899 to 1: 5.98 in April 1904' - P Richardson 'The Recruiting of Chinese Indentured Labour for the South African Gold-Mines 1903-1908' (1977) 18 *Journal of African History* 85, 87.
[61] R Bright *Chinese Labour in South Africa 1902-10: Race Violence and Global Spectacle* (2013) 2.
[62] Indeed between 1904 and 1906 as such as 62 296 indentured Chinese labourers arrived to work on the Witwatersrand mines, imported by the Chamber of Mines Labour Importation Agency (CMLIA) of the Transvaal. African labourers were also recruited from Mozambique at unfavourable cost to fill the gap – Richardson (note 60 above) 86-92; E Walker *The Cambridge History of the British Empire Vol 2* (1963) 640.
[63] Many argued for the stricter enforcement of the Squatters' Law No. 21 of 1895 along with dissolution of native locations, which would force Africans to have to reside and work in farms - *Reports of the Transvaal Labour Commission* (1904) 10-11 available at https://catalog.hathitrust.org/Record/011984084, accessed on 16 June 2019.
[64] *South African Native Affairs Commission 1903-1905: Report with Annexures no. 1 to 9* (1905) 2 available at https://catalog.hathitrust.org/Record/011984084, accessed on 27 June 2019.

The proposed commission, which became the South African Native Affairs Commission, was preceded in reporting by, and also drew heavily on, the findings and conclusions of the Transvaal Labour Commission of 1904 in its ultimate recommendations.

The Transvaal Labour Commission heard evidence from ninety-two witnesses, only two of whom were Africans.[65] At paragraph 68 the report noted the allegation that the shortages of labour were a function and 'outcome of design' which could be 'readily obviated by well directed efforts.' The report concluded that the labour problem had been a longstanding issue, caused by 'the fact that the African native tribes are, for the most part, primitive pastoral or agricultural communities … whose standard of economic needs is extremely low'[66], and that 'a savage people, who before the advent of Europeans lived their own life, in which industrial employment had no place' would not quickly and gain similar wants to those of industrialised societies and consequently willingly make themselves available to meet labour demands of industry.[67] Restricting access to expansive swathes of land through further adjustment to land occupation by Africans was therefore reported as necessary to channelling Africans toward wage labour.[68] In short, the goal was to make Africans need money. High wages bestowed on Africans were determined likely to be counter-productive to the overall aim of increasing the numerical labour supply, because the need for money at the time was still small.[69]

On increasing the supply of African labour, the commission suggested four broad interventions, namely, 'compulsion, either direct or indirect, modifications of native tribal system, or changes in native land tenure'.[70] The effectiveness of compulsory labour offered the swiftest method of increasing quantities of African labour. It was discounted by the commission as being prejudicial to both master and servant. The limited efficiency of taxation, as a way of acquiring labour, was attributed in large part to the continued bountiful access of Africans to land.[71] Consequently it was suggested that for maximal effect the restrictions of

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[65] Comprised of 'twenty officials, seventeen farmers, twenty-three representatives of the mining industry…, nineteen labour organisers, agents and recruiters…, four missionaries, two natives' – Majority Report *Transvaal Labour Commission* (note 63 above).
[66] Paragraph 69.
[67] The report deduced that '[t]he only pressing needs of a savage are those of food and sex, and the conditions of native life in Africa are such that these are as a rule easily supplied' – para 70.
[68] Paragraph 72.
[69] Paragraph 80.
[70] Paragraph 88.
[71] Paragraphs 90-91.

access to land should apply systematically to South Africa as a whole.[72] On the inevitability of subjugation the majority report of the commission said:

> 'Without entering into the moot point of the rate of progress of negro races, it may be concluded that a gradual increase in the severity of the economic conditions under which they at present live will occur, and this increasing pressure must result in an improvement in the native's industrial habits.'[73]

Commenting on British colonialism in India in 1853 Karl Marx once expressed similar opinions, thus:

> 'Now, sickening as it must be to human feeling to witness … inoffensive social organizations disorganized and dissolved into their units, thrown into a sea of woes, and their individual members losing at the same time their ancient form of civilization, and their hereditary means of subsistence … The question is, can mankind fulfil its destiny without a fundamental revolution in the social state of Asia? If not, whatever may have been the crimes of England she was the unconscious tool of history in bringing about that revolution.'[74]

The South African Native Affairs Commission (SANAC) followed on with the mandate to create an all-encompassing policy on which matters relating to the status and treatment of Africans would be legislated in the unified colony to be assembled. On matters of African labour, the SANAC Report was largely in agreement with the assessment of the Transvaal Labour Commission report findings.[75] SANAC sought to enquire into and suggest the viable course of action to remedy the shortage of native labour.[76] That African males between the ages of 15 and 40 years were not in continuous employment was a source of concern; the average estimated three to six months of annual employment was deemed woefully insufficient for mining needs.[77] Therefore the goal was to convert wage labour into a necessity for sustenance, rather than an enhancement to existing means.[78] The minimal material needs of the Africans were again identified as a major impediment to the incentive to work for money,

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[72] Paragraph 92.
[73] Para 100; this is similar to the sentiments expressed in the Caledon Code of 1806 in the Cape.
[74] K Marx 'The British Rule in India' *New-York Herald Times* (1853) (25 June 1853) available at https://www.marxists.org/archive/marx/works/1853/06/25 htm, accessed on 29 June 2019.
[75] Para 357 SANAC (note 64 above).
[76] Paragraph 358.
[77] Paragraph 365.
[78] Paragraph 372.

surmised as 'terms on which they occupy the land.'[79] The success of what SANAC thought 'indirect compulsion' in the form of taxation was noted to be having below par results in inducing Africans to seek wages. Nonetheless, the continuation of poll and hut tax was deemed necessary at a minimum annual rate of £1 per adult African male.[80] SANAC recommended the rigorous enforcement of laws which confined the movement and settlement of Africans – pass laws, squatting laws and laws assigning particular locations for African use.[81] SANAC also encouraged the employment of African women in domestic work in order to make more men available for industrial work.[82]

Morrison's analogy of a machine in reference to African presence in European text seems suitable to the policy recommended by the commissions.[83] All efforts were focused on extracting the highest quantities of labour possible from Africans, making them the cogs of the overarching machine – commodities. They are seen but not really seen, in other words they are 'thingified'[84], made into mere tools. And so their palpable presence becomes absence. What is present in the pages or provisions of law and policy has not been the African, but what the discourse has created to represent the absent presence of Africans as beings – denuded of a humanity and personhood comparable to that bestowed on white persons.[85] The tenor of the deliberations and the recommendations of the report reinscribe the erasure the Africans. Cesaire interpreted the situation as follows:

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[79] '[P]ossessing easy access to land' on the part of the African population was again determined to be the primary cause of their sporadic forays into waged labour – para 374-375.

[80] An additional payment of £1 was to be levied on an African male for every wife he took after his first. Exemption was proposed for (among others) 'farm servants in bona fide and continuous employment' – para408.

[81] Suggestions to 'stimulate industry among the Natives' included the following: '[t]he checking of the practice of squatting, by refusal to license all but necessary or desirable private locations, and the imposition of a tax on such locations as may be authorised, based on the number of able-bodied Natives domiciled thereon[;] [t]he imposition of a rent on Natives living on Crown lands as distinct from recognised reserves or locations, such rent to be based upon the value of such land and to be regularly and punctually collected[;] [t]he enforcement of laws against vagrancy in municipal areas and Native labour locations, whereby idle persons should be expelled[;] [t]he encouragement of a higher standard among Native by support given to education with a view to increase their efficiency and wants[;] [t]he encouragement of industrial and manual training in schools' – para383.

[82] Paragraph 384.

[83] Morrison has described Africans as the machine itself, rather than the oft thought 'ghost in the machine' – Morrison (note 3 above).

[84] According to Cesaire 'colonization = "thingification"' - A Cesaire *Discourse on Colonialism* (1950) (trans J Pinkham, 2000) 42.

[85] Section 1 of the Industrial Disputes Prevention Act No. 20 of 1909 defined an employee as 'any white person engaged by an employer to perform … work in any undertaking'; the Workmen's Compensation Act No. 25 of 1914 defined 'workmen' as who's labour activities were not regulated by the Native Labour Regulation Act No. 15 of 1911; the Miners Phthisis Act No. 35 of 1925 defined a miner as any person 'other than a native' employed underground in a mine.

> '…colonial activity, colonial enterprise, colonial conquest, which is based on contempt for the native and justified by that contempt, inevitably tends to change him who undertakes it, that the colonizer, who in order to ease his conscience gets into the habit of seeing the other man as *an animal*, accustoms himself to treating him like an animal, and tends objectively to transform *himself* into an animal.'[86]

For Cesaire, the white community appears to become the very beastly thing it purports to avoid and reject, by diminishing (in its thinking) the humanity of Africans. In this context it becomes possible to behave as if Africans exist in a peripheral fashion, only useful as labour for a grand enterprise of civilised or recognised beings.

4.4.2. Fashioning the Corporatist Model

The deliberations and recommendations of the commission reports guided the contents of the South African Act, 1909 which established the Union of South Africa as well as laws promulgated thereafter to administer Africans and manage labour. The kind of state model pertaining to relations between the state, labour and the business sector that was established in the single colony has been described as corporatist.[87]

Corporatism rests on tripartite agreement between the state, capital (the business sector), and organised labour (trade unions). These are the components required in what is argued to be the effective management of industrial relations, employment and economic growth. In South Africa, a special kind of corporatism was developed in tandem with the colonial incursion and inception of industrial extractive capitalism, and was vital in assembling what later became Apartheid institutions.[88] The plight of African workers was largely disregarded in the industrial relations scheme which was devised.

Corporatism concerns itself with consolidating the representation of the acknowledged interests groups, particularly worker representation. According to Schmitter

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[86] Cesaire (note 84 above) 41.
[87] Yudelman asserts that 'contrary to the widely accepted view of South Africa's past, organized (white) labor was decisively subjugated and co-opted by an alliance of the state and capital in the early part of the twentieth century' – Yudelman (note 56 above) 2-4.
[88] Y Kim & J van der Westhuizen 'Why Corporatism Collapsed in South Africa: The Significance of NEDLAC' (2015) 50 *Africa Spectrum* 87, 88.

> 'constituent units are organized into a limited number of singular, compulsory, non-competitive, hierarchical ordered and functionally differentiated categories, …licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.'[89]

The intent is that cooperation between these interest-representing entities will be articulated and facilitated by the laws and reflected in public policy formulation.[90] Indeed Baccaro contended that corporatism works best when officially recognised exclusive hegemony precedes the expression of policy.[91]

In the corporatist structure the freedom of individual workers is curtailed by the centralised way the system operates.[92] Membership ceases to be based wholly on voluntariness on the part of workers.[93] The right of workers to form or join alternative unions operating in the same sphere and competing for the right to represent workers is severely restricted. The corporatist model favours the creation of 'monopolistic' unions, buttressed by enforced subscription of employees.[94]

The idea is that a measure of parity in the decision-making process ought to subsist for the proper functioning of corporatism; in theory each entity should not be powerful enough to 'dictate policies and impose them unilaterally, but the same time it [should be] sufficiently powerful to resist capture by' the other interest organisations.[95] Maree distinguishes two kinds of corporatism.[96] In the first, an interest organisation forms independently then seeks license from the state to assimilate or get rid of competitors in order to gain the monopoly. This is societal corporatism. In the second, the state authorises the formation and functioning of

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[89] P Schmitter 'Still the century of corporatism?'in P Schmitter and G Lehmbruch (eds) Trends Towards Corporatism Intermediation (1979) 13.
[90] L Baccaro 'What is Alive and What is Dead in the Theory of Corporatism' (2003) 41 *British Journal of Industrial Relations* 683, 685.
[91] Baccaro (note 90 above); Lehmbruch agrees that it goes beyond arrangements of articulating interest to encompass ways of formulating policy where large entities collaborate with each other and public institutions to make '"authoritative allocation of values" and in the implementation of such policies' - G Lehmbruch 'Liberal Corporatism and Party Government' (1977) 10 *Comparative Political Studies* 91 94.
[92] Lehmbruch (note 91 above) 92.
[93] P Schmitter 'Still the Century of Corporatism?' (1974) 36 *The Review of Politics* 96.
[94] Baccaro (note 90 above) 686.
[95] A Cawson *Corporatism and Political Theory* (1986) 35.
[96] J Maree 'Trade Unions and Corporatism in South Africa' (1993) 21 *Transformation* 26.

designated interest organisations, and in effect guarantees their monopoly. This is state corporatism.[97]

The corporatist logic of harmony spurns industrial strife and sees conflict which may culminate in collective strike action as counterproductive to the larger and more industrious goals of securing overall economic prosperity for the country. Therefore in theory the state and labour along with capital collaborate to direct the course of workers toward the good outcomes projected. And so within this paradigm the private aspirations of individual workers must understandably be suppressed. A contrary view was asserted famously by James Madison, that '[i]t is vain to say that enlightened statesmen will be able to adjust … clashing interest, and render them all subservient to the public good.'[98] Historically these arrangements have been routinely indifferent to the concerns of large segments of the affected groups of people. However proponents of corporatism appear to have had confidence in the autocratic leadership or the 'enlightened foresight of technocratic planners' and their ability to decipher and maintain broad public welfare.[99]

Proponents of corporatism have extolled the perceived virtue in worker solidarity, envisioning coherence as instrumental to progressive well-functioning society.[100] This sponsored unity tends to suppress prevailing inter- and intra-worker racial, political and social discord. In effect, it negates the heterogeneity of the enormous and multi-faceted working class in particular. It is argued that rather than mediating the power disparities between labour and capital, the state in effect becomes co-opted by and functions in service of the *de facto* ruling capitalist dominion.[101] In South Africa the colonial state and capital thrived precisely because it dispensed with reciprocal interchange of labour. Only white workers were given meaningful

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[97] Maree (note 96 above) 26.
[98] J Madison 'The Utility of Unity of the Union as a Safeguard Against Domestic Faction and Insurrection' (1787) The Federalist No. 10; More pluralist representation entails that 'the constituent units are organised into an unspecified number of multiple, voluntary, competitive, non-hierarchical ordered and self-determined (as to type or scope) categories which are not specially licensed, recognised, subsidised, created or otherwise controlled in leadership selection or interest articulation by the state and which do not exercise a monopoly of representational activity within their respective categories' - P Schmitter 'Still the Century of Corporatism?' (1974) 36 *The Review of Politics* 96.
[99] Schmitter (note 93 above) 96.
[100] L Panitch 'The Development of Corporatism in Liberal Democracies' (1977) 10 *Comparative Political Studies* 61.
[101] Panitch (note 100 above).

consideration in the dialogue that ensued. Africans played no part in the South African version of corporatism.

4.5. Conclusion

Historically a minority labour aristocracy was conceived by law as homogenous in character. The ascendancy of this white upper-crust was always contingent on the abjection of the vast numbers of African people as 'thingified' commodities.[102] Cast mostly as tools, Africans were then readily disqualified from equitable consideration as employees. It is in light of this that the understanding of the purpose of labour law in South Africa should be understood. The reviewed definitions and supposed aims of labour regulation have therefore proved insufficient, since attitudes toward and control of Africans have not been embedded as key features therein. They were not representative of tenets foundational to the South Africa Act, 1909 and the legislation that followed. Instead, the SANAC has provided the road map for understanding authentic objective of labour law following unionisation. The tapered version of corporatism which was implemented on unification also falls short of accounting for Africans. Having ousted Africans from appropriate consideration, this approximation of corporatism acquiesced to the labour practices that ensued.

The next chapter surveys the development of labour law in the Transvaal, following the inauguration of the Union of South Africa. It examines how, as the courts interpreted the provisions of law, they established a model to represent Africans. The constitutionalism of this era is linked with the laws that were enacted. The working conditions instated by the Native Labour Regulation and the Mines and Works Act, from recruitment to the arrangement onsite as well as compensation for injury, disease or death are appraised.

[102] Cesaire (note 84 above) 42.

CHAPTER 5

ENSLAVED MASTER ALONGSIDE UNCONQUERABLE SLAVE? AFRICAN LABOUR AT THE MINES 1910-1920

5.1. Introduction

The ethos and content of early labour regulation in the mines provides a window on the fashioning of rules, some of which remain, and their actual intended purposes. This re-reading confronts text that shows how Africans have been ruinously disciplined in an environment profuse with the acceptance of 'the sanctity of whiteness and the shame of blackness.'[1] The query of African humanity looms large. However, the question for present purposes is not whether Africans possess equivalent humanity, but rather, taking into consideration their prolonged enslavement, 'what sort of people they were … and could be.'[2] Lacunae in the recount and the reckoning of all the effects of labour regulation persist.[3] Therefore it is essential to continue to reflect consciously on the re-assertions of conquest borne out in identified provisions of labour laws and case law, so as to grasp fully the conditions which the Africans of that time had to tolerate.[4] Only when this has been laid bare exhaustively should there be firstly venture into 'what sort of people they were' and, thereafter, what kind of people Africans in South Africa 'could be.' Like Cesaire announced, '[i]t is not a dead society that we want to revive … we must create, with the help of our brother slaves, a society rich with all productive power of modern times'.[5]

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[1] C Robinson *Black Marxism* (2000) 123-124

[2] Robinson (note 1 above) 125. In describing the metaphorical 'six mountains' carried by African women, a representation of the multiple intersecting sites of oppression they occupy, Gqola repeats the important observation by Ogundipe-Leslie that 'we are able to move with them … The mountains are not overwhelming, even if they are monumental and strenuous, and **we** are not passive'- P Gqola 'Ufanele uqavile: Blackwomen, feminisms and postcoloniality in Africa' (2001) 16 *Agenda* 11, 12. Therefore while methodically exposing the prolonged deprivations visited upon Africans through the highlighted labour regulatory systems this thesis concurs that the legal culture prompted Africans themselves to re-shape their thinking and lived culture as it was being trodden and 'worked over' by colonialism.

[3] Robinson explains that distortions of selective narrations of African experiences 'might have been a simpler matter if it had been merely a question of a gap occurring in the record, but the space had been filled with nonsense that was made credible by conventions of racist thinking[, and] [f]or the unaware, nothing was amiss' – Robinson (note 1 above) 175.

[4] Cesaire has described these circumstances as a setting in of rot characterized by regression in civilisation, as the enterprise embraced cruelty - A Cesaire *Discourse on Colonialism* (1950) (trans J Pinkham, 2000)35.

[5] Cesaire (note 4 above) 23.

Therefore the purpose of this and subsequent chapters is not to present a 'mode of revenge historiography' by focusing on the Africans, as they were manufactured in selected laws, in a defensive posturing.[6] Instead, this chapter seeks to reveal the pigeonholed African in a manner that displays both the ossified typecast as well as the fact that the African worker has been discerned mainly through this materialised situation, which was undergirded by such law. Discussion of legal provisions that mandated African servitude is aimed at arousing suspicion of the cogency in the assigned master and servant designations they ostensibly reveal. This might provoke the realisation that 'there is only the matter of the enslaved master, [alongside] the unmastered slave.'[7] Drichel has correctly identified transition from pure 'ontology [concepts and categories] to performativity' being key in the postcolonial scholarly paradigm.[8] The notion of hybridity does require some integration with the stereotype of the colonised, a partial integration which does not denote assimilation; instead it performs 'a "troubling" of opposed positions through their *partial* assumption.'[9] Here hybridity signifies a more nuanced simulation of historic labour law, with African otherness being focal in the representation of the system. So 'what is needed to challenge the hierarchy encoded in the self/other binary [colonial in origin], in the first instance at least, is an intervention on the very level of the binary' – the collective racialised identity of Africans.[10] This evokes Derrida's mandate to go beyond momentary face-value overthrow and take the time to anatomize, in order to disrupt the naturalised hierarchies present in specific arenas methodically.[11] The passage of time is crucial to what the re-enactment of the discourse will reveal. Interpretations of the same text evolve as new forms of agency foment – 'new and hybrid agencies and articulations'.[12] The mixedness of the agency denotes the continuing presence of the colonial within the arena. A

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[6] Dutta is concerned that the preoccupation of postcolonial theory with the colonised is premised on colonised people as conceived in colonial imaginaries, with little concern of the material realities and institutional frames which continue to subsist - N Dutta 'The Face of the Other: Terror and the Return of Binarism' (2004) 6 *interventions* 431, 432.

[7] H Bhabha *The Location of Culture* (1994) 131.

[8] Drichel explains that '[w]hat is called for, consequently, is a deconstruction of otherness; and what brings about such a deconstruction of otherness is the performative re-enactment of "ontology"' - S Drichel 'The Time of Hybridity' (2008) 34 *Philosophy & Social Criticism* 587, 598-599

[9] Drichel (note 8 above) 591.

[10] As Arendt explains: '[w]hen one is attacked as a Jew, one must defend oneself as a Jew. Not as a German, not as a world citizen, not as an upholder of the Rights of Man' – H Arendt cf: J Betz 'An Introduction to the Thought of Hannah Arendt' (1992) 28 *Transations of the Charles S. Peirce Society* 379-422; Drichel (note 8 above) 594.

[11] J Derrida *Positions* (1972) (trans A Bass, 1981) 41.

[12] H Bhabha 'Postcolonial Criticism' in S Greenblatt & G Gunn (eds) *Redrawing the Boundaries: The Transformation of the English and American Literary Studies* (1992) 457.

'third space' – neither entirely that of coloniser nor exclusively that of the colonised – then emerges to destabilise the centralised schemes of reasoning.[13]

This study remains geographically located in the then Transvaal. The chapter begins with the convoluted processes in law of distilling what elements were required to identify and then appropriately classify Africans. Then the old constitution, the South Africa Act, 1909, is considered briefly along with the gold and diamond mining law, taxation and occupation laws that presided over African workers following the unification of the four colonies. Thereafter the chapter moves to pertinent labour regulation at the mines in the Transvaal. The Mines and Works Act, the Native Labour Regulation Act, the Miners' Phthisis Acts as well as the workmen's compensation laws are the key laws under scrutiny.

5.2. Who is or What is a 'Native'?

The very idea of a 'native' in colonial law addresses the reality that Africans were just people, ordinary people, before their racialised re-designation by Europeans. Much like Said's Oriental, 'European culture gained in strength and identity by setting itself off against' Africans.[14] In similar vein Bhabha describes the situation as follows:

> 'In situations where cultural difference – race, sexuality, class location, generational or geopolitical specification – is the linchpin of a particular political edict or strategy, even the oppressor is being constituted through splitting. The split doesn't fall at the same point in colonized and colonizer, it doesn't bear the same political weight or constitute the same effect, but both are dealing with that process.'[15]

Africans (by law) were established as a group, which was then clothed with a number of characteristics that were intoned repetitively as their innate features. This part recites the interpretations of the depiction of Africans in early twentieth century law. Butler described this deconstructive process, intended to dislocate the prevailing sentiment, thus:

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[13] H Bhabha *The Location of Culture* (1994) 37.
[14] According to Said'the Orient is not an inert fact of nature. It is not merely there, just as the Occident itself is not just there either … men make their own history … what they can know is what they have made' - E Said *Orientalism* (1979) 3-5.
[15] H Bhabha 'Translator Translated: WJT Mitchell Talks with Homi Bhabha' (1995) 80 *Artforum* 80-83.

> '[t]his is citation, not as enslavement or simple reiteration of the original, but as an insubordination that appears to take place within the very terms of the original, and which [in turn] calls into question the power of origination.'[16]

This practice derives from understanding that when one is labelled in a derogatory manner, the label activates an opportunity to use the demeaning descriptions within that discourse 'to counter the offensive call.'[17] Since the discourse of labour law has ossified the African into assigned caricatures and does not account for the complexities of human relations and interaction, the disparaging labels require re-articulation as a method of address. If the appearance of the African (labelled 'native' or 'coloured') in the provisions of law signals the repeated assertion of alterity or othering in comparison to white people, it may now be used to devise ways to countermand such discourse in the law. The discussion of courts on the correct method of determining what properties must be detected as well as the proportions in which they are required, in order to find that a person is African under law, follows next.

In the context of the law prohibiting the sale of intoxicating liquor to Africans, the Appellate Division had occasion to consider the scope of the definition of 'native' in *Rex v Kogan.*[18] The accused was charged with contravening section 2 of the Cape Liquor Licensing Act 28 of 1898 as amended by section 1 of the Native Definition Amendment Act 1 of 1916 for selling to liquor to a 'native.' Section 5 of Cape Act 28 of 1898 defined a 'native' as *inter alia* including 'Griqua, Zulu, Bechuana, Swazi, or any member of any aboriginal tribe or race of Africa'. The question of what evidence was required to prove that a person was a 'native' was considered. African (per the Act) was held to extend to people coming from beyond the territorial borders of the Union – Basotho, Swazi, Batswana – even East Africans who fitted the general appearance described.[19] Nonetheless, the court limited the scope of the aboriginal African as it might pertain to 'Moors, Algerians and Egyptians', whom the court surmised were not contemplated as groupings to be included in the definition by the legislature for purposes

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[16] J Butler *Bodies that Matter: On the Discursive Limits of Sex* (1993) 45.
[17] J Butler *Excitable Speech: A Politics of the Performative* (1997) 2; 'the citation, or iteration, of collective otherness thus offers the possibility to reintroduce, quite literally, the sense of alterity that had been disavowed in the stereotype as a fixed form of otherness' - S Drichel 'The Time of Hybridity' (2008) 34 *Philosophy & Social Criticism* 587-615, 601; Bhabha agrees that this situation 'allows the native or the subaltern or the colonized the strategy of attempting to disarticulate the voice of authority at that point of splitting' – Bhabha (note 15 above).
[18] *Rex v Kogan* 1918 AD 521.
[19] Ibid 522; in *Rex v Price* 1915 CPD 27 the court held the term native applied to a Zulu even though the Zulu people have not been specifically referred to in the Act 28 of 1898.

of the Act.[20] But, the court held that if a man originated from 'Nairobi or Lake Nyanza … [their] position would be' that of an African.[21]

For the test to be applied in deciding whether a person was in fact African, the court referred to the dictum of De Villiers CJ in earlier cases of the Cape Colony *R v Parrot* and *R v Joplin*.[22] The provisions of the same law (Act 28 of 1898) which prohibited sale of liquor to Africans were in issue in *R v Parrot*. The court found that being the illegitimate son of a European did not mean the accused was not an African by virtue of his mother. De Villiers CJ stated that '[w]here a European is married to a native woman their children would probably not be treated as natives, but the illegitimate children of a native woman by a European, if retaining the features and characteristics of the mother, would be natives.'[23] Though European parentage had been declared by their African mothers to the court, the accused were held to have the appearance of being 'a cross between a Bushman and a Hottentot, [so] … as both tribes are natives the mixture would not affect the question at issue.'[24] And this was gleaned from the magistrate's opinion that from their appearance they looked African. In concurring, Buchnan, Judge (J), added that 'where a person shows the appearance and usual characteristics of a native the proof that there is probably a strain of foreign blood in his veins is not sufficient to take him out of the protection of the Act.'[25] In *R v Joplin* the court endorsed the practice of ascertaining whether a person was an African primarily through the observations of the magistrate about what his appearance indicated.[26] Similarly, the Appellate Division in *Kogan* highlighted 'the importance of the personal inspection by the magistrate of the so-called native'; that in cases of this nature 'detailed evidence' on the resemblance of the person in question to African tribes recognised in South Africa is warranted.[27] The appearance test was approved.

The court in *Kogan* also declared that the purpose of the law was to shield Africans from the effects of liquor which they were ill-equipped to handle, given the substandard capacities of their Africans, 'particularly those who resembled the tribes which were specially

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[20] *Kogan* (note 18 above) 523.
[21] Ibid 526.
[22] *R v Parrot* (1899) 16 SC 452; *R v Joplin* (1902) 19 SC 502.
[23] Ibid *Parrot* 454.
[24] Ibid 455.
[25] Ibid 456.
[26] *Joplin* (note 22 above) 506.
[27] *Kogan* (note 18 above) 523.

prohibited by name.' The rationale behind the prohibition was explained by Innes CJ as follows:

> 'If we refer to the mischief of the statute, and the intention of the Legislature, it was to prohibit the supply of liquor to those classes of the community who, from a want of training in civilisation, were unable to refrain from excess in the use of liquor. The specified tribes were all primitive, and considered as a whole, they were all tribes backward in civilisation as compared with Europeans.'[28]

The individual being assessed by the court in *Kogan* was a 'Portuguese East African' coming from the 'southern portion' of Africa, a colony which was to become present day Mozambique. He was found to be a 'native' for purposes of the Act.

In *Rex v Swarts,* the court held that there were three questions which had to be answered in order to determine whether someone was a 'native', namely, appearance, parentage and the associations of the person in question.[29] Ordinance 32 of 1902 amended Ordinance 19 of 1898 which banned the sale of liquor to coloured people and defined a 'coloured person' as 'any African or Asiatic native or coloured American or St. Helena person, Coolie or Chinaman, whether male or female.'[30] The appellant was married to a coloured person and associated with coloured people. In the context of the facts of this case, coloured meant a person of mixed race. The fact that the appellant looked white to the court raised reasonable doubt in the mind of the court. The court held that the Crown had not discharged its onus of proving that the appellant was coloured primarily because 'the most important factor is the question of appearance', and to the court the appellant 'had the appearance of an ordinary white person.'[31] This appellant was found to be white, rather than coloured.

In *Rex v Sonnenfeld,* the Provincial Division confirmed that the test to determine 'coloured' was appearance, parentage, habits and associations, 'the most important factor being his appearance'.[32] Once again the assessment related to a person of mixed race parentage and

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[28] *Kogan* (note 18 above) 526.
[29] The prohibition on the sale of intoxicating liquor to a coloured person under section 48 of Transvaal Ordinance 32 of 1902 was in issue - *Rex v Swarts* 1924 TPD 421.
[30] Section 6 Liquor Law No. 19 of 1898 (Transvaal).
[31] *Rex v Swarts* 1924 TPD 421, 422.
[32] Yet again the probation of the sale of intoxicating liquor under section 46 of Transvaal Ordinance 32 of 1902; *Rex v Sonnenfeld* 1926 TPD 597, 598.

the detailed methodology of the court in determining these factors in this case is noteworthy. On the question of appearance, the court stated:

> 'I am satisfied that the usual characteristics of a coloured person are not present, notably the characteristics of hair, of features, of stature, and of pigmentation. Her hair is sleek. The negroid formation of face and feature is entirely absent, and she is unusually tall. She is certainly dark complexioned, but not nearly as dark as many persons of ones knowledge who undoubtedly pass as Europeans.'[33]

By her own evidence, Mrs Batty's mother had been a Mauritian Creole (a mixed-race person), but for the court this did not disqualify her white status conclusively since in her evidence she did not define what she meant by Creole; moreover '[o]ne of the definitions given by a recognized dictionary is that a Creole is a person born outside Europe of European parents'.[34] That Mrs Batty described herself as coloured was also deemed inconclusive of the fact. The concurring judgment of Tindall J refers to the reasoning of the court in of the 1912 judgment of *Bashali v Rex,* where Wessels, Judge President (JP) declared:

> '[t]he Act gives no definition to guide us. Did the Legislature mean that every person who has some colour should be prohibited from being in possession of liquor? … I do not think that the Legislature ever intended that any trace or apparent trace of colour should debar a Transvaal citizen from being in possession of liquor. Nor does it appear to me that to say coloured means manifestly coloured brings us much further. A person who appears manifestly coloured when compared with a blonde might not seem such when compared with a brunette. . . I think therefore we must assume that the Legislature meant by coloured something more than merely a dark skin.'[35]

This meant that although a person's skin may be dark, if he or she could prove European descent he or she might then be regarded as white.[36] Notice was taken of the evidence of

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[33] Ibid 599; The court proceeded to comment on 'habits, associations and mode of living. As far as Mrs. Batty's habits are concerned, we have it in evidence that in 1913 she was married before an Army Chaplain at Bloemfontein to a European soldier, and that she lived with her husband for a considerable period until he went overseas on active service. Whilst overseas he deserted her, giving as his reason that he had made the discovery that she was a coloured person. I must assume, therefore, that when he married her in 1913 he was under the firm impression that he was marrying a white woman. Since the desertion by her husband she has been living with another white man. In 1920 she adopted a white child, and it is clear from the evidence that she would not have been allowed to adopt the child if it had been thought at the time that she was not a white woman. She, moreover, now lives and has always lived, in quarters usually occupied by Europeans' – Ibid,600.

[34] Ibid 601

[35] Ibid 603

[36] Ibid 604.

Professor Dart who exhibited a 'skin colour table' ostensibly showing that Batty fell within the range of colours attributable to Europeans or white people.[37] The corroborative evidence of Dr Braun, a practitioner at the General Hospital, Johannesburg, stated that Mrs Batty's nose was 'definitely not negroid'.

A different outcome awaited the accused in *Rex v Tshwete* where the accused, who was charged with failing to pay his 'native tax', was the illegitimate son of a white father and an African (Xhosa) mother, who spoke Xhosa and had been raised in a 'native' location, was married to an African woman and associated with Africans.[38] Applying the *Swarts* test on appearance, the preponderance of evidence was inconclusive and he could be deemed either African or coloured (mixed race). The '[a]ccused's features certainly showed some European characteristics, his complexion had a ruddy tint, his hair though black and crinkly was not of the tightly curled variety common to the Bantu races.'[39] On appearance, he could pass as coloured (mixed-race). When the test of 'preponderance of blood' or parentage was applied, the court could not say that any parental component dominated or outweighed the other.[40] On the 'habits of life' test he presented as a 'native' – an African.[41] The court followed the magistrate's ruling on the basis of habits and earlier law stating that mixed-race children having an African mother were classified according to their mother.[42] This occurred despite the Appellate Division *Kogan* ruling which the declared the primacy of appearance in the assessment process.

The Appellate Division in *Rex v Fakiri* affirmed that, under section 19 of the Natives Taxation and Development Act 41 of 1925, that where there is reasonable doubt the accused bears the onus of proving that he is not African as alleged.[43] Remarking on proof that the accused's appearance was decidedly African, the court noted that he had 'crinkly black hair almost as tightly curled as that of the ordinary Bantu native, a dark-brown complexion, a high,

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[37] Professor Dart remarked that there was 'nothing in the shape or colour of her lips to indicate negroid bastardism … bastardism with any native race of Africa' – Ibid 605.
[38] Rex v Tshwete 1931 EDL 62
[39] Ibid 64.
[40] Ibid.
[41] Ibid 65.
[42] Ibid 65; in making its decision the court referred to the 1903 Natal decision of *Govu v Stuart* 1903 NLR 440, 441 – where it was determined that the status of an illegitimate child, 'the offspring of promiscuous intercourse' derives from that of the mother.
[43] *Rex v Fakiri* 1938 AD 237.

narrow forehead, a somewhat narrow face, a straight but broad nose and a small moustache.'[44] So the evidence of the Crown was enough to raise reasonable doubt on the allegation made by the accused that he was not an African and liable for the non-payment of Native tax under the Act. The court aligned itself with the *court a quo* decision of the Natal Provincial Division (NPD) in *Fakiri v Rex*.[45] The appellant's great-grandfather was an Arab. Racial mixture of parentage had been anticipated by section 19 and was not the only decisive factor and it was for the accused to prove it, failing which he would be deemed African.[46] The argument before the NPD was that 'native' meant 'pure or unmixed aboriginal stock.'[47] The NPD noted that 'the appearance of the appellant … [was] such that he could be taken for a full-blooded native.'[48] The NPD relied on the reasoning of the Appellate Division in *Moller v Keimoes School Committee and Another* where the court stated that:

> '[t]he words must speak for themselves. The natural meaning of European is not partly European, any more than the natural meaning of extraction is descent on one side alone. It ought to require some special indication of intention to justify … holding that European extraction was intended to mean or include mixed extraction.'[49]

On this the NPD commented that the intention of that law (Cape School Board Act) had an historical imperative of preserving unblemished white stock in a particular sphere of education – schools, whereas in *Kogan* the AD had addressed the meaning of 'native' directly and referred to the purpose of the law (the 'mischief' being curbed).[50] The court opined that section 12 of Act 41 of 1925 created the 'Native Development Account' where taxes were deposited so as to improve the lot of the Africans. The NPD found it 'inconceivable' that the legislature would have intended that a person who looked African and had their 'preponderance of blood' being African, should escape the tax; more particularly when the culprit had an African wife and lived like other Africans.[51] The court found such a concept of the legislative

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[44] Ibid 242.
[45] *Fakiri v Rex* 1938 NPD 454.
[46] Section 19 read: '"native" means any member of an aboriginal race or tribe of Africa but does not include a person in any degree of European descent (even if he be described as Hottentot, Griqua, Koranna or Bushman) unless he is residing in a native location under the same conditions as a native: Provided that whenever there is any reasonable doubt as to whether any person is a native as thus defined, the burden of proving that he is not a native shall be upon such person.'
[47] *Fakiri* (note 45 above) 456.
[48] Ibid 457.
[49] *Moller v Keimoes School Committee* 1911 AD 635, 647 – the case involved the denial of admission of mixed raced children into a white school.
[50] *Fakiri* (note 45 sbove) 458.
[51] Ibid 459-460.

intent 'absurd' since 'the Legislature must have been aware that there are living in the Union many thousands of individuals who look like natives, live as natives do, but whose blood contains at least a trace, and often more than a trace, of blood other than that of the pure aboriginal races of Africa.'[52] The court then looked to the section 19 description of 'native' which reversed the usual onus in criminal matters by placing the burden on the accused. Under this provision the accused would not be given the benefit of a reasonable doubt. Having applied the three pronged test of appearance, blood and habits, the NPD found the appellant to be African and therefore guilty as charged.

The stance shifted somewhat later on in *Rex v Radebe and Others* where the accused was the illegitimate son of an Indian father and an African mother.[53] The appellant had been charged in the Native High Court in Natal and the question was whether that court had had jurisdiction to try him. The Appellate Division stated that '[b]roadly speaking, the population of South Africa is made up of four racial groups – Europeans, natives (or Africans), Asiatics and persons of mixed breed.'[54] The court remarked that '[i]t has not hitherto been contended that a person who by descent was a pure blooded African could by reason of his appearance, habits and associations or otherwise be brought outside the definition' of an African.[55] The court held that 'the basic definition rests upon descent alone, with appearance and habits or associations merely providing evidence of descent where no certain direct evidence is available'.[56] Ultimately the court decided that he was not a 'native'.

The assessment of courts on the components required for being African in the cases highlighted illustrates the difficulties of the definition itself. The Supreme Court of the Transvaal had sourced authority for such inequality in the *Grontwet*.[57] *Kogan* illustrates the attitude of the courts which went so far as to segment the African continent when demarcating how far to extend the application of 'native', much like Hegel's pronouncements on an 'Africa

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[52] Ibid 460.
[53] *Rex v Radebe and Others* 1945 AD 590.
[54] Ibid 603.
[55] Ibid 604.
[56] Ibid 609.
[57] The Grontwet stated that '[t]he people will have no equality between coloured and white inhabitants, either in Church or State', which court declared meant that '[t]here is not and never was an equality between whites and persons of colour, and we are bound to accept, as a principle, that every right possessed by the white man can only be exercised to a limited extent, or not at all, by the person of colour' - *Tayob Hajee Khan Mohamed v The Government of the South African Republic* (1898) 5 Off Rep 168, 169, 178

proper'.[58] Moors, Algerians and Egyptians had been excluded from the definition of an African, but those coming from Nairobi and further south were held to qualify.[59] Indeed the same court had already distinguished 'Asiatics' – 'Coolies, Arabs and Mohammedan subjects of the Turkish Empire' – from Syrians, who, though natives of Asia, belonged to the white race.[60] Hegel described a 'peculiarly African character' which required the suspension of universally applicable values and principles in order to understand it;[61] because

> '[i]n Negro life the characteristic point is the fact that consciousness has not yet attained to the realization of any substantial objective existence – as for example, God or Law – in which the interest of man's volition is involved and in which he realizes his own being. [The African] … exhibits the natural man in his completely wild and untamed state. We must lay aside all thought of reverence and morality – all that we call feeling – if we would rightly comprehend him; there is nothing harmonious with humanity to be found in this type of character. The copious and circumstantial accounts of Missionaries completely confirmthis'.[62]

Likewise in South Africa the 'native question' was premised on the assertion that Africans were 'a savage people', unworthy of the receipt of 'equal civil rights … [which were] incompatible with their uncivilised condition'; and '[t]hat the only pressing needs of a savage people are food and sex'.[63]

Imbued with this kind of ideological background, courts struggled to operationalise their legal mandate accurately. The fate of 'pure' Africans and mixed race people who closely resembled them was determined largely by what they seemed to look like. In *Parrot,* 'proof of foreign blood' was deemed insufficient to dispel the belief that a person possessed 'substandard

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[58] Hegel divides Africa into spaces of history, sub-Saharan Africa being labelled 'Africa proper'. This region and its peoples Hegel claims has been 'shut up' and 'compressed within itself – the land of childhood' untouched by 'self-conscious history' and enclosed 'in the dark mantle of Night' - G Hegel *The Philosophy of History* (2001) 109-111 available at https://socialsciences mcmaster.ca/econ/ugcm/3ll3/hegel/history.pdf, accessed on 23 April 2020.
[59] *Kogan* (note 18 above) 523-536.
[60] The court pronounced that 'Syrians, though Asiatics, are a white Semitic race which has been Christian and not Mohammedan from very early times' and were therefore not covered by the prohibition of landownership by Asiatics under Law 3 of 1885. The court explained: 'If this were not so, very remarkable results would follow; for not only a Syrian, but a Jew from Palestine would be relegated to the location, be compelled to carry a permit, and be subject to the stringent restrictions of Act 2 of 1907, and similar legislation.' - *Gandur v Rand Township Registrar* 1913 AD 250, 254, 256
[61] Hegel (note 58 above)110.
[62] Hegel (note 58 above)111.
[63] Resolution No. 198 Annexation of The S.A. Republic to the British Empire [12 April 1877]; Management of Natives Law No. 4 of 1885; para 70 *Reports of the Transvaal Labour Commission* (1904) 29.

capacities' consequent on 'want of training in civilisation'.[64] Yet despite the protestations of necessary white racial purity in *Moller v Keimoes*, the fact that a person looked white to the appellate court was enough to satisfy the court that he was white in *Swarts*. Much was certainly made of appearance in *Sonnenfeld* where the person, by her own admission, said that she was not white. Here it was the habits and associations that were given prominence. In *Sonnenfeld,* as in *Bashali,* a 'trace or apparent trace of colour' was held not to disqualify access to whiteness. But in *Tshwete,* where the 'preponderance of blood' could go either way, a man whose father was white was held to be a 'native' based on his African mother, despite the fact that he was clearly mixed-race. The legislature went as far as eschewing the accepted burden of proof when it came to the collection of poll tax under the Natives Taxation and Development Act 41 of 1925.

In reading of the above judgments which appear to be about Africans – who and what they are – it is striking to note that, although mentioned, they remained tangential to the process at hand. Africans, characterised primitive, in reality remained 'obviously voiceless' blemishes 'at the borders of the [stated] normative values' and law.[65] Yet the ingredients of a 'native', should such a being continue to be assumed to exist, remained elusive. The language of explanation yielded shaky results, which place the cogency of the categorisations that quantified African-ness in doubt. The thoughts of Ngugi wa Thiong'o are apt when he states: 'I feel that the English language will be able to carry the weight of my African experience. But it will have to be a new English' – one that carries the collective anthology reflective of all of the protagonists in the South African arena.[66]

5.3. Africans in the Union of South Africa

This part focuses on the constitutional position of Africans as well as the mining and taxation law in the Transvaal province following the incorporation of the Union. The section narrates the labour regulatory aspects of these laws during the first decade of unification.

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[64] *Kogan* (note 18 above) 526.
[65] V Mudimbe *The Idea of Africa* (1994) 6
[66] Ngugi wa Thiong'o *Decolonising the Mind: The Politics of Language in African Literature* (1986) 8, 15.

5.3.1. South Africa Act, 1909

The South Africa Act, 1909 brought into being the Union of South Africa (the Union), an amalgamation of the Cape of Good Hope, Natal, Transvaal and Orange Free State into a single Colony. The only mention of Africans in the Act is found in section 147 thereof. This section provided for 'control of native affairs … throughout the Union', which it vested in the Governor-General-in-Council (Governor-General), who was to preside as 'supreme' chief over Africans. The Governor-General also had special powers over Crown land in declared reserves set aside for occupation as African locations. Of the 152 sections this establishment Act, section 147 contains the only direct mention of Africans – who at all times have constituted the vast majority of the population of the Union, before and since amalgamation. Yet in reality other sections such as those pertaining to the composition of the state, in particular the House of Assembly and Senate, do also refer implicitly to Africans.

Parliament consisted of two houses, the Senate and House of Assembly. Section 24 provided that four of the eight senators that were nominated by the Governor-General would 'be selected on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa.'[67] In terms of section 26, qualifications of Senators included being 'a British subject of European descent.'[68] Likewise section 44(c) stated that in order to qualify to be a member of the House of Assembly, a person had to be *inter alia* 'a British subject of European descent.' Section 33 set out the quota that determined number of members permissible in the House of Assembly per province based on 'dividing the total number of European male adults in the Union, as ascertained at the' 1904 census, by the total number of members already in the House (section 34(i)). In terms of section 34 (ii), (iii) and (iv) from 1911 onwards at five year intervals, 'a census of the European population of the Union' was to be taken for the purpose of maintaining the correct quota.[69]

Section 35(1) laid out the qualifications to vote, stating that those who had qualified 'or may become capable of being registered as a voter' via existing Cape law before the Union, would not be deprived of the vote on creation of the Union, 'by reason of … [their] race or

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[67] Section 24(ii) South Africa Act, 1909
[68] Section 26(d) South Africa Act, 1909; 'European descent' signified overt exclusion of Africans.
[69] According to section 34(vii) - the number of white male adults quantified by the 1904 census was taken to be 167 546 in the Cape, 34 784 in Natal, 106 493 in the Transvaal and 41 014 in the Orange Free State.

colour only'; 'unless the Bill be passed by both Houses of Parliament sitting together' by a two-thirds majority. Section 35(2) stated that if such a law were to be passed, people already entitled to vote would not be deprived on the basis of 'race or colour' – meaning that such a law would not be retrospective but apply to future voter registration applicants. Section 36 entrenched voter qualifications which existed in the provinces prior to union. In the Transvaal and Orange Free State only white males could vote and in Natal there was an extremely stringent qualification which had ensured that no Africans had the vote.[70]

The purport of the South Africa Act was that Africans should not or could not exist in law as beings with the entitlements accorded to white people. By making Africans all but invisible in what was overtly discussed the law dispensed with the need to justify the morality.

The decision of *Mokhatle & Others v Union Government (Minister of Native Affairs)* is relevant to the interpretation of section 147 of the South Africa Act because in it the Appellate Division addressed the scope and power of the Governor-General sitting as 'supreme chief' over Africans.[71] Plaintiffs, members of the Bafokeng tribe – a part of the Barolong people, who were summarily expelled from the Pokeng location or 'any land in the tribal ownership of the Bafokeng' by the Governor-General, argued that they were entitled to occupy and use said territory. The reason for the expulsion was that they were defying the appointed chief and sowing dissention in the tribe. The issues before court were: (1) 'can a paramount chief, according to native law and custom, remove a recalcitrant or rebellious native from his tribe or the tribal property; and (2) if so, can this power of removal be exercised without an investigation or trial of the native or natives who have been so removed?'[72] The court declared that:

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[70] The OFS constitution of 1854 restricted citizenship to 'white persons' and the franchise to citizens who had reached the age of 18 years; successive franchise laws in the ZAR had restricted the vote to white persons and categorically excluded 'coloured people, half-castes' – e.g. Law No. 4 of 1890; Act 8 of 1896 in Natal disenfranchised Indians, though in theory Africans could get the vote they first had to own property and prove that they had be 'civilised' for seven years, according to Lodge et al by 1909 there were only six Africans registered to vote – T Lodge, D Kadima & D Pottie (eds) *Compendium of Elections in Southern Africa* (2002) 292-294

[71] *Mokhatle & Others v Union Government (Minister of Native Affairs)* 1926 AD 71.

[72] The evidence per Rev. Mr. Behrens, a missionary in charge of a station in the Rustenburg area; that of a headman Taetele; and that of Solomon Plaatjies 'a very intelligent and educated native, who is the author of a well-known book' was construed to show that 'the head chief' could indeed to do. Additionally Chief Linchwe another 'educated native' stated that 'chiefs will only take advice … where it suits them' and was supported in this view by several other witnesses - Ibid 75-77.

> '[t]he Governor-General, as supreme chief, is, consistently with the circumstances, free to act and treat a case of insubordinate conduct on the part of certain natives as one of policy and of good government … if he does so act, he proceeds according to native law and custom in the exercise of his authority, as supreme chief, conferred upon him under the provision of the Transvaal Act.'[73]

On the question whether the expulsion ought to have been preceded by a fair hearing, and that failure to do this fell foul of 'elementary justice … universally observed by the civilised world', the court concluded that since the Governor-General was vested with the powers of a supreme chief under 'native' law he was at liberty to exercise such power. The court explained that 'principles of civilisation' were defined by and in relation to societies at 'an advanced stage of social development',[74] and that, since African law and custom was 'best understood by the native mind', it ensured efficient management of Africans. Therefore its use was 'in keeping with the practice of civilised countries.'[75] Ultimately the courtdeclared:

> '[i]t is no injustice or hardship to the natives to be permitted to live under their tribal government according to native usage; and unless a clear case of injustice and illegality has been made out …, the decision of the Supreme Chief according to native law and custom cannot be disturbed by the Court.'[76]

The court essentially ruled that the assumption of the powers of supreme chief, as provided for by section 147 of the South Africa Act, entailed bifurcation. One set of justice principles for the white community and another for Africans. The court declared that for Africans this was in accord with African law and civilised conventions. But the Governor-General had not sourced this power from African law. Instead the power had been bestowed on the Governor-General by the sections 2 and 5 of Act 4 of 1885 (Transvaal) – the Management of Natives Act.[77] Thus the Governor-General could interpret and reorder African custom as he saw fit, to dovetail with the colonial objectives and understanding of justice as it

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[73] Ibid 78; Act No. 4 of 1885 (Transvaal)..
[74] Ibid 79.
[75] Ibid 79.
[76] Ibid 82.
[77] Section 2 stated that 'laws, habits and customs hitherto observed among the natives shall continue to remain in force … as long as they have not appeared to be inconsistent with the general principles of civilization recognized in the civilised world.' But by contrast section 5 stated that '[a]ll matters and disputes of a civil nature between natives shall be dealt with according to the provisions of this Law [Law No. 4 of 1885] and not … in accordance with native laws … in so far as the same shall not occasion evident injustice or be in conflict with the accepted principles of natural justice.'

pertained to Africans. In this case, the court was unable or unwilling to perceive injustice in the expulsion without a hearing, in the context of circumstances that related to Africans. Robinson has discussed founding myths of societies 'recognized in the official instruments of class hegemony … [functioning] to legitimate the social orders'.[78] Africans were barred from accessing the justice principles of the colonial authority because conquered spaces where no 'sins' could be committed had been established.[79] The dual function at once subdues 'thedark unruly spaces of the earth' while proclaiming superior culture, exhibiting the precariousness of its power.[80]

5.3.2. Mining, Taxation, Mobility and Residential Occupation Laws

This part revisits mining regulation during the first decade of unification, focusing yet again on labour. This law under review repeated the pattern of prior laws by not defining 'white person'. Routinely 'person' in these laws meant the white person, and where Africans have been addressed the words 'native' or 'coloured' prefixed 'person' in the provision. In some instances, specific chapters were set aside in statutes to deal with the position of Africans. To this, Mbembe has charged that critique of whiteness – white as normative – within colonial formations, must 'start from the assumption that whiteness has become this accursed part of ourselves we are deeply attached to, in spite of it threatening our own very future well-being.'[81]

The Precious and Base Metals Act No. 35 of 1908 defined 'coloured person' as 'any African or Asiatic native or any other person who is manifestly a coloured person'.[82] Section 14(1) stated that when applied for, 'a prospecting permit' would be issued to 'any white person of the age of sixteen years or upwards either on his own behalf, or on behalf of another such person or persons or an incorporated company.' Section 32(1) provided that '[e]very white person of the age of sixteen years or upwards, may, on payment of license moneys in

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[78] Inevitably this 'legend as history' comes to replace authentic historical accounts as they disseminate the leanings of their sponsors – Robinson (note 1 above) 186, 189.
[79] S Ndlovu-Gatsheni 'Beyond the Equator There Are No Sins: Coloniality and Violence in Africa' (2012) 28(4) *Journal of Developing Societies* 419-440.
[80] But '[a]s a signifier of authority, the [text] … acquires its meaning *after* the traumatic scenario of colonial difference, cultural or racial, returns the eye of power to some prior, archaic image or identity' – Bhabha (note 7 above) 107.
[81] A Mbembe 'The State of South African Political Life' available at https://africasacountry.com/2015/09/achille-mbembe-on-the-state-of-south-african-politics, accessed on 26 July 2019.
[82] Section 3 Precious and Base Metal Act No. 35 of 1908 - the object of the Act was to 'consolidate and amend the law relating to prospecting and mining for precious metals and base metals and to provide for matters incidental thereto.'

accordance with section forty, obtain … a license called a "prospecting license"' which allowed him to peg a portion of a Public Digging still open for pegging. Section 79(1) permitted any 'white person who, or an incorporated company which, on any proclaimed land (whether open or held under mining title), desires to carry on works, necessary or incidental to the mining industry … may make written application … for a stand called "an industrial stand"'.[83] Section 105 prohibited the unlawful dealing in unwrought precious metals except by a license holder (who could only be a white person in terms of section 32), a banker or a person granted permission by the Mining Commissioner. Section 106 made it an offence to be in possession of unwrought precious metals. Only the people permitted to deal (under section 105) could be in lawful possession of the metals. Section 107(1) stated that the Receiver of Revenue could 'issue to any white person, who produces and lodges with such officer a certificate of fitness … a licence' for a particular district to deal in unwrought precious metals. Section 114 underlined the prohibition, stating that no 'coloured person' could 'sell, barter, pledge or otherwise dispose of any unwrought precious metal' – it was an offence punishable by up to five years imprisonment. Section 130(1) read:

> '[s]ave as provided for in section twenty-four[84] no right may be acquired under this Act by a coloured person; and the holder of a right acquired under Law No. 15 of 1898 [Gold Law] or a prior law or under this Act shall not transfer, or sub-let, or permit to be transferred or sub-let, any portion of such right to a coloured person, nor permit any coloured person (other than a bona fide servant) to reside on or occupy ground held under such right.'[85]

Section 131 stated that coloured persons were to reside only in designated 'bazaars, locations, mining compounds, and other such places as the Mining Commissioner may permit.' An exception were coloureds employed by white people on the premises of their employer (section 131(3)).

In *Hussen v Receiver of Revenue Johannesburg,* a Hindu 'coloured' man approached the court for an order directing that he be granted a jeweller's permit.[86] The Receiver of Revenue required a 'fit and proper person' certificate from the commissioner of police in order

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[83] Section 78 provided for a white person to open a stand or a business on proclaimed land if given permission by the Mining Commissioner, following written application.
[84] Section 24 Special provisions applicable to native locations.
[85] Section 130(2) set out a penalty for the offence of contravening subsection 1 of up to £50 and a further £5 for every day that the contravention continued.
[86] *Hussen v Receiver of Revenue Johannesburg* 1914 WLD 23.

to grant a license to trade as a jeweller. The commissioner had refused to grant the certificate on the grounds that Hussen was not a white man. The court referred to section 114 of Gold Law 35 of 1908 which banned 'coloured persons' from buying, selling or possessing unwrought gold unless working for a licence holder, stating that it should be read together with s 106 and s 107. In holding that the applicant was not entitled to a license to trade as a jeweller in a designated area, the court referred to amendment Act 18 of 1913 and extended the definition of unwrought to include 'bangles, chains, or any other articles whatever, containing precious metal made up'.[87]

In *Pitch and Bhyat v Union Government,* the Union took issue that Pitch, a white man, had transferred a stand to Bhyat, a coloured person, in violation of law.[88] The government claimed that it was accordingly entitled to cancellation of the deed against both defendants and to take possession of the stand in question. The Transvaal Provincial Division (TPD) had found that the second defendant, Bhyat, was a British Indian – therefore coloured – hence the Lieutenant Governor could apply sections 130-131 of Act 35 of 1908 by cancelling the deed, ejecting Bhyat and taking possession of the stands. Appellate Division (AD) held that there was no authority to import the Gold Law restrictions to the Township Law Act 34 of 1908. That 'confiscation is not authorized by the Townships Act. Bye-laws cannot make class distinctions.'[89] The court held that the 'existing titles were subject to severe and restrictive conditions in respect of coloured occupation, made applicable by an Act of Parliament' and further restrictions would have to emanate from an Act rather than municipal Bye-laws.[90]

Diamond law in force at the time of unification was the Precious Stones Ordinance No. 66 of 1903 which amended Law No. 22 of 1898. Section 4 said '[a]ny white male inhabitant of … [the] Colony over the age of eighteen' was free to approach the office of a District

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[87] The Transvaal Precious and Base Metals Act 18 of 1913 (amended the 'principal law' Act 35 of 1908). Section 2(1) '… trading by coloured persons (as in the principal law defined) in … locations and bazaars' was permissible subject to the provisions of law and regulations. Section 3 defined 'unwrought precious metal' to include '… reduction works and scrapings and bye products of unrefined precious metal and … bangles, chains or any other articles whatever containing precious metal, made up, smelted or manufactured in the Union'. Section 4 repealed s 106 of Precious and Base Metals Act (Transvaal) 35 of 1908 and restated that persons permitted to possess precious metals were still those set out in s 105 of Act 35 of 1908 (licence holders - white men). The new section 106(2) said that the GG could make regulations licensing persons 'authorized to buy, sell, make up, smelt or otherwise dispose of unwrought precious metal, *including the licensing of persons to carry on the business of jewelers or pawnbroking.*

[88] *Pitch and Bhyat v Union Government* 1912 AD 719.

[89] Ibid 723.

[90] Ibid 737.

Registrar to get a license 'to prospect for precious stones'.[91] Section 46 stated that '… it shall be lawful for any white male person over the age of eighteen years to obtain a license at the office of the District Registrar entitling him to peg off one claim on the areas proclaimed.' Sections 56 to 58 granted the Lieutenant Governor power to appoint a Diggers Committee and set out its powers and functions, or abolish or dissolve it when he deemed it necessary. Chapter 8 is headed 'Compounds and Searching of Natives'. Section 59 stated that 'coloured' persons were to be employed at mines or diggings under renewable voluntary contracts of no more than 3 months. Section 60 provided for the building of compounds to house 'coloured' labourers which was to be done once submitted plans had been approved by the Inspector. Section 63 stipulated that payment of 'coloured' workers had to be in current coin (money) not 'delivery of goods or otherwise than in the current coin. Section 68 provided for regulations to be issued for the proper process of searching 'coloured' people at mines or diggings.

The Precious Stones (Alluvial) Amendment Act No. 15 of 1919 amended the Ordinance 66 of 1903**.** Section 11 mandated that prior to the issuance of a claim license a person first had to be obtain a digger's certificated from the digger's committee. Thus digger's committee had the task of vetting the suitability of people; whether or not a person was of 'good character and a fit and proper person to hold such a claim licence' was the criterion.[92] Section 6 stated that 'any white person of the age of eighteen' and older who had a digger's certificate could on payment of the prescribed license get a claim license, permitting him to peg part of a declared alluvial digging. Section 19 – prohibited the working of a claim 'in partnership with any of his native labourers thereon'; even payment of a part of the revenues generated from the claim instead of wages was forbidden. A penalty punishable by up to £100 was established for any contravention of section 19.

The Native Tax Act 9 of 1908, which amended the Native Tax Ordinance No. 20 of 1902, defined an 'adult' as a 'male native apparently of the age of eighteen years or upwards'. 'Native' was defined as 'a person both of whose parents belong to an aboriginal race or tribe of Africa South of the Equator'. 'Proprietor' was defined as 'the registered owner of a farm or any white person who is the lessee or lawful occupant thereof'. The Act required payment of 'native tax' as follows: every farm labourer – one pound; a municipal location resident – one

[91] Precious Stones Ordinance No. 66 of 1903
[92] Refusal to grant the digger's certificate by the digger's committee was appealable via the mining commissioner and then a magistrate – section 11(d) Act 15 of 1919

pound; an adult not domiciled in the Colony but residing for 12 months – two pounds (section 3).

The Urban Areas Native Pass Act No 18 of 1909 regulated issuance of passes to Africans in urban areas. It defined a 'native' as 'a male person of the age of fourteen years or over that age, if both of his parents are members of an aboriginal race or tribe of Africa'. At this time the carrying of passes was not compulsory for African women. The Act empowered the Governor to 'make, alter, or rescind regulations' which administered matters including:

> '(a) … the issue of passes to and the compulsory carrying of passes by natives in urban areas, and imposing a charge on the issue of the pass not exceeding one shilling per month payable in advance by the native; (b) the supervision and control of natives and their sojourn in urban areas; (c) the conditions under which contracts of service entered into by natives in urban areas shall be regulated and enforced; … (e) prescribing penalties for a breach of any such regulations' (section 4).

Leading up to unification, the capacity of Africans to possess, occupy and reside indefinitely on immovable property continued to be a linchpin of labour regulation.[93] Key in this endeavour following the establishment of the Union was the enactment of the Native Land Act No. 27 of 1913. The Act defined a 'native' as follows:

> 'any person, male or female, who is a member of an aboriginal race or tribe of Africa; and shall further include any company or other body of persons, corporate or unincorporated, if the persons who have a controlling interest therein are natives'.[94]

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[93] Ordinance 58 of 1903 entitled 'Establishing Municipalities' defined 'native' as 'any person both of whose parents belong to any aboriginal race or tribe of Africa'. It left room for other non-whites to be classified differently. Section 37 of the Ordinance stated that the municipal council could 'lay out on lands under its control such locations for natives as may be deemed desirable and erect suitable buildings' for African occupation in regulations which would be compulsory for all Africans except those exempted by law or the fact that they are 'lodged on the premises of their employers to reside within such locations.' So the Ordinance stipulated the expected discrimination against 'natives' but it would be contended that such discrimination did not necessarily include all coloured people. Section 37 also gave the Lieutenant Governor the power to make regulations for the 'proper carrying out of the provisions of … [the] section'. In *Moses v Boksburg Municipality* 1912 TPD 659 the Boksburg Municipal Bye-Law made provision for the establishment of housing for both 'native and coloureds' rather than just 'natives' as stipulated in the empowering Ordinance. The accused had provided housing for 'coloureds'. The Bye-law was found to be *ultra vires*. But later on in *Williams and Adendorf v Johannesburg Municipality* 1915 TPD 106 the same court indicated that even where a discriminatory bye-law had been made without required specific mandate, it could nonetheless be allowed to stand where the municipality tendered evidence of its necessity.

[94] Section 10 Natives Land Act No. 27 of 1913.

Section 1 was headed: 'Restriction as to Transactions Relating to Land between Natives and other Persons Pending Enquiry by a Commission'. The section stated that on the commencement of the Act, land outside that 'schedule native areas' agreements on 'the purchase, hire, or other acquisition' of land were not to be made between Africans and 'a person other than a native'; nor were any rights or interests or servitude regarding land to be bestowed on Africans (section 1(a) and (b).[95] Such contracts were void *ab initio* (section 1(4)). Section 2 stated that at the commencement of the Act a commission would be appointed by the Governor General to investigate and report on areas which could be set aside for African acquisition, hire and other land entitlements and submit a report with maps showing the boundaries of the suggested territories within 2 years.[96] Reports were to be tabled before both Houses of Parliament (section 2). Section 5 made it an offence for persons who made agreements with Africans that fell foul of the section 1. Section 8(2) stated that the restrictions of the Act did not apply to registered voters in the Cape. Initially Section 8(1)(a) allowed for the 'continuation and renewal' of agreements which were in force at the time of the commencement of the Act on which dealt with 'a hiring or leasing of land'.[97]

Concentrating on the Transvaal mining sector, the next part considers the inaugural labour law of the first decade of the Union, namely, the Mines and Works Act, the Native Labour Regulation Act, the Miners' Phthisis Acts, and the Workmen's' Compensation Act. The conditions of service, permissible work designations which in turn signal likely remuneration level are highlighted, and so too the applicable compensation schemes, given the dangers associated with mine work.

5.4. Labour Regulation on the Rand Goldfields 1910-1920

5.4.1. Mines and Works Act of 1911

The Mines and Works Act No. 12 of 1911 was assented to on 15 April 1911 and commenced operation on 1 December 1911. The Act integrated all law of former colonies, its purpose being '[t]o consolidate and amend laws … relating to the operating of Mines, Works, and Machinery,

[95] Initially the sub-section read: 'until Parliament acting upon the report of the commission appointed under this Act shall have made other provision', but that portion was deleted by section 50(1) of the Native Trust and Land Act No. 18 of 1936.
[96] This provision was repealed by the Native Trust and Land Act No. 18 of 1936.
[97] This provision was repealed by the Native Trust and Land Act No. 18 of 1936.

to [mining] Certificates.'[98] It also made provision for prescribed minimum conditions of service for employment. Section 2, the Interpretation of Terms, did not have 'native', 'coloured person' or 'white person' among the terms defined therein. Thus on its face, read without context and other supporting legislation, the Act appeared to be devoid of racial discrimination. Section 2 defined 'work' as 'any place where there is any machinery'.[99] Section 4 granted the Governor-General power to make regulations on the operations of mines, works and machinery. Section 4(1)(d) allowed regulations on 'the duties and responsibility of owners, managers, overseers, and other persons engaged in or about mines, works, and machinery'. Section 4(1)(n) permitted regulations on 'the grant, cancellation, and suspension of certificates of competency to (1) mine managers, (2) mine overseers, … (5) engine drivers, (6) miners entitled to blast, (7) such other classes of persons employed in, at, or about mines, works, and machinery'.

Regulations under the Mines and Works Act, 1911 were published in November 1911.[100] At the outset, chapter 1 of the regulations, 'Interpretation of Terms', defined 'Banksman', 'Ganger', 'Manager' and 'Onsetter' as positions occupied by white people.[101] Section 30(1) stated that a banksman and onsetter could delegate part of their duties, in writing to 'responsible white persons'. Section 39 provided that the conveyance and delivery of explosives could be made to gangers, miners or 'to some person (other than an aboriginal native) who were 'responsible for its charge'. Under these regulations, the supervisory and specified duties at mines and works could only be performed by white employees.[102] The

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[98] It amended Transvaal Ordinances No. 50 of 1903, No. 54 of 1904 and No. 11 of 1906 and Act No. 32 of 1909 and No. 8 of 1910.

[99] Ordinance 54 of 1903 had defined 'works' as inclusive of 'chemical works metallurgical works reduction works salt works brickmaking works pottery works lime works and any places where machinery iserected'.

[100] Government Gazette Notice 1922 of 17 November 1911

[101] 'Banksman' was a person supervising boarding and alighting in 'the cage or skip' in conjunction with an engine-driver and an onsetter; 'Ganger' was a person 'in charge of workmen in one or more working places in or at the mine'; 'Manager' referred to the person 'responsible for the control, management and direction of a mine or portion of a mine or of works; and 'Onsetter' was the person in 'charge of the cage or skip underground' which 'raised or lowered' people – Ibid GN 1922.

[102] Section 91(1) read: '[a]ny person in whose temporary charge explosives have been lawfully left shall be responsible therefor until some other person, not an aboriginal native, accepts charge thereof'; '[F]iery mine safety lamps' had to be 'inspected' by white men (reg. 75); 'only a white person [could] … conduct blasting operations in a mine' except with the permission of the Minister (reg. 99); '[a] coloured person [could] … not remove props except under specific instructions from a white person' (reg. 105); '[p]ail removal and cleaning of sanitary conveniences and other places, [had to be] … carried out under the supervision of a competent' white person (reg. 158(1)(g); '[m]ine overseers and shift bosses' had to be white men (regs. 160, 161, 285, 300, 320); see also sections 76, 89, 90, 100, 104, 105.

regulations also enabled 'coloured persons' to perform certain duties under the supervision of competent white people (sections 104-105).

In *Rex v Hildick-Smith*, a provision of regulations made under section 4 of the Mines and Works Act (12 of 1911) read:

> 'the operation of or attendance on machinery shall be in charge of a competent shiftsman and in the Transvaal and Orange Free State Provinces such shiftsman shall be a white man, but unskilled persons working under his directions may be employed on such operation or attendance provided that the shiftsman exercises effective control.'[103]

Hildick-Smith was charged for permitting Stephen, 'a native who is not a competent white shiftsman and who was not under the effective control of a competent white shiftsman' to be in charge of an electric locomotive.[104] It was argued that the provision was *ultra vires*, because there was no specific empowering provision in the Act permitting exclusion of Africans from certain forms of work. Regulations 41(1), 285, 106 of the impugned regulations provided further that in the Transvaal a 'coloured person' could not be granted an engine-driver's certificate to be 'in charge of a winding engine used for the conveyance of persons.' Regulations 42, 285, and 309 stated that 'a person in charge of a locomotive engine used on or in a mine or "works" whilst used for the conveyance of persons other than those required for the working of the locomotive or train,' had to have a license, from which a coloured person was prohibited being granted. Moreover, regulation 146 barred coloured men from operating 'electrical machinery underground in any fiery mine, except in intake or with the written permission of the Inspector of Mines.'[105]

The Attorney-General argued that the regulations did not exhibit an intent to discriminate between classes; that it did not *per se* designate coloured people 'incompetent', but just limited the options open to mine owners by forcing them to appoint white supervisors and put only whites in charge of machines.[106] However the court acknowledged the effect of the regulations, that 'no matter how competent,' 'coloured persons' were excluded from certain

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[103] *Rex v Hildick-Smith 1924* TPD 69
[104] Ibid 70.
[105] Only white men could be certified as engineers by the Inspector of Mines – regulations 165, 285, 305 GN 1922 of 1911; Ibid 72.
[106] Ibid 73-74.

tiers of work.[107] It was further argued that 'in so far as it introduces the "Colour Bar", [the impugned regulation was] *intra vires* the enabling statute' and that 'courts have no jurisdiction to question the reasonableness or otherwise of such regulations and incidentally their validity.'[108] The Attorney-General argued that the regulation was permissible and appropriate because:

> '... it was common knowledge, that coloured persons, on account of their ignorance and backward civilisation would constitute a positive danger to others if allowed to be in charge of machinery, and, on account of the known prejudice against them, they would not be able to maintain the necessary discipline, even if they were competent persons --- (as in this case, it was proved, that Stephen was a careful and skilled person).'[109]

The court did accept this reasoning when, in turn, pronouncing as follows:

> '[g]enerally speaking it can be admitted that coloured persons especially natives have not yet reached the same stage of civilization as white or European persons. The Cape coloured persons are undoubtedly on a different plane of civilization to the ordinary native, and consequently, the argument loses its force when applied to them. In respect again of natives the regulation differentiates between natives in the four Provinces.'[110]

But, the court stated, '[t]he real point, however, is not whether the regulation might be *ultra vires*, in respect of its discrimination between white and coloured persons … but whether it is not *ultra vires* the enabling Act'.[111] Section 4 of the Act did not expressly give power to colour discrimination and regulation 179 was found *ultra vires*.

Krause J remarked on the intentions of Law No. 4 of 1885 (Transvaal) to manage or supervise the gradual enlightenment of Africans, who were then due to 'ignorance, usages and customs … unfit for the duties and responsibility of civilised life'.[112] That law, according to the judge, promoted the notion that with proper guidance Africans might acquire sufficient tutelage to participate in civilisation. Yet the regulations in issue appear to be counter- productive to these endeavours since they deprived 'the native from enjoying the very fruits of

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[107] Ibid 74.
[108] Ibid 80-81.
[109] Ibid 83.
[110] Ibid 83.
[111] Ibid 83.
[112] Ibid 83.

his advancement by prohibiting him from performing such work as … it was proved he was capable of doing.'[113] Cesaire has bluntly pointed to 'collective hypocrisy that cleverly misinterprets problems, the better to legitimize the hateful solutions provided for them.'[114]

Subsequent to *Hildick-Smith*, the Mines and Works Act 12 of 1911 was amended by Amendment Act No. 25 of 1926, which added to section 4(1)(p) – section 4(1)(p)(i) and (ii) that read:

> '(i) [t]he regulations under paragraph (n) may provide that in such provinces, areas or places as may be specified in the regulations, certificates of competency in any occupations referred to in that paragraph shall be granted only to the following classes of persons, namely – (a) Europeans; (b) persons born in the Union and originally resident in the Province of the Cape of Good Hope who are members of the class or race known as "Cape Coloured" or the class or race known as "Cape Malays"; (c) persons born in the Union and ordinarily resident in the Union elsewhere than in the Province of the Cape of Good Hope who would if resident in that Province, be regarded as … "Cape Coloured" or "Cape Malays"; and (d) the people known as Mauritius Creoles or St. Helena persons or their descendants born in the Union. (ii) [t]he regulations under any other paragraph of this sub-section may restrict particular work to, and, in connection therewith, impose duties and responsibilities upon the classes of persons mentioned in (a), (b), (c) and (d) of part (i) of this sub-section; may apportion particular work as between those classes and other persons; and may require such proof of efficiency as may be prescribed.'[115]

The observations of Krause J in *Hildick-Smith* were premised on the assumptions of and in law that Africans were ahistorical or primitive and on the borders of what might eventually constitute civilisation. This legal claim, sourced from the sections 2 and 5 of Act 4 of 1885 (Transvaal), the Management of Natives Act, has been relied upon as if imparting irrefutable facts.[116] The court characterised the position which had assigned Africans inferiority as

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[113] Ibid 84.

[114] Cesaire has disputed that idea that colonialism was or is 'a philanthropic enterprise, … a desire to push back the frontiers of ignorance, disease, and tyranny, … an attempt to extend the rule of law' – Cesaire (note 4 above) 32; similarly Nandy has argued that the most debilitating weapon of colonialism is that 'it creates a culture in which the ruled are constantly tempted to fight their rulers within the psychological limits set by the latter' - A Nandy *The Intimate Enemy: Loss and Recovery of Self under Colonialism* (1083) 3.

[115] Section 1 Mines and Works Act, 1911, Amendment Act No. 25 of 1926.

[116] Act No. 4 of 1885 (Transvaal); *Mokhatle* (note 71 above) 78. Section 2 Act No. 4 1885 stated that 'laws, habits and customs hitherto observed among the natives shall continue to remain in force … as long as they have not appeared to be inconsistent with the general principles of civilization recognized in the civilised world.' But by contrast section 5 stated that '[a]ll matters and disputes of a civil nature between natives shall be dealt with

'providing for their better treatment and management by placing them under special supervision'.[117] The temptation then is to ignore the painful effects of these beliefs, as they were implemented in law, on Africans. For Nandy a major impediment to developing a comprehensive picture as decolonisation has occurred has been the implementation of 'principled forgetfulness', a 'refusal to separate the remembered past from its ethical meaning in the present.'[118] For this to set in, the past has been deliberately obfuscated so as to permit the acceptance of present circumstances as normal. But this forgetfulness has not been arbitrary – 'there are elaborate internal screening devices, the defenses of the ego or the principles of ideology, that shape our forgetfulness'. Left 'untouched' much of African experience will remain indefinitely ahistorical.[119]

The ideology was so settled in the South African system that the *Hildick-Smith* matter stands out as the singular appearance of an African in deliberations on the validity of the Mines and Works Regulations, which had permanently relegated Africans to the cheapest labour available. Arguably, it was Hildick-Smith himself who incited the uproar by slotting an African (Stephen) into a supervisory role, which was prohibited by the regulations. A reading of the regulations shows this, since most of the regulations refer to prohibition on a 'coloured person' occupying supervisory position at the mine. 'Coloured' in the regulations refers to non-whites in general, including mixed-race persons, since a few provisions refer to a person 'other an aboriginal native'. Prohibitions on 'coloured persons' by implication excluded Africans without having to mention them specifically. Indeed, the situation was such that the cases presented before the courts involving discriminatory delegated legislation, usually bye-laws, pertained largely to non-whites (coloureds or Asiatics), and not Africans.[120] The *Hildick-Smith* decision prompted legislative intervention per Amendment Act No. 25 of 1926 which explicitly permitted the hierarchical racial division of regulations. And so the labour regulatory objectives

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according to the provisions of this Law [Law No. 4 of 1885] and not … in accordance with native laws … in so far as the same shall not occasion evident injustice or be in conflict with the accepted principles of natural justice.'

[117] *Hildick-Smith* (note 103 above) 84.

[118] A Nandy 'History's Forgotten Doubles' (1995) 34 *History and Theory* 44, 47.

[119] Cast 'the prehistorical, the primitive, and the pre-scientific' – Nandy (note 118 above) 50.

[120] *Ismail Suleiman & Co v The Landdrost of Middleburg* (1885-1888) 2 SAR TS 244 *Tayob Hajee Khan Mohamed v The Government of the South African Republic* (1898) 5 Off Rep 168; *Moller v Keimoes School Committee 1911 AD 635; Gandur v Rand Township Registrar* 1913 AD 250; *George & Others v Pretoria Municipality* (1916) TPD 501; in *Swarts v Pretoria Municipality* 1920 TPD 187, 191 regulations under section 88(31) Ordinance No.9 of 1912 which provided that cabs should be classified as either first class (for whites) or as cabs for conveying coloured people were held to be ultra vires as against the principal law since '[w]herever the Legislature intends to allow the exercise of discriminating powers, it appears to …have used express language to that effect.'

of the Mines and Works Act, 1911 – the Colour Bar – were validated in section 4 thereof. From its inception, the Act operated with the identified discriminatory regulations.

5.4.2. Native Labour Regulation Act of 1911

5.4.2.1. Labour Regulation

The Native Labour Regulation Act No. 15 of 1911 (NLR) was directed specifically at African workers 'to regulate the Recruitment and Employment of Native Labour and to provide for Compensation to Native Labourers in certain cases'.[121] This Act, which commenced on 1 January 1912, was a companion to the newly minted Mines and Works Act 1911, as *the* recruitment and employment law for Africans in the Transvaal.

'Native' was defined as including 'any member of the aboriginal races or tribes of Africa'; while 'native labourer' was 'a native employed upon any mine or works or recruited under this Act or any prior law for labour upon any mine or works'.[122] A 'runner' was a 'native employed by a labour agent or employer to canvass or collect natives on his behalf'.[123] Section 3 of the Act cancelled pre-existing licenses and permits meaning that all recruitment and employment of Africans was to be in terms of the Act. In terms of section 4 labour agents, compound managers and conductors and runners were to be licensed.[124] Section 5 pertained to the licensed recruitment African labour for any mines or works – only those holding 'an employer's recruiting licence' were permitted to recruit.[125] In terms of section 12(1), written contracts between African recruits and labour agents had to be concluded and endorsed by a magistrate after satisfying himself that the contract was understood and 'accepted' by the

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[121] Murray J (ed.) The Union Statutes 1910-1947 Classified and Annotated Volume 10 (1952)

[122] In *Rex v Tiyo* 1921 EDL 203 the accused had been convicted of contravening s 14(1)(a), desertion. But since the labour in question was cutting of cane and loading it, the court held that that work did not make him a 'native labourer' under the Act.

[123] An employer was defined specifically in respect of native labour as a 'person to whom and such labourer is registered under' the Act.

[124] '[L]abour agent' was a 'person who, by himself or through runners, recruits natives for the purpose of being employed'; 'compound manager' a person who doesn't supervise them at work but has 'superintendence or control of 50 or more native labourers in any labour district'; 'conductor' was employed by a labour agent or an employer to supervise or escort 'native' workers going to their assigned labour cites.

[125] A licenced recruiter had to perform the function in accordance with the Act. No licence was needed for hiring Africans to work in farming and shipping or domestic setting or in shops – s 5(a); Africans working at a Government compound with written authorisation – s 5(b); and anyone recruiting less than 20 African workers at a time. Section 6 the licence could not be made in the name of a company or association of persons; section 7 the granting, refusal, renewal, endorsement of a license was discretionary; section 9 a permit holder (licenced labour agent or holder of employer's recruiting licence) could employ runners after getting a permit for each runner from the magistrate.

African who seemed to have reach 18 years of age.[126] The capacity for unencumbered acceptance of employment was affected by deprivation of citizenship and land, taxation, restricted mobility, perceived backwardness as well as their forced foray into waged employment. Additionally, the Mines and Works Act ensured their position was the lowest workplace level in the mines. Thus Africans were the most vulnerable workers, essentially having to take what was offered, and were susceptible to rampant mistreatment.

Section 13 set out offences including 'seducing natives from service, harbouring deserters from services.'[127] The matter of *Cohen v Rex* highlights the curtailment freedom of contract, since the right to repudiate the contract was not open to Africans, meaning that they were locked-in to service.[128] Section 14(1)(a) & (b) created offences for African workers who unlawfully deserted or absented themselves from employment or failed to execute the terms of the contract, or 'wilfully and unlawfully' behaved in a way that caused or was likely to cause injury to persons or property, or reneged on a written or verbal agreement to work after receiving an advance and moving on to another agent or employer (section 14(1)(c)).

Section 15 prohibited withholding wages from African workers, or the payment of sums due to other parties 'save with the written consent of the director' (an appointee of the Minister of Native Affairs), 'without reasonable and probable cause for believing that wages were not due'. It is notable that though there were a number of offences with which the worker could be charged, withholding of wages appears to be the principal one for the employer. Section 16 made provision for the housing of fifty or more Africans in compounds. One single compound manager was to be appointed per compound.

In *New Rietfontein Estate Gold Mines v Misnum*, an African worker had ceded his wages to a third party without the consent of the director.[129] Innes ACJ remarking on the purpose of section 15 of the NLR pronounced as follows: '[c]learly, the object of the clause, read as a whole, was to save the native from himself, and to protect him against his employer

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[126] In *Tetyana v Rex* 1912 EDL 295 though the accused deserted in contravention of section 14(a) the contract was not attested per section 12 so the conviction was quashed.
[127] The offences included arranging labour contracts with African chiefs or other leaders, misrepresenting the nature of the work and conditions under which it was to be performed, promises better pay and/or conditions in an attempt to convince an African to breach his contract, helping a deserter by hiding them or giving them work, supplying an African with liquor as a way of getting their labour – section 13(a), (b), (c), (d), (g).
[128] *Cohen v Rex* 1912 EDL 164.
[129] *New Rietfontein Estate Gold Mines v Misnum* 1912 AD 704.

and others with whom he might be induced to have dealings'; that to allow African workers autonomy to cede their wages, 'improvident and unsophisticated' as they were, would defeat the purpose of the section.[130]

In *Rex v Sokkies*, the regulation in Government Notice 524 of 1916: Regulations controlling labour compounds in terms of section 23 of the NLR were in issue.[131] The accused was alleged to have contravened section 4 of GN 524 of 1916 because he left the premises of the New Kleinfontein Gold Mine without the permit required by the regulations – signed by the compound manager or the employer (the regulation was ostensibly in terms of section 23(h) and (k) NLR).[132] It was argued to be a type of slavery in that it put the entire liberty ofAfrican workers at the mercy of the whims of the compound manager (one man).[133] The court disagreed since, according to the court, it was comparable to Pass Laws where a master was permitted to decide whether or not to grant a permit – that '[i]f a bye-law comes within the language of the power prima facie it is valid.'[134] At 486 Bristowe J reasoned as follows:

> '[t]he pass system, involving very considerable restriction of the free movements of natives, has been for years in universal vogue in this country. Along the Reef large bodies of natives are congregated in compounds, who might easily become a source of danger if not carefully watched and guarded. Whether it would be possible to invent some other form of regulation less drastic and not less efficacious than the present I do not know. But I try it by the test whether it is so oppressive as to find no justification in the minds of reasonable men, then I can only say that in my opinion it is not. That it restricts a labourer's liberty is of course clear. But that it restricts it more than is reasonably required by the necessities of the case I am not prepared to say.'[135]

The regulation in question was thus *intra vires*.

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[130] Ibid 709.
[131] *Rex v Sokkies* 1916 TPD 482
[132] [132] Section 23 permitted the G-G to make regulations on *inter alia*: (h) the conveyance of native to their destination or to labour centres and the control of native labourers during their sojourn in labour districts; (k) the regulation and control of compounds and the married quarters of native labourers, and the powers and duties of compound managers.
[133] Sokkies (note 131 above) 484.
[134] Ibid 484.
[135] Ibid 486.

5.4.2.2. Compensation for Occupational Injury or Death

Section 22 provided compensation for Africans in respect of accidental workplace injury and death. Section 22(1) read '[t]here shall be payable by the employer of any native labourer to the director on behalf of such native labourer compensation in respect of any personal injury caused by accident' at work.[136] Section 22 set out the scale of compensation which the Director would calculate as follows:

- for partial permanent incapacitation 'a sum not less than one pound and not more than twenty pounds' (section 22(2)(a));
- where there was permanent 'total incapacitation' in respect of work, a minimum payment of £30 but no more than £60 could be paid (section 22(2)(b)); and
- where death had resulted a payment of £10 was to be made (section 22(2)(c)).

Any payment of compensation for accidental injury sustained during work was conditional upon the injury not having been caused by 'serious and wilful misconduct' on the part of the African labourer such as intoxication, intentionally flouting safety rules or 'any other act or omission which the Director … may declare to be serious and wilful' in a specific situation (section 22(2)). Section 22(3) provided that where an employer rejected the applicability of compensation or the amount thereof, a board headed by the district magistrate, consisting of employer nominee and a medical practitioner would hear arguments and make the final decision. Notably only the employer, not the African labourer, was permitted to dispute the matter of whether or how much compensation may have been warranted. Furthermore, in that eventuality, the African worker concerned was not afforded representation at the hearing or in the composition of the board.[137] Section 22(5) permitted Africans to claim compensation under any other law, common law or statute.

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[136] Accidental injury 'arising out of or in the course of his employment whereby such native labourer … [became] permanently, totally or partially incapacitated or … met his death' – section 22(1) Native Labour Regulation Act No. 15 of 1911.

[137] Section 23 permitted the G-G to make regulations on *inter alia*: '(g) the disposal or return to their homes of natives whose contracts have been legally cancelled, or varied, or have otherwise terminated, or of native labourers declared medically unfit for labour; (h) the conveyance of native to their destination or to labour centres and the control of native labourers during their sojourn in labour districts; … (j) the proper housing, feeding, and treatment of native labourers, the care of the sick or injured, the entry upon and inspection of premises in which native labourers reside and sanitary precautions in places other than the underground workings of a mine; (k) the regulation and control of compounds and the married quarters of native labourers, and the powers and duties of compound managers;… Section 23(3) permitted the regulations to stipulate penalties for contraventions – a fine not exceeding £50 and in default imprisonment not exceeding 6 months.

Compensation of African workers under the NLR can be contrasted with that which was already in operation in the Transvaal under the Act No. 36 of 1907 – the Workmen's Compensation Act. This Act regulated liability of employers to make compensation for work-related injuries and to implement some penalties to avoid work related accidental injuries.[138] Act 36 of 1907 defined a 'workman' as 'a white person engaged by an employer to perform work'. In the instance of transitory incapacitation, the Act provided for a periodic payment of half-wages during the time that the workman was convalescing from injury, to be paid on the usual pay day until the workman was fit to resume duties (section 7). By contrast section 22(1) NLR provided for compensation only where an African 'in the course of his employment … has become *permanently*, totally or partially incapacitated or has met his death' (my emphasis).

Section 17 of Act 36 of 1907 stated where accidental injury had occurred a workman could claim:

> '(a) in case of total incapacitation for work an amount equal to three years' wages at the rate of wages earned by him at the time of the injury less any sums received under such provisional order aforesaid or seven hundred and fifty pounds less any sums so received whichever amount shall be the less; (b) in case of partial incapacitation for work (which shall mean inability owing to the injury to resume work similar to that at which he was employed at the time' of the injury or for which he was previous to the injury fitted by trade or apprenticeship) an amount equal, to the probable deficiency in his income for the next three years consequent on his diminished capacity to earn wages at the same rate as he was earning at the time of the injury less any sums received under such provisional order aforesaid or three hundred and seventy-five pounds less any sums so received whichever amount shall be the less'[139]

Section 19 gave the dependants of a workman who had died performing work entitlement to claim a sum equal to 'a sum equal to two years' wages of the workman at the time of his death

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[138] In terms of section 2 the injuries to be compensated had to have occurred during the course and scope of employment and it would not be payable if it has resulted from 'serious and wilful misconduct' on the part of the workman.

[139] 'provided always that wherever the workman was at the date of the accident under twenty-one years of age the Magistrate may- (i) in the case of a claim under paragraph (a) where the gross amount recoverable is under three hundred pounds sterling increase the gross amount recoverable to a sum not exceeding three hundred pounds sterling; (ii) in the case of a claim under paragraph (b) where the gross amount recoverable' is under one hundred and fifty pounds sterling increase the gross amount recoverable to a sum not exceeding one hundred and fifty pounds sterling ; if having regard to what would but for the accident have been the probable increase in the workman's earning capacity during the three years immediately succeeding the date of the accident such increase should appear reasonable ana may give judgment on the basis of such increased amounts.' – s 17 Act 36 of 1907 (Transvaal).

or five hundred pounds whichever sum shall be the less'. In terms of Section 8, the employee could appeal the refusal of a magistrate to order compensation (after the employer had refused) on grounds that his wilful misconduct was to blame, to the Supreme Court.

The Workmen's Compensation Act No. 25 of 1914 repealed Act 36 of 1907.[140] The Act merged the law relating to compensation for workplace injuries or loss of life of the four former colonies into one law. It commenced on 1 July 1915. Section 1 referred to compensation related to a personal injury befalling a workman during the course of executing his employment duties, which would result in the liability of the employer to pay some compensation.[141] Section 2 described persons to be regarded as 'workmen' when they had 'entered into, or works under, a contract of employment or of apprenticeship … whether the contract … [was] expressed or implied, … oral or in writing, and whether the remuneration … [was] calculated by time or by work done'; except *inter alia* those who earned more than £500 in wages per year (section 2(1)(b) and casual labourers (section 2(1)(c)). In terms of section 2(1)(f) 'persons whose rights to compensation in respect of personal injuries caused by accidents' at work were administered NLR Act 15 of 1911 would also not be regarded as workmen for purposes of the Act. Consequently, African workers, who had been labelled 'native labourers' eligible for compensation under section 22 of the NLR, were not considered workmen under this Act.

The Workmen's Compensation Act set out the procedure to be followed in the event of a dispute between the employer as to compensation or the amount applicable. A hearing which would take place first in the magistrate's court was appealable to superior courts for final determination. The first Schedule of the Act set out the 'Scales of Compensation and Manner of Calculating it.' Section 1(a) First Schedule provided that where the impairment was transitory, such that the employee would be unable to resume duties for a time, periodic payment of up to half of normal wages could be awarded on the normal pay days.[142] Such payments would be made until the worker resumed duties for a period not extending beyond

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[140] It also repealed similar laws in other provinces: the Employer's Liability Act No. 12 of 1896 as amended by Act No. 18 of 1906 in Natal and the Workman's Compensation Act No. 40 of 1905 as amended by Act 41 of 1906 in the Cape.

[141] With regard to injuries or death which was 'attributable to the workman's own serious or wilful misconduct' or the worker had a pre-existing condition of ailment (undisclosed to the employer) which caused the incapacity or death – no compensation was due (s 1(a)); the claimant was limited to claim either under common law (delict) or under this Act (s 1(b)); once a claim was lodged, or a written agreement on a payable amount was made with the employer it barred the workman from pursuing other compensation options (s 1(c))

[142] If the wages were already small the magistrate could make an order of periodic payments which exceeded the normal salary.

one year, and after three months of infirmity the payments could not be at a scale of more than £3 per week. Section 1(b)(i) of the First Schedule stated that where disability was partial but permanent in that the workman would never do the work he was doing during or before the mishap, an amount 'not exceeding the probable deficiency in his wages for three years' set along his lessened earning, which was not more than 'one half of three years wages or three hundred and seventy-five pounds, whichever sum may be less.' In effect the employee was guaranteed at least £375 or more if the amount calculated taking into account his lessened earnings was more than £375 but came to less than half of three years wages. This is in stark contrast with the reality that an African could not claim for a partial disability which was not permanent in nature. The NLR made no provision for an allowance or periodic partial payments when an African worker was convalescing from a workplace injury. When injured at the mines, a notoriously unsafe occupation, an African worker would be without an income whilst he was recovering. A worker would most likely be unable to afford any additional rehabilitative medical treatment that might be required. Moreover, in the situation of a permanent partial injury, an African claimant was entitled to as little as £1, with the maximum allowable compensation being a meagre £20.

Section 1(b)(ii) of the First Schedule attached to the Workmen's Compensation Act provided that in the case of permanent total disability up to 3 years wages or £750, the lesser of the two amounts being the one payable, would be due to the employee. Section 1(c)(i) stated that on death, where the workman was sole breadwinner, dependants would get up to two years of his salary at the time of accident, or £500, whichever was less.[143] Under this regulatory system a permanently totally incapacitated African worker could only be awarded a maximum of £60, with £30 being the minimum compensation. Worse still, if an African died, only £10 would then be awarded. An accident resulting in fatalities would be cheaper to compensate, so in the context of personal injuries in the workplace, an African's death was accorded less import than his survival and possible impairment. This rudimentary comparison of the compensation availed to Africans by the NLR *vis-à-vis* that available to white and other non-white workers ('coloured' and 'Asiatic' workers) illuminates the status of Africans in this regime.

[143] Section 1(c)(iii) made comparable provision if the workman was not a breadwinner at the time of death.

In *Ngcema v Gilbert Harmer & Co Ltd*, an African employed at the mine seeking compensation instituted a claim under the Workmen's Compensation Act.[144] Ngcema had presented a pass issued under Natal pass regulations and was registered as provided for by section 12 of the NLR. He was injured at work and applied for compensation under the Workmen's Compensation Act 25 of 1914. It was argued that section 2(1)(f) of the Workmen's Compensation Act stated that persons whose compensation was provided for under the NLR would not be regarded as workmen under the Workmen's Compensation Act. Ngcema was African, and, despite the fact that he was not recruited as per the Act, and that Durban had not been declared a labour district in terms of the provisions of the Workmen's Compensation Act, his particulars were recorded in his employer's labour book that was kept in accordance with section 12 of the NLR. Since section 22(5) NLR stated that the African was not barred from making claims under common law or any other workmen's compensation law, the appellate court held that there was nothing in the NLR that limited the application of section 22(1) only to African labourers who had been employed 'within a proclaimed "labour district"'.[145] Moreover '[t]he Act is called the Native Labour Regulation Act … to regulate the recruiting of native labour, to regulate the employment of native labour, and to provide for compensation to native labourers in certain cases.'[146] The court referred to the definition of 'native labourer' in the Act which encompassed Africans who were not recruited, hence all Africans employed in mines were native labourers. Indeed regulation 49(1) and (2) of GN 1988 of 1st December 1911 (made under Act 15 of 1911) stated that all registration of Africans which preceded the Act would nonetheless fall under it (regulation 49(1)), and that African workers employed under pass regulations or even without a pass could be recorded by the employer and would fall under the Act (reg 49(2)). The Labour Book kept by the Master would suffice. The court held that an African worker was not entitled to workmen's compensation under Act 25 of 1914because s 2(1)(f) precluded this.

5.4.3 Compensation for Miners' Phthisis

At the beginning of the nineteenth century the debilitating and often deadly effects of silicosis, called miners' phthisis, were becoming apparent on the Rand.[147] The passing of law was

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[144] *Ngcema v Gilber Harmer* 1928 AD 34.
[145] Ibid 38.
[146] Ibid 37.
[147] Silicosis is a chronic disease which is characterised by gradual fibrosis in lung tissue that occurs as a result of breathing in the dust emitted underground mining.

preceded by the Miners' Phthisis Commission 1902-1903 (commissioned by Milner). The life expectancy of miners at the time, particularly rock drillers, was 37 years.[148] Indeed, of the total deaths recorded in 1909 in the Transvaal, 35 per cent of those assessed were attributable to lung diseases such as silicosis. [149] The plumes of quartz and silica dust particles released from the rock drilling process over time caused irreparable damage to the lungs of some mine workers.[150]

The award of compensation for this occupational disease began with the Miners' Phthisis Allowances Act No. 34 of 1911. Section 1 established a system of periodic payment to people who had worked in mines and become incapacitated either partially or completely due to having developed silicosis. Section 2 provided for the creation of a fund that was to be administered by a board which would disburse said money according to the procedure laid out. In order to facilitate this process, section 4 permitted the Governor-General to make regulations on how to administer the fund that had been established by the Act, including the nature of allowances, comprising maximum amounts permissible, and the procedures regarding issuance of medical certificates. Section 4(g) required the regulations to include 'the framing of lists of miners wherein the mineral dust produced by mining operations … [was] of such a nature as to cause miners' phthisis'. The regulations construed the list of miners under section 4(g) to mean that a list of white miners, who would then be eligible for compensation in the event of silicosis, should be drawn up.[151]

Next came the Miners' Phthisis Act No. 19 of 1912 which carried forward the administration of the fund established by Act 34 of 1911. It established a fund, the Miners'

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[148] R Elrich 'A Century of Miners' Phthisis in the South African Gold Mines: Any End in Sight?' (2007) available at http://www.collegiumramazzini.org/gest/up/Ehrlich.pdf, accessed 23 April 2020; E Katz 'Silicosis of the Witwatersrand and Gold Mines: Incidence and Prevalence Compensation 1902-1978' available at http://disa.ukzn.ac.za/sites/default/files/pdf_files/LaMar79.0377.5429.004.009.Mar1979.9.pdf, accessed on 23 April 2020.

[149] G Burke & P Richardson 'The Profits of Death: A Comparative Study of Miners' Phthisis in Cornwall and the Transvaal 1876-1918' (1978) 4 *Journal of Southern African Studies* 147, 164.

[150] J McCulloch 'Air Hunger: the 1930 Johannesburg Conference and the Politics of Silicosis' (2011) 72 *History Workshop Journal* 118-137; J McCulloch 'Counting the Cost: Gold Mining and Occupational Disease in Contemporary South Africa' (2009) 108 *African Affairs* 221-240.

[151] Regulation 20 of Government Notice 879 (2nd June 1911)read:
'The Government Mining Engineer shall, within one month from the date hereof, furnish to the Board a statement showing the number of white persons employed underground by each of the mines specified in these regulations during every month of the two years ending the 31st :May, 1911, if such mine was producing or developing during such month. In the case of any mine on this list formed by the amalgamation of two or more previously existing mines, the number of white persons who were employed underground in such mines shall be taken together for the purpose of this clause.'

Phthisis Insurance Fund, for the payment of benefits in accordance with allotted entitlements as set out in the Act. Section 1 defined 'miner' to mean 'a person of European descent' who had worked underground for the time period stipulated, 'miners' phthisis to be 'silicosis of the lungs', and 'native labourer' as having the same meaning as that given in the NLR.

Section 30(1) provided that when Africans employed underground became afflicted with silicosis they would be deemed to have suffered a personal injury occurring in the performance of work duties, as stipulated in Section 22 of the NLR. When an African mine worker exhibited symptoms of the disease but could still work underground, or had not been totally ruled out from working underground (as specified in section 21(1)(a) of this Act, Act 19 of 1912), he would be deemed to have suffered partial impairment as tabulated in section 22(2)(a) of the NLR (section 30(1)(a)). This meant that the African mine workers displaying markers of silicosis in their physical condition were entitled to compensation of between £1 and £20, £20 being the top limit. In the event of the African mine worker being found to have contracted silicosis with sufficient severity to eliminate his ability to work underground, as stipulated in section 21(1)(b) of this Act 19 of 1912, he would be deemed to have suffered permanent total disability as provided for in section 22(2)(b) of the NLR (section 30(1)(b)). Thus an African worker whose ability to work underground had been destroyed by having contracted chronic silicosis could access a minimum compensation of £30, the maximum allowable being £60. Section 30(3) provided that in the event that an African miner worker was found to have died as a result of silicosis, his dependants were entitled to compensation of £10. Ironically, section 30(4) provided for an offence punishable by a maximum fine of £100 for impeding the processing of a claim concerning an African.[152] The stipulated fine was more compensation than an African worker could ever be awarded under this Act. Thus it would certainly have been more cost-effective to work a sickly African until moribund, so as to pay out the meagre £10. Regulations framed under Act 19 of 1912 for African workers per Government Notice 1348 (3 October 1912) stated that where there was disagreement on whether compensation was due to an African worker, a board comprising of a magistrate, a nominee of the employer and a medical examiner would sit to make the final determination.[153]

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[152] This related to medical officers failing to transmit a written report of a diagnosis of silicosis, to a mine manger, who should then forward the report to the Director – s 30(4).
[153] Section 4 GN 1348 of 3 October 1912.

Award for compensation for white persons and non-white persons other than African persons was administered in Act 19 of 1912. Section 9 required employers to make monthly contributions in respect of each miner ('person of European descent') working underground to the fund, a portion of which the employer could deduct from the wages of miners.[154] Section 21(1)(a) awarded a miner who exhibited clear symptoms of silicosis, whose ability to work was at the time not significantly compromised as a result, £8 per month for up to one year. The board could extend such monthly payments until the amount of £400 had been reached. Section 21(1)(b) said that a miner who was found to have indeed acquired the malady in a pronounced manner which compromised his ability for underground work and caused severe lifelong impairment would be granted £8 per month, which would not exceed a total of £400. The board could extend payments to exceed £400 in special situations. Section 21(1)(c)&(d) said that dependants of deceased miners could be awarded up to £400.

Section 22 awarded benefits to non-whites who were neither 'miners' nor 'native labourers' under Act 19 of 1912. Such mine workers could choose to have deductions from their wages made by their employers in the manner stipulated in section 9. Having done so, upon a claim the Board had the discretion to award such non-white workers up to half of what was payable to a miner for the first two years of the operation of the Act, and later the same benefits as miners. In the event that the non-white did not request deductions, an award similar to that of Africans was payable.[155]

Section 22 of the Miners' Phthisis Act No. 44 of 1916 continued to place compensation to African mine workers suffering from silicosis with NLR.[156] Section 22(3) stated that if an African was found to have tuberculosis (TB) between August 1916 and August 1917, it would be treated like a personal injury at work. If the TB was not complicated by silicosis, it would

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[154] For the first two years the contributions would be equal to 5% of wages and thereafter contributions would increase to the equivalent of 7.5% of wages. For the first two years an employer could deduct half of contributions made from the salaries of miners and thereafter one-third of the contributions could be deducted – s 9(1) & (2) Act No. 19 of 1912.

[155] Government Notice 1025 entitled Regulations Under the Miners' Phthisis Act, 1912 (26 July 1912) set out regulations applicable to miners, other than Africans and stipulated that further regulations 'with regard to native labourers … [would] be published separately.' Subsequently on 3 October 1912, Government Notice 1348 issued regulations pertaining to Africans. These separate regulations set out the process to be followed by Africans making a claim for compensation in terms of section 30 of the Act.

[156] Africans who had been diagnosed with silicosis were still to be treated as though having had a personal injury at work as provided for by the NLR. Section 22(1)(a) equated primary stage silicosis to partial incapacitation in the NLR; and sub-section (b) equated secondary stage silicosis to permanent total incapacitation and both were to be paid by the Director in accordance with the prescribed compensation set out in the NLR. S 22(2) reiterated that the same amounts would still be paid on death of an African as if it were a workaccident.

be deemed equivalent to partial incapacitation, and if it was complicated by silicosis it would be equivalent to permanent total incapacitation. Once again the Act created an offence punishable by a fine of up to £500 for contravention of the law for not obtaining medical certificates or allowing sick workers to work underground (section 31).

For 'miners' (whites and non-whites other than Africans), Act 44 of 1916 distributed benefits in terms of section 9. Allowances were granted to miners whose medical exam revealed affliction with 'primary stage' silicosis between August 1916 and August 1918. They were awarded £8 per month or an allowance that would not exceed £300, and if the miner died the board awarded payment to dependants up to £300 (section 9(1)(a)). Section 9(1)(b) granted allowances to those having 'secondary stage' silicosis between August 1916 and August 1918 of up to £10 per month for married miners and up to £8 for unmarried miners, with an aggregate of £400 in all. These amounts were extendable up to £750 if certain conditions were met to the satisfaction of the board. Section 13 permitted the award of up to £20 for medical expenses of deceased miners and burial costs. Section 26 provided that where a miner was found to be suffering from TB he would receive the benefits accorded to miners in section 9 of theAct.

The Miners' Phthisis Act No. 40 of 1919 replaced all preceding law and also established distinction between a 'miner'[157] on the one hand and an African[158] on the other hand. This time compensation of Africans was incorporated in the Act. Yet again the process of compensation was segregated, with compensation for African mine workers provided for under section 39. The Act had three Schedules appended to it. The First Schedule awarded a fixed amount based on monthly earning. The Second Schedule dealt with quantifying interest on amounts 'standing to the credit of the beneficiary' according to the records of the Board. The Third Schedule related to the rates of allowances which could be awarded to a miner, his wife or legitimate children. Under section 39 African workers could only be granted compensation under the First Schedule. By contrast, claims awarded lifelong monthly allowances to 'miners' included at 'secondary stage' silicosis diagnosis, which could go on provided the amount of £750 wasnot

[157] A 'miner' was described as 'any person (other than a native labourer)' employed in specified occupations and others which necessitated spending one hundred or more working hours per month underground – section 66(1) Act 40 of 1919.
[158] A 'native labourer' was defined as a 'native who is, or since the 31st July, 1912, has been, employed underground upon a scheduled mine.'

exceeded (section 25). The balance of the allowance, up £750, could be paid to dependents if the miner died (section 27).

McCullough has documented the racially segregated and unequal practices in terms of which the care of workers was administered under established law. White workers were accorded regular health screenings which included 'clinical examination, a chest x-ray, and the taking of medical and work histories'.[159] Ironically, even though they accounted for a small minority of the work force it is mostly the data collected in respect of white miners that were used as evidence for the advancement in research on silicosis.[160] The veracity of findings in 1930 that the rates of silicosis were higher in white miners than in Africans has been challenged due to the lack of adequate research on the health status of African miners in the compilation these findings.[161] Following deaths of African workers, post-mortem reports routinely attributed death to TB. This persistently high rate of lung disease, routinely identified TB in African miners, was attributed to the declared poor hygiene of Africans.[162] African miners were fashioned as migrant labour, subsisting on short fixed-term contracts, with their primary residences designated in rural settlements set aside for their occupation.[163] Consequently in many instances 'rural households became field hospitals for retrenched, medically repatriated, and ageing men.'[164] In order for chronically ill African workers to apply for compensation they were required to have medical certificates based on diagnoses which were often not forthcoming. The result was that:

> '[b]etween May 1911 and September 1929, £11,208, 015 was paid to white miners and their dependents, who in addition benefited from grants-in-aid, free medical care, retraining and rural resettlement schemes. There were dowries to encourage widows to remarry. Black miners, who outnumbered whites by ten to one, received £722, 036 in a comparable period (1 May 1911 to 31 July 1929).'[165]

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[159] McCulloch 'Air Hunger' (note 150) 124.
[160] McCulloch 'Air Hunger' (note 150) 125.
[161] This incongruence had at the time been characterised consistent with the furloughs taken by African miners on completion of each labour contract, and yet the TB rate of African miners has always been found to be much higher than that of their white counterparts - McCulloch 'Air Hunger' (note 150) 126.
[162] McCulloch 'Air Hunger' (note 150) 126.
[163] In this strategy which was significant in the way in which disease was and remedies were formed by the mining corporations and the state collaborated - McCulloch 'Counting the Cost' (note 150) 224.
[164] H Wolpe cf: McCulloch 'Counting the Cost' (note 150) 224.
[165] During the period of compensation up to 1946 £24,487,000 was issued to white miners whereas African miners received only £2 million – *Report of Miner's Phthisis Board for the Period 1st April, to 31 st July, 1946* and *Report*

These numbers do not tally with the fact that African workers far outnumbered white workers. Africans performed the hazardous work of digging and drilling, while in general white mine workers were a class of overseers.

5.5. Conclusion

Spivak has made the point that those who have access to imperial knowledge are able to create a bridge in the knowledge divide; they can communicate with other 'formerly' colonised people as well as the metropolitan culture. This may occur when an opportunity to say an emphatic yet unattainable 'no' to the confining imperialist structures is being expressed.[166] In this paradigm the narration at once inhabits that which it is trying to disassemble. It is trying to de- encrypt things like 'constitutionality, citizenship and democracy' from within the manifest reality of colonial subjugation; concepts 'for which no historically adequate referent may be advanced from postcolonial.'[167] The law examined demonstrates how, following unification, Africans have been repressed as fabricated 'natives'. Justification of African maltreatment has been inscribed in law which pronounces, as fact, their brutishness based on the imperialist ethos it embraces. From this law, the African mine workers of the early twentieth century cannot really be discerned. '[W]hat sort of people they were' has been falsified and legal provisions merely implement the fictions of Africans as appropriate tools for use by white people. Even though the provisions highlighted appear to be on or about Africans, there is arguably no authentic African presence there. Rather, what is reflected therein is whiteness – the deliberate propagation of white people (colonisers) and a white point of view as the normal or transcendent.[168] According to Kilomba, 'it is not the … [African] subject we are dealing with, but *white* fantasies of what Blackness should be'.[169] This reading of law has been a window

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of the Silicosis Board for the Period 1st August, 1946 to 31st March, 1948 (1949) cf: McCulloch 'Air Hunger' (note 150) 125.

[166] G Spivak 'The making of Americans, The Teaching of English, and the Future of Cultural Studies' (1990) 21 *New Literary History* 781-798, 794.

[167] Spivak (note 166 above) 794.

[168] Frankenberg describes whiteness as above all a position of 'structural advantage, of race privilege.' It is also the vantage through which white people perceive themselves, others, societal formation and the world - R Frankenberg *White Women, Race Matters: The Social Construction of Whiteness* (1993) 1. Chambers explains that 'whiteness is not itself compared with anything, but other things are compared unfavorably with it, and their own comparability one with the other derives from their distance from the touchstone' – R Chambers 'The Unexamined' (1996) 47 *Minnesota Review* 141-156, 142.

[169] '[T]he denied aspects of the white self which are re-projected … as if they were authoritative and objective pictures of' Africans - G Kilomba *Plantation Memories Episodes of Everyday Racism* 2 ed (2010) 19; as stated by Fanon 'what is often called a black soul is a white man's artifact' – F Fanon *The Wretched of the Earth* (1961) (trans C Farrington, 1963) 42.

into the mechanics of the ideological hegemony of the time, which really has little to do with Africans as people. It suggests that, since the 'native' is fictitious, the 'white person' too has been invented to uphold the ideology. Therefore if the repeated caricatures of African backwardness juxtaposed on white enlightenment lack validity, then the discrete hierarchies created by law are also questionable. If master-servant relation denotes a defunct White-African link, then even the master and servant classifications of the workplace become unstable.

The next chapter charts continuing efforts to detect how Africans experienced the execution of the highlighted law as they engaged in mine work throughout the twentieth century. At the outset, the 1914 report of the Native Grievance Commission highlights the living and working conditions created under law for Africans. From then on, at regular intervals, the effects of law are described with reference to documented official reports.

CHAPTER 6

LABOUR REGULATION OF THE TWENTIETH CENTURY: LIVING AND WORKING IN THE MINING ENVIRONS BEFORE 1948

6.1. Introduction

This chapter undertakes a detailed description of the development of labour regulation in the first half of the twentieth century. The performative aspects of the laws are gleaned from a number of telling commissioned reports.[1] The convening of the selected commissions of inquiry was preceded by unease in labour relations. The commission reports discussed *inter alia* appropriate labour policy, the intent of the laws, and possibilities of reform in respect of Africans. The manner in which accessible influential attitudes were reflected in the reports and in the laws is examined. Thus the rationality and specialist knowledge of law is considered in light of notable ideological representations connected to the resultant rules. During the analysis, the concrete experiential effects that may be ascertained from official accounts, as the regulations were enforced, are noted.

Guha and the subaltern studies group have highlighted the problem of being unable to source records readily that are located in and belong to the subaltern, hence attempts to read the dominant discourse against the grain.[2] The goal is to stimulate 'small voices' which have been obfuscated historically in the dominant project,[3] hence the pertinence of Ampka's question: 'can alterity be heard?'[4] In the present context, where text attempts to project a definition on Africans and to confine them to certain predetermined contours, it is especially difficult to discern and perceive what of the African is reflected in or by the law. But, as Spivak has admonished,

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[1] Law is performative in that it pronounces particular values as credible and then fashions the rules obedient thereto, which assemble particular socio-economic and political relations.
[2] This is attempted by trying to consider what is depicted in a way that questions how subordinated voices are being reflected or transmitted within and through colonial narrative, if at all - R Guha *Elementary Aspects of Peasant Insurgency in Colonial India* (1983); likewise Said has proposed contrapuntal re-reading to procure effaced and suppressed parallel stories which have been marginalised by controlling narratives – E Said *Culture and Imperialism* (1994) 51
[3] S Webber 'in between is as much a place to be at home as any other' (1997) 31 *Middle East Studies & Subaltern Studies* 11, 12
[4] A Ampka 'Drama in South Africa and tropes of postcoloniality' (1999) 9 *Contemporary Theatre Review* 1, 14.

revealing 'pure subalternity' is not the goal here.[5] Similar to the Indian debates on the practice of *sati*, the African mine worker of the late nineteenth century and the twentieth century plays no genuine part in the deliberations at hand. Historically his concerns have been and arguably continue to be filtered through intermediaries, all of them tainted by colonialism.[6] The postcolonial thinker does not wholly avoid being compliant to western reasoning and the re-reading then draws strength from being aware of the pitfalls of its in-betweenness, its hybridity. The process is fraught because, despite the critical orientation, the project is already somewhat compromised by the cognitive impairment of being positioned in a colonised setting, being folded-in with colonialism and the bad education it has instilled – the deep aporia of Spivak.[7] Yet, defective as it is, it is an 'effort to rethink the past and re-see the present' from a less structured perception which tries to illuminate the binary fully, rather than prematurely claiming to have moved beyond it.[8]

The account of mining and other labour experiences begins with the 1914 report of the Native Grievances Inquiry (NGI). The NGI described the circumstances under which African mineworkers had to labour.[9] Next, the interconnected web of the laws promulgated from the 1920s onwards is mapped. The Natives (Urban Areas) Act of 1923 laid out the strategy for an African labour presence in all urban spaces and depicts the larger structure of which mining recruitment was a part. The manner of taxing Africans was transferred to the Native Taxation and Development Act of 1925 which aligned with the Natives (Urban Areas) Act to manage African locations. Pertinent mining law revisions are highlighted mindful of the continuance of the Native Labour Regulation Act (NLR) as the principal law for the employment of Africans at

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[5] For present purposes alterity is discerned in withholding acknowledgement on importance of African labour as seen in recruitment, work designation, remuneration, working conditions and compensation for injury, disease or death. Alterity is also present in the recognition given to the workers of white and other race groups since it reiterates the devaluing of Africans in the scheme. The troubling presence of Africans in the law has not been completely justified by dominant reasoning.

[6] That said even the African mine worker, were he to be given genuine voice, has been circumscribed by colonialism – he too is to an extent a creature established by this conquest.

[7] Webber maintains that 'there is something to be said for a methodology and philosophy that emerges from the Third World, however much in collusion those Third World scholars may be with counterparts in the North' – Webber (note 4 above) 12.

[8] Webber (note 4 above 12) 13; Prakash describes that the 'notion of the subaltern's radical heterogeneity with, though not autonomy from, the dominant remains crucial [since] subalterns and subalternity do not disappear into discourse but appear in its interstices, subordinated by structures over which they exert pressure … The actual subalterns and subalternity emerge between the folds of the discourse, in its silences and blindness, and in its over determined pronouncements' - G Prakash 'Subaltern Studies as Postcolonial Criticism' (1994) 99 *The American Historical Review* 1475, 1482.

[9] Writing in 1969 Diamond noted that the mining conditions of Africans as documented in the Native Grievances Inquiry report of 1914 were largely unchanged – C Diamond *African Labour Problems on the South African Gold Mines with Special Reference to the Strike of 1946* (unpublished MA thesis, University of Cape Town, 1969) 6.

the mines. Then the formal incorporation of collective bargaining and the launching of sector wide wage determinations under the Industrial Conciliation Act and the Wage Act is examined for its effects. The coordinated modes of maintaining wages minimal for Africans, which were discussed in the 1932 Native Economic Commission and that of Lansdown in 1943, are highlighted. An evaluation of the developing workplace compensation arrangements for chronic disease, injury and death at the mines concludes the chapter.

6.2. The Native Grievance Commission of 1914

The argument that African workers were developing into a threat to the privileges enjoyed by white workers in mines is contested. Early on following formation of the Chamber of Mines, it had been agreed to stunt the wage progression of Africans by placing a ceiling on how high their wages could go.[10] This measure was implemented to such a degree that it 'curtailed the earning power of the African and inhibited competitiveness within the industry'.[11] Certainly, the formation of the Witwatersrand Native Labour Association (WNLA), which centralised and cartelised the recruitment and supply of African labour, meant that wages remained consistent because mines did not need to have more attractive wages than their counterparts in order to attract labour.[12] With the transitioning from the Anglo-Boer War which ended in 1902 came the earmarking of the difficulties of 'poor whites' which yielded a 'civilised labour' policy.[13] The policy dovetailed with the avarice of the mining industry for large quantities of disenfranchised African labour.[14] Furthermore the maintenance of a low wage was endorsed by the SANAC report which had dismissed the increase of wages as a possible solution to inducing more

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[10] The decision of the Chamber of Mines read as follows: 'The solution of the problem of native labour supply has constantly engaged the attention of the Chamber. With a view to the reduction of wages, the Companies entered into an Agreement not to pay above a certain maximum' Annual Report of the Chamber of Mines for 1892, p. 10, cf: paragraph 18 *Reports of the Transvaal Labour Commission* Majority Report (1904) 6 available at https://catalog.hathitrust.org/Record/011984084, accessed on 12 December 2019.

[11] Para 253-264 *Report of the Native Grievances Inquiry, 1913-1914* U.G 37 of 1914; C Diamond *African Labour Problems on the South African Gold Mines with Special Reference to the Strike of 1946* (unpublished MA thesis, University of Cape Town, 1969) 6.

[12] Milner's Colonial Office communique of 1901 stated that 'mineowners were entitled to combine in order to depress the level of wages; while the Government was to ensure, and to enforce, labour contracts resulting from such combination of employers and disorganization of employees' – Colonial Office Archives, C.O. 291/30. 45779 Milner to Chamberlain, 6th December 1901; cf: Diamond (note 11 above) 9.

[13] Hertzog's 1924 governing 'civilised labour' policy of 1924 sought to assimilate white people in a general system of privilege in workplaces in general - J Jones 'Industrial Relations in South Africa' (1953) 29 *International Affairs* 43, 44.

[14] D Yudelman *The Emergence of Modern South Africa: State Capital and the Incorporation of Organised Labour on the South African Gold Fields 1092-1939 (1983)* 38-39.

Africans to work at the mines.[15] It is in the context of this environment that the grievances of African mine workers took shape.

The established workplace legal framework and working grading structure at mines already created a colour bar that was expanded following the formation of the Union. The first decades of the twentieth century saw poor working conditions for African mine workers, described in part as follows:

> 'They worked twelve hours a day on the surface or eleven hours underground without food, were often kept waiting in wet clothes for as much as three hours while the skips were being used to transport rock, and walked back to the compounds in a state of exhaustion, their bodies covered with stale sweat and grime. The regulations of 1906 compelled owners to provide change houses for white and Coloured miners, but not for Africans, many of whom contracted pneumonia and chest complaints' as a result of the working conditions.'[16]

In 1913 a number of African mine workers in four compounds refused to work unless they got a wage increase, and the response was that troops were called in to dismantle this strike.[17] The industrial action of African mine workers was preceded by that of white workers, who had, as a result, gained assurances from mine owners of the continuation of the effective colour bar.[18] Following the disturbance, a commission of inquiry was convened, the Native Grievance Inquiry

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[15] Para 80 *Reports of the Transvaal Labour Commission Majority Report* (note 10 above); para 378 *South African Native Affairs Commission 1909-1905* (1905).

[16] Chamber of Mines Annual Report for 1907,p17, 85, 1910,p70, SA 1914 U.G 37 p16 cf: H Simons & R Simons *Class and Colour in South Africa 1850-1950* (1967) 84-85.

[17] In early July 1913 (among others) some 600 workers at Driefontein and New Cornet mines, as well as approximately 9000 workers on four mines including Meyer and Charlton refused to work - T Moodie 'Profitability Respectability and Challenge: (Re)Gaining Control and Restructuring the Labor Process while Maintaining Racial Order on the South African Gold Mines 1913-1922' available at https://www.uj.ac.za/faculties/humanities/sociology/Seminars/2013/Moodie%202013%20Profit%20Respect%20Challenge.pdf, accessed on 21 March 2020.

[18] By the middle of 1913 18 000 white mine workers went on strike and this affected 63 mines – Simons & Simons (note 16 above) 156; indeed the exclusively white Transvaal Miners' Association of 1902 was rebranded the Mineworkers' Union (MWU) in 1913 after this strike and was somewhat recognised by the Chamber of Mines as a bargaining agent - A Lawrence *Employer and Worker Collective Action* (2014) 163; Wiehahn remarked that the strike was precipitated by 'the lack of proper communication between the mine management and the workers, a renewed attempt to replace White workers with lower-paid Black workers, and the growing shortage of skilled labour as a result of competition for the services of skilled workers between the developing manufacturing industry and the mining industry' – N Wiehahn *The Complete Wiehahn Report* (1982) xx, 678; as at 1937 a closed shop agreement was concluded between the Chamber of Mines and the trade union at gold mines, solidifying the position of unions and their ability to ensure that reserved competency levels were filled by its members (who were exclusively white) alone.

(NGI), manned by a magistrate appointed as a sole commissioner to consider any problems and complaints.

Working conditions were considered in chapter one of the NGI report. The report revealed that, contrary to the seemingly tightly controlled health and safe regulations, accidental injury was common place due to derelictions of oversight and non-compliance by assigned white workers.[19] Regulations such as 100(11) and 106(5) (Mines and Works Act No. 12 of 1911) requiring safety inspections by supervisory white mine workers, prior to permitting African workers to commence the arduous underground manual labour, were routinely unheeded.[20] The report proposed that where safety of mining conditions was in doubt, at least two opinions of supervisory personnel who had investigated the environment should verify safety. Furthermore, the report recommended that for failure to take adequate care that resulted in accidents 'there ought not to be … [the] universal option of a fine' (paragraphs 18, 19 & 23). The report asserted that '[w]hen the lives of several persons habitually depend upon the care and skill of a superior … imprisonment … [was not] too severe a penalty for serious negligence (paragraph23).'

African workers complained of being routinely beaten while underground by their white task masters. Though physical chastisement was deemed 'inevitable' in light of the environment by the report, more restraint was recommended.[21] Hammerboys, those operating jackhammer drills, were likely equivalent to today's rock-driller designation at the mines. Hammerboys were repeatedly compelled to do the additional work of clearing off shattered rock fragments following blasting, called 'lashing', before embarking on the work they were contracted to perform – drilling holes for blasting. This occurred even though they were only paid at casual or 'piece-work' labour rates 'for every inch drilled'.[22] Hammerboys were required to drill acertain number of holes per shift, failing which they would not be paid for that shift, they did not receive pro-rata payments for holes drilled and the 'lashing' process at times took hours to complete. Such forcibly forfeited shifts could result in the extension of the length of a contract of service.[23]

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[19] Paras 17-32 NGI (note 11above).
[20] Paras 25-28 NGI (note 11above).
[21] The report opined that 'the master has to give directions and the servant has to obey them … working under unhealthy and unnatural conditions … [which give rise to] the temptation to and the opportunity for assaults on the servant [; that] these circumstances may perhaps be modified, but cannot be altogether removed' – this in despite the prohibition of assaults by regulation 16 - para 33 & 34 NGI (note 11 above).
[22] Paras 65, 80, 81 & 82 NGI (note 11 above).
[23] Paras 65, 80, 81 & 82 NGI (note 11 above). A comparable situation was experienced by miners in the coal sector in 1918 relating to the interpretation of the one year – which had been taken by miner owners to mean 360 shifts whereas regulations provided for 313. Additionally coal mines tended to close for a some days during each month

The requirement to do 'lashing' was not stipulated in any of the labour contracts. A circular of the Native Recruiting Corporation of November 1913 explained that:

> '[i]t has always been considered inadvisable to insert a clause in the native contract having reference to the shovelling work required of natives employed on hand drilling, as it is feared that it may needlessly alarm them as to what they may be called upon to perform, and so adversely affect our recruiting operations.'[24]

Next came a review of conditions at compounds where there were reports of deficient food rationing, heating and disruptive police raids for contraband, such as alcohol.[25] Overall the report was of the view that, despite some infrequent shortages of food and unsanitary conditions in some kitchens, generally regulations were being adhered to and that the mass feeding scheme was efficient and cost effective.[26] The primary diet consisted of mealie-meal gruel, with the regulations further prescribing about three pounds of meat per week.[27] The report agreed with the sentiment that married quarters should be discouraged, being 'a source of liquor and other vice,' since women residing there were generally not sanctioned wives but 'mere temporary concubines.'[28] The report recommended the establishment of more decent accommodation for married men through the creation of locations.

For the purposes of controlling the compound, a compound manager had a contingent of African mine worker assistants called compound police, the leader of whom was the *induna*.[29] A number of complaints of abuse of power and ill-treatment at the hands of the compound police 'boys' (who carried sjamboks), which the magistrate was inclined to believe, were received by the commission.[30] Though the compound managers argued that compound police members were not allowed to beat African miners, in writing the report Buckle responded by pronouncing that

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meaning that workers would work part shifts on some days which were then counted up to make a full day's work. This resulted in workers having to work for a year and a half or at times longer than two years to fulfill a one year contract. A strike ensued in support of this grievance – The Department of Mines and Industry, Annual Report of the Government Mining Engineer for the year ended 31st December 1918 UG 38 of 1919, p. 110 cf: C Diamond African Labour Problems on the South African Gold Mines with Special Reference to the Strike of 1946 (unpublished MA thesis University of Cape Town, 1969) 40

24 Para 75 NGI (note 11 above).

25 Paras 115-131, 139 NGI (note 11 above).

26 Paras 115, 120, 121, 126, 131, 139 NGI (note 11 above).

27 Paras 115-116 NGI.

28 U.G 37 paras 132 & 134 NGI (note 11 above).

29 The induna, under the authority of the compound manager, was given charge of the thousands of African miners inhabiting the compound - para 143, 144 NGI (note 11 above).

30 Para 146 NGI.

'when you put an offensive weapon into the hands of a savage, I doubt whether it is easy to convince him that he carries it ornamental purposes'.[31] Even while having received accounts of favouritism toward particular groups, which was attributed to tribal affiliation affinity, the report explained that police 'boys' served the function of liaisons between the African workers and the compound manager, and ought not to be stripped of their positions and attendant powers.[32]

Concerning medical care, the report noted that, since there was no proper medical reporting and record keeping, it was not possible to assess the level of care that Africans were receiving, nor how many patients were being attended to at a given time.[33] Medical officers attached to their care often performed various other duties, including private practice. The ratio of medical professional to was particularly high.[34] The report agreed with published medical opinion of the time of 'the "almost impossible moral strain" upon a medical man whose attention is competed for by Europeans who can enforce it and by natives who cannot'.[35] Indeed, in 1913 the Director of Native Labour did report to the Secretary for Native Affairs that 'the attention given to-day to native labourers by most Mine Medical Officer is shockingly inadequate'.[36]

The matter of wages was also problematic since 'taking surface and underground work together, [wages] were lower than they had been in 1896.'[37] The evidence revealed that when the Chamber of Mines in May 1897 agreed on a standardised wages schedule, the agreed schedule lowered salaries of African mine workers to one third of what they had been in the preceding year of 1896.[38] The report compared the wage schedule pertaining to African miner workers of 1912 with the most recent one of 1913, which was operational in the significant mines that employed 80 percent of the total African mine labour population.[39] The pay schedules which were attached to the NGI report, marked Annexure 12 and 13, revealed 'a slight decrease of the previous rates paid to the natives as a whole, the average per shift for 1912 being 1s. 11·58d.,

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[31] Para 146 NGI.
[32] Paras 148-153 NGI.
[33] Paras 203-205 NGI.
[34] Para 225 and para 227 NGI.
[35] Para 206 NGI.
[36] Para 222 NGI.
[37] Para 254-255 NGI.
[38] Para 250-254 NGI.
[39] Para 255 NGI.

and for 1913 1s 11·075d.'[40] The schedules of 1912 and 1913 rates of pay may be found in Appendix B of this thesis. The agreed upon wage caps on African wages were holding fast.

The report also charged the colour bar at length as the major grievance.[41] Even where Africans performed the same work as their white counterparts they had no hope of similar reward. For some Africans the report characterised it as 'absence of opportunity to do the work for which their education … fitted them, and thereby to earn sufficient to maintain them in the state of civilisation which they … [had] attained.'[42] The report continued to detail that '[s]ome of these natives were extremely sensible, well-mannered and well-reasoning people; and they complained bitterly that they were, for all practical purposes, classified by everyone with raw savages'.[43] Even the compensation scheme of the NLR was queried,[44] and complaints were determined by the report to be, on the whole, well founded.[45] The report raised suspicion that Africans afflicted with silicosis were not being diagnosed and advised that they be tested for the disorder prior to being sent home.[46] Additionally Africans were often not aware of their rights to pursue the limited compensation that was available to them.[47]

The report then turned to the matter of control of African workers and the potential for revolt, describing the position as follows:

> 'There are … about 200, 000 native mine labourers on the Reef. They are all male, practically all adults and the large majority in the prime of life. They are scattered over 50 miles of country in blocks of from 1, 000 to 5, 000 in each compound. They can mobilise themselves in a few minutes, armed with such weapons as assegais, jumpers, axes, etc. A good many of them consider … that they have grievances against the Europeans, and most of them are savages, whose only idea of reform is violence.'[48]

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[40] Para 255 NGI.
[41] Despite becoming proficient in their work African mine workers had no possibility of access to promotions. Furthermore the report explained that '[a] good many boys complained that, every time they returned to a mine, they had to begin at bottom rates, even though they had worked there, on and off, for years and had been getting top pay before they went on their [compulsory] holiday' - paras 274-280 & 281 NGI.
[42] Paras 282 & 283 NGI.
[43] Paras 282 & 283 NGI.
[44] Paras 361, 362 & 363 NGI.
[45] Para 384 NGI.
[46] Para 389 NGI.
[47] Para 400 NGI.
[48] Para 474 NGI.

The report suggested more militaristic control of compounds, characterised by vigorous intelligence gathering, erection of more secure access barriers at compounds, and development of emergency forces at mines to respond to any tumult.[49]

Were any changes to policy and practice made consequent on the NGI report? In general no, or at least not immediately.[50] There was further strike action in 1920 which involved up to 71 000 African mine workers '37% of the total African labour force employed on the Witwatersrand gold mines'.[51] The strike, which yielded no tangible concessions on the part of the government or the mine owners, centred on dwindling wages, high prices in mine shops and the continuance of the established colour bar.[52] Katzen has noted that during the period '[b]etween 1914 and 1920 [the wages of African mine workers] rose by only 10% compared with a rise in retail prices of 55% over the same period.'[53]

The NGI reveals that in reality the position of Africans in the mining workplace was even more precarious than a cursory look at the legislation reveals. The depression of African wages which began in the late 1800s was continuing during the first decade of the Union. The working conditions were also bad in that workers, such as Hammerboys, were routinely forced to work beyond their signed contractual terms. Unpaid work that prolonged the duration of their labour contracts went unchallenged. Despite the maltreatment and viewpoint of African inferiority reflected by the report, irreconcilable deficiencies have been pointed out. Africans deemed to have developed beyond the stage of 'raw savages' received substandard remuneration,

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[49] Para 492, para 501-504 & para 507 NGI.

[50] Toward the end of the first decade, beginning with the retail boycotts in 1918 there was some widespread industrial action by African workers on the Rand. The complaint was that money had depreciated in value and the prices of goods were too expensive at the shops situated at the mines. Later the same year African municipal night soil workers 'bucket boys' who went on strike were jailed under severe threat that following release they would have to work without remuneration and would incur beatings for any further work-stoppages. This created more discontent among Africans and animated calls for general revolt by mine workers which were for a time defused. 1919 saw concerted demands for eradication of pass laws and demands for better pay - B Hirson 'The General Strike of 1922' (1993) 3 *Searchlight South Africa* 67-70; Diamond (note 11 above) 45-47.

[51] Diamond (note 11 above) 47.

[52] The only notable response to was the normalising of prices at shops open for African mine workers to lowered prices – Diamond (note 11 above) 49, 53.

[53] Katzen explains as follows: '[t]he stability of African wages is the most important single factor causing the rigidity of mining costs with respect to changes in the level of activity and the general price level in South Africa. This stability and the lowness of African miners' wages … [was] due to the numerous legal and other restrictions which … [governed] the employment of Africans, the operation of the migratory labour system and the monopsonistic position of the Transvaal Chamber of Mines with regard to the recruitment of African Labour. This mines … [did] not compete with one another for the available labour. … The migratory labour system [was] also effective in keeping African wages low and stable' - L Katzen *Gold and the South African Economy: The Influence of the Goldmining Industry on Business Cycles and Economic Growth in South Africa 1886-1961* (1964) 23

accommodation, medical care and still could not receive promotions at work. The particularly low compensation afforded to Africans by the NLR, even while greater numbers of Africans suffered injury, infirmity and death, was also queried.[54] The report revealed a fear of revolt against the prevailing status quo by African workers and so advocated tighter control of Africans in compounds, with additional forces at the ready to fiercely quell any unrest. Thus Prakash has correctly observed that the colonised are 'subordinated by structures over which they exert pressure'.[55] The colonisers become 'enslaved master[s]' due to ever-present fear of rebellion by the 'unmastered slave.'[56] The situation creates a state of hyper-vigilance in the dominant culture, an awareness of the precarity of the control.

6.3. Control of Africans 1920-1948

6.3.1. Natives (Urban Areas) Act No. 21 of 1923

This Act administered African labour recruitment and mobility control in urban areas.[57] The areas surrounding mines and the mining compounds, to which many African workers were confined, were also tightly controlled. The management of labour influx in the surrounding environs is therefore relevant. Throughout the time of the subsistence of signed mining contracts, the wider urban area controls assisted in enclosing African mine workers within mining compounds as well as other designated areas, and as soon as the contracts expired the urban area laws mandated speedy exit from the region. The Act operated in tandem with the Mines and Works Act and the NLR 'conductor[s]' to convey mine workers to and from rural reserves under supervision.[58] The Natives (Urban Areas) Act was applicable in all urban areas under the authority of local authorities, which at the time facilitated the funnelling of many Africans to the mines while also controlling their employment in the growing urban industrial sectors as well as placements as domestic workers in private homes and farms in the Transvaal. Thus the Act assists to contextualise what was happening to African mine workers, offering a more complete picture of the larger story of African labour of the Transvaal, into which mine workers fitted. The labour

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[54] Paras 361-364 & Para 384; the NGI report also raised the possibility that cases of Africans suffering from silicosis were not being adequately investigated and diagnosed – para 386-389 NGI.
[55] G Prakash 'Subaltern Studies as Postcolonial Criticism' (1994) 99 *The American Historical Review* 1475-1490, 1482
[56] H Bhabha *The Location of Culture* (1994) 131; the real African is never actually known or mastered by the white community because the 'native' is a figment of colonial text, hence the anxiety in the hegemony.
[57] The Transvaal was developing the largest metropolis due to the exponential profitability of the mining sector.
[58] A 'conduct' was a person 'employed by a labour agent or employer for the purpose of supervising or escorting native labourers proceeding for labour to their destinations' – section 2 NLR (Act No. 15 of 1911).

structure cannot be fully understood without reference to what else was happening to Africans in the adjacent areas of the Transvaal which were developing because of and alongside the mining industry.

The refined enactment of urban mobility and occupation law was preceded and largely persuaded by the findings of the Transvaal Local Government Commission – the Stallard Commission.[59] Apart from proposing systematised housing allocation and spaces for Africans, the report detailed the necessity of influx control thus:

> 'It is recognised that the existence of a redundant black population in municipal areas is a source of the gravest peril and responsible in a great measure for the unsatisfactory conditions prevailing. (By redundant Native is meant the Native male or female who is not required to minister to the wants of the white population, but does not include a Native who ministers to the legitimate needs of his fellows within the municipal area.)
>
> To combat this evil, the following practical measures are recommended: -
>
> (a) the provision of a rest-house, with suitable accommodation for male and female, where all Natives looking for employment will be housed;
> (b) the prevention of any Native (male and female) living elsewhere than on his master's premises, in the Native village, or at the rest-house;
> (c) the registration of Natives to remain in the hands of the Native Affairs Department;but … no Native to be registered to any employer or allowed to reside outside the rest-house or Native village without the certificate or visa of the municipality certifying that there is suitable accommodation for the employee.'[60]

The Stallard Commission strongly discouraged any moves toward the integration of Africans with white people and declared that an African 'should only be allowed to enter urban areas,

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[59] The Transvaal Local Government Commission (T.P. 1-1922) cf: *Report of the Native Laws Commission 1946-48 UG No. 19 of 1948* (1948) 2.

[60] Para 5 The Transvaal Local Government Commission (T.P. 1-1922) cf: *Report of the Native Laws Commission* (note 59 above) 4; according to Suzman the Stallard Commission articulated the legal norm 'It should a be recognised principle of Government that Natives-men women and children-should only be permitted within municipal areas in so far and for so long as their presence is demanded by the wants of the white population and should depart therefrom when they cease to minister to the needs of the white man' – H Suzman *A Digest of the Fagan Report* (1953) 2.

which are essentially the white man's creation, when he is willing to enter and to minister to the needs of the white man, and should depart therefrom when he ceases so to minister.'[61]

Section 29 of the Natives (Urban Areas) Act No. 21 of 1923 reiterated the definition of a 'native' as a 'person who is a member of an aboriginal race or tribe of Africa', stating that in the case of doubt the burden of proof would rest on the person seeking to disprove his or her assigned racial profile.[62] The Act sought to regulate the living conditions of Africans in urban areas, while making provision for more effective control measures within the designated living spaces, including streamlining the registration of labour contracts, controlling entry and exit, and limiting the sale and consumption of alcohol including 'kaffir beer'. Section 1 provided for territory, based on existing location or extensions of those locations or other identified areas, to be set aside for African 'occupation, residence and other reasonable requirement of natives'. With the approval of the Minister, Africans were to be able to get 'lease of the lots' for building housing to live in.[63] For unmarried Africans, those 'not living under conditions of family life' as prescribed by the Minister, 'native hostels' were to be built.[64] Anyone employing more than 25 Africans or Africans as casual workers in an urban area had to arrange and supply them with accommodation in a location or hostel, as approved by the Minister.[65] Section 5 allowed the Governor-General, by proclamation in the Gazette, to pronounce that 'from and after a date to be specified therein, all … [Africans] within the limits of any urban area or any specified portion thereof other than those exempted under subsection (2) of this section, shall reside in a location, native village or native hostel.' Any person found harbouring an African outside a designated area would be guilty of an offence.[66]

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[61] Para 42 *The Transvaal Local Government Commission* (T.P. 1-1922) cf: para 1436 *Report of the Industrial Legislation Commission of Enquiry* UG 62 of 1951 (1951) 192; *Report of the Native Laws Commission 1946-48* UG No. 19 of 1948 (1948) 20.

[62] The Act repealed the (Transvaal) Native Passes Proclamation 37 of 1901; Native Pass Proclamation Amendment Ordinance No. 27 of 1903; '[C]oloured' was defined as a 'person of mixed European and native descent and shall include any person belonging to the class called Cape Malays' and one of the express aims of the Act was to exempt coloured people from pass laws – s 29 Act 21 of 1923

[63] S 1(b) Act No. 21 of 1923.

[64] S 1(c) Act No. 21 of 1923.

[65] S 1(e); a local authority did not have the power to move/relocate or demolish/eradicate a location without the consent of the Minister or the administrator – s 2(2); in general only Africans were allowed to apply for and acquire or have an interest in 'any lot or premises situate in' locations (s 4(1)). Default was an offence punishable by up to £100 fine and/or up to £5 for every additional day of continuance of the offence (s 4(2). But a coloured person who was living in an African location as at the time of the commencement of the Act was allowed to stay(s4(3)).

[66] Section 5(3) did not apply to excepted persons under s 5(2) such as a 'registered voter in the Cape,' 'a domestic worker whose accommodation was being provided by the employer, [and] … Africans living in mission house, private hospitals, private hostels'.

Section 10 established a native advisory board (NAB) comprising of three Africans and a white chairperson, the duties of which would be set out in regulations. Section 12 permitted the Governor-General to, per Gazette, announce an area as a location and mandate that employers (that is, those who had concluded valid service contracts with Africans) to register the contracts with the applicable local authority and to report termination of the contracts or desertion.[67] Where the African was a 'native labourer' in terms of the NLR registration in terms of section 12(1)(a) (under Act 21 of 1923), it would be deemed sufficient to satisfy registration for purposes of the NLR. Section 12(1)(b) permitted regulations controlling the entry of male Africans to a proclaimed areas from within the country and from outside the Union by mandating reporting of entry and certification by a prescribed official. Section 12(1)(c) allowed regulations to deal with Africans who remained in the area after their employment contract had ended to facilitate compulsory reporting of themselves in order to get restrictive certification to remain. Section 12(1)(d) allowed regulations on the refusal of a permit to enter and reside to an unaccompanied male African who appeared to be below eighteen years of age. Section 12(1)(e) provided for regulations to manage the erection of dwellings for Africans looking for employment. Section 12(1)(h) allowed regulations on the expulsion of Africans whose work contracts had expired or who failed to find work within the prescribed time period.[68] Section 14 created offences for contravention of section 12 or regulations proclaimed thereunder. Section 17[69] provided for the 'manner of dealing with idle, dissolute or disorderly natives in urban areas'.[70] Section 18

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[67] S 12(1)(a); proof of registration of contract had to be produced on demand to an empowered official.

[68] Section 12(2) exempted certain Africans including those who were registered to vote in the Cape, ministers of religion, chiefs and headmen approved as prescribed from the provisions of section 12 – Act 21 of 1923

[69] Section 8 of Amendment Act No. 25 of 1930 amended section 17(1) to read: 'whenever in any urban area … [an appointed official] has reason to believe or suspect that any native ... (a) is habitually unemployed; or (b) has no sufficient honest means of livelihood; or (c) is leading an idle, dissolute or disorderly life: or (d) has been convicted of section 29 of Native Admin Act, 1927 [prevention of disseminating material making people Africans and whites hostile]; (e) convicted of selling liquor … ' such African could be brought before a magistrate.

[70] In *Native Commissioner & Union Govt. v Nthako* 1931 TPD 234 the court held that an official placing an African accused of contravening section 17 (as amended by section 8 of amendment Act 25 of 1930) before a Magistrate or Native Commissioner had the duty to account for the factors that caused him to reasonably suspect or believe that such African was in violation of the law, even though such account was not required to meet the threshold of legal evidence. The accused African would then be afforded the opportunity to rebut such apprehension, so long as the belief was not in the view of the presiding officer without reasonable cause. The Native Administration Act 38 of 1927 which aimed '… to provide for the better control and management of native affairs,' contained additional supportive devices. Section 1 reiterated the pronouncement of the Governor-General as 'supreme chief of all Natives of Natal, Transvaal and the Orange Free State'. Section 28 permitted the promulgation of regulations to 'create and define pass areas within which' Africans had to carry passes and regulations 'for the control and prohibition of the movement of' Africans. Section 28 permitted the Governor-General to announce, by way of Gazette, the establishment of demarcated pass areas wherein it would be compulsory for Africans to carry passes (s 28 (1)(a), as well as set out the 'regulations for the control and prohibition of the movement' of Africans 'into, within or from any such areas' (s 28(1)(b). Section 29 made it a criminal offence to utter or perform any action intended to 'promote any feeling of hostility' between Africans and their white counterparts; punishable by up to one year's imprisonment

restricted the hiring of Africans who did not live in locations, hostels or 'native labourers' living in compounds, as provided for in the NLR. Section 19 prohibited consumption, possession or sale of alcohol in locations. The unauthorised brewing or otherwise producing alcohol of 'kaffir beer' was prohibited (section 20). Section 23 permitted the promulgation of regulations on *inter alia* section 12 matters by the Governor-General.

A number of court decisions on the use of the provisions of the Act point to some of the continuing practical effects that the law had on the mobility, occupational rights and access to employment of Africans.

In *Rex v Hodos and Jaghbay*, the court held that, in order for a proclamation to be *bona fides*, the Governor-General had to refrain from proclaiming the date of moving to a scheduled area unless he was sure that there would be enough appropriate accommodation for Africans.[71] The evidence had revealed that accommodation catered for 8 500 people whereas the total number of un-exempted Africans expected to live there was 60 000. At time the proclamation was formulated and issued, the facts relating to the accommodation requirements were known to the office of the Governor-General; therefore the act of fixing a date in full knowledge that there was not sufficient accommodation rendered the executive decision an invalid 'flagrant injustice'.[72] The court's blinkered 'black letter law' perception of where the injustice lies is

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or a maximum fine of £100 or both (s 29(1). S 29(2) permitted a magistrate to issue a search warrant on any premises on 'reasonable grounds for suspecting' that 'it will afford evidence as to the commission of any such offence' or 'on reasonable grounds for believing that it … [would] afford evidence as to the commission of any such offence'. Any material confiscated could be destroyed on order of the magistrate. This gave authorities wide discretion to police the attitude, sayings and behaviour of Africans. Section 30 permitted the Governor-General to issue regulations for controlling and managing African villages or townships not falling under local authorities in term of Act 21 of 1923 (s 30(a); moreover the rates and charges on land owners and occupants could be levied (s 30(b)). The court in *R v Dumah 1928* OPD 152 had earlier held (in relation to a similar provision) that there must be an intention to provoke warlike feelings between all Europeans and all natives; *Rex v Bunting* 1929 EDL326.

[71] *Rex v Hodos and Jaghbay* 1927 TPD 101, 104.

[72] The court referred to the long title of the Act '… to provide for improved conditions of residence for natives'. In this situation the court held the living conditions under review fell 'so very far short of the needs of those natives that it is impossible to suppose that a reasonable man could for one moment have conceived it adequate' - Ibid 104-105. Similarly in *Rex v Nkonyane* 1934 TPD 363 the appellant had been living in a four-roomed house prior to the proclamation issued on 27 March 1933 requiring them (as un-exempted Africans) to move to a designated location in terms of section 5(3). The issue was whether the available accommodation in the location a two-roomed house was adequate or reasonable accommodation for him, his wife and three children. The court held that it was not and that the Crown had failed to discharge the onus of proving it sufficient. In *Rex v Zock* 1927 TPD 582 the Governor-General had issued a proclamation in terms of section 5 of the Act stating that all Africans who were not exempted in had to be living in identified scheduled areas 'locations, native villages or hostels' on or before 18 February 1927. Court held that the proclamation did not give Africans reasonable time to make the move; that the proclamation was invalid because it had failed to 'fix a date which … [would] give the natives a reasonable time to move' to locations in scheduled areas. The accused in *Rex v Kostas* 1932 AD 138 had leased rooms to Africans and was charged with contravening section 5(5) Act 21 of 1923 which created an offence for a person who allowed un-exempted Africans

notable. All Africans within the environs of the Transvaal had to be identified, accounted for and assigned living space under the strict control of appointed white officials. Moreover, stringent surveillance of labour contracts was administered through systematised registration. A postcolonial perspective challenges the validity of such a 'collusive' sense of justice which has been established through a process of diminishing the status of colonised people.[73] Instead of focusing on the legitimated racial hierarchy, the occluded subjectivity of Africans should preoccupy the reading of the judgment and thereby 'confound' the logic of the interpretation. The aim is to think beyond and 'traumatize' the 'arbitrary' closures created by the law.[74]

In *Hashe v Cape Town Municipality*, the applicants had been expelled from the location in terms of section 17 of the Act.[75] The court explained that when a magistrate considered reasons under section 17, he acted in an administrative capacity rather than a judicial one, that is, sitting as a criminal court. The magistrate had ordered the applicants to give reasons why they should not order them removed, and when they failed to give satisfactory reasons an order for their removal was issued. The court held that the hearing had not amounted to a criminal prosecution. Furthermore, the court stated that police were empowered by the Act to bring 'habitually unemployed' Africans 'leading an idle, dissolute or disorderly life' before a magistrate to explain themselves and give good cause why they ought not to be expelled.[76] Since it had not been a prosecution, no evidence that he was being an 'idle or disorderly person' had had to be adduced by the police. The onus had rested on the African to convince the magistrate otherwise by way of acceptable explanation.[77] The court nonetheless considered the nature of the evidence which had been presented, including an affidavit of the superintendent of the location as well as that of the previous convictions against the applicant.[78] In an obiter statement the court, per Innes CJ, aligned itself with the comments of the Cape Provincial Division regarding the provisions of Act 21 of 1923, that 'the grave dangers that may arise to the liberty of the subject if persons can be dealt with in this informal manner, and sent for long periods of detention to penal institutions.' Nonetheless the Chief Justice pronounced '[t]hat … is a matter for the consideration of the

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to occupy premises outside 'proclaimed areas' – locations. The court held that gradual removals were permissible and that the appellant could have applied for license to keep housing Africans but had not done so.

[73] Bhabha (note 56 above)173.

[74] Bhabha (note 56 above)179.

[75] *Hashe v Cape Town Municipality* 1927 AD 380; section 17 of Act 21 of 1923 provided for the identification and expulsion of 'idle, dissolute or disorderly natives in urban areas'.

[76] Ibid *Hashe* 383.

[77] Ibid 383.

[78] Ibid 388.

Legislature. As far as Courts of Justice are concerned our duty is to give effect to the laws enacted by Parliament, no matter whether we approve of them or not.'[79]

Despite the court's equivocations, African people were criminalised as lazy and disruptive if they did not conform to the naturalised ordering of relations. The implementation of law went so far as to condone relaxation of normative evidentiary rules in order to fulfil the overarching objectives. That African presence in designated white spaces was judged inappropriate is the crux of the matter, rather than whether or not the formal procedure of establishing alleged facts was adhered to.[80] The notion of African presence being a misplaced menace when not engaged in the service of the white community was explicit in the narrative. The real life consequences for Africans of not being recognised as rights-bearing citizens was absent in the interpretation of the court. The court overlooked the palpable fact that the law located Africans in a wilderness of nonbeing,[81] such that its warning on 'dangers … to … liberty of the subject' were inapplicable.

The *Simango v Buitendag* matter centred on regulations under section 23(3) of the Act, which provided that Africans living in locations had to reapply to continue living there and satisfy the Superintendent that they were 'fit and proper' persons in order to be reissued a residence permit.[82] The applicant, an African originating from erstwhile Rhodesia (present-day Zimbabwe), was denied reissuance of a permit under regulation 22(a) on grounds that he was from Rhodesia, was unmarried (in that he failed to prove his presumably customary marriage), and owned another stand in Evaton township.[83] The court held that the purpose of the rules was to maintain 'good order, health and sanitation', and that it was in this regard that the advisability of awarding extensions on permits should be tested.[84] Since the African in question was married by 'native custom', living permanently in the Union, had a proven record of continuous

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[79] Ibid 388.
[80] Said encourages scrupulous deconstruction of the way dominant structures 'clothe, disguise, rarefy, and wrap [themselves] …in the language of … rationality' – E Said *The World, the Text and the Critic* (1984) 216; B Parry 'The Postcolonial: Conceptual Category or Chimera?' (1997) 27 *The Yearbook of English Studies* 3-21, 5-6.
[81] F Fanon *Black Skin White Masks* (trans C Markmann, 1986) 10.
[82] *Simango v Buitendag* 1943 WLD 85
[83] Ibid 90; Regulation 22(a) stated that everyone wanting to continue to reside in a location had to apply to the Superintendent for a permit and satisfy him that he was 'a fit and proper person to reside in the location' and that the applicant was still employed or 'carrying on a lawful occupation'. Regulation 22(b) provided that every permit expired on 31 December every year.
[84] Ibid 91.

employment in the area and had 'become detribalised' and also owned property elsewhere, he was fit and proper, according to the court.[85]

The reality was that the Act separated families, making it unlawful for young males, and, in certain situations, young women, to continue to live at their parental home, or indeed with any available extended family. This was evinced in *Molife v Municipality of Potchefstroom*.[86] The accused was a male over the age of 18 who was living in the location without a site or residence permit. A regulation under section 23(3) of Act 21 of 1923 stated: 'No person other than the holder of a site permit … a residential permit … shall reside in the location unless' they first applied for and got a 'lodger's permit' from the superintendent who had assessed him as fit and proper.[87] The effect was that, on attaining the age of eighteen years, African males became destitute and had to fend for themselves. They had to prove their worth by being certified fit and proper in order to obtain employment on penalty of banishment. The regulation was argued to grant too wide a discretion to the superintendent as there was no guidance on 'fit and proper'.[88] The impugned regulation provided that whilst a person was finding suitable accommodation, in the event of satisfying the fit and proper requirements, 'a temporary permit for six days' could be issued. It further decreed that permits would 'specify the dwelling, with the name of the occupier thereof, in which the lodger shall alone reside.' Moreover:

> '[a]ny visitor to the location desiring to remain longer than three hours … [had to] report himself to the superintendent, who … on his being satisfied that the applicant … [was] a fit and proper person, [would] issue to him a temporary permit available for a specifiedperiod.'[89]

The court held that rules of reasonableness applied to the decision, meaning that the issue was not whether the superintendent was satisfied, but rather whether the person was considered fit and proper, if the decision was appealed to the magistrate and local authority. The courtheld

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[85] Ibid 92.
[86] *Molife v Municipality of Potchefstroom* 1930 TPD 197.
[87] Regulation 11 read: '[n]o persons other than the holder of a site permit who has erected a dwelling in the location and the holder of a residential permit together with their wives and families, being children under 18 years of age or unmarried daughters, shall reside in the location' without first getting a 'lodger's permit – granted on passing the fit and proper test.
[88] It was contended that the regulation '(a) it does not define the terms and conditions of residence … (b) it is vague and uncertain; and (c) … the right to grant refuse a lodger's permit is in the arbitrary discretion of the superintendent' – *Molife* (note 86 above) 200.
[89] In terms of regulations 14 and 15 the superintendent had to keep a record of all the permits issued and refused and the reasons for refusal (reg. 14); and a person refused a permit could appeal to the local authority first, and finally to the magistrate (reg. 15) – Ibid 201.

that 'fitness and propriety must be in relation to the powers of regulation conferred by section 23(3) of Act 21 of 1923': to enable the local authority to administer and manage matters such as 'good order, health, and sanitation' in the location; and to eliminate African elements who might in its view jeopardize this.[90] Furthermore since it was deemed impossible to give detailed grounds upon which a decision of undesirability could be made, this served as the justification for keeping the regulation as it was.[91]

The Native (Urban Areas) Consolidation Act[92] carried forward the objectives of its predecessor, consolidating its provisions under the undertaking to enhance the residential situation of Africans in urban locales, along with heightening the efficiency of the management of matters concerning them including employment contracts, the entry and exit of Africans into areas within and outside of their designated areas of occupation, and controlling the prohibition on the sale of alcohol. In terms of section 2, with the assent of the Minister, local authorities could identify more parcels of land for African occupation to develop locations, native villages and hostels. In general, only Africans or companies with exclusive African membership could acquire a 'lot or premises or any interest therein or servitude thereof'.[93] Section 6 prohibited the acquisition of land or property by Africans and associations of Africans ('corporate or unincorporate') in urban areas outside of the areas designated by the local authority with the consent of the Minister.[94] This Act also provided for the making of regulations which restricted the rights of Africans to enter urban areas, legitimate entry being largely confined to the purpose of 'seeking and taking up employment' and placed additional limitations on sanctioned residential occupation.[95] Africans failing to comply with such regulations (once proclaimed) would be guilty of an offence.[96] Section 15 provided that Africans were not permitted to 'congregate', reside or build dwellings within five miles of an urban boundary – 'no owner, lessee or occupier of land situated outside an urban area within five miles of the boundary thereof

[90] Ibid 203.
[91] Ibid 203.
[92] Native (Urban Areas) Consolidation Act No. 25 of 1945.
[93] S 5 Act No. 25 of 1945.
[94] Section 8 prohibited transactions of fixed property by persons other than Africans such as companies where Africans had a controlling interest – Act of 25 of 1945
[95] S 10 Act No. 25 of 1945.
[96] S 10(3) Act No. 25 of 1945.

shall allow natives to congregate upon, … or occupy any dwelling on, that land' except if permitted by the Minister.[97]

As seen in these cases, the Act maintained control on the ability of Africans to move from place to place and mandated the finding of placement in employment. It also made the tenure of Africans who had been granted permits to occupy dwellings in locations insecure, and susceptible to annual revocable renewal. Whole communities were displaced by proclamations which redesignated different areas for occupation. The position of young male Africans was also vulnerable in that they became homeless on attaining the age of eighteen years and effectively had to fend for themselves by reporting to regional offices for placement at designated places of work. To be suspected of being 'idle' or otherwise disorderly made a person susceptible to expulsion.

6.3.2. Native Taxation and Development Act No. 41 of 1925

This Act carried forward the taxation of Africans and ensured that, in general, Africans beyond a certain age could not lawfully reside in the locations as provided for by the Native (Urban Areas) Act without being employed and paying tax. The stated aim of the Act was to revise and merge existing laws on the taxation of Africans as well to obtain funds for administering and educating them. Once again 'native' was defined as one belonging to 'an aboriginal race or tribe of Africa' as well as those living in locations like Africans.[98] In cases of doubt, the burden to disprove an assigned race rested on the African person.[99] In *Rex v Mohamed*, it was alleged that the appellant looked and behaved like an African even though he was disputing liability for tax in contravention of section 9 by saying he was from Madagascar.[100] The court held that, in terms of section 19, the onus rested on the accused. The evidence presented by the state was as follows: '[t]here is no difference between accused's hair and that of a Zulu. His complexion is also similar to that of a Zulu. … He is married to a native woman. … There is no marked distinction in features between accused and other natives, for example, Zulus, etc.'[101]

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[97] In *Rex v Chrimes* 1940 TPD 357 the court held that an African worked part-time (part year, month, weekly) cannot live within 5 miles of an urban area unless he is at the time fulfilling his work duties.
[98] Section 10 of Amendment Act 37 of 1931 modified the section 19 definition of 'native' to exclude anyone who had 'in any degree of European descent' unless they lived in African locations like Africans.
[99] S 19 Act No. 41 of 1925.
[100] *Rex v Mohamed* 1930 TPD 726.
[101] Ibid 727; in *Rex v Nkana and Nkana* 1946 CPD 360 following the evidence of the two accused the court found that the crown had failed to prove that the accused were African despite evidence of association with Africans and

Section 2(1) provided for a tax of £1 to be levied on all African males living in the Union and those present within it constantly for a year – a 'general tax'. In addition a local tax of 10 shillings, over and above the general tax, for 'every hut or dwelling in a native location' had to be paid by its occupier.[102] Section 4 created exemptions from the payment of tax which included the aged, indigent, chronically ill or those with exemption certificates, such as those attending educational institutions. Section 7 provided for mandatory production of a valid tax certificate, or exemption certificate, or certificate of extension[103] to an authorised official on demand. The Act created an offence for failure to pay tax which was outstanding for more than 3 months.[104] Section 9(5) stated that when an African had failed to pay tax, the native commissioner could (if such African was not employed) secure employment for him 'on terms and with an employer approved by the native commissioner … [and] he may require the native to accept it.'[105] Where such employment had been secured, if the African left the employment he could be arrested and be brought before the commissioner to present any exculpatory explanation.[106]

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speaking an African language; in *Rex v Horn* 1942 CPD 370, 371 the accused, who claimed not to be African, was charged with failing to pay for 3 years. The evidence of the crown, per a Transkei policeman Mr Smit, was that his knowledge of Africans led him to conclude that the accused who associated with and was married to an African woman also looked African, and was not a 'baster' as he was claiming. Nonetheless the court did accept the 'positive and uncontradicted evidence of the accused as to his parentage and the colour of his children … [along with] the fact that his father and brother had never paid the native tax'. The Act applied to adult males described as those who had attained the age of 18 years and in the case of doubt, in the absence of opposing evidence, the opinion of the officer would suffice - *Rex v Tshwete* 1931 EDL 62. In *Rex v Kolokoto* 1936 OPD 130 the appellant had been convicted of failure to pay tax for the years 1932, 1933, 1934 and 1935. Evidence came to light post-conviction (via his baptismal certificate) that the accused had been below eighteen before December 1932 so the 1932 conviction was deleted. The judge commented on 'the harshness and possible wrong that may be inflicted when presumptions of fact' were made 'against ignorant natives.' But concluded that the 'remedy for this … does not however lie with this Court.'

[102] S 2(2) Act No. 41 of 1925.

[103] This provision was inserted by amendment Act No. 37 of 1931.

[104] S 9 Act No. 41 of 1925.

[105] Sub-section 5 was inserted by section 3 of Amendment Act No. 25 of 1939

[106] Additional support to the elimination of work-shy Africans from urban areas was found in the Work Colonies Act No. 20 of 1927 which provided for the establishment of 'compulsory work colonies' for people who: s 4((1)(a) – habitually begged ('for money, food or clothing') or sent others to be for them; or s 4(1)(b) those to seemed not to have enough for subsistence and were unable to provide for their dependents (wives and children) and had 'refused work suitable to … [their] circumstances and capacity which … had been offered … by or on behalf of an inspector or officer'. Section 5 provided for a hearing to be held before a magistrate who could then, in the case of a person who appeared free of physical or mental impairment, commit the person to be detained in a colony for a minimum of 12 months and up to a maximum period of five years (s 5(3)). Section 6 stated that a person convicted of vagrancy and contravening legal prohibitions of consumption of intoxicating alcohol (which mainly pertained to Africans and other non-whites) could also be committed to these colonies, if they appeared to be living in dire circumstances as 'it would be in his interest or in the interest of his wife or any child' for him to be detained in this manner. The Native Laws Amendment Act No. 46 of 1937 amended section 17 of the Native (Urban Areas) Act 21 of 1923 to provide that an African found to 'an idle or disorderly person' could be transmitted, on ejection from the urban zone, to a work colony for a maximum period of two years (s 22 Act No. 46 of 1937). The two year confinement could be served in a work colony, 'a farm colony … rescue home or similar institution established or

Section 12 created a 'Native Development Account' into which one fifth of the general tax moneys collected would be deposited.[107] Section 18 stated that an African male would not be exempted from paying tax in terms of the Act merely because there was another law that had exempted him 'from the operation of native law … or that he is a native who is relieved from the operation of any laws differently affecting natives.' The impact of this legislation was evident in *Sishubu v Minister of Finance*, where the prescripts of section 18 *vis-à-vis* non-whites were in issue.[108] Section 1 of Act No. 39 of 1887 (Cape) which regulated poll taxes in the Cape Colony stated that a non-white registered voter should also be subject to the laws applicable to white people. The appellant was a registered African voter who contended that the tax was not applicable to him. The court concluded that section 18 was clear in that it had removed 'the protection which might otherwise have existed'.[109]

6.3.3. Mining Law: Precious Stones Act No. 44 of 1927

With some periodic updates and amendments the Precious and Base Metals Act No. 35 of 1908 remained the applicable Gold law for more than half of the twentieth century. Though the Diamond law was revised by the Precious Stones Act No. 44 of 1927, it continued to be similar to its predecessors. In particular, the racialised structure of industrial relations was maintained. Unoccupied, unalienated Crown land could be opened to prospecting by those in possession of a prospecting authorisation. Section 8(1) stated that a prospecting permit could only be issued to a natural person who had first obtained a digger's certificate, as provided for in section 57. Section 50(1) discussed the characteristics of those who could obtain claim licenses, stating that they must be holders of digger's certificates as provided for in section 57. Section 57 stated that a person wanting a digger's certificate to enable him to prospect for diamonds or dig at a proclaimed digging had to make an application to the relevant digger's committee. An important qualification for obtaining the certificate was that the applicant, other than having the requisite 'good character' and having attained the age of 18 years, had to be 'enrolled or entitled to be enrolled [on attaining the required age] as a voter at the election of the members of the House of Assembly'.[110] A reading of section 36 of the South Africa Act, 1909 indicates what this meant.

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approved under … the Prisons and Reformatories Act, 1911' – section 22(e) Native Laws Amendment Act No. 46 of 1936.

[107] The percentage was increased to ⅗ ('three-fifths) by Act 49 of 1935 and then to ⅔ ('two-thirds) by section 20(1) of the Finance Act No. 27 of 1940.

[108] *Sishubu v Minister of Finance* 1927 CPD 271.

[109] Ibid 274.

[110] S 57(1) Act No. 44 of 1927.

Section 36 of this former South African Constitution stated that the pre-unification qualifications for voting for the legislature in the four colonies (now provinces) would now correspond with eligibility to vote for the House of Assembly in the Union. Therefore, apart from some non-white registered voters in the Cape, only white people were capable of obtaining a digger's license and then a license to prospect, peg or dig for diamonds.[111]

6.4. Collective Bargaining and Wage Regulation 1920-1948

6.4.1. Industrial Conciliation Act No. 11 of 1924

The Industrial Conciliation Act stands out in labour and industrial relations discourse for having decidedly stunted the capability of the vast majority of the workforce to participate in sanctioned collective bargaining. Yet although the Act in its various forms appears largely to ignore Africans, in many respects this law together with Mines and Works Act, the NLR and the subsequent Wage Act assembled lopsided management of labour throughout most of the twentieth century. The Industrial Conciliation Act (ICA) was operated in close contact and cooperation with the apparent race neutrality of the Wage Act of 1925. Thus some attention is drawn to the manner in which these two laws partnered in presiding over African labour conditions.

The Act repealed the Industrial Disputes Prevention Act No. 20 of 1909 (Transvaal).[112] The Act aimed to provide 'for the prevention and settlement of disputes between employersand employees by conciliation; for the registration and regulation of trade unions' as well as other related matters. Section 1 stated that the Act applied to 'every industrial and public utility undertaking, to every industry, trade and occupation, and to every employer and employee' except in the agricultural sector. Section 2 permitted the establishment of an Industrial Council by employers and registered trade unions as a mechanism to resolve industrial disputes.[113] An equal number of employer and employee representatives comprised the membership of the council.[114] Section 9(1) stated that an agreement of an industrial council in a particular sector

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[111] In reality other mining law had already disqualified non-whites (other than Africans) altogether from obtaining digger's certificates and becoming license holders.
[112] Section 25 Industrial Conciliation Act No. 11 of 1924; the Act also repealed similar legislation in the Cape, namely Act No. 20 of 1906.
[113] The main purpose of the industrial council was to resolve any 'matters of mutual interest'. The Minister would approve the council once he had satisfied himself that the constitution and rules of the council and agreements between the parties were in order – s 2(2) & (3) & (4) Industrial Conciliation Act No. 11 of 1924.
[114] S 3 Act No. 11 of 1924.

could, on application by the parties, be extended by the Minister to other employers and employees in that trade, or industry or occupation through publication in the Government Gazette.[115] The Minister could also extend the application of an arbitration award in similar manner.[116] Section 7 of the Industrial Conciliation Amendment Act No. 24 of 1930 provided for the extension of an Industrial Council agreement to cover servants who were not employees in terms of the definition of the Act.[117] In addition section 9(4) allowed the Minister to publish a minimum rate of wages and hours and the like, as recommended to him by the industrial council.[118] Section 12 prohibited that the opposing parties resort either to strike or to lock-out until a matter had been 'submitted to, considered and reported on' by the established industrial council.[119] Where there was no council, the dispute first had to be sent to the conciliation board if it was a matter that could be dealt with by the board.[120]

Significantly, section 24 provided that an 'employee' was a 'person engaged by an employer to perform, for hire or reward, manual, clerical or supervision work in any undertaking, industry trade or occupation to which' the Act applied, excluding people hired in a manner regulated by the NLR (inclusive of its amendments) or if their employment was subject to 'any Native Pass Laws' or those hired under Law No. 25 1891 or Law No. 40 of 1894 (Natal) (inclusive of amendments to those laws).[121] This covered every African worker who was engaged either through a written labour contract or through an oral agreement. In *Sweet Workers' Union v Orkin N.O. and Minister of Labour*, the Sweet Workers' Union (SWU) applied for registration

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[115] S 9(1)(a)&(b) Act No. 11 of 1924.
[116] S 9(2) Act No. 11 of1924.
[117] S 7(h) Act No. 11 of1924.
[118] Section 48(4) Industrial Conciliation Act No. 36 of 1937 also made similar provision for the extension of an Industrial Council agreement to cover servants who were not employees in terms of the definition of the Act.
[119] S 12(1)(a) Act No. 11 of 1924; a strike was defined as 'a suspension or temporary cessation of work of any number of employees in order to compel their employer or to assist other employees in compelling the employer of such employees to agree to specific terms or conditions of employment' and a 'lock-out' was defined as 'the act of an employer in causing a suspension or temporary cessation of the work of any number of employees and done in consequence of any dispute with him in reference to any specific terms of employees' contract of service or in order to compel his own employees or to assist other employers to compel their employees to accept specific terms or conditions of employment' – section 24 Industrial Conciliation Act No. 11 of1924.
[120] S 12(1)(b) Act No. 11 of 1924.
[121] Natal Law No. 25 of 1891 was the Indian Immigration Law. It regulated the subsistence and the manner of work of indentured Indian labourers – defined as 'Indian immigrants' – those residing in Natal. Sections 9 and 10 provided for the requisitioning of settlers to engage Indian immigrants and contracts which bound them to service for a prescribed period. Natal Law No. 40 of 1894 was the Master and (Native) Servants Law No. 40 of 1894 – 'to regulate the relative rights of Master and Native servants'. Master meant 'any person employing for hire, wages, or other remunerations, any Native servant'. Africans employed as miners were incorporated by the ambit of this law.

in terms of section 4 of the ICA Act 36 of 1937 which was granted.[122] The court labelled Africans who were not employees in terms of the Act 'excluded natives'. The SWU had admitted some Africans ('excluded natives') to its membership. The union had bargained and gained some concessions from the employers' organisation. The agreement was subject to the registration of an Industrial council which had to be registered in terms of section 19 of the Act. Registration was refused because Africans were found to be members of the SWU. The court held that an industrial council under the Act could only be registered under section 19 if it included trade unions as contemplated by the Act. A trade union had to have employees as defined by the Act. Having 'excluded natives' was a fatal flaw.

Historically the Act has been a boon to the state, white workers and the mining sector in South Africa, predicated on its non-application to African workers. It was complementary to labour and other controls already in force. With no legal capacity to bargain as employees, African mine workers had to continue to accept the standardised contracts emanating from the Chamber of Mines, regulated in terms of sections 12 and 23 of the NLR.

6.4.2. Wage Act No. 27 of 1925

The Wage Act did not define an employee with the same restrictions as Industrial Conciliation Act (ICA), which had plainly excluded Africans.[123] The purpose of the Act included to facilitate the creation of a wage board to investigate the working conditions and wages in order to recommend appropriate minimum wage determinations.[124] Section 1(2)(a) stated that the wage determinations of the Act would not apply to 'parties covered by any award or agreement' made under the ICA which was not lower than the minimum wage set by the Act.[125] Section 2 established a wage board. In terms of section 3(3), if the board was unable to 'recommend in respect of the employees in any trade or section thereof a wage upon which such employees may be able to support themselves in accordance with civilised habits of life' it was to make no

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[122] *Sweet Workers' Union v Orkin N.O and the Minister of Labour* 1946 CPD 303; *Baloyi v IC Clothing Industry* 1946 (1) PH K28.
[123] An employee was defined as 'any person whatsoever employed by or working for or with any employer, and receiving, or entitled under the terms of his employment to receive, any wage or other remuneration in money or in kind' – section 18 Wage Act No. 27 of 1925.
[124] S 3(1)&(2) Act No. 27 of 1925.
[125] In *Manoim v Veneered Furniture Manufacturers* 1934 AD 237 where a worker had agreed to a wage which was below that published in the Gazette, the employer was convicted for contravening section 8 of the Act. The agreement to pay a wage less than a determination under either the Wage Act or the Industrial Conciliation Act was held to be void.

recommendation but instead report to the Minister about the working environment of the trade in issue and provide a justificatory explanation for its assessment.

Section 7(1) provided that on considering a recommendation or a report of the wage board the Minister could 'by notice in the Gazette, and as from a date … specified … determine in accordance with any report or recommendation … (a) the minimum wage or rate free of all deduction' to be paid to 'any employee or special class of employees and the variation thereof … (b) ascending scales of wages for either male or female … (g) any other matter whatsoever affecting the remuneration or the conditions of employment of any employees.' Section 8 obliged employers to pay no less that the determined Gazetted wage and made contravention of the provision an offence punishable by up to £100.

This Act conferred comprehensive powers to determine the minimum wage benchmarks for all workers, including Africans, to the wage board. Nonetheless it deliberately preserved the right of industrial councils to set standards commensurate with 'civilised habits of life' for the white employees it served. In so doing, the councils were also given license to determine the lesser wages and working conditions of their (non-employee) African counterparts. Thus for Africans the Wage Act cannot be viewed separately from the ICA. A number of cases speak to experience of workers following implementation of the Industrial Conciliation Act and the Wage Act.

6.4.3. Industrial Council and Wage Board Effects on Africans

In *Rex v Barone,* the court considered the correct application of section 1(2)(a) of the Wage Act in light of Africans being excluded as employees under the ICA.[126] An employer had failed to pay African employees in line with the published rate under the Wage Act, claiming that the existence of an industrial council agreement in respect of white workers created wholesale exemption in respect of all workers.[127] The issue was whether an industrial council agreement regarding the wages of white employees had the effect of also exempting the employer from adhering to Wage Act benchmarks in respect of its African employees. The court reasoned that '… an employer may be covered … by such an agreement in relation to some of his employees

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[126] *Rex v Barone* 1927 TPD 478; section 1(2)(a) of the Wage Act stated that a wage determination would not apply to parties who were covered by an industrial council agreement or award. Section 7 and 9 ICA stated that provided agreements were not below the wage determinations under the Wage Act, the Wage Act would not be binding if the was an agreement or award in place.
[127] Ibid *Barone*.

and not covered in relation to another section of his employees.'[128] Thus the exemption operated in respect of those covered by an agreement under the ICA. Those who had not been so covered would be dealt with under the determination in terms of the Wage Act.[129] The court side-stepped the fact that Africans were not employees under the ICA. They were adjunct 'native labourers' who could only be awarded regimented contracts of service. Even the determinations under the Wage Act entailed the imposition of set terms by the Minister, rather than an agreement based on some measure of exchange. Their situation was circumscribed by 'an assumed givenness… in the ascription of superiority and inferiority'[130] that worked to embed the economic and other advantages of white workers, while minimising degradation required to achieve it.

In *Rex v Meltzer*, the minister published a minimum rate of wages and a maximum rate of wages for Africans working in the baking industry in terms of section 9(4) of the ICA (as amended by section 7 of Act 24 of 1930) at £4 10s per week.[131] The appellant was claiming to pay his African workers the prescribed effective £4 10s, however he was deducting £3 10s per week for accommodation which was in fact valued at 7s. 6d. per week.[132] The appellant was convicted of not adhering to the wages in the Gazetted notice. The industrial council agreement in question referred to white employees only. But the section 9(4), used by the Minister in publishing and extending wages determinations allowed for the industrial council to recommend the extension to 'persons excluded from the definition of "employee" in section 24' on grounds that the purpose of the agreement would be defeated if this did not occur.[133] The Minister had

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[128] Ibid 480.

[129] In *Rex v Esrock and Esrock* 1940 TPD 293 two African workers were 'employees' under the Wage Act but not so under the Industrial Conciliation Act. The question was whether the employer (though bound by an industrial council agreement in relation to white workers) was exempted from the wage determination in respect of African employees who do not fall under the agreement. Section 2(3) of the Wage Act 44 of 1937 stated that a wage determination would not apply to people who were bound by an agreement or award under the Industrial Conciliation Act, 1937. Court held that s 2(3) must be read as not changing the position created by the *Barone* decision.

[130] D Goldberg 'The ends of race' (2004) 7 *Postcolonial Studies* 211, 212.

[131] *Rex v Meltzer* 1933 TPD 416.

[132] 'On pay day the sum of £4 10s., being the rate of wages fixed in the schedule for a baker per week, was placed into the hands of the natives in question, whereupon they would proceed with the money in their hands from the room where they had received it to another room and there pay over to the accused, or his agent, the sum of £3 10s. It was agreed at the trial that the value of the board and lodging supplied by the accused under his contract … was 7s. 6d. per week' – Ibid 419.

[133] 'If an industrial council or conciliation board reports to the Minister that in its opinion, any object of an agreement … is being or would probably be defeated by the employment, in the undertaking, industry, trade or occupation to which such application refers, at rates of wages, or for hours of work other than those specified in the agreement, of persons excluded from the definition of "employee" in sec. 24 of this Act', it could recommend a suitable wage or revised working hours for those not deemed employees under the Act to the Minister for publication in the Gazette – s 9(4) Industrial Conciliation Amendment Act No. 24 of 1930.

heeded this recommendation and specified that the prescribed wages and workinghours applied to Africans in the baking industry. The Gazetted minimum wage was upheld and the labour contracts were found to be *in fraudem legis*.

In *Parisian Bakery v Ben*, the respondent was an African, 'a pass-bearing native', who in terms of the ICA was not an 'employee'.[134] Following the publication of minimum wages, he continued to be paid less than had prescribed and the employer was charged and convicted. Section 9(5) ICA (as amended by section 7 of Act 24 of 1930) stated that where an employer was convicted of paying lower wages than the applicable industrial council agreement or award published in the Gazette, the court could order that the difference between the wages received and those which should have be paid be payed to employees.[135] The issue was whether the unpaid portion of the prescribed wages would be recovered, as provided for by section 9(5) when applied to the African 'servant' who was not an employee in terms of the ICA. The court reasoned as follows:

> 'it is clear from sec. 9(4) that the provisions in regard to persons excluded from the definition of employee were inserted not in their interest but to prevent the defeat of the objects of an agreement which was not entered into for their protection, and it may be that the Legislature thought that this object would be adequately safeguarded by the provisions of sec. 9 (4) and the first portion of sec. 9(5). The magistrate came to the conclusion that it cannot be said that "it was the manifest intention of the Legislature to apply to cases of underpayment of wages to persons such as the present plaintiff who do not fall within the terms of the definition of employee in the Act the remedial provisions of the latter portion of sec. 9(5)." I agree with this'.[136]

The court acknowledged that allowing industrial councils to determine the wages of Africans was not intended to improve African working conditions incrementally. Instead, the aim of section 9(4) was to secure the maximal benefit for ICA employees – white workers. Thus the unfairness of underpayment pertaining to the African plaintiff could not find protection under the ICA. Implicit in this determination was the court's unwillingness to recognise animperative to mitigate the harm suffered by the plaintiff through ordering payment of all the wages due as minimallyjust. Connected as it is to notions of legal objectivity, this performance of adjudication

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[134] *Parisian Bakery v Ben* 1934 TPD 245.
[135] Ibid 245; *Downer v Yzelle* 1932 TPD 253.
[136] Ibid 249.

should prompt re-evaluation of the concept itself.[137] Since Africans were deleted from consideration, the knowledge assembled at this juncture becomes 'interested' and not unbiased.[138]

In *Rex v Campbell*, an industrial council agreement regulated the wages and hours of work of unskilled labourers.[139] The applicant, who paid African and coloured unskilled labourers less than the prescribed in the agreement as well as applying working hours contrary to the agreement was convicted for contravening the agreement. The court held that the part of the agreement relating to unskilled African and coloured workers who were not members of the trade unions represented at the bargaining council was nonetheless *intra vires*. The court took the view that 'non-membership of unskilled labourers in the trade unions' did not disqualify the regulation of their wages by an industrial council as a matter of mutual interest.[140] The court reasoned that some of the unskilled workers in question, coloureds and non-whites other than Africans, did qualify for membership of at least one of the trade unions that comprised the industrial council at hand.[141] Furthermore, the court argued that was 'a matter of interest to the artisans, the skilled employees, that proper provision should be made for the protection of unskilled labourers' so as to secure a 'continuous supply of such labour.'[142] Therefore regulating the wages of African workers was acceptable when done as a matter of mutual interest between the employer and white employees. The marginalised Africans were always integral to the objective of furthering the interests of the recognised bargaining entities. So there was no actual separation or separateness from the othered, because the composition of white advantage was interlocked with the devaluing of Africans.

In *Rex v Central Mattress*, the wage board under the Wage Act, 1925 had reported that it was unable to make an applicable wage determination as provided for by section 3(3).[143] The contention before the court was that in making is proposals the wage board ought to have considered white workers as distinct from their African counterparts, and that failure to do so

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[137] Said contends that '[t]he contributions of empire to the arts of observation, description, [and] disciplinary form [should not be] … ignored' – Said (note 3 above) 304.
[138] G Spivak 'The Rani of Sirmur: An Essay in Reading the Archives' (1985) 24 *History and Theory* 247, 256.
[139] *Rex v Campbell* 1936 TPD 84.
[140] Ibid 87.
[141] Ibid 87.
[142] The court was concerned that 'a cessation of work by unskilled labourers' would be detrimental to the interests of skilled workers – Ibid 87.
[143] *Rex v Central Mattress* 1930 TPD 226.

had unlawfully limited the scope of investigation and ensuing recommendations. Under section 3(3) of the Act the board had reported that its understanding of a normative income threshold accorded with the requirements of a white man in relation to properly maintaining 'himself and his wife and family with a reasonable degree of comfort according to European standards'.[144] The existing agreement of the industrial council had fixed wages for semi-skilled work well below this norm and had not accounted for the earnings of unskilled workers. In its report to the Minister, the wage board had put forward that '[t]here remains the further question whether "native" unskilled labourers constitute "a class of employees" within the Wage Act. That Act makes no distinction between employees on the ground of race or colour'. Moreover, since Africans and 'non-natives' often performed the same tasks alongside each other, the board opined that 'employees cannot be classified as native or non-natives, although they may rightly be classified as skilled or unskilled.'[145] The court agreed that employees could only be classified as skilled and unskilled, stating that '[t]he fact that the Legislature has set up as a criterion a civilised standard of living, negatives the view that the Board can concern itself with the question whether the employee is a native or a European.'[146] In effect, the court endorsed the position of the board that the standard setup did not permit it to distinguish between employees on grounds of race in making wage determinations; contrary to the prevailing presumption was that Africans legitimately could be awarded a wage below the set 'civilised' wage norms. This decision did not improve the position of the African workers, who continued to be barred from accessing skilled and semi-skilled work by the deliberate racial hierarchy present in most other labour regulations. Indeed the next part clarifies the official policy that was enforced regarding the applicability of wage determinations of the Wage Act to African workers.

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[144] The court described the position as follows: '[i]n its report the Board stated that by the wage described in … [section 3(3)] it understood a wage upon which an employee, if an adult male, can maintain himself and his wife and family with a reasonable degree of con fort according to European standards, and if the employee is an adult female, a wage upon which she can maintain herself according to European standards without being dependent upon her relatives. The Board pointed out that in the Industrial Agreement above referred to the Industrial Council itself had fixed for semiskilled tasks a wage which was not of the standard mentioned in the sub-section and that, moreover, the wages of employees engaged on unskilled tasks remained to be dealt with. Accordingly, as the Board found that it could not recommend for all employees in the furniture industry a wage upon which they could support themselves in accordance with civilised habits of life, it reported this fact to the Minister'- Ibid227.

[145] Ibid 228.

[146] Ibid 229.

6.5. The Effects of Retarding African Wages

6.5.1. Native Economic Commission of 1932

A Native Economic Commission was convened in 1932 and its report reflected some prevailing thinking regarding Africans and their labour. Certainly, finding a way to answer the native question was still an issue. Among its aims, the commission had to consider the socio-economic circumstances of Africans in urban areas, laws which managed their earnings, their terms of employment, how to deal with industrial disputes, and whether there was a need to amend the law.[147]

Three possible paths were put forward to resolve the 'Native question': a '*repressionist*' one – 'tying down the Native or driving him back to barbarism;' an '*assimilationist*' one – 'trying to make him a black European;' and lastly an '*adaptionist*' one – 'taking out of the Bantu past what is good, and even what is merely neutral, and together with what is good of European culture for Abantu, building up a Bantu future'.[148] The report endorsed the adaptionist approach unequivocally.[149] Regarding urban areas, the report pointed to the purposes of the Native (Urban Areas) Act 21 of 1923 as being the anchor for controlling the access to and the presence of Africans in urban areas.[150] Progress on implementation of that Act was deemed crucial by the report.

The report advised against 'the introduction of wage regulation for Natives' believing that it would disrupt the 'economic structure' around which work soundly progressed in South Africa,[151] that it would disrupt the casual labour systems,[152] and, more significantly, it was argued that wage regulations were undesirable because they would result in the reduction of the valuable 'elasticity of the economic system and the power of the community to adjust itself to changing circumstances.'[153] The manner in which the fluctuation of commodity prices affected economic development was deemed to be of pivotal importance, and it was concluded that the

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[147] Para *1 Report of Native Economic Commission Report 1930-1932* UG 22 of 1932 available at http://uir.unisa.ac.za/handle/10500/5028, accessed 20 August 2019.
[148] Para 200 (note 147 above).
[149] An assimilationist position discounted the possibility of the simultaneous existence of two cultures in the South African milieu, thus opting for a purely European engulfment of African culture – para 200 & 201 (note 147 above).
[150] Paras 410-413 (note 147 above).
[151] Para 994.
[152] Para 996.
[153] The report argued that unlike in European countries where it might have been appropriate to have set minimum wages, the African labour supply of South Africa was not sufficienty stable to warrant such measures – para 997.

further pressure that African wage regulations would place would be untenable.[154] The report also asserted that wage regulations would exacerbate the growing problem of African urbanisation and hamper the development of their assigned reserves, which had already been identified as the most viable method of resolving the 'Native economic problem'.[155] Though wage regulations would not apply directly to the mining sector, it was reasoned that 'the margin of productive enterprise' would be based largely on this sector, which would cause any minimum wage determinations for Africans to be inflated, in turn driving production costs higher.[156] Thus the report recommended that wage regulations remain applicable primarily to whiteworkers.

A dissenting view of a minority of the commissioners was also presented in the report. This dissent argued that since African wages had consistently been modest, historically there had been a pervasive reluctance to improve 'the efficiency of native labour' incrementally, causing the introduction of mechanisation to be slower than it otherwise might have been.[157] Despite the fact that the labour-intensive mining sector had in fact benefited from this supply of cheaper labour, it was proposed that inserting Africans into the operation of the Wage Act would allow the incremental improvement of the their wages.[158] The minority opinion observed the significant gap between the wages of Africans *vis-à-vis* those of white workers. This was considered to be premised on the notion of differential standards of living.[159] The minority view argued that the wages of Africans were fixed according to what were presumed to be the needs they would have in their 'tribal' settings, rather than people living in 'civilized community'.[160] The view was that the wage was 'unreasonably low'.[161] The report aligned itself with the position of the 1925 Economic and Wages Commission report which motivated for the introduction of a wage determinations for the unskilled work done by Africans, under the Wage Act.[162]

The Van Reenen Commission , which was a commission of inquiry on the interchange between the Industrial Relations Act and the Wage Act, with regard to gaps in wage scales for

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[154] It was further stated that '[w]hen their real wages are rising and the fall in prices is inflicting a very heavy burden on those whose duty it is to keep the wheels of industry in motion, it is scarcely a proper time to introduce a further rise – para 998, 999.
[155] Para 1001.
[156] Para 1005.
[157] Para 1010.
[158] Para 1012.
[159] Para 1013.
[160] Para 1014 Report.
[161] Para 1035 Report.
[162] Para 1023 Report.

skilled as opposed to unskilled workers as well as male to female ratios and other matters, was convened in the mid-1930s.[163] Though the position of Africans was not amongst its terms of reference, the report did comment on the necessity 'to fix a minimum rate for an occupation or craft so high that no Native would be likely to be employed'.[164]

6.5.2. Witwatersrand Mine Natives' Wages Commission of 1943 (Lansdown Commission)

Underground working conditions deteriorated in the 1940s. Since the growing manufacturing sector offered an alternative, some African labour moved away from the gold mines.[165] Yet the mines remained the major employer and producer of wealth. During the second world war, while some white miners were conscripted, African miners were given more responsibilities without corresponding wage increases. Instead mines made cuts on efficiency-enabling mechanisms, which made working conditions even worse.[166] The African Mine Workers' Union, an African trade union, was formed in 1941 by the Transvaal chapter of the African National Congress. Efforts at first to ignore and then to quell the militancy of the union's activities ultimately ledto the convening of the Lansdown Commission to investigate the wages of Africans.[167] The commission was appointed in the wake of a looming threatened strike.[168]

The Landsdown Commission report stated that by 1945, soon after its release, the worker population on the Rand would consist of 38 000 white workers and 335 000African workers.[169] The report acknowledged the marked dependence of the mining sector on African labour as a

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[163] *The Van Reenen Commission of 1934-1935* (Report: UG 37/1935) in A De Kock 'Three Commissions' (1980) 1 *Industrial Law Journal* 26-31; Wiehahn credits a severe drought in farm lands for the movement of 200 000 to 300 000 white workers to the rapidly industrializing cities in the 1930s and leading to the establishment of the Van Reenen Commission to rework industrial labour law – N Wiehahan *The Complete Wiehahn Report* (1982) xxii.
[164] Para 154 *Van Reenen Commission Report* cf: A De Kock (note 163 above) 26.
[165] C Badenhort & C Mather 'Tribal Recreation and Recreating Tribalism: Culture Leisure and Social Control on South Africa's Gold Mines 1940-1950' (1997) 23 *Journal of Southern African Studies* 473, 480
[166] By the end of 1942 Africans were having to work 'double, even treble shifts' for which they received no additional pay - W James 'Grounds for a Strike: South African Gold Mining in the 1940s' (1987) 16 *African Economic History* 1, 9.
[167] The attitude was that 'the mines cannot submit to the rag, tag and bobtail of the urban trades unions … we shall call out the police and arrest some of the ring leaders and all we shall tell the Natives is that their grievances will be discussed with the Native Affairs Department with their indunas' – NTS 2224, 442/280, GPC to Minister of Mines 26/1/44 cf: T Moodie 'The South African State and Industrial Conflict in the 1940s' (1988) 21 *The International Journal of African Historical Studies* 21-61, 21 & 30; C Badenhort & C Mather 'Tribal Recreation and Recreating Tribalism: Culture Leisure and Social Control on South Africa's Gold Mines 1940-1950' (1997) 23 *Journal of Southern African Studies* 473, 480.
[168] Moodie (note 167 above).
[169] *Report of the Witwatersrand Mine Natives' Wages Commission* UG 21/1944 (1944) 2; 'Conditions of African Employment on the Rand Gold Mines' (1945) 51 *International Labour Review* 56, 57, 58.

tool for normalised heightened productivity.[170] The report was in agreement with the policy of adhering to the established cheaper labour sourcing of African labour, as compliant with the overall 'Native policy' of the Union.[171] The Chamber of Mines did not equivocate on compliance with its historical resolve to engage low-wage African labour, which included steps in the late 1800s to reduce African wages.[172] The report referred to the late nineteenth century decision of the newly formed Chamber of Mines to install 'the maximum average' for African workers at its affiliated mines.[173] Apart from preventing mines from competing for African labour, the maximum allowable wage indefinitely depressed the earning capacity of Africans. In light of increasingly limited means and economic pressure, which were compelling Africans to seek employment in large numbers at the mines, the question at issue was whether the remuneration policies of the Chamber of Mines 'or Government acquiescing in it' were still appropriate.[174]

It was notable, as argued before the commission, that despite the profitability of the mines there had been no significant wage increase for African mine workers since 1914.[175] There was no mechanism for the periodic review of wages with a view to making incremental adjustments. There were a number of deductions being made to wages.[176] The underground work being undertaken was particularly strenuous and hazardous. Overtime pay rates remained equivalent to normal pay rates. There was no provision for pay during leave. African workers were paid less than other unskilled workers of different races on the mines.[177] Moreover, there was nothing to

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[170] The report stated that 'the gold mining industry of the Witwatersrand is dependent upon unskilled native labour, and it is of the greatest importance to the industry that the supply of such labour should be adequate to keep its reduction plants running at fully capacity' – para 41 (note 169 above).
[171] According to the report '[i]n spite of the contrary views expressed by certain witnesses, the Commission is satisfied that the Chamber's policy was a sound one in general accordance with the native policy of the country' – para 72 (note 169 above).
[172] Para 67 (note 169 above).
[173] Para 80 (note 169 above); unjustifiable none-adherence to the fixed daily rate of pay for Africans by associated mines incurred some sanction from the Chamber - 'Conditions of African Employment on the Rand Gold Mines' (1945) 51 *International Labour Review* 56-65, 58
[174] The report explained that 'formerly the Native in the Reserves, either on account of higher productivity of his lands or because of his simpler tastes, was reluctant to leave his home, today he is forced by economic pressure to seek employment which will enable him to support his wife and family, and this pressure is so great that the gold mining industry is able … to recruit native labour for underground work at a cahs wage of 2s. per shift' – para 73 & 74 (note 169 above); 'Conditions of African Employment on the Rand Gold Mines' (1945) 51 *International Labour Review* 56, 59.
[175] Paras 83-91 & 98 (note 169 above); 'Conditions of African Employment on the Rand Gold Mines' (1945) 51 *International Labour Review* 56, 60.
[176] Ibid.
[177] Ibid.

alleviate '[t]he increased cost of living and consequent additional expenditure both by the worker on the Witwatersrand and by him and his family in the Reserve'.[178]

The Chamber of Mines argued that it spent considerable sums of money on the upkeep of African workers, since the mines provided them with food, housed them in compounds and responded to their medical needs.[179] Furthermore, it was argued that because the workers were migratory they continued to have other means at their assigned Reserves.[180] It was also argued that the sector would not be able to meet the additional expense of paying higher wages and that this would be detrimental to economy of the country as a whole.[181] Could the African mine worker accumulate sufficient funds to care for his family, as alleged? The Commission investigated the actual family wage realities of African mine workers to determine whether the economic position at the rural reserves was sufficient to offset the paltry mine wages.[182] The commission found that the argument that Africans did not need higher salaries, based on perceived circumstances on reserves, was misplaced.[183] The report then proclaimed that:

> '[i]t is clear to the Commission, however, that, having regard to the circumstances of the Witwatersrand gold mining industry, the migratory system of peasant labour must continue. Any other policy would bring about a catastrophic dislocation of the industry and consequent prejudice to the whole economic structure of the Union.'[184]

To ameliorate the position of Africans, it advised wage increases to so as 'to improve the condition of families in the Reserves'.[185] Therefore a wage increase was recommended.

The commission recommended pay increases for Africans of 5d. per shift for both surface and undergrown workers, as well as a 3d. subsistence allowance, 3s. per 30 shifts, a boots allowance and some provision for overtime pay.[186] The proposed increase was that wages moved 'from 1s. 9d. to 2s. 2d. per shift for surface workers and from 2s. to 2s. 5d. per shift for

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[178] Ibid.
[179] Ibid.
[180] According to the Chamber of Mines African workers generally spent an average of 14 months on the Rand and then on completion of their contracts spent between 12 months with their families at their assigned reserve; para 99.
[181] Ibid.
[182] Paras 103-183..
[183] At para 200 the report stated that it was 'satisfied that the allegation as to the unsatisfactory state of malnutrition in the Reserves generally is no "parrot cry", but, on the contrary, that the conditions give cause for grave concern.'
[184] Para 211.
[185] Witwatersrand Mine Natives' Wages Commission. *Report.* Government Printers, UG 21 (1944) cf: Diamond (note 11 above) 125.
[186] Paras 287, 293, 302, 306 Diamond (note 11 above) 204.

underground workers'.[187] On the query about whether it was advisable to permit Africans to form trade unions and engage legally in activities connected thereto, the commission opined that Africans were not at a 'stage of development which would allow them safely and usefully to employ trade unionism as a means of promoting their advancement.'[188] Instead the commission proposed that procedures be devised to allow African workers to notify the mine authorities of any generalised complaints from their midst, beginning with assigned officials and ultimately leading to formation of 'council[s] of workers'.[189]

Subsequent earning scales introduced following receipt of the report were less than those proposed by the commission.[190]

6.6. Evolving Compensation for Occupational Disease Injury or Death 1920-1948

6.6.1. Compensation for Acquired Silicosis or TB

The Miners' Phthisis Consolidation Act-of 1925[191] reiterated that for its purposes a miner was 'any person (other than a native labourer) who … [had] been employed underground at a scheduled mine'.[192] Section 16 provided that employers had a duty to pay compensation as provided for in the attached Schedules to 'miners, native labourers and their dependants.' Section 35 provided for the compensation of African mine workers afflicted with silicosis as follows: the ante-primary stage would be compensated in terms of the First Schedule;[193] primary stage suffers would receive the amount as calculated for the ante-stage (under the First Schedule) plus an additional fifty percent thereto;[194] secondary stage silicosis sufferers or those having TB with comorbid silicosis would were entitled to the amount as calculated for the ante-stage (under the First Schedule) plus an additional one hundred percent thereto, which was double the amount of the ante-stage sufferer.[195] Section 35(2) provided that an African who died before receiving

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[187] Ibid.
[188] The commission took the view that 'public interests would definitely negative the delegation of such power to' African worker associations at the mines - para 467 (note 169 above).
[189] Para 470 Report of the Witwatersrand Mine Natives' Wages Commission UG 21/1944 (1944) 37; 'Conditions of African Employment on the Rand Gold Mines' (1945) 51 *International Labour Review* 56, 65.
[190] R Christie *Electricity Industry and Class in South Africa* 1(1984) 39-142.
[191] Act No. 35 of 1925.
[192] S 76(1) Act No. 35 of 1925
[193] S 35(1)(a) Act No. 35 of1925.
[194] S 35(1)(b) Act No. 35 of1925.
[195] S 35(1)(c) Act No. 35 of1925.

compensation, who had dependants, would receive the amount which would have been awarded in terms of a section 35(1)(c) payment for the secondary stage. The First Schedule provided for twelve times the monthly salary, not exceeding £29 3s. 4d. plus six times monthly earnings which were above £29 3s. 4d. but which did not go beyond £37 10s plus three times any part of the monthly wages that were beyond £37 10s. The benefit scheme for African workers constituted one section of the Act, section 35, which spanned approximately one and a half pages of the Act, whereas, by contrast, the benefits for miners, white and other non-white workers, was found in ten sections of the Act which spanned ten pages of the Act.

Section 17 provided for compensation of miners (white people and non-whites other than Africans) suffering from silicosis or TB. Section 22(1)(a) provided that for ante-primary stage silicosis payment that was calculated as per the First Schedule; primary stage silicosis was calculated as per the First Schedule 'with an additional fifty per cent thereto'[196] for secondary stage silicosis 'a monthly allowance' in accordance with Schedule Three would be granted – half the monthly salary not exceeding £20 plus a quarter of the salary above £20 but below £28 6s. 8d., plus one twentieth of any salary above £28 6s. 8d., plus an additional monthly allowance for his wife at one fifth of the amount he would be receiving, plus an additional allowance of one-tenth for each of his children. Miners suffering from TB were paid in terms of section 22(1)(b) if they had TB without silicosis.[197] Sections 24, 25, 26, 27, 28, 29, 32, 33 and 64 provided for the award of payments and allowances for dependants of miners who had died. Apart from lump- sum payments, Africans continued to be excluded from the benefit scheme created under the Act.

As at 1946, a miner was still defined as 'a person other than a Native who has lawfully worked in a dusty occupation at a scheduled or registered mine' by the Silicosis Act No. 47 of 1946.[198] African workers still could only receive once-off lump-sum payments based on their salaries and had no access to pensions and monthly allowances for themselves or their dependents. Section 71(1) awarded 36 times the 'monthly earnings' or £180 (the greater of the

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[196] S 22(1)(b) Act No. 35 of 1925

[197] S 23 Act No. 35 of 1925.

[198] 'Native' as described as 'any person belonging to one or other of the following classes – (a) aboriginal tribes or races of Africa, including Bushmen, Hottentots and Korannas; (b) persons upon whom are levied general or local tax in terms of section *two* of the Natives Taxation and Development Act, 1925 (Act No. 41 of 1925), or any tax substituted for any such tax, and does not include American negroes, Eurafricans, Eurasians, or a member of the races or classes commonly known as Cape Malays, Griquas, Mauritians or St. Helenians' – section 1 Silicosis Act No. 47 of 1946.

two amounts) to an African who was found to be suffering from silicosis.[199] Section 72 administered payment to dependants of dead African miners. A dead miner found to have been suffering from silicosis or TB could have compensation equal to that claimable under section 71 given to dependants. Moneys due to the African worker or his dependants would be paid over by the board to the Native Affairs Authority which would then transmit the money to the worker himself, or identified dependants, if any, 'at such intervals as he deems desirable in the interests of the Native labourer and his dependants.'[200]

Benefits to miners comprised of the following provisions in the Act: first stage silicosis (section 59); second stage (section 60); third stage (section 61); TB (section 62); benefits for TB comorbid with silicosis (section 63); permissible award of payments to augment pensions (section 64); benefits considered accrued to dead miners (section 65); pensions for dependants of dead miners (section 66); payments toward medical and funeral expenses of dead miners (section 67); aid to transition miners and their dependants into acquiring skills of other trade and finding jobs (section 68); special grants for miners or deceased miner dependants (section 69); and gratuity for widows of miners on re-marriage (section 70).

Examination of the policy and practices directed at suppressing the earning potential of Africans illustrates the correlation with the compensation assigned to chronically ill and impaired mine workers. The rate of pay was deliberately suppressed by the Chamber of Mines at the end of the nineteeth century. During the first half of the twentieth century African workers periodically voiced their dissatisfaction collectively at the worsening circumstances caused by the paltry wages and harsh working conditions. Though narrow-minded, the investigative commissions that were convened to examine such matters routinely highlighted the validity of the complaints raised. Yet the welfare of African workers was consistently sacrificed on the grounds that this was best for the economy and the country as a whole. With each decade the inferior wages of Africans were concretised. Under those circumstances the legislature was assured that the compensatory scheme for lung impairment would award exceedingly low payments to Africans. Even so, when the Miners' Phthisis and subsequent Silicosis Acts were devised, the scale of disparity was widened further through the additional allowances and special

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[199] An African who had worked for at least 30 days under ground, found to be having TB was entitled to payment of 20 times his 'monthly earnings' or £100 (whichever is greater) – s 71(2). TB after working in dusty conditions for average of 8 years was compensated at a rate of approximately £180 – s 71(3) Act No. 47 of 1946.
[200] Section 73(2) Act No. 47 of 1946.

grants awarded to white workers and their dependants. The continuous violence of colonial subjugation was inflicted on Africans as these laws reflected the normative pattern. Therefore the above mimicry, a recount conducted through the figure of the 'native labourer,' signals a concurrent narrative to moderate the validity of the meta-narrative. The incessant presence of the hemmed in African haunts the scheme and so impairs its cogency.

6.6.2. General Compensation for Occupational Injury or Death

This Workmen's Compensation Actof 1934[201] repealed section 22 of the NLR as well as the entire Workmen's Compensation Act of 1914 and its amendment Act of 1931. By so doing it integrated the bifurcated compensation scheme into one Act. '[N]ative' was described as

> 'any person belonging to one or other of the following classes – (a) aboriginal tribes or races of Africa, including Bushmen, Hottentots and Korannas; (b) persons upon whom are levied general or local tax in terms of section two of the Natives Taxation and Development Act, 1925 (Act No. 41 of 1925), or any tax substituted for any such tax, and does not include American negroes, Eurafricans, Eurasians, or a member of the races or classes commonly known as Cape Malays, Griquas, Mauritians or St. Helenians'.[202]

Section 2 related to accidental injury occurring during the performance of employment duties, causing impairment or death, in which case the employer was liable to pay some compensation.[203] A person was a 'workman' if he had 'entered into, or ... [worked] under, a contract of employment or of apprenticeship with an employer, whether the contract … [was] expressed or implied … oral or in writing'.[204] Section 13 set out the procedure, which included medical certification of injury or cause of death, for obtaining compensation. Chapter VI titled 'Compensation for Natives' was tailor-made for African workers and section 67 stated that the provisions of the chapter applied in cases of inconsistency with other sections of the Act. A Native Affairs Department (NAD) was established to facilitate processing of claims by African

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[201] Act No. 59 of 1934.
[202] S 84 Act No. 59 of 1934.
[203] Compensation could not be recovered for the first 3 days of impairment if the impairment lasted for less than two weeks, 2 days if it lasts more than 2 weeks, and the 1st day if it lasts for more than 3 weeks (s 2(1)(a)); if the accident was due to 'wilful misconduct' no payment unless it result in serious impairment or death [there would be no compensation for drunkenness regardless of the circumstances] (s 2(1)(b)); if there was a pre-existing condition known to the worker but unknown to employer a magistrate could still award compensation if the accident material increased impairment (s 2(1)(c)) – Workmen's Compensation Act No. 59 of 1934.
[204] S 6 Act No. 59 of 1934.

workmen.[205] Instead of following procedure laid out for all other workmen in section 13, when an African was befallen with applicable injury, his employer was to give over written description of the accident to the NAD for the NAD to investigate and assess payable compensation on behalf of the African workman or his dependents.[206] Payment was to be made by the employer to the NAD and the NAD would thereafter pay the workman, or dependant(s) at its discretion.[207] The procedure of assessing the claim of an African workman could be laid out by the Minister.[208]

For temporary total incapacity, an African would receive monthly periodic payments for no more than six months, of sixty percent of his monthly wages if he earned £13 6s. 8d. or less per month.[209] For permanent impairment, compensation would be determined in relation to the degree of disability. For a one hundred percent[210] impairment, compensation would be a lump-sum amount computed as follows:

- monthly wages not in excess of £5 yielded a £75 lump-sum; monthly wages exceeding £5 but not more than £10 yielded payment of between £75 and £150 'in proportion to the increase of monthly earnings above five pounds'; wages in excess of £10 but below £13 6s. 8d. garnered payment of between £150 and £225.[211]
- In the event of one hundred percent disability where the workman earned more than £13 6s. 8d., a lump-sum payment of 'twenty-five times the monthly' salary up to £20 per month along with 'ten times his monthly' salary up to £33 6s. 8d. could be made.[212]

In the case of death, dependants would receive a lump-sum payment deemed fair by the NAD, which could not be more than eighty percent of the amount that would have been received by the African in the event of irreversible total incapacity or £375 or applicable cumulative earnings for

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[205] Where one was not appointed a native commissioner, an assistant native commissioner or a magistrate could perform the duties – s 68(1) & (2) Workmen's Compensation Act No. 59 of 1934.
[206] S 68(3) Act No. 59 of1934.
[207] S 68(4) Act No. 59 of1934.
[208] S 68(5) Act No. 59 of1934.
[209] No payments would be made to an African who was totally impaired for less than a week; and if the African workman received food, shelter and medical aid from his employer, he could only start getting payments after 6 weeks of incapacity and then only 25% of his wages would be paid to him – s 69; 'temporary total disablement' was described as 'the temporary inability of such workman, as the result of an accident in respect of which compensation … [was] payable, to perform the work at which he was employed at the time of such accident or work similar thereto' – section 84 Workmen's Compensation Act No. 59 of 1934.
[210] 100% disability related to accidental injury that caused: loss of two limbs, loss of both hands or all fingers, and thumbs, total loss of sight, total paralysis, injuries resulting in being permanently bedridden - the First Schedule Workmen's Compensation Act No. 59 of 1934.
[211] S 70(1)(a) Act No. 59 of1934.
[212] S 70(1)(b) Act No. 59 of1934.

18 months.[213] Where disability required on-going medical care the NAD could, in the event that the employer had not made provision for such, order that an allowance not exceeding £75 in toto be provided by the employer for the period of infirmity.[214]

Chapter III section 47 onwards up to section 66 dealt with the calculation of compensation for workmen, other than African workmen – their white and other non-white counterparts. Temporary permanent disability garnered an allowance of sixty percent of the monthly salary along with thirty-fice percent of the monthly salary if the salary was more than £20 (up to £33 6s. 8d.). This compensation could be increased to £6 10s per month if necessary.[215] Payments could exceed the allotted 6 month period and be extended for another 6 months if the workman was still disabled – a total of twelve months allowable.[216]

Irreversible permanent disability, which included permanent serious disfigurement, was compensable as follows: at forty percent total impairment a lump sum of sixteen times monthly wages up to £20 plus nine times monthly wages exceeding £20 up to £33 6s. 8d.;[217] at one hundren percent total impairment the workman received a monthly pension of half his monthly earnings up to £20 plus a quarter of his monthly wages over £20 up to £33 6s. 8d.[218] When a workman died, two years of his monthly earnings or £500, whichever was less, was to be paid to his spouse with no children;[219] a spouse with children received eighteen months' salary or £375 plus a monthly pension of twenty percent for one child, thirty-five percent for two children, fifty percent for three children, and sixty percent for four children, of the monthly salary before death until the children turned sixteen years old.

The Workmen's Compensation Act No. 30 of 1941 revised payment of compensation. Section 84 provided for Africans experiencing total disability of a transitory nature to receive periodic payment during the period of impairment, for no longer than six months, of two-thirds (66⅔%) of a monthly salary of £13 6s. 8d. or less.[220] If the disability was not resolved at the expiry of six months, it could be extended for a further period not exceeding six additional

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[213] S 71(1) Act No. 59 of 1934.
[214] S 72 Act No. 59 of 1934.
[215] S 47(1)(a) Act No. 59 of1934.
[216] S 47(1)(b) Act No. 59 of1934.
[217] S 48(2)(a) Act No. 59 of1934.
[218] S 48(1)(d) Act No. 59 of1934.
[219] S 49(1)(a) Act No. 59 of1934..
[220] S 84(1) Act No. 30 of 1941.

months at the discretion of the Workmen's Compensation Commissioner.[221] Once the extension had expired the commissioner could order the continuation of payments at the reduced rate of no more than fifty percent of the salary for another period.[222] No payment would be made in the case of infirmity of which did not last for seven days or in the case of a two weeks infirmity where the workman continued to receive food and shelter or medical aid from the employer.[223] For permanent incapacity, rendering the workman unable to work,[224] payment was as follows:
(a) for one hundred percent impairment an African would receive a once-off amount calculated at thirty times his monthly salary up to £20 of the actual salary amount plus fifteen times the amount of his monthly salary which was more than £20 – the minimum payment being £150 and the maximum capped at £800;[225] for all other (lesser) degrees of impairment the payment scale of section 85(1)(a) would be reduced proportionately to correspond with the percentage of total disability.[226]

In terms of section 38(5), periodic compensation for temporary but partial impairment could be made using the same scale of section 84(1).[227] Section 86 provided that if death had resulted a payment of no more than eighty percent of the payment, which would have been made for total irreversible disability, would be made to dependants.[228] A further payment of up to £5 for funeral expenses could be made at the discretion of the commissioner.[229] Medical expenses to the maximum of £25 could also be paid.[230] The decision on the racial status of a workman, whether or not he was African, was vested solely in the commissioner.[231]

Ten sections of the Act (sections 38 to 49) provided comprehensively for the payment scheme of workmen other than Africans – white, coloured and other non-white persons who were not classified as Africans. Section 38 provided that for transient permanent impairment

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[221] S 84(1)(a) Act No. 30 of1941.
[222] S 84(1)(b) Act No. 30 of1941.
[223] S 84(1)(c) Act No. 30 of1941.
[224] Unable to work in the capacity for which he had been employed.
[225] S 85(1)(a) Act No. of 1941.
[226] S 85(1)(b); some examples of degrees of disability were as follows: loss of an arm at the shoulder was 60%, loss of arm between wrist and elbow was 45%, loss of eye sight was 30%, loss of hearing in both ears was 50% - First Schedule Workmen's Compensation Act No. 30 of 1941.
[227] '[T]emporary partial disablement' was described as the 'temporary inability of such workman as the result of an accident … to perform the work at which he was employed at the time of such accident, or work similar thereto' – section 2 Workmen's Compensation Act No. 30 of 1941.
[228] S 86(1) Act No. 30 of1941.
[229] S 86(2) Act No. 30 of1941.
[230] Where specialised medical expenses, such as provision of artificial limbs, were deemed warranted the a maximum amount not exceeding £50 could be paid – 87 Workmen's Compensation Act No. 30 of 1941.
[231] S 88 Act No. 30 of 1941.

these workmen would receive period payments during the period of infirmity for up to 6 months, at a rate of two-thirds (66⅔%) of their monthly salaries up to £20 of the salary and thirty-seven and a half percent (37½%) of such salary which was over £20 to the maximum of £33 6s. 8d. At the discretion of the commissioner, the amount could be increased to be at least £6 10s. 8d..[232] After an extension of up to one year the amount would be reduced to fifty-five percent of monthly earnings up £20 plus twenty-seven and a half percent (27½%) of the monthly salary over £20 to a maximum of £33 6s. 8d. Section 38 provided for payment during transitory partial impairment for these workmen as using the same calculations provided for in subsection 1.[233] For permanent incapacity with one hundred percent degree of impairment a pension, payable at a monthly rate of fifty-five perent of the workman's monthly salary up to £20 (of that salary) plus twenty-seven and a half percent (27½%) of monthly salary (above £20 and capped at £33 6s. 8d.) was due to these workmen.[234] A degree of disability which was above twenty-five per cent would also attract a monthly pension proportionate in terms of calculations based on section 39(1)(c).[235] The monthly pension would last for the duration of the rest of life of the workman.[236] In the case of death, a monthly pension would be awarded to the widow on the one hand and the children on the other hand of the workman.[237] Widows would receive a pension of thirty-five per cent of the pension the workman would have received had he been permanently incapacitated,[238] and an additional amount per child per month would be paid.[239]

Diamond offers dubious speculation for the disparate compensation rates between Africans and other races which were set by law, thus:

> '[a] possible argument for these disproportionate rates of compensation for total incapacitation and death paid to Africans may have been that the kinship system and the social obligations it defined differed from that of the urbanised European. In time of incapacity or old age, the African

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[232] S 38(1) Act No. 30 of 1941.
[233] S 38(5) Act No. 30 of 1941.
[234] S 39(1)(c) Act No. 30 of 1941.
[235] S 39(1)(d) Act No. 30 of 1941.
[236] S 39(5) Act No. 30 of 1941.
[237] S 40 Act No. 30 of 1941.
[238] S 40(1)(a) Act No. 30 of 1941.
[239] One child would receive 20% of the pensionable amount, two children 35%, three children 50% and six or more children 70% - section 40(1)(c) Workmen's Compensation Act No. 30 of 1941. The Workmen's Compensation Amendment Act No. 36 of 1949 as well as the subsequent Act (Act No. 21 of 1964) merely adjusted amounts and percentages due in line with the racially differential compensation scheme of Act No. 30 of 1941.

was more fortunate than the European in that he and his family were ensured collective support through tribal custom, while the European generally would have to fend for himself.'[240]

The statement of Diamond was lean on detailed investigative accounts of the type of utopian care clusters described. It did not take into account the available evidence of the inability of communities in African reserves to meet basic needs, let alone the needs thrust upon it by the repatriation of ailing men. The report of the 1932 Economic commission as well as that of the Lansdown commission clearly set out the subsistence shortfalls experienced by Africans workers and their families on reserves.[241] Unlike with respect to other race groups, the compensation strategy did not account for what was to happen to the dependants of deceased or incapacitated African mine workers.[242] Instead, supposedly observed communal values of Africans were weaponised in official discourse to justify withholding adequate compensation.

Conclusion

Using the law and official chronicles, this chapter has illuminated some of the perilous conditions under which African workers carried out mine work during the early to mid-twentieth century. There was progressive centralisation of the management of African labour using the mining laws, the pass laws, the Natives (Urban Areas) Acts and the taxation laws, to direct African life comprehensively towards the imposed labour system. Although the law permitting and administering trade union membership and collective bargaining denied Africans participatory recognition, the advantages it bestowed on white workers was at all times dependent on the purposeful suppression of the African workers.[243] This was managed efficiently through a racialised workplace hierarchy, the repression of African wages, the neglect of African wellbeing, and the award of woefully inadequate compensation for infirmity.

The muffled 'small voices' of the Africans themselves can scarcely be discerned from the depictions of 'natives' and 'native labourers'. What are salient are the consistent efforts to discount the material circumstances of Africans through a dogged 'law pure and simple'

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[240] Diamond (note 11 above) 86.
[241] Paras 103-183, 200 (note 169 above).
[242] Walshe has stated that 'African mine workers … received an award which failed to recognize the need for a family income'; '[m]en were paid the lowest possible cash wage while being kept fit … by an additional payment-in-kind of food' - P Walshe *The Rise of African Nationalism in South Africa: The African National Congress 1912-1952* (1970) 309; W James 'Grounds for a Strike: South African Gold Mining in the 1940s' (1987) 16 *African Economic History* 1-22, 1
[243] *Parisian Bakery v Ben* 1934 TPD 245; *Rex v Campbell* 1936 TPD 84; Wage Act No. 27 of 1925.

adherence to the justificatory edifice of colonialism.[244] This procedural 'black letter law' approach concerns itself with applying set legal principles to given facts in accordance with a ratified method, which is presumed to be neutral.[245] The cases discussed have also shown that the ubiquitous attendance of Africans was moderated by interpretations that accepted their denuded subjectivity as a rational given.[246] The next chapter continues the exploration the developments in labour and related laws during the second half of the twentieth century and logs the progression towards the official post-apartheid era.

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[244] S Chaplin 'Written in the Black Letter' (2005) 17 *Law and Literature* 47-68.
[245] J Miles 'Black Letter Law With a Hint of Grey' (2008) 67 *Cambridge Law Journal* 17-20; *Rex v Hodos and Jaghbay* 1927 TPD 101; *Parisian Bakery v Ben* 1934 TPD 245.
[246] *Hashe v Cape Town Municipality* 1927 AD 380; *Rex v Mohamed* 1930 TPD 726; *Molife v Municipality of Potchefstroom* 1930 TPD 197.

CHAPTER 7

LABOUR REGULATION OF THE TWENTIETH CENTURY: LIVING AND WORKING IN THE MINING ENVIRONMENT IN THE APARTHEID ERA

7.1. Introduction

This chapter charts developments during the period generally recognised as that of formal apartheid (1948-1994). Developments of this more recent time span have analogous relevance to the earlier law, itemised in previous chapters, as well as the strategies of the current era to de-racialise the conventions on labour and its regulation. Regarding matters of decolonisation, Mbembe has painted a discomforting Nietzschean picture of enfeebled self-perception that is limited because it has been 'seduced by servitude and its hidden lures … the excesses of the flesh'.[1] Indeed, Fanon has described a resort to imitation of the coloniser triggered by the allure of colonial entitlements.[2] To obviate this, Chakrabarty proposes that the solution may be found in a process of 'writing the colony back into the centre of the empire.'[3] By this it is meant that transformative variations are introduced when writing focused on the colonial margins is inserted into the dominant discourse. It mitigates the customary practice of producing knowledge as an expression of colonial dominion.[4] Because through the 'force of repetition' fictions have become authenticated knowledge,[5] the repetition of the muted alternate narratives (within the colonial record) is well placed. In continually revisiting the practice of being othered, 'the final irony of partial representation' emerges, a falsified African seemingly skirting the margins of full humanity.[6]

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[1] A Mbembe 'On the Power of the False' (2002) 14 *Public Culture* 629, 630; thus for Sekyi-otu 'the reactive practices of the colonised [often amount to] … botched acts of transcendence in the context of life lived in captive space' – A Sekyi-otu *Fanons Dialectic of Experience* (1996) 96.
[2] Fanon decribes 'how the colonized always dream of taking the colonists place … replacing him' – F Fanon *The Wretched of the Earth* (trans R Philcox, 1963) 16.
[3] D Chakrabarty 'History as Critique and Critique(s) of History' (1991) 26 *Economic and Political Weekly* 2162-2166, 2162; E Said 'Third World Intellectuals and Metropolitan Culture (1990) 9 *Raritan* 27-50.
[4] R Guha *An Indian Historiography of India: A Nineteenth-Century Agenda and Its Implications* (1988) 3 cf: Chakrabarty (note 3 above) 2163.
[5] Mbembe (note 1 above) 632.
[6] H Bhabha *The Location of Culture* (1994) 88; '*almost the same but not quite*' - H Bhabha 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' (1984) 12 *Discipleship: A Special Issue on Psychoanalysis* 125, 126.

Prior to the inception of apartheid, a preparatory commission, the Native Laws Commission (Fagan Commission), was detailed to evaluate the suitability of existing law for the management of the already segregated South African society. The particular attention given to the status of Africans in policy is instructive. So too the laws that were enacted in light of the recommendations emanating therefrom. The Botha Commission, which deliberated on matters of labour, industrial relations and the possibility of the formal recognition of African trade unionism, along with its attendant collective bargaining structures, is discussed. Then the resultant Native Labour (Settlement of Disputes) Act is evaluated. The attention then reverts to the situation of labour regulation at and near the mines. The developments in mining and industrial relations law are discussed. The effects of the provisions and attendant regulations of the 1964 Bantu Labour Act are therefore examined. A detailed account of the evolving work-related monetary compensation system for disease, injury and death is then presented. Lastly, the policy changes suggested by the Wiehahn Commission in response to widespread labour unrest and the ensuing amendments to law are assessed. The gains of workers of other racial groupings continue to remain tangential, only appearing to the extent that they shed light on African circumstances.

7.2. Fagan Commission, Botha Commission, and Ensuining Law

7.2.1. The Native Laws Commission (Fagan Commission) of 1948

This commission reviewed the 'Native law' in force at the time with a view to establishing the cogency of its purposes and whether it might require modification. An assessment of mobility and urban settlement law was integral to the scope of the commission's investigation, as well as the socio-economic results of mining employment practices and also in suggesting the appropriate policies going forward.[7]

The commission considered which of three alternatives would be the appropriate policy approach, namely, total segregation in the form of 'absolute territorial division between European and Native', elimination of racially discriminatory law and practice, or the maintenance of the racial status quo as at the time of the commission's enquiry in the form of

[7] *Report of the Native Laws Commission 1946-48* UG No. 19 of 1948 (1948) 1.

co-existence managed by segregationist law.[8] The report cast total segregation practically unattainable due to economic imperatives as migration could be regulated but not eliminated.[9] It was recognised that a large African population had *de facto* settled in the reserved urban areas and the report called for a 'central instead of local regulation of the movement of Natives in urban areas'.[10] A self-titled more elastic policy which adapted to the fluctuating racial relations was therefore advanced.[11] In relation to the pass laws that affected Africans the commission asked:

> '[i]s it necessary in this regard to have special laws for Natives? … Are restrictions on the freedom of movement necessary? … Is it necessary to make the mere non-production of some document a punishable offence?'.[12]

The answer to the first question was considered in paragraph 41 of the report. The report maintained that white people and Africans were 'so fundamentally' different as a consequence of their racial profile that it was doubtless necessary to manage interactions between them through law which would, on the one hand protect Africans from maltreatment at the hands of white people, and on the other hand safeguard the white community from African incursion. The report exemplified the racialized land purchase law, which set aside parcels of land for African occupation, and was in the view of the commission a mechanism for protecting Africans from the wholesale purchase and possession of all land by white people. While discriminatory law was deemed permissible, the report argued against the instatement of an unjust discrimination law which unjustifiably applied solely to Africans and exempted all other races. Africans were considered no longer to be homogenous and typified by the 'kraal Native'. A sizeable number, it was argued, had evolved into farm and migrant labourers as well as other classes, a situation which was unaccounted for by the pass laws. It was proposed that this defect might be cured through modification with regard to how pass laws were applied to differing categories of Africans.

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[8] Para 18 (note 7 above); at para 19 the report explained that a policy of total segregation entailed that Africans could 'have no permanent home' outside areas not specifically set aside for their occupation 'Native territory' into which they would be expelled once white people could dispense with their labour, meaning therefore African labour was only ever to be migratory (family migration was thus considered undesirable).
[9] Para 28 (note 7 above).
[10] Para 30 (note 7 above).
[11] The policy proposed 'constant adaptation to changing conditions, constant regulation of contracts and smoothing out of difficulties between the races, so that all may make their contribution and combine their energies for the progress of South Africa' – para 31 (note 7 above).
[12] Para 40 (note 7 above).

Paragraphs 42 and 43 of the report responded to the issue of whether mobility restrictions were necessary. The report noted a visceral negative response of Africans on the matter, arguing for, and in some instances earnestly pleading for, the eradication of passes.[13] The report concluded as follows:

> '[w]e … consider it essential, in the interests of the population as a whole but particularly in the interests of the Natives themselves, that the movement should be regulated; and where Native communities become settled in the vicinity of European ones, or Natives enter the service of Europeans (both in rural areas and in the towns) a certain amount of regulation is necessary for the maintenance of the principle of residential separation and, as these circumstances involve contact between races that differ so greatly from one another, for the purpose of checking both exploitation from the one side and undesirable intrusion from the other, and of making both races feel safe and protected.'[14]

The report then suggested more efficient ways to achieve the desirable goals of mobility restrictions of Africans, which included a more centrally located identification scheme as well as heavy clamp-down on delinquency.[15]

The third question about criminalising the non-production of passes in order to limit and manage the inflow of Africans to cities was answered in paragraph 46.[16] The commission recommended that pass laws should require the police to retain the right to demand passes and that non-production of a pass should result in the African being taken to the charge office when

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[13] The commission's view on possibly eliminating pass laws was that the white community would regard it 'as a danger to the economic life of the country as well as a serious threat to law and order and even to personal safety' so in order for it to happen 'it … [should only] come about after proper preparation and after the creation of alternative and efficient machinery to regulate, in an orderly and satisfactory manner, the migration of Natives, the settlement of Native communities in proximity to European ones, and contacts between the Europeans and the Natives' – para 42 (note 7 above).

[14] Para 43 (note 7 above).

[15] The following five efficiencies were recommended: '(1) The emphasis must be shifted from local to central regulation; (2) the emphasis must likewise be shifted from compulsory measures and from restrictive laws to machinery for advice, guidance and voluntary regulation; (3) steps must be taken to ensure that everybody has some fit place to which he is entitled to go; (4) while on the one hand the object should be to reduce restrictive measures to a minimum in respect of law-abiding people, there should on the other hand be strong and energetic action against idlers, disorderly persons and other lawless elements; and (5) a really efficient system of identification should be instituted, both to assist and protect the honest man and to facilitate action against disorderly elements' – para 43, para 44 & 45 (note 7 above).

[16] The commission recounted a general encounter as follows: '[t]he constable … simply asks for his pass, "i-pass"; he produces it, and everything is in order. If he does not produce it, what can the constable do? Ask him his name and address? Then in most cases he would never get hold of the man again … So the legislators and regulation-makers decided: let us make it obligatory on the Native to have with him at all times, and to produce to a police officer on demand, the document which proves that he has complied with the law' – para 46 Report of the Native Laws Commission 1946-48 UG No. 19 of 1948 (1948) 30

there was suspicion that service of summons would be counter-productive. In the absence of acceptable explanation he be charged with the applicable offence, with the onus to disprove the charge resting on the accused.[17] The report clarified that 'placing the onus of the accused in cases of this kind would be in accordance with the legal principle that the onus ought to lie on the person who has special knowledge of the facts of the case, and who therefore, if he is innocent, should find it easy to rebut the charge'.[18] The report acknowledged that in the event that the breach of pass laws was committed by an African in conjunction with his white employer, such employer would 'practically never be taken into custody'. It explained that: '[t]hat, however, is not because the one is a white man and the other is a Native, but because the one is a comparatively well-known person, who can always be found at a fixed address and is practically certain to appear in court in answer to summons, while the other falls in none of these categories'.[19]

Delegates from representatives of gold mining corporations made some representations to the commission on the advisability of retaining the migratory system of African employment at the mines. The report quoted some extracts of the evidence given as follows:

> '[a]ny examination of the employment of migratory Native labour in this country must be made against the background of the South African scene, where … the progress of the Native population from their primitive civilization to the civilization of the European – a policy of trusteeship and of endeavour to ensure that the difficult passage from one civilization to another shall be attended, as far as possible, with benefits which accrue fromboth.'[20]

The mine owner presentation argued that that the migratory labour system was in line with the social and family conventions of African lives and that allowing fixed settlement of a labour near urban mining areas would cause the disruptive detribalisation of Africans which would harm the entire country.[21] It was further argued that in the case of mining the migratory system

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[17] Para 46 (note 7 above).
[18] Moreover, for the prosecution it would be 'difficult or even impossible to obtain evidence of his guilt – para 46 Report of the Native Laws Commission 1946-48 UG No. 19 of 1948 (1948) 30
[19] Para 46 (note 7above).
[20] Para 52 (note 7above).
[21] It was submitted that '[i]n the tribal system of the Native people … there is a clearly defined structure, of which the family unit is the root. It ranges from the family through the village, to a group of villages, to a number of such groups and to the final tribal authority. … Under tribal ethics, obedience is one of the strongest characteristics of the Native. He is obedient to his family duties and obligations, to his Headman, to the authority of his tribe and last, but not least, to the very strict moral code of his society. … [It was] contended that their traditional background should be maintained as fully and as long as is consistent with progressive development on sound lines' – para 52 (note 7 above).

was responsible for a decreased incidence of silicosis in African underground workers as compared with their white counterparts, who worked for more prolonged periods than the usual eighteen month duration of Africans.[22] Regarding TB, the 'policy of early repatriation', saidto be in line with the wishes of Africans to return home, was advantageous to the mining sector because it meant that mines were not saddled with the expenses for chronic illness or 'a high tuberculosis death-rate'.[23]

On the effect of the prolonged absences on African family life, the commission heard evidence that 'the sexual life of Africans is more natural than that of Europeans … more seasonal, less permanent … [meaning that] [t]he possibility of long periods of sexual abstinence has therefore been to a certain extent less harmful for Africans than it would have been for Europeans'.[24] Other evidence was expressed on the development of sexual relations that were not permissible in African custom, which were damaging to traditional family and communal moral codes.[25] The absence of young able-bodied men in rural areas was also shown to have ill-effects on communal development and family structures.[26]

The report stated that economic pressure was certainly the reason an African man availed himself to the migrant labour system that was governed by the NLR, and that the main argument for its retention was that it, in turn, allowed 'him to learn from white civilisation and to adapt himself to it in stages without the shock of being suddenly uprooted from his traditional environment.'[27] Yet the commission was unpersuaded by that reasoning because of the permanence of the system; Africans seemed to remain in this system of tutelage perpetually without ever becoming accepted members of the white ('civilised') community.[28] Since it was not permissible for Africans to hone their skills in order to be appointed to skilled or specialist occupations, and because they had to spend periods of time not working at all, the report concluded that the migratory system was 'wasteful' rather than economically expedient.[29] It

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[22] It was reported that during 1944 the diagnosed incidents of silicosis in white miners was '80 persons per 10,000' whereas for Africans it was estimated at '6 per 10,000' – para 52 (note 7 above).
[23] Para 54 (note 7 above).
[24] The evidence continued that a 'normal and intelligent African' automatically abstained without difficulty until he had fulfilled the duration of his 18 month contract, at which point the his sexual urges 're-appeared' in time for him to be sent home – para 54 Report of the Native Laws Commission 1946-48 UG No. 19 of 1948 (1948) 38.
[25] Paras 54-55 (note 7 above).
[26] Ibid.
[27] Para 59 (note 7above).
[28] Para 59 (note 7above).
[29] Para 59 (note 7above).

was proposed that the system could be adapted to apply only to the unmarried, for shorter periods and in a manner that caused the workplace to be situated close enough to the worker's home to remain in contact with his family, with Durban being a prime example of such proximity arrangements.

Certain proposals of the report, though not always faithfully complied with, were reflected in some subsequent legislative enactments, such as the Population Registration Act, the Group Areas Act, and the Natives (Abolition of Passes and Co-ordination of Documents) Act.

7.2.2. Ensuing Law

The Population Registration Act[30] established an all-encompassing scheme of identifying the established racial groupings in South Africa which would be applicable in the political, social, economic and other spheres. The Act endeavoured to answer to the question of how to identify an African definitively through a system of pre-emptive registration. Subsequent law then came to routinely refer to the racial definitions as presented in this Act. '[N]ative' meant 'a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa'.[31] The Act provided for the methodical accumulation of a population register, segmented in terms of racial identity.[32]

Everyone on the register had to be identified as either African, coloured or white, and the Africans had to be accorded an ethnicity or other sub-group designation in the register.[33] It was then for the Governor-General to define the various ethnic or other sub-groupings of Africans through Gazetted notification.[34] Each registered person would receive an identity card.[35] In terms of section 7, the identity cards issued to Africans had to include 'the ethnic or other group and the tribe of which' they belonged,[36] and Africans who were not South African

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[30] Act No. 30 of 1950.
[31] A 'coloured person' was described as 'a person who is not a white person or a native'; while 'white person' was defined as 'a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a coloured person' – s 1 Population Registration Act No. 30 of 1950.
[32] Sections 2-5 Act No. 30 of 1950.
[33] S 5(1) Act No. 30 of1950.
[34] S 5(2) Act No. 30 of1950.
[35] S 6 Act No. 30 of 1950.
[36] S 7(2)(b) Act No. 30 of 1950.

citizens had to be fingerprinted.[37] If a person was considered to have possibly been wrongly classified the Director of Census would notify such person and give them a chance to be heard before a change was made.[38]

The purpose of the Group Areas Act[39] was to amalgamate the systematised residential segregation based on racialized criteria, and to curb procurement of fixed property for Africans and other non-white people. '[G]roup' had one of three meanings 'the white group, the coloured group or the native group'.[40] A 'native group' incorporated 'a member of an aboriginal race or tribe of Africa' other than those deemed coloured, with 'coloured' being someone who was 'not a member of the white group or the native group'.[41] The acquisition and ownership of fixed property was disbursed to members of the racial groupings assigned by the Act. The Act designed and allocated group areas for settlement and permissible presence based on racial profile. The Governor-General would through Gazetted notice declare a group area for purposes of settlement ('occupation'),[42] or for purposes of 'ownership by members of the group specified therein'.[43] Persons belonging to groups not included in proclaimed areas of occupation or ownership would be deemed disqualified persons in respect of those areas and their occupation, possession or purported ownership would be unlawful. Section 4 stated that disqualified people could only occupy space, other than that set aside for their groups, as servants or employees of 'the State, or a statutory body or as … domestic servant[s] of any person lawfully occupying the land or premises'.[44]

The Native Abolition of Passes and Co-ordination of Documents Act[45] sought to centralise and merge existing inter- and intra-provincial pass laws into a coherent system of entry, mobility and exit control of Africans in ordinarily prohibited areas, particularly those

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[37] S 7(2)(f) Act No. 30 of 1950.
[38] S 5(3) & s 11(7) Act No. 30 of 1950.
[39] Act No. 41 of 1950.
[40] S 1; a member of the white group was described as follows: 'any person who in appearance, obviously is, or who is generally accepted as a white person, other than a person who although in appearance obviously a white person, is generally accepted as a coloured person'; a woman (regardless of her race) married or cohabiting with an African would lose her white group status and fall into the 'native group' - s 2(1) Group Areas Act No. 41 of 1950.
[41] S 2(1)(b) & s 2(1(c) Act No. 41 of 1950.
[42] S 3(1)(a) Act No. 41 of1950.
[43] S 3(1)(b) Act No. 41 of1950.
[44] S 4(2)(a); disqualified persons who were visitors, dependents of servants, hospital patients or those confined to institutions such as work colonies, asylums, or prisons could also be exempted under certain conditions – section 4(2)(b), (c) & (d) Act No. 41 of 1950.
[45] Act No. 67 of 1952.

seeking employment and those already employed.[46] The Act devised a 'reference book' which had to be carried, always and everywhere, by all African males who had reach the age of sixteen years.[47] Such a reference book, which now had a picture of the carrier as well as a record of his tax payments, his employment status, any previous offences, and his allotted residential place of origin, was to be produced at the behest of an authorised official. The identity card issued in terms of the Population Registration Act No. 30 of 1950 was to be appended to the reference book.[48] Section 15 created an offence for non-compliance with the provisions of the Act punishable by a fine of up to £50 or 6 months imprisonment.

7.2.3. Industrial Legislation Commission of Enquiry (Botha Commission) of 1951

In 1946 a 76 000 strong contingent of disgruntled African workers embarked on a strike which had been co-ordinated by the African Mine Workers' Union. A major demand was the recognition of African trade unions under the industrial relations legal framework.[49] Thereafter the Botha commission was convened to enquire *inter alia* into whether it was advisable to create legislation that recognised and administered trade union activities of African workers and, if it was deemed appropriate, what form such law should take.[50] The report cast the NLR as being a piece of protective law, a buffer for African mine workers against exploitative tactics of labour recruiters and employers.[51] Referring to the conclusions of the 1925 Wage Commission, the report maintained further that from the beginning Africans' wages were not oppressive because of the cushioning effect of alternative means of subsistence that they enjoyed.[52] However it later transpired, per the 1932 Native Economic Commission, that

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[46] The stated purposes of the Act were to 'repeal the laws relating to the carrying of passes by natives; to provide for the issue of reference books to natives; to amend the Native Administration Act, 1927, … the Natives (Urban Areas) Consolidation Act, 1945, and to provide for incidental matters', 'native' was any 'person who is or is general accepted as a member of any aboriginal race or tribe of Africa' – Natives (Abolition of Passes and Co-ordination of Documents) Act No. 67 of 1952.

[47] Africans were separated into 'classes' which would be pronounced by Gazette of the Governor-General – section 2 Natives (Abolition of Passes and Co-ordination of Documents) Act No. 67 of 1952.

[48] S 4 Act No. 67 of 1952.

[49] This led to a draft bill titled the Industrial Conciliation (Natives) Bill which itemised proposed separate industrial relations management for Africans that was met with strong opposition from existing white dominated trade unions and employers - 'The State and Change in Industrial Relations' (1978) 4 *South African Law Bulletin* 1-2. [50] Para 1427 *Report of the Industrial Legislation Commission of Enquiry* UG 62 of 1951(1951).

[51] The report detailed necessity for 'protection against … abuses … assaults at their places of employment; [contending that] supervision was necessary over the entry into contracts by them, over compound conditions, feeding, health requirements, and hospitalization; and they required assistance in maintaining contact with their families and remitting money for their support [;] [c]ompensation for injury sustained in the course of employment had to be provided for, and, in the event of death of any migrant … his estate had to be administered by officials' – para 1443 & para 1445 (note 50 above).

[52] Economic and Wage Commission, 1925 UG 14-26 cf: para 1446 (note 50 above).

development in the reserves was not sufficient to sustain the African workers in conjunction with their substantially lower wages. The low wages were also owing to concerted efforts of employers to inhibit the bargaining power of Africans, typified by the manner of centralised recruitment and standard labour contracts implemented in the mining sector by the Witwatersrand Native Labour Association together with the Native Recruitment Corporation.[53]

On the matter of acquiring evidence on whether African trade unions should be accepted and managed by law, the commission expressed disappointment at the perceived apathy and reluctance to cooperate of African union leaders. The commission opined 'it incumbent to state that the Native trade-union leaders, who were irresponsible enough not to cooperate, did their own cause a disservice.'[54] The attitude of the commission, which had been convened its investigation during the time of the intensification of suppression of African social and political rights,[55] is noteworthy because ultimately it endorsed measures to inhibit African trade union activity. Furthermore, the formulation and enactment of the Suppression of Communism Act aimed at outlawing organisations and activities which, among others, 'bringing about any … industrial, social and economic change within the Union … encouragement of feelings of hostility between the European and non-European races' was contemporaneous with the commission.[56]

The relevant majority conclusions and recommendations of the commission will be considered first. Thereafter the divergent opinion of the minority shall be discussed.

7.2.3.1. The Evidence and the Majority View

The objections to Africans being included as employees in the definition of the Industrial Conciliation Act, thus making them eligible to be members of trade unions and participate in its collective bargaining structures, were as follows:

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[53] Para 1447 (note 50above).
[54] Para 1548 (note 50above).
[55] M Budeli 'Trade unionism and politics in Africa: the South African experience' (2012) 45 *The Comparative and International Law Journal of Southern Africa* 454, 469.
[56] The Communist Party of South African was declared unlawful and wide investigative powers, which included powers to detain and question any suspected persons or supporters of supposed questionable organisations, were established for purposes of supressing the development of other undesirable organisations - section 1, 2 & 7 Suppression of Communism Act No. 44 of 1950; gatherings believed to promote 'the achievement of any of the objects of communism' could be outlawed and the Riotous Assemblies Act No. 27 of 1914 was deployed to effect this – section 9 Suppression of Communism Act No. 44 of 1950.

(a) it would place Africans on the same footing as whites, 'absolute equality with the workers', which was in conflict with white sentiments;
(b) the long established discrimination against Africans would not be permissible if African trade unions were recognised in this manner;
(c) if trade unions were fully racially integrated Africans would be eligible to be appointed as officials, and since by sheer numbers they constituted an overwhelming majority African opinions would dominate – they 'could force more intellectual European leaders into the background';
(d) if Africans would be able to sit on industrial councils and conciliation boards engaging in collective bargaining on an equal footing with other races, they would be the leading representatives and fix wages and conditions of employment in a manner detrimental to white and non-white (other than African) interests; and
(e) the racially discriminatory nature of the South African milieu militated against the inclusion of Africans, as it would dislocate existing industrial councils causing them to dissolve in protest and hindering the purpose of the Act.[57]

The commission commented that '[i]f Natives were placed on the same footing as "employees" of other races, it would be illogical and indeed impossible, to apply special measures for the guidance and control of their unions'.[58] Furthermore, it was to be noted that Africans were of diminished living standards and lower order occupations which required and necessarily attracted less remuneration.[59] In determining the matter the commission was guided by its understanding of certain factors, namely, the political and socio-economic repercussions for the country, seeking to afford Africans some modicum of justice, balancing the differing communal opinions of white and African people in a pragmatic way, the growing urbanisation of the population with its attendant shift toward more collectivised bargaining, and some consideration of international views and the international obligations of South Africa.[60] The commission determined that, in the context of work, '[t]he complete social and

[57] Para 1556 (note 50 above).
[58] The report was of the view that 'because of the stage of development so far attained by them [Africans], special measures would be desirable' – para 1559 (note 50 above).
[59] Most of the commission witnesses had argued that white people possessed a 'higher standard of civilization, better education, and greater business acumen … Natives had always been prepared to follow the lead given by Europeans and they could not agree that this position would alter, even if Native workers should predominate in the unions' - para 1561 & 1564 (note 50 above).
[60] Para 1591 (note 50 above).

political equality of all races … would inevitably lead to the disappearance of Europeans as a separate race and of European civilization in Southern Africa.'[61]

This left either the recognition of African trade unions under a separate law which would maintain white supremacy in industrial relations, or opting for alternative methods of dealing with African workplace grievances while generally maintaining the non-recognition status quo.[62] The commission touted the appropriateness of demarcating certain tasks as suitable for Africans, and within those tasks creating a limited range of upward mobility in jobs and wages, while also ear-making work to be performed solely by white people and non-white people other than Africans so that in those spaces Africans were confined to unskilled work only.[63] The commission took the view that the recognition of African trade unions could be effected in a manner that accorded with the implementation of apartheid, so long as they were totally racially segregated.[64] In order to prevent the spill-over of political demands into the proposed trade union activities of African people, the report dedicated a large portion of chapter 16 to measures to control African unions. At paragraph 1619 the report recounted an alternative suggestion which discounted recognition of trade unions, but advised that 'a central board' be created to avail itself to resolve queries and grievances of African workers as well as matters on salaries and conditions of employment. Sub-committees or appointed officials would have to receive complaints from clusters of workers and ultimately forward them to the centralised authority, and the commission took the view that the alternative proposal would be unwieldy and impracticable.[65] Thus the commission recommended separate legislation to administer African unionism, provided that dominion with regard to collective bargaining remained with white unions and matters of setting minimum wage determinations were not relinquished.[66] Even the right to negotiate separately with the employer was to function in a manner and to the extent that it did not jeopardize white labour interests and their proclaimed trusteeship over Africans.[67]

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[61] Para 1593 (note 50above).
[62] Para 1595 (note 50above).
[63] The suggestion was that in those arenas designated as applicable to white people and races other than Africans the presence of African workers would be limited, to the extent possible, in the industry – para 1613 (note 50 above).
[64] Para 1614, paras 1623-1637, para 1660 (note 50 above).
[65] Para 1779 (note 50 above).
[66] Para 1788, para 1789, para 1791 (note 50 above).
[67] Para 1790 (note 50 above).

On the matter of whether Africans would be permitted to engage in a strike under proposed trade union recognition, the commission heard evidence that:

(a) Africans were reckless and thus ill-equipped to wield such a right appropriately;
(b) Africans would use strikes an excuse to avoid work; and
(c) since strikes often became violent it would be chancy 'to place such a weapon in the hands of people who did not understand its effects.[68]

Without any scientific or factual evidence in support of its conclusiion the commission agreed that the majority of Africans possessed diminished developmental capacity, such that they could not yet be entrusted with the full arsenal of bargaining weapons like theright to strike.[69] It therefore recommended that the right to strike should generally be withheld in the proposed African trade union legislation.[70]

The report turned to the industrial relations of the mines in the Witwatersrand noting that, contrary to complaints, since 1947 the state had deployed additional labour officers who kept in close touch with African workers to manage grievances and intercede with Chamber of Mines officials so as to resolve disputes and to improve working conditions.[71] Thus with the contemplated implementation of the Witwatersrand Mine Natives' Wage Commission innovations the commission took the view that the collective bargaining structures of this industry were making sufficient strides and ought not to be incorporated in the dispute resolution apparatus of the proposed legislation.[72]

7.2.3.2. The Minority View

Significantly, it was the minority opinion of the commission which was subsequently to find the most favour with law-makers. The opinion categorically discouraged any legal measures to afford Africans the ability to bargain directly with employers.[73] It asserted that the South African situation was plagued with a unique 'Native problem' that could not and should not be resolved through referring to mechanisms instated in other countries.[74] African workerscould

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[68] Para 1819 (note 50above).
[69] Para 1820 (note 50above).
[70] Para 1820 (note 50above).
[71] Para 1825, para 1826 (note 50 above).
[72] Para 1827 (note 50 above).
[73] Para 1849, para 1872 (note 50above).
[74] Para 1850, para 1858 (note 50above).

only be suitably controlled using the existing Department of Native Affairs structures, and any interventions to carry the concerns of African workers to employers had to be done using the officials of the Department.[75] Therefore any worker organisations administered by an official appointed under the auspices of the Department would (*inter alia*):

(a) have no right to initiate or participate in a strike;
(b) submit to rules that its members and officials were prohibited from engaging in or supporting any political causes;
(c) open membership only to citizens of the country;
(d) restrict its leadership to members of the organisation;
(e) forward disputes via the appointed registering official (who first investigated) to a National Labour Board;
(f) on summons from the Board make representations, where after the Board would make its recommendations to the Minister on the appropriate determination.[76]

The minority was favourably persuaded by arguments which proposed the expansion of reserves to become permanent home bases for the majority of Africans.[77] The stewardship role of white people over Africans was held to call for the exercise of 'wise guidance' in the form of the Native Affairs Department.[78]

In any event, the report of the commission proposed the continuation of segregation between white and African workers, along with a law tailored for African workers with fewer rights and privileges than those accorded to their white and other non-white counterparts. It recommended racially exclusive trade union membership. The response of the legislature was to discard the idea of permitting the recognition of African trade unions, instead opting for more stringent control in industrial dispute resolution – the Native Labour (Settlement of Disputes) Act No. 48 of 1953.

7.2.4. Native Labour (Settlement of Disputes) Act No. 48 of 1953

This Act inducted a targeted mechanism of industrial dispute resolution for African workers. The Act did not cover African labourers working in the mining sector, but made provision for

[75] Para 1851, para 1852 (note 50 above).
[76] Para 1854 to para 1857 (note 50 above).
[77] Para 1861 (note 50 above).
[78] Para 1866, para 1867 (note 50 above).

the Governor-General (later the State President) by proclamation in the Gazette to specifically include this category of workers in the designed framework.[79] Thus the mining sector was exempted from compliance with the Act, allowing it the continued leeway in the manner in which African employees were managed by the Chamber of Mines, an employers' organisation.[80] The purpose of the law was 'prevention' and settlement of disputes in the context of the specific regime which structured African labour as an adjunct to white and non- white (other than African) dispute resolution under the Industrial Conciliation Act.[81]

The Act referred to an employer as 'an employer of natives'.[82] Therefore a labour dispute was one that involved an employer and African employees only and pertained to 'employment or the conditions of employment of or refusal to re-employ any native', but excluded dismissal from employment and other issues associated with the employment of particular workers and the interpretation of legal provisions and agreements of industrial councils under the Industrial Conciliation Act or determinations under the Wage Act which affected Africans.[83] Section 18(2) made it an offence punishable by a fine of £500 or imprisonment of three years for workers to go on strike. The section expanded the definition of a strike to include 'refusal to continue work, to accept reemployment, or to comply with terms or conditions of work, obstruction of work, or breach or termination of any employment contracts' if such conduct was carried out in a common pursuit to pressure employers to change conditions of employment in a certain way. Section 3 of the Act created a Central Native Labour Board, manned by white people whose ultimate purpose, among others, was to counsel the Minister. Sections 4 and 6 allowed for regional native labour committees (made up of 'one or more' Africans and chaired by a white person, the native labour officer) to liaise with and

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[79] Section 2(2) which stated that the Act did 'not apply … to natives employed in the gold or the coal mining industry' was to be read with section 2(3) which provided for their insertion into the Act through Gazette pronouncement – Native Labour (Settlement of Disputes) Act No. 48 of 1953

[80] By contrast in 1937 the Chamber of Mines had concluded a Closed Shop agreement with the exclusively white trade union making them the only recognized bargaining agents - N Wiehahn *The Complete Wiehahn Report* (1982).

[81] The Act defined native as 'a member of any aboriginal race or tribe of Africa', while 'European' was defined as 'a white person as defined in section *one* of the Population Registration Act, 1950 (Act No. 30 of 1950) – s 1 Native Labour (Settlement of Disputes) Act No. 48 of 1953; later the Bantu Law Amendment Act stated that 'Bantu' was now to signify 'a native as defined in section *one* of the Population Registration Act' No. 30 of 1950. In the same manner the 'native labour', 'native Chief' and NAD (Native Affairs Commission) were renamed the 'Bantu labour' 'Bantu Chief' and Bantu Affairs Commission (s 1). Section 1(h) provided for the deletion of 'native', 'native labourer', and 'native commissioner' – all replaced with Bantu. The Act was renamed the Bantu Labour (Settlement of Disputes) Act.

[82] Section 1 Act 48 of 1953.

[83] Section 1 (v) Act No. 48 of 1953.

feed findings to the Central Board. Regional committees monitored the employment arrangements and produced reports regarding ensuing disputes and those likely to occur and were tasked with intervening to resolve the issues.[84]

Where there were more than twenty African workers in a workplace, a committee of between three and five members could be formed – a works committee.[85] The formation of a committee elected by workers, which then appointed a spokesperson ('liaison officer') 'to maintain contact with' the regional committee, occurred at a meeting which was summoned and chaired by the native labour officer at the behest of the inspector (a white appointee of the Minister.[86] In the event of a dispute the regional committee consulted with the works committee. If an industrial council advised alteration of working conditions, the Central Board and the regional committees would receive notification and could transmit non-voting representation to deliberations.[87] Native labour officers were to be appointed to monitor employment relations and pre-empt the fomenting of industrial disputes, and to transmit disputes they could not resolve to Central Board or Wage Board for recommendation to the Minister.[88] New compulsory applicable terms would then be published by the Minister – the dispute was thereby deemed resolved and failure to adhere to the Gazetted terms was a punishable offence.[89]

No provision was made in the Act for the formation and acceptance of trade unions by African employees, the works committees being the instrument of worker representation. Instead section 36 of the Act amended the definition of 'employee' in the Industrial Conciliation Act[90] to read *inter alia* that it 'does not include a person who in fact is or is

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[84] When resolving disputes the regional committees would investigate as well as invite representations from both sides – s 6(2) Act No. 48 of 1953.
[85] S 7 Act No. 48 of 1953.
[86] S 7(1), (2) & (3) Act No. 48 of 1953; the native labour officer was a white person appointed by the Minister to acquire knowledge on the desires and needs of African workers, report on the developing issues to native commissioners and inspectors, be a go-between in relations between employers and employee, and keep the regional committee abreast of brewing disputes – s 8 Act No. 48 of 1953.
[87] Once an industrial council had voted the Central Board chair could notify the Minister whether he agreed with said recommended changes (as they pertained to Africans) or whether the chair proposed adherence to Wage determinations as per the Wage Board recommendations – s 9 Act No. 48 of 1953.
[88] S 7, s 9, s 10 & s 11 Act No. 48 of 1953; the native labour officer would report the dispute to the regional committee, then try to resolve the matters. If unsuccessful the dispute was referred to the central board for settlement. If the board was unable to settle the matter it was then forwarded to the Minister of Labour with recommendations. The Minister could request further recommendations from the wage board (established under the Wage Act No. 44 of 1937).
[89] S 15 Act No. 48 of 1953.
[90] Industrial Conciliation Act No. 36 of 1937.

generally accepted as a member of any aboriginal race or tribe of African'. Though the Industrial Conciliation Act excluded Africans from its benefits, it kept re-inscribing African abjection in law as the 'universal form … call[ed] Reason.'[91] Thus it is from within the space where law undertakes to discipline African life that the deconstruction occurs.

The Native (Settlement of Disputes) Act 1953 augmented the NLR as a tepid way of quelling the growing collectivisation and militancy of 'proletarianized Africans';[92] which followed on from the allowance made in the Industrial Conciliation Act 1937 for the inspector in the Labour Department to stand for Africans at meetings of industrial councils. Indeed, the Act has been characterised as one 'designed to thwart and co-op any impulse to independent trade unionism among urbanized Africans.'[93] Landis noted the effectiveness of the restrictiveness of the Act in that in 1955 of the 6 400 000 African workers, only thirty-three work-stoppages were recorded. In 1958 the average wages for African mine workers, which included 'free board and lodging for the worker but not for his family', were £68, while Asians received £236 and white miners were earning £1 095.[94]

7.3. Developments in Labour and Mining Hierarchies

The Mines and Works Actof 1956[95] restated that regulations which provided racialised criteria for the receipt of competency certificates at particular occupational levels were permissible.[96] Similarly a generalised permit of job reservation was introduced by section 77 of the Industrial Conciliation Act.[97] The Act followed on from earlier law and the contemporaneous apartheid

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[91] J Derrida 'White Mythology: Metaphor in the Text of Philosophy' (1974) 6 *New Literary History* 5, 11; S Moran 'White Mythology: What use in Deconstruction?' (1995) 2 *Alternation* 16, 21.
[92] A Lichtenstein 'Making Apartheid Work: African Trade Unions and the 1953 Native Labour (Settlement of Disputes) Act' (2005) 46 *The Journal of African History* 293.
[93] Lichtenstein (note 92 above) 296.
[94] E Landis 'South African Apartheid Legislation II: Extension Enforcement and Perpetuation' (1962) 71 *The Yale Law Journal* 437, 400, 442.
[95] Act No. 27 of 1956.
[96] Section 12(2) and (3) Mines and Works Act No. 27 of 1956 read:
'(2) (a) Any regulation under paragraph (n) of sub-section (I) may provide that in any Province, area or place specified therein, certificates of competency in any occupation likewise specified, shall be granted only to persons of the following classes: (i) Europeans; · (ii) persons born in the Union and ordinarily resident therein, who are members of the class or race known as Cape Coloureds or of the class or race known as Cape Malays; and (iii) the people known as Mauritius Creoles or St. Helena persons or their descendants born in the Union. (b) The regulations may also restrict particular work to, and, in connection therewith, impose duties and responsibilities upon, persons of the classes mentioned in sub-paragraphs (i), (ii) and (iii) of paragraph (a) of this sub-section, may apportion particular work as between them and other persons, and may require such proof of competency as may be prescribed. (3) Different regulations may be made in respect of different Provinces, areas or mining districts of the Union or in respect of different mines or classes of mines or different works or classes of works.'
[97] Act No. 28 of 1956.

era policy legislation of the time. Among its stated objectives was '… to provide safeguards against inter-racial competition'. Section 1 defined an African as 'a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa'.[98] An employee was defined as an employed 'person (other than a native) … receiving or entitled to receive any remuneration, and any person whatsoever (other than a native) who … [assisted] in the carrying on or conducting of the business of an employer; and "employed" and "employment" … [had] corresponding meanings'.[99] '[R]eserved occupation' was defined as 'an occupation referred to in any certificate or notice issued or published under sub-section (10) of section*thirty-five*'.[100] Membership of a trade union was not permissible for Africans.[101] Section 17 established an industrial tribunal to hear appeals, advise the Minister of Labour, and make investigations on pertinent issues and recommendations to the Minister. Section 77 was titled 'Safeguards against inter-racial competition'. In terms of the section when the Minister wanted 'to safeguard the economic welfare of employees of any race in any undertaking, industry, trade or occupation', he could dispatch an investigation of the industrial tribunal, which would consult with identified stakeholders such as industrial councils, the Central Native Board[102] and employers' organisation.[103] Section 77 of the Industrial Conciliation Act permitted 'the Minister to preserve occupational positions for certain race groups in order to 'safeguard the standards of living of the White workers of South Africa and … ensure that they … will not be exploited by the lower standards of living of any other race.' The tribunal could then propose partial or complete job reservation of certain work in favour of a class of employees belonging to a

[98] 'coloured person' 'a person who is not a white person or a native'; 'white person' 'a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a coloured person'; 'native area' meant land held out for African occupation and use under the Native Trust and Land Act No. 18 of 1936, areas ascribed as locations, native villages under the Native (Urban Areas) Consolidation Act No. 25 of 1945, settlements regulated in terms of the Native Administration Act No. 38 of 1927, spaces set aside for African occupation and use under the Group Areas Act No. 41 of 1950 – section 1 Industrial Conciliation Act No. 28 of 1956.
[99] S 1 Act No. 28 of 1956.
[100] Section 35(10) provided that the registrar could proclaim via a Gazette job reservation classifications for employees belonging to particular classes at his discretion - s 35(10)(b) Industrial Conciliation Act No. 28 of 1956.
[101] Section 8(a) stated that where membership of a trade union consisted of both white and coloured employees the constitution of the trade union had to establish 'separate branches for white persons and coloured persons, respectively (s 3(a)(i)(aa)), which held separate meetings even though the executive body would be comprised 'only of white persons' (s 3(a)(i)(bb) &(cc).
[102] The Central Native Board emanated from section 3 of Act No. 48 of 1953.
[103] S 77(5) Act No. 28 of 1956.

specified race.[104] The minister could then publish such recommendations in a Gazette to establish the binding preferred reservations.

The Precious Stones Act No. 73 of 1964 defined 'Bantu' as having the same meaning as that appearing in the Population Registration Act.[105] Section 27 provided for the grant of diggers' certificates, which in turn was the gateway to obtaining a prospecting and or diggers' license.[106] On receipt of an application for a digger's certificate, the mining commissioner of the place would, among other things, consider it based on several criteria. The applicant had to be a person 'of good character … and a fit and proper person to hold such certificate *and* … enrolled or entitled to be enrolled as a voter at the election of members of the House of Assembly' (current researcher's emphasis).[107] Thus *the* major qualifying feature was that the applicant had to be a white person, since only white people were eligible to register as voters for the House of Assembly. Section 30 prohibited the presence, occupational or residential, of a person who was not in possession of a 'digger's certificate or residential and work permit'.[108] An African worker could apply for permits for work and residence to the Bantu affairs commissioner of the area in which he proposed to take up employment.[109] Issuance of a one month notice of cancellation of work and residence permits could be made by the commissioner, on the reasonable apprehension that a worker was 'an undesirable person and not … fit and proper' to continue living at working at the dig, or that the person did not infact work or live at the dig.[110] Section 125 the State President could issue regulations to administer (among others) restricting 'entry or sojourn upon or passage over alluvial diggings by any person or class of persons'.[111]

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[104] S 77(6); section 77(14) stated that '[n]o determination shall be made under this section in respect of any occupation or any particular work in regard to which the Governor-General may make regulations under provisions of paragraph (*n*) of sub-section (1) of section *four* of the Mines and Works Act'.
[105] A coloured person is also described as having the same meaning as that accorded in the Population Registration Act, but a white person is not similarly defined for purposes of the Act – s 1 Precious Stones Act No. 73 of 1964; this Act repealed the Precious Stones Act No. 44 of 1927 along with all of its amendments; Population Registration Act No. 30 of 1950.
[106] The right to prospect for precious stones was regulated by section 5, which required that the holder of a license be first in possession of a digger's certificate and that where the certificate lapsed the license would also lapse – section 5(6)(b) Precious Stones Act no. 73 of 1964.
[107] S 27(3) Act No. 73 of 1964.
[108] S 30(1) Act No. 73 of 1964.
[109] S 30(2) Act No. 73 of 1964.
[110] S 31(1) Act No. 73 of 1964.
[111] S 125(1)(r) No. 73 of 1964.

The Mining Rights Act[112] repealed the Precious and Base Metals Act No. 35 of 1908 in its entirety along with all other Gold laws regulating mining in the Transvaal as well as the other three provinces of South Africa. Its purpose was 'to regulate prospecting and mining for precious metals, base minerals and natural oil'. The identity of Africans in this Act referred to as Bantu was as defined in the Population Registration Act, 1950 including 'a Bantu tribe, a community or aggregation of Bantu, an association of Bantu and a corporate body orcompany in which Bantu hold a controlling interest'.[113] Section 7 provided that only persons possessing a prospecting permit or lease were permitted to prospect.[114] In order to qualify to be granted a prospecting permit, a person had to over the age of eighteen years and section 7(3)(c) stated that: '[n]o prospecting permit shall be issued … to any Bantu' except in certain situations.[115] At this time the Promotion of Bantu Self -Government Act No. 46 of 1959, which declared the creation of 'self-governing' areas for Africans, was already in force. It had been preceded by the Bantu Authorities Act No. 68 of 1951. These Acts had allocated Africans to particular declared homelands on the basis of their assigned ethnicity in terms of the Group Areas Act, 1950. The Transkei Constitution Act No. 48 of 1963 had established the Transkei as an area where Africans who belonged there could exercise some fixed property rights which, to a degree, included rights to prospect.[116] An African who obtained a permit would be able to peg land within the prescribed area which could not exceed 2000 square feet.[117] But, as a general rule, no African would be granted a license to prospect under this Act.

Likewise, in terms of section 48(2), a claims license (for base metals or for base minerals), which accorded the right to peg one's allotted space, could only ordinarily be issued to an eighteen-year-old who was specifically not African,[118] and not a coloured person as

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[112] Act No. 20 of 1967.
[113] White person meant 'a person who is a white person within the meaning of the Population Registration Act, 1950 – s 1 Act No. 20 of 1967
[114] S 7(1); 'prospect' was defined as 'intentionally search[ing] for precious metals, base minerals or natural oils by means which disturb the surface of the earth'; 'prospector' meant a person holding 'a prospecting permit, a prospecting license, or prospecting lease … prospecting permission' – s 1 Mining Rights Act No. 20 of 1967.
[115] … except in respect of private land of which the South African Bantu Trust or a Bantu is the owner or which is held in trust for a Bantu'; similarly section 7(3)(b) specified that: '[n]o prospecting license shall be issued … to any coloured person or any association of coloured persons or any corporate body or company in which coloured persons hold a controlling interest'; the exception was applied to the Cape where coloured persons or their association were permitted to obtain licenses section 7(3)(b) Mining Rights Act No. 20 of1967.
[116] Section 51 Transkei Constitution Act No. 48 of 1963; section 23(2) Bantu Trust and Land Act No. 18 of 1936; section 7(4)(d) Act No. 20 of 1967.
[117] S 8(1)(a) Act No. 20 of1967.
[118] S 48(2(a) Act No. 20 of 1967.

defined by the Act – meaning a white person.[119] Section 102 titled 'Stands for business and industrial purposes' prohibited the establishment of businesses and shops by Africans on land proclaimed a public digging for gold or other metals.[120] Section 103(1), which related to the issuance of permits to carry out works as defined by the 1956 Mines and Works Act, also disqualified Africans, in that applicants had to be in possession of mining titles. Section 172 prohibited settlement, whether temporary or otherwise, of Africans within a mining district or on areas proclaimed for digging unless they were housed lawfully in a compound or other approved lawful accommodation while they were employed within the mining sector.[121] The proprietor of premises occupied by Africans in contravention of section 172 would be guilty of an offence punishable by up to R50 or up to one month's imprisonment.[122]

7.3.1. Bantu Labour Act and Regulations of 1964

This Act repealed and replaced the NLR on matters of recruitment and hiring of Africans and the compound housing system.[123] Applicable Africans were already re-renamed from 'native labourer' to 'Bantu labourer'.[124] Licenses were issued under the Act to enable labour recruitment through various role-players – the agents, conductors, compound mangers and runners.[125] Recruitment of Africans was allowable and controlled strictly through the issuance of the licenses.[126] Permits issued to recruiters at the discretion of the Bantu affairs commissioner (BAC), had to be produced on demand to the empowered official.[127] Each

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[119] This was the rule except in certain specified circumstances to do with areas of land which had been designated for settlement by Africans and/or was held in Trust under the Bantu Trust or in the case of coloureds the province of the Cape of Good Hope – section 48(2)(b) (iii) & (ii) Act No. 20 of 1967.
[120] S 102(1)(b) Act No. 20 of 1967.
[121] Section 172(1) would not apply to areas lawfully occupied by Africans as provided for by the Group Areas Act No. 36 of 1966; section 172 applied to Africans and coloured persons.
[122] S 172(3) Act No. 20 of 1967.
[123] Recruiting was defined as 'procuring, engaging or supplying or undertaking or attempting to procure, engage or supply Bantu for employment in work'; and Bantu was defined as per the Population Registration Act No. 30 of 1950, in particular the regulations relating to people who from the appearance it was obvious were members 'of an aboriginal race of Africa – s 1 Bantu Labour Act No. 67 of 1964
[124] Bantu, Bantu hostel, Bantu affairs commissioner, Bantu chief, Bantu Administration and Development, Bantu labourer all became the common place manner of referring to Africans in the law – Bantu Laws Amendment Act No. 42 of 1964; Bantu labourer was *inter alia* 'a Bantu recruited for employment, employed or working on any mine or works – section 1 Act No. 67 of 1964
[125] A 'labour agent' used African 'runners to recruit Africans to works in mines, a 'runner' was an African working for a labour agent who actually approached Africans with offers of employment, a 'conductor' supervised the conveying of African workers to their work destinations at the behest of labour agents or employers, 'compound mangers' oversaw the management of 50 or more African workers.
[126] S 4 Act No. 67 of 1964.
[127] S 5 Act No. 67 of 1964.

compound, erected for the housing of fifty or more African workers, was to be manned by a compound manager who was an employee of the employer.[128]

A written contract of employment had to be completed before an authorised attesting official and signed-off by the BAC as per applicable provisions of section 13. Failure to adhere to the signing procedures was an offence.[129] An African who, after agreeing to becoming a labourer refused to enter the contract or repudiated it after signing by not entering service would be guilty of an offence and punishable by a fine of up to R50 or up to three months imprisonment.[130]

Section 15 created offences for African workers who absented themselves without permission or accepted cause, or absconded;[131] deliberately acted or failed to act in a manner that resulted in (or had the potential to cause) property damage or injury to another;[132] had been derelict in the execution of duties or intoxicated;[133] failed to follow lawful instructions issuing of the employer;[134] or left employment without completing the duration set for service in the agreement.[135] On conviction, the worker could be fined up R50 or imprisoned for up to three months.

Section 21 established a labour bureau in every region and district. The regional labour bureau had powers to inspect labour bureaus within its jurisdiction along with properties within which Africans were housed or working.[136] A district labour officer could give or decline to give permits required in terms of the Urban Areas Act to be or to remain in a particular place.[137] A district labour officer could also decline to endorse hiring or extension of hiring of African workers in its area of control, duly notifying the affected employer in writing of a voided contract on grounds that the agreement was *mala fides*, or that the African was unlawfully in the area, or was still obliged to work under another service contract, or that the African could not lawfully be employed, or that a required medical report on the health status of the African

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[128] S 11 Act No. 67 of 1964.
[129] S 13(6)(a) Act No. 67 of1964.
[130] S 13(6)(b) Act No. 67 of1964.
[131] S 15(1)(a) Act No. 67 of1964.
[132] S 15(1)(b) Act No. 67 of1964.
[133] S 15(1)(c) Act No. 67 of1964.
[134] S 15(1)(d) Act No. 67 of1964.
[135] S 15(1)(e) Act No. 67 of1964.
[136] S 22(2) Act No. 67 of 1964.
[137] S 22(6)(a) Act No. 67 of 1964.

was outstanding, or that permitting the employment would threaten public order, or that an order for the removal of the African had been made.[138]

Section 28 provided for the promulgation of regulations to manage, among others, the process of attesting, cancelling and making variations on labour contracts;[139] the housing, transporting and control of contracted African workers;[140] the management of compounds including the duties of compound managers;[141] overseeing the registration of all African workers with labour bureaus, the tracking control of the mobility of Africans between workplaces and the areas prescribed for their occupation, the particulars of employment contracts all in conjunction with stipulations of the Bantu (Abolition of Passes and Co-ordination of Documents Act, 1952;[142] and the establishment of 'aid centres' as receptacles and repositories of African workers prior to placement, ejection or dissemination to employment settings.[143]

A cursory review of aspects of the regulations illuminates the interconnectedness between the Act, pass laws and the urban areas strictures in place at the time. It also discloses some detail of the controls on African mobility, presence and permissible duration of presence outside assigned urban locations and rural reserves which so marked the apartheid era, and that much of this was geared at extracting labour.

7.3.2. Bantu Labour Regulations

The Bantu Labour Regulations of 1965 provided that every African had to obtain a reference book as prescribed by section 3 of the Bantu (Abolition of Passes and Co-ordination of Documents) Act.[144] Within the reference book, the fingerprints of the African person would be impressed using ink in the prescribed manner .[145] An identity card issued in terms of the Population Registration Act No. 30 of 1950 would be appended to the reference book.[146] Regulation 17 of the regulations titled 'Particulars to be Recorded in Reference Books and

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[138] S 22(6)(b) Act No. 67 of 1964.
[139] S 28(1)(d) Act No. 67 of 1964.
[140] S 28(1)(k) & (m) Act No. 67 of 1964.
[141] S 28(1)(o), (p) & (q) Act No. 67 of 1964.
[142] S 28(1)(u) Act No. 67 of 1964.
[143] S 28(1)(w) Act No. 67 of 1964.
[144] Reg 2(1) Bantu Labour Regulations (3 December 1965) issued per Government Notice No. 1292; Bantu (Abolition of Passes and Co-ordination of Documents) Act No. 67 of 1952.
[145] Reg 7 Bantu Labour Regulations.
[146] Reg 9 Bantu Labour Regulations.

Passports' has been added to this thesis as 'Appendix C'. Part "A" of this annexure provided for an extensive list of required information which was to be completed within the reference book (or passport as the case may be) of an African, which included:

- endorsement of the district labour bureau to which the African was attached;
- areas within which the African could lawfully be present;
- where, when, to whom and for what purpose the African was to report him- or herself;
- particulars of the assigned place of employment and job designation; and
- permission to seek employment within a stipulated area.

Part "B" of this annexure required the details of the employer with monthly endorsements of said employer for the duration of the employment contract. Payment of district tax and levies would be recorded under part "D", while exemptions would be recorded in part "E".

Chapter 4 of the regulations provided for the recruitment of African labour through the issuance and use of recruiting licenses, which funnelled African workers through the labour administration bureaucracy and created an offence for failure to recruit African workers in terms of the chapter. Chapter 4 correlated with the function of the central labour bureau and its functionaries in terms of chapter 8 of the regulations. African work seekers were to be registered with the bureau offices, regional, district and local, which would then refer them, when necessary, to aid centres for further processing.

Regulation 5(4) of chapter 8 made provision for slightly differential treatment of Africans employed at the gold mines in the Transvaal where mines were operated in conjunction with the Chamber of Mines membership. When an African was recruited to for the mining sector, prior permission of the labour bureau apparatus was not required.[147] This was in line with section 13 of the Natives (Urban Areas) Consolidation Act[148] which stated that the provisions for the procedure of introducing Africans to urban areas under section 11 and 12, which required that the local authority grant written permission for the to seek employment, and on attainment of employment periodic permission to reside in the area, would not apply to

[147] Reg 23 Chapter 8 Bantu Labour Regulations.
[148] Act No. 25 of 1945.

Africans employed in the mining industry.[149] Once the contract expired or was otherwise terminated, the provisions of the regulations would apply immediately to a former African mine worker. Where an African was neither employed nor registered in the prescribed manner as a job seeker in a particular area, he or she would be ordered to leave the area within a specified time or directed to the appropriate district labour office by the municipal labour officer.[150] Chapter 9 of the regulations provided for influx control.[151]

The labour and other regulations described above are similar to those enacted during the first half of the twentieth century. In reality, apartheid signified the consolidation of the measures already in place for the control of Africans and their labour. The Mines and Works Act, the Industrial Conciliation Act, the Precious Stones Act and the Mining Rights Act were all retouched versions of their predecessors. Indeed, these laws continued to implement the pre-existing ethos, which was re-articulated succinctly in the Fagan and Botha commission reports. Rather than the touted objective to safeguard Africans under benevolent white tutelage, the enumerated laws depict the systematic subjugation of the targeted population through the narrowing of options for subsistence. The Bantu Labour Act in particular illustrates the lengths undertaken to confine African existence within prescribed parameters. Its implementation shows the web of layered restrictions that were mandated to achieve the seeming tranquility of proper work relations.

The above in-depth iteration revealed the generalised African typecast in an unsettling manner. This current reappraisal has allowed for the construction of 'new and hybrid agencies,' so that the reiteration itself performs a form of revision.[152] It likely sparks an 'unconscious unravelling of thought, a conceptual slippage between *logos* and *mythos* … [in] the Western discourse of law'.[153] It amplifies mistrust of grand chronicles of justice, allowing for the details

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[149] Section 14 of Act 25 of 1945 mandated the removal of Africans found in urban areas without prescribed permission.
[150] Reg 11 Chapter 8 Bantu Labour Regulations.
[151] A visiting African had to present him or herself to the local municipal officer to request permission to be in the area, as a visitor for beyond 72 hours - reg 4 chapter 9.
[152] H Bhabha 'Postcolonial Criticism' in S Greenblatt & G Giles (eds) *Redrawing the Boundaries: The Transformation of English and American Literary Studies* (1992) 457.
[153] Chaplin explains that usually '[l]aw is identified with logos as the ideal of reason that "guarantees the truth of a … symbolic order" … Law-as-Logos functions as the ground zero of the symbolic order'. The notion is in reality fictional since all law is based on 'founding supposition[s]' - S Chaplin 'Written in the Black Letter' (2005) 17 *Law & Literature* 47, 50-51.

and the repercussions of the law to inspire sensitivity to the ethos underpinning South African law.

7.4. Compensation Laws During Apartheid

7.4.1. Occupational Injury or Death

Section 84 of the Workmen's Compensation Amendment Act of 1967 adjusted the compensation due to African workmen as follows:

(a) For transient total disability, monthly payments were 75 percent of monthly salary of wages up to R150 for no more than twelve months.
(b) When the disability was permanent and constituting one hundred percent impairment, a once-off amount equivalent to 48 times the monthly salary of the up to R40 of the salary plus 30 times the monthly salary which was over R40 up to R150 was paid, the lowest permissible compensation being R480.[154]
(c) No provision for receipt of pension was made for African workmen for permanent disability.
(d) For compensation following the accidental death of a workman, a lump-sum deemed appropriate by the Workmen's Compensation commissioner would be granted to dependants on the same scale as that for permanent total disability in section 85.[155]
(e) The Act made no provision for pension following the death of an African workman to be received by dependants.

What of white and other non-white miners? The amount payable for transitory total incapacity was revised to 75 percent of a workman's monthly salary for up to R150 of those wages, so long as the payments were not below R13 a month. Compensation for irreversible total disability was revised to provide that in the case of one hundred percent disability a monthly pension equivalent to 75 percent of monthly wages up to R150 of those wages would be issued for the duration of the life of the affected workman.[156] Where death had resulted, a widow 'or invalid widower' would receive a lump-sum of R300 or double the monthly income of the workman, plus a pension equivalent to 40 percent of the pension which would have

[154] S 85 Act No. 58 of 1967.
[155] S 86 Act No. 58 of 1967.
[156] S 39(1)(c) Act No. 58 of 1967.

accrued due to permanent total incapacity.[157] A widow or invalid widower who remarried would also receive a lump-sum equivalent to 34 times the monthly pension.[158]

The Workmen's Compensation Amendment Act of 1977 introduced payment of pensions for African workmen and in some cases their dependants to the principal Act.[159] Section 86 provided that when an African workman accidentally died his dependants, regardless of how manythey were, would receive compensation which could not exceed more than what the widow or dependants of a workman in terms of section 40 would receive as if 'only one such widow or only one such widow and such child or children.'[160] The provision clearly took into account that African workmen could have more than one wife. Unlike in section 40, which specifically stipulated the percentage of compensation due based on the wages of the deceased workman, in the case of Africans it was the commissioner who would determine and periodically adjust (as he saw fit) the compensation due to widows and children.[161]

7.4.2. Occupational Silicosis and TB

7.4.2.1. Pneumoconiosis Act of 1962

The Pneumoconiosis Compensation Act No. 64 of 1962 followed on from the Pneumoconiosis Act No. 57 of 1956 to merge law relating to compensation for occupational diseases acquired by mine workers.[162] The Act referred to 'Bantu' labourers as male or female Africans that had or were 'deemed to have lawfully worked in a dusty atmosphere at a controlled mine'.[163] A

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[157] S 40(1)(a) Act No.58 of 1967.
[158] S 40(1)(c) Act No. 58 of 1967.
[159] Workmen's Compensation Amendment Act No. 28 of 1977.
[160] Section 40 widows and child dependants of white and non-white workmen other than Africans to receive pensions in the event of the death of a workman Workmen's Compensation Act No. 30 of 1941.
[161] For workmen other than Africans section 40 awarded widows 35% of monthly wages plus additional amount for children such as 50% of the salary for three children – Workmen's Compensation Act No. 30 of 1941. Later the Workmen's Compensation Amendment Act No. 29 of 1984 made the procedure of initiating court proceedings for damages under section 8 uniform for all race groups.
[162] Section 19 of Pneumoconiosis Act No. 57 of 1956 stated that '[e]very person, other than a native, who performs work in a dusty atmosphere at a controlled mine, shall be medically examined at' prescribed intervals.
[163] A 'Bantu person' being one 'belonging to … aboriginal tribes or races of Africa, including Bushmen, Hottentots and Korannas;' along with those taxed under the Native Taxation and Development Act No. 41 of 1925, but not 'American negroes, Eurafricans, Eurasians or persons commonly known as Cape Malays, Griquas, Mauritians or St. Helenians'; a 'miner' meant 'a male person of European descent working under dusty conditions in controlled mines; the 'coloured female' and 'coloured male' were those who were neither miners nor European females nor Bantu females, nor Bantu labourers that had been exposed to dusty working conditions at controlled mines; – s 1 Pneumoconiosis Compensation Act No. 64 of 1962.

'one-sum benefit' meant a single monetary award in respect of having contracted pneumoconiosis[164] or TB. The Act established a Miners' Certification Committee which could receive applications of workers to determine whether compensation was due, as well as the rate of award, after having contracted pneumoconiosis or TB in a controlled mine.[165] Section 19(1) stated that: '[n]o person (other than a Bantu person) shall perform work in a dusty atmosphere at a controlled mine, unless he holds a current initial or other certificate of fitness'. Section 27 prohibited the issuance of fitness certificate to workers found to have TB or pneumoconiosis which was causing at least fifty percent disability to their heart and lung functions. Section 28 obliged controlled mines to keep registers of all those working in dusty conditions except male and female African mine workers.[166] Section 22 provided for everyone 'other than a Bantu person' doing work which exposed them to hazardous dust to have regular health check-ups and re-certification at prescribed intervals. If during a health check of anyone 'other than a Bantu person' symptoms of disease were detected a full report would be present to the committee for determination.[167] The cost of the medical examinations and any additional follow-up medical care required for anyone 'other than a Bantu person' were to be covered by funds specifically allocated by Parliament for this.[168] Responsibility for the medical examination of Africans was left entirely in the hands of individual employers, bearing in mind the exclusions highlighted above, who would have to pay for said examinations.[169] The mine owner was to engage a medical practitioner to perform the examinations on Africans in the manner prescribed by the Minister of Mines and a register pertaining to Africans was to record how many were employed in dusty work.[170] Section 35 stated that only where the employer had knowledge or 'reason to believe' that an African had pneumoconiosis or TB was the employer barred from employing such African person at the mine, unless the medical practitioner has deemed the TB 'healed or non-infectious'.[171] Section 41 provided for the

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[164] Pneumoconiosis is a disease of the lungs due to inhalation of dust, characterised by inflammation, coughing and fibrosis. Silicosis, coalworkers' pnemoconiosis and absetosis are types of pnemoconiosis.
[165] Sections 7-10 Act No. 64 of 1962.
[166] A register which excluded African workers had to specify the name, the corresponding Miners' Medical Bureau number of the person, the date of issue and expiry of fitness certification and conditions included therein – s 28(1) Pneumoconiosis Compensation Act No. 64 of 1962.
[167] S 24 Act No. 64 of 1962.
[168] S 33 Act No. 64 of 1962.
[169] S 34 Act No. 64 of 1962.
[170] S 34 Act No. 64 of 1962.
[171] Section 35 and 36 also gave the Minister power to make regulations on the examination of African mine workers and the 'standard of fitness which shall be applied at an initial examination of a Bantu person – Pneumoconiosis Compensation Act No. 64 of 1962

examination of an African miner whose contract had expired to check for TB and pneumoconiosis.[172]

Thus the outlawing of tasking employees working at controlled mines to do dusty work without the prescribed certification did not apply to African workers, who could be assigned to do underground work despite having obvious life threating impairment of the cardio-respiratory functions. The provision gave license to mine owners to place African workers suffering from chronic silicosis or TB in occupations that exposed them to factors that were likely to worsen their already compromised health status. The tepid method of ascertaining disease and possible impairment, which were not preventative and mostly not compulsory kept African workers vulnerable to abuse. Moreover since the cost of the health care checks was to be in the hands of employers, it would not be possible to establish uniform standards and it is doubtful that the policing of the process would be policed by the state. Spivak astutely described the construction of human subjectivity in discourse as belonging 'to the exploiters' side of the international division of labour.'[173] The process has perpetuated the fallacy of Africans as merely adjunct and incomplete figures in the face of realised human capacities, embodied in white people. This kind of thinking has served to obscure the exploitative profiteering which this logic supports.

Section 79 provided that an African worker certified as having pneumoconiosis, regardless of degree of impairment, would receive a once-off award of R480. If an African miner died and the disease was discovered afterwards, and in the event that no previous award had been made, the dependants would be entitled to receive the R480.[174] In contrast, in terms of section 72, white and coloured workers found to have impairment of between twenty to fifty percent due to TB or pneumoconiosis were entitled to monthly pensions.[175] When the impairment was more than fifty percent but less than seventy-five percent, the monthly pension pertaining to miners was R46 for the miner, R12 for the wife, and R6 per child. For coloured

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[172] Arrangements could be made for the Minister Health to take over the treatment of the African miner worker and refund the mine for any expense it had incurred by employers (s 41); report of a finding of disease in an African, following a medical examination, to the committee prohibited the mine from employing him or her in dusty work and any further testing would then be incurred by the state (s 42) Act No. 64 of 1962.

[173] G Spivak 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds) *Marxism and the Interpretation of Culture* London: Macmillan, (1988) 271-300.

[174] S 80 Act No. 64 of 1962.

[175] For miners the pensions included: R24 for the miner, R6 for his wife and R3 for every child; for coloured labourers it was between R8 and R10 for the worker, between R2 and R4 for the wife and between R1 and R2 for per child – s 72 read with s 71(1) Act No. 64 of 1962.

labourers it was between R14 and R19 for the coloured labourer, between R2.50 and R5 for the wife, and between R1.50 and R3 per child.[176] Section 75 provided for widows of miners and coloured labourers to continue to receive pensions after the death of employees who were already receiving pensions.[177]

7.4.2.2. Occupational Diseases in Mines and Works Act of 1973

The Occupational Diseases in Mines and Works Act[178] ascribed a particular meaning to 'one-sum benefit', an award which was distinguished from 'a pension or monthly allowance' and any exceptional additional payment that might be made at the discretion of the compensation commissioner or the Bantu affairs authority.[179] A 'compensatable disease' was pneumoconiosis with or without TB, TB contracted while carrying out of work duties or within 12 months of performing the risky work, as well as other permanent diseases such as blocked lungs and heart conditions caused by working in mines. The provisions mandating examination of mine workers, in order to ascertain fitness to perform risk work, were segregated and differential in the Act. Section 38 related to African workers, while sections 15 to 37 regulated matters comprehensively for white and coloured mine workers.

Section 38 stated that mine owners were tasked with procuring medical examinations for the Africans they employed. Section 38(2) provided for regulations to be made by the Minister on, among others, the manner of examination and the intervals at which it was to be conducted, 'the standard of fitness which … [was] required to be complied with' for African mine workers, 'the repatriation or return of … [Africans] and the payment of the cost of such repatriation or return'. Section 15 prohibited white and coloured people from doing risk work as defined in section 13, without a valid fitness certificate, certificates being valid for six months.[180] There was no specific prohibition in section 38 which disallowed the performance

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[176] Permanent impairment of above 75% attracted R73, R23 and R9 respectively for miners and R18/R25, R3/R6, R2/R3 respectively for coloured labourers – s 72(3) Act No. 64 of 1962

[177] Section 77 provided for payment of gratuity on remarriage of widows that had been receiving pensions.

[178] Act No. 78 of 1973.

[179] Bantu person meant 'any person belonging to… aboriginal tribes or races of Africa, including Bushmen, Hottentots, Korannas and Natives' as well as people who had to pay tax in terms of the Bantu Taxation and Development Act No. 41 of 1925, but excluding 'American Negroes, Eurafricans, Eurasians … Cape Malays …'; 'coloured person' meant 'any person who is not a White person or a Bantu person'; whereas white person meant 'a person classified as a White person under the Population Registration Act, 1950'.

[180] Section 13(2)(a) & (b) described 'risk work' as work which exposed a person to inter alia harmful compositions and concentrations of dust, 'gases, vapours or chemical substances, or factors or working conditions, which … are harmful or potentially harmful' – Act No. 78 of 1973.

of risk work by Africans without first undergoing medical examination and receiving certification. Section 16 required keeping of a record of white and coloured people doing risk work, conditional upon any specifications in their fitness certification. No corresponding provision for meticulous record keeping was provided for by section 38 for Africans. Section 23 provided for the examination and issuance of fitness certificates for white and coloured employees upon their application for a twelve month period. Moreover, a white or coloureed person who was declared temporarily unfit was entitled to free medical care as required.[181] No corresponding provision for applications for certification and detailed processes of examination, issuance of fitness certificates (some on restricted basis), assessment and reporting, found in section 23 to 37 for white and coloured mine workers, was made for Africans in the Act.

Section 44 stated that for 'first degree' compensation to be payable the degree of impairment for either pneumoconiosis or cardio-respiratory functions or any other condition had to be forty percent or more;[182] for 'second degree' compensation to be payable the ability to do work had to be more than forty percent impaired or he had to be have comorbid TB (or another 'compensatable' illness). In terms of section 48, the finding of awardable compensation or otherwise would be communicated, in the case of an African, to the Bantu affairs authority.[183]

Chapter 7 regulated compensation for Africans. Section 78(3) provided that Africans would apply for compensation to the Bantu affairs authority, who would then forward it to the commissioner.[184] An African found to have acquired a 'compensatable disease other than' TB in the manner prescribed was entitled to a lump-sum payment of R1 000 if he had not yet been compensated under this or the previous Act. In the case of TB when comorbid with another 'compensatable disease' where a benefit had not yet been awarded, a lump-sum of R2 000 was due.[185] Where TB was detected within twelve months of the cessation of risk work, where the

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[181] S 23(4)(c); section 24 provided for the examination of white and coloured workers when a mine was declared a controlled mine and section 25 provided for periodic medical examination and re-certification of fitness certificates for whites and coloureds – Act No. 78 of 1973.
[182] S 44(1) Act No. 78 of 1973.
[183] S 48(1)(c) Act No. 78 of 1973.
[184] Commissioner meant the Compensation Commissioner for Occupational Diseases in terms of the Act. Similarly applications of coloured workers would first be received by the Secretary for Coloured Relations and Rehoboth Affairs – section 78(4) Act No. 78 of 1973.
[185] S 106(a) & (b); where TB was comorbid with another 'compensatable' condition and 'a benefit was previously awarded in respect of tuberculosis or any other compensatable disease, an additional one-sum benefit equal to the

person had not worked less than two hundred shifts but more than one hundred shifts, to have been worked within the six months before the stoppage of risk work, a lump-sum of R600 would be due.[186] Where an African miner worker died and was determined to have had a 'compensatable' condition other than TB at the time of death, or the 'compensatable disease' and TB, he would be entitled to two-thirds of the compensation that would have been due if he was alive, if he had 'not before his death become entitled to a benefit under the previous Act or this Act', to be paid to dependants.[187] In the event that compensation for the TB coexisting with a 'compensatable disease' had been awarded in terms of the previous Act or this Act prior to death, two-thirds (if any) of 'the additional benefit to which the deceased would have been entitled had he not died' would be paid out.[188] In the case of TB alone, where he had prior to death 'become entitled to a benefit,' half of the payment which would have been due if he was alive – R500 – was payable.[189]

Chapter 6 stipulated the compensation matrix for white and coloured workers. White workers who were already receiving pensions would continue to receive monthly pensions of R50, R94, or R136 depending on the condition and the nature of impairment.[190] Such pension could be converted to a lump-sum payment calculated as an amount 'equal to the difference … between twelve thousand rand and such smaller total amount as … [had] been received'.[191] Section 80 provided compensation for white workers as at the commencement of the Act. '[F]irst degree' impairment warranted a lump-sum of R12 000, and if 'first degree' progressed to 'second degree' impairment an additional R6 000 would be awarded.[192] If 'second degree' impairment was detected at the initial certification of disease such whiteperson would receive a lump-sum of R18 000 would be granted, and a finding of TB within 12 months of having performed risk work would be awarded R5 000.[193] Where a white miner had died and thepost-mortem revealed that he was suffering from a 'compensatable disease', a lump-sum equal to what he would have received or the residual balance of what he was already receiving would

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difference between one thousand two hundred rand and the benefit previously awarded' would be payable – s 106(b) Occupational Diseases at Mines and Works Act No. 78 of 1973

[186] Such payment was due provided that a benefit had not previously been paid out for TB in the past – section 106(c) Act No. 78 of 1973.

[187] S 107(a) Act No. 78 of1973.

[188] S 107(c) Act No. 78 of1973.

[189] S 107(b) Act No. 78 of1973.

[190] S 79(1) Act No. 78 of1973.

[191] S 79(4) Act No. 78 of1973.

[192] S 80(1) & (2) Act No. 78 of1973.

[193] S 80(3) & (4) Act No. 78 of1973.

be paid or a pension to his dependants in the manner provided for in sections 81, 82, 83, 84 and 85. Section 86 regulated the receipt of pensions by coloured workers who had been receiving them under previous statute, but specifically prohibited receipt of such pensions by their widows or dependant children.[194] Such coloured workers would be entitled to receive a monthly pension of R25, R47 or R68, depending on the condition and the disease progression detected.[195] Section 87 regulated compensation once the Act came into force. 'First degree' disease progression entitled the worker to a R6 000 lump-sum, and if 'first degree' progressed to 'second degree' an additional R3 000 was payable. Where 'second degree' progression was detected at the initial diagnostic certification of disease, then a lump-sum of R9 000 would be granted, and a finding of TB in a coloured person within twelve months of the cessation of risk work would be awarded R2 500. Where a coloured miner had died and the post-mortem revealed that he was suffering from a 'compensatable disease', a lump-sum equal to what he would have received or the residual balance of what he was already receiving would be paid or a pension to his dependants in the manner provided for in section 89. Pensions were provided for in the Act for widows and children of deceased white and coloured workers. Section 95 provided for a gratuity for widows who remarried 'equal to twenty-four times the amount of her monthly pension.'[196] Section 102 provided for payment to be made to the impaired white or coloured worker or their dependants in order to: 'receive school education; or … to receive education at any college, university or other educational institution for the purpose of qualifying for any profession; or … for the purpose of qualifying for any trade or for any commercial, industrial or domestic occupation.'

Throughout the rest of 1970s and into the 1980s the benefits which accrued in terms of the Act were periodically increased at an annual average rate of ten percent (in 1977 it was fifteen percent) with a proviso that the adjusted benefit rates would not apply 'to any one-sum benefit'.[197]

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[194] Provided that under certain conditions an additional R1. 50c per child might be awarded in particular situations.
[195] S 86(1) Act No. 78 of 1973.
[196] In 1975 section 95 was amended to increase the gratuity due to widows who remarried in the following manner: a widow who had been receiving a pension for less than 3 years would receive an amount equal to 50 times the monthly pensions she had been receiving, one who had received a pension for more than 3 years but for less than 6 years would get 40 times the monthly pension, and who had received a pension for 6 years or more would receive 30 times the monthly pension – s 7 Occupational Diseases in Mines and Works Amendment Act No. 45 of 1975.
[197] Sections 1, 2, 3 & 4 Occupational Diseases in Mines and Works Amendment Act No. 67 of 1974; section 1(2) Occupational Diseases in Mines and Works Amendment Act No. 45 of 1975; section 1(2) Occupational Diseases

As illustrated above and in earlier chapters, the circumstances of African mineworkers were beset with lamentable conditions of service and remuneration. From the beginning, Africans were the ones doing the heavy work of digging, drilling and cleaning out the debris of rock particles produced during the process. These tasks guaranteed maximal exposure to the hazards of the occupation. Along with the threat of frequent cave-ins and rock falls associated with deep-level mining,[198] the prolonged exposure to pulverised airborne fragments posed another less immediate peril. Arguably, more than the recorded 108 000 African deaths attributed to mining on the Witwatersrand in the first three decades of the twentieth century occurred.[199] More recently the Leon commission of inquiry into mine safety and health announced that installing adequate safety precautions was historically known to prevent the 'adverse health effects' which routinely plagued mineworkers.[200] The report acknowledged the known lag of time between exposure to harm and the advent of acute symptoms of malady. Yet during apartheid Africans were not availed of the preventative and protective health measures mandated for all other race groups. In fact, they were intentionally excluded therefrom.[201] The law deliberately placed the health of Africans in jeopardy, when the known likely result was the onset of chronic illness that induced death. Moreover, the sustained migratory labour system functioned to disadvantage African mine workers who generally became progressively gravely ill after having returned to their far-off homes.[202] These rural settlements invariably lacked the medical resources to diagnose and treat the disease. Once at home and sickly, access to the already insufficient R1 000 or R2 000 compensation in terms of the Act was improbable. Furthermore, together with the afflicted mineworkers, their families and the impoverished

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in Mines and Works Amendment Act No. 117 of 1977; section 1(2) Occupational Diseases in Mines and Works Amendment Act No. 83 of 1979; section 1(2) Occupational Diseases in Mines and Works Amendment Act No. 85 of 1981.

[198] The pillars placed to support the walls and roofs of the tunnels excavated routinely buckled due the instability of the structures erected - J Higginson 'Privileging the Machines: American Engineers, Indentured Chinese and White Workers in South Africa's Deep-Level Gold Mines 1902-1907' (2007) 52 *International Review of Social History* 1, 18-19.

[199] Of these 93 000 were attributed to occupational disease while 15 000 were attributed to accidents workplace accidents - M Smith *"Working in the Grave": The Development of a Health and Safety System on the Witwatersrand Gold Mines 1900-1939* (unpublished MA thesis, Rhodes University, 1993) 1.

[200] In addition or alternatively protective gear could be used – para 4.4.1 *Report of the Commission of Inquiry Into Saftey and Health in the Mining Industry Volume 1* (1995) 40.

[201] Section 19 Act No. 57 of 1956; section 19, section 22, section 24, section 33, section 34 Act No. 64 of 1967; section 38, section 15, section 16, section 23 Act No. 78 of 1973.

[202] Para 4.4.1 *Report of the Commission of Inquiry Into Saftey and Health in the Mining Industry Volume 1* (1995) 40.

communities to which they returned had to suffer the disease burden. This was the lot of African workers throughout the twentieth century and conceivably to the present-day.

Cesaire describes as hypocrisy the tendency to equate colonialism with civilisation.[203] Instead 'moral relativism' has functioned to devalue African people while aggrandising colonial culture as if principled.[204] But to recognise this requires a shift in thinking which accords innate complete humanity to African people. Yet ideology persists in positioning Eurocentrism as 'the endpoint of a universal development process' to which all societies will inevitably submit.[205] Disrupting this reasoning unlocks the possibility that depicting Africans as 'other' (in the law) is parochial rather than valid and generalisable. Therefore changes to the law that appear to facilitate access to upgrading for Africans to 'superior' white status, while retaining the grading system itself, are adhering to the same narrow-minded logic. It is the 'moral relativism', on which notions of civilisation have been based, that requires revision because the understanding of deservedness flows from it. If the African encountered in the above-mentioned provisions of law, cheapened and supposedly deserving of lesser treatment, has been an invention of values that have normalised a fabricated white personhood, then the premise of the law itself is questionable. Reluctance to expose fully and thereafter seek to derange the 'anti-black bifurcated societal structure', will likely cause the system to morph only slightly to accommodate a few more – the 'affranchised slaves' – into the ruling class.[206]

7.5. Changes Nearing the Removal of Formal Apartheid

7.5.1. Commission of Inquiry into Labour Legislation (Wiehahn Commission)

This final part considers matters during the latter years of formal apartheid. In response to the unremitting labour discontent and unrest throughout the country, marked by the 1973 strikes which began in Durban, the Bantu Labour Relations Regulation Amendment Act revised the principal Act to allow for more liaison committees, which in turn were intended to provide

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[203] Cesaire denounces colonialism as 'neither evangelization, nor a philanthropic enterprise, nor a desire to push back the frontiers of ignorance, disease, and tyranny, nor a project undertaken for … the rule of law' – A Cesaire *Discourse on Colonialism* (1950) (trans R Kelley, 2001) 31.
[204] Cesaire (note 203 above) 35-36.
[205] L Lange 'Burnt Offerings to Rationality: A Feminist Reading of the Constitution of Indigenous Peoples in Enrique Dussel's Theory of Modernity' (1998) *Hypatia* 132, 134.
[206] T Madlingozi 'Social justice in a time of neoapartheid constitutionalism: Critiquing the antiblack economy of recognition incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123, 124; Fanon has described a supposed emancipation gained by self-interested African elites who have long desired acceptance and assimilation into the world of the coloniser - Fanon (note 2 above) 61.

greater centralised control of African labour.[207] This measure failed to achieve its intended purpose as African worker militancy and trade unionism grew.[208] In the mid-1970s an inter-departmental committee was convened to investigate and report on the turmoil at the mines. The committee blamed the violence, much of which was stoked between groupings of African miners themselves, on the unsavoury conditions at the mines (particularly the compounds) and a desire to be 'treated humanely'.[209] At this time, though the white ruling class was contemplating some relaxation of the fixed racial stratification, in general the discussion did not contemplate 'fundamental changes in the apartheid framework.'[210]

The Wiehahn commission was appointed in 1977 and produced reports which were contemporaneous with some of the changes to labour law during the turbulent 1980s, which preceded inauguration of the current era. Its purpose was to investigate the industrial relations arrangements and to suggest appropriate adjustments to the law where necessary.[211] The report observed that the widespread strikes by African workers of 1973 had shifted or magnified the political trajectory of African unionism. Africans had come to see labour unions as 'possible means of achieving change in South Africa – not only in the economic conditions of the Black worker himself, but indirectly also in other spheres'.[212] The commission received views similar to those made during the Botha commission, almost thirty years prior, regarding the inadvisability of permitting African trade unions to be recognised equitably as bargaining agents by the labour relations framework. It was argued that Africans lacked the developmental and intellectual capability to participate in unionism, and that calls for legal recognition of

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[207] Bantu Labour Relations Regulation Amendment Act No. 70 of 1973 (the Native (Settlement of Disputes) Act No. 48 of 1953 had been remaned the Bantu Labour Relations Act); employer controlled liaison committees were installed in numerous industrial settings but African workers failed to funnel grievances and disputes through these structures - F de Clercq 'Apartheid and the Organised Labour Movement' (1979) 14 *Review of African Political Economy* 69, 73.

[208] There were approximately 81 incidents of unrest at the mines in the years 1972 until 1979 - D Horner & A Kooy 'Conflict on South African Mines 1972-1979' (1980) 8 *Southern African Labour and Development Research Unit Working Paper No. 29* available at http://opensaldru.uct.ac.za/bitstream/handle/11090/534/1980_horner_swp29.pdf?sequence=1, accessed on 24 April 2020 ; F de Clercq (note 207 above) 70.

[209] Violence the report opined, based on ethnological anthropology, was the default inclination of Southern African Africans who 'even regard fighting as a form of recreation' – L Welcher 'Extracts from the Report of the Inter-Departmental Committee of Inquiry into Riots on the Mines in the Republic of South Africa' (1978) 4 *South African Labour Bulletin* 49-65, 49; D Horner & A Kooy *SALDRU Working Paper No. 12* (1980)14

[210] De Clercq (note 207 above) 69.

[211] The purpose according to the mandate given was to adjust to 'changing times' by; introducing more efficient dispute resolution methods, identifying and removing impediments to 'the creation and expansion of sound labour relations' in the country – Order of the State President-in-Council N Wiehahn *The Complete Wiehahn Report* (1982) xxxii, xxxiii.

[212] Para 3.27 Part 1 'Industrial Relations in South Africa' (note 211 above) 30.

African unions emanated from extraneous trouble-makers. It was also argued that Africans were in fact non-nationals belonging to independent countries who were as such not entitled to unionise, and that their majorities were such that they would subsume the interests of other race groups. These interests were presumed to represent the national interest and were raised before the commission.[213] Though the majority report considered that much of the argument was outdated and lacking in merit 'in the light of the present-day situation and probable future developments,' the report was willing to agree that the arguments could have been well-founded in the past, presumably when they were presented in the earlier Botha commission, but had 'been invalidated by developments in the intervening three decades.'[214]

In advancing the argument for the formal inclusion of African unions into the legal framework, the report made the observation that '[r]egistered trade unions are under certain statutory restrictions and obligations designed to protect and nurture a system that has proved its success in practice.'[215] Thus the manner of stabilising industrial relations as they pertained

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[213] Paragraph 3.31 (note 211 above) 31; consequently the minority opinion of the Wiehahn commission penned by Commissioner Nieuwoudt argued against the legal recognition of African unionism as follows:
'3.37.1 The activities of … [African] trade unions will inevitably extend beyond purely labour matters and are bound to spill over into the political and social spheres, leading to untenable pressures.
3.37.2 The aspirations of … [African] trade unions will necessitate stricter control over the trade union movement with resultant inroads into existing rights and freedoms.
3.37.3 … African trade unions are more likely to make unreasonable demands than existing trade unions, with detrimental effects on the position of those persons who at present enjoy trade union rights and on the economy in general.
3.37.4 The admission of … [Africans] to registered trade unions will result in their being swamped, with concomitant erosion of the vested rights of other groups who at present enjoy registered trade union rights.
3.37.5 Recognition of … [African] trade unions will not lead to any significant abatement of foreign criticism against and pressure on South Africa.
3.37.6 There is every likelihood of … [African] trade unions becoming affiliated to international bodies whose aims and objectives may be inimical to South Africa and who may overtly and covertly aid or pressurise … [African] trade unions in an effort to influence the course of events in South Africa…
3.37.7 The 1873 strikes by … [African] workers cannot be ascribed to the non-registration of … [African] trade unions since they were caused primarily by instigators and agitators from outside the trade union movement.
3.37.8 There is every possibility that the demands, aims, objectives and priorities of … [African] trade unions will differ from and could be fundamentally incompatible with those of other trade unions, for example in regard to public holidays etc.
3.37.9 All … [African] workers are citizens of self-governing or independent … [African] states and as such exercise their political rights in such states. It is therefore only natural that the governments of such states should be involved at the inter-state level with the regulation of labour relations involving their citizens and that they should themselves determine the extent of trade union participation within their respective states.' – (note 211 above) 37.

[214] The report described Africans of the late 1970s as follows: 'they have achieved a far greater degree of employment stability and industrialisation; their ability to make responsible use of trade unionism despite the constraints of non-recognition has been demonstrated; the permanency of … [Africans] in our economy is now officially recognised; the notion of White "trusteeship" over … [Africans] has largely dissipated' - paras 3.31 & 3.32 N Wiehahn (note 211 above) 31.

[215] The report pointed out that the Industrial Conciliation Act 28 of 1956 provided for 'the strict control of constitutions and membership; and a prohibition on affiliation with any political party', that as things stood

to Africans was to incorporate them into the streamlining structures of law.[216] The report was of the view that the development of an informal unincorporated bargaining system threatened to disassemble the established arrangements of collective bargaining under the Industrial Conciliation Act.[217] The report referred to the International Labour Organization (ILO) Convention 87 which provides for freedom of association and pointed to the reality that in South Africa the law specifically withheld protection afforded by this right from Africans.[218]

On the matter of the established workplace colour bar, the commission considered provisions of the Industrial Conciliation Act 1956 as well as the long established reservations of the Mines and Works Acts, the 1956 Act being the most current.[219] The Department of Labour had argued that it was a mechanism to protect skilled white labour from encroachment of less skilled non-white workers and to keep standardised wages, which protected the standard of living of white people and prevented inter-racial strife.[220] The argument was that allowing Africans to enter the skilled levels of employment would weaken the elite status of skilled workers and drive down wages, thus affecting the normative standard of living of white people adversely. The proffered intent of maintaining the *status quo* was key to the maintenance of labour peace.[221] The commission explained that the legitimacy of job reservation had been eclipsed by time and experience, which had proved its inefficiency in meeting its stated

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African unions were not subject to 'the protective and stabilising elements of the system nor to its essential discipline and control' – para 3.35.4, 3.35.5 & 3.35.6 (note 211 above) 33.

[216] This would curb the 'formation of power groups outside and above the industrial council and committee systems [which] would place employers in the untenable position of having to negotiate, first, with registered trade unions on industrial councils, second, with their committees at enterprise level, and third, with … [African] trade unions or their federations outside the statutory system' – para 3.35.13 & 3.35.14 (note 211 above) 34-35.

[217] Para 3.35.14 to para 3.35.17 (note 211 above).

[218] Para 3.43, para 3.44 & para 3.45 (note 211 above) 38-39; article 2 of the 1948 ILO Convention on freedom of association (which came into force on 4 July 1950) provides that 'workers and employers, without distinction whatsoever, shall have the right to establish and, subject to the rules of the organization concerned, to join organisations of their own choosing without previous authorisation' available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C087:NO . On this issue the report notes that involving self-governing territories on deliberations about whether or not African were to be allowed to join trade unions would be in violation of the 'without previous authorisation' stipulation of ILO Convention 87 – para 3.62.1 – 3.62.4 (note 211 above) 52.

[219] In particular the job reservation provisions of section 77 of the Industrial Conciliation Act, 1956 entitled '[s]afeguard against inter-racial competition' and the regulations under section 4(1)(n) of the Mines and Works Act, 1956 – (note 211 above) 76-77.

[220] Para 3.126.1, para 3.126.3, para 3.129.1 (note 211 above).

[221] Para 3.131 (note 211 above).

objectives.[222] The report thus advocated *inter alia* implementation of the notion of 'equal pay for work of equal value'.[223]

Inquiry was made into industrial relations in the mining sector and part 6 of the commission report revealed findings and made recommendations in regard thereto. As at1979 there were approximately 413 118 African workers, 921 coloured workers, 24 Asian workers and 41 492 white workers employed at the gold mines.[224] The report honed in on section 12(2) of the Mines and Works Act, 1956 which permitted the announcement of regulations reserving certain mining occupations for 'scheduled' people, namely, white people and other specified non-whites, such as Cape Coloureds, but never Africans. In effect this meant that Africans would continue to be prohibited from occupying certain (upper level) jobs in the mining sector indefinitely.[225] This occurred despite the prescribed logic that proficiency ought to 'be based solely on ability to perform the required duties and to assume the concomitant responsibilities'.[226] The situation had been worsened by the fact that a pervasive practice of favouring 'scheduled' race groups in jobs in general, even where regulations did not provide for such, had developed in the mining sector.[227] The report couched the rationale of job reservation issuing from the Act under issues of mine safety 'predicated on the premise that every short-term migrant labourer is entitled to the protection afforded by the competence, experience and local knowledge of his White supervisor, who is considered a permanent employee'.[228] But again the argument suggesting innate ineptness on the part of Africans was advanced, that Africans 'are not sufficiently sophisticated to accept responsibility for safety or to acquire the necessary competence'.[229] It was also argued that national security would be

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[222] Para 3.136 & para 3.137 (note 211 above).
[223] Para 3.137.5; the dissenting view Nieuwoudt contended that:
'3.140.1 Statutory work reservation is merely the maintenance of the traditional work pattern which gradually emerged between the various racial groups in South Africa in accordance with and on the grounds of the standards, background, constitutional development and work area of each racial group.
3.140.2 Statutory work reservation is necessary to ensure inter-racial harmony in the workplace particularly in view of the heterogeneous composition of the labour force and the dangers inherent in unfair inter-racial competition, between workers of different cultural backgrounds and at different levels ofdevelopment.
3.140.3 The protection or entrenchment of minority interests through non-statutory measures is unproven and not likely to have the same measure of success as measures which can be enforced statutorily. For this reason they are unacceptable' – (note 211 above) 80.
[224] Para 2.5 Part 6 'Industrial Relations in the Mining Industry' (note 211 above)) 688.
[225] Section 12(2)(a) Mines and Works Act No. 27 of 1956; para 3.4 Part 6 'Industrial Relations Problems in the Mining Industry' (note 211 above) 701.
[226] Para 3.5.3 (note 211above).
[227] Para 3.5.4 (note 211above).
[228] Para 3.12.6 (note 211above).
[229] Para 3.14.1 (note 211above).

jeopardised by allowing Africans to possess blasting certificates along with attendant explosives expertise.[230]

The gold mines had been handling industrial relations without recourse of forming industrial councils in terms of the Industrial Conciliation Act. As highlighted earlier, the Native (Settlement of Disputes Act)/Black Labour Relations Act 1953 did not apply to the mining sector.[231] The report recommended that it would have been advisable for the State President, by proclamation in the government Gazette, to insert the gold and other mining sectors into the operation of provisions of the Black Labour Relations Act. From the evidence received there was no justification for excluding the mining sector from the ambit of dispute resolution mechanics of the Act; mining was not so peculiar that it had to be left out.[232]

The evidence revealed that following the conclusion of a closed shop agreement in 1937 between the Chamber of Mines and the Mining Unions Joint Committee, manned by white trade unions such as the Mine Workers' Union, bargaining on wages, skills and other matters was conducted primarily between the two interest groups.[233] The Chamber of Mines was the employer organisation registered as such under the Industrial Conciliation Act.[234] The Chamber of Mines engaged as the mouthpiece for its members with the registered unions, white trade unions, on matters of mutual interest such as wages, recruitment and conditions of service regarding employment and industrial relations. Among the eight trade unions, the recognition of which had been fortified by closed shop agreements, the Mine Workers' Union was still the largest in 1979.[235] As no industrial council had been registered, bargaining occurred between the Chamber and unions and also between management and individual unions at workplace level, where matters were localised in nature. Agreements had been concluded by the Chamber and unions on the manner of bargaining in order to resolve disputes. None of these processes were available to African labourers at the mines, rather, '[i]n keeping with the [long

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[230] Para 3.15 Part 6 'Industrial Relations Problems in the Mining Industry' (note 211 above) 711-712.
[231] Section 2(3) of the Act stated the State President could by Gazette proclamation make the it applicable to the mining sector, a determination left wanting – Black Labour Relations Act No. 48 of 1953.
[232] Para 3.20.2 Part 6 'Industrial Relations Problems in the Mining Industry' (note 211 above) 716.
[233] Para 1.19 & para 1.20 Part 6 (note 211 above) 679-680.
[234] By 1979 the Chamber of Mines had 116 members which included 46 gold mines, some diamond, copper and platinum mines as well as 14 financial institutions – para 2.17 (note 211 above) 693.
[235] The union formed two federations which then joined to form the Council of Mining Unions - Para 2.28.2 (note 211 above) 698.

established] monopsonistic system of labour recruiting, wages and all other conditions of employment … [were] fixed centrally and unilaterally by the employers.'[236]

While the majority view of the commission called for the revision and removal of the discriminatory racialised competency provisions of the Mines and Works Act and the Occupational Diseases in Mines and Works Act, it did also propose continued accommodation of the Black Labour Relations Act, 1953 with some modifications.[237] Thus the report did not advocate the removal of racially bifurcated labour relations regulations evinced by the Industrial Conciliation Act of 1956 on the one hand and the Black Labour Relations Act of 1953 on the other hand. The recommendation was for modification of the dispute resolution mechanisms in place at the time.

7.5.2. Amendments to Labour and Compensation Law

7.5.2.1. Industrial Conciliation Amendment Act of 1979

During the time of investigations and staggered reporting of the Wiehahn commission, the Industrial Conciliation Amendment Act of 1979[238] was enacted. It amended section 1 of the principal Act[239] to state that an employee was a person who was legally entitled to reside in the country, excluding those allocated residential status in terms of the Development Trust and Land Act.[240] Furthermore, those belonging to the self-governing territories which had been established within the Republic and formed part of the migrant workforce regulated by labour contracts were excluded from the ambit of employee.[241] Section 4(5) was amended toprohibit

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[236] Para 2.30 (note 211 above) 700.
[237] Modifications such as the removal of the section 2 exemptions of the golds and coal mines from the operations of the Act to allow for works committees and a form of binding plant based bargaining. This even while accepting that although no formal industrial council existed in the mining sector negotiating apparatus of equivalent status (to an industrial council) was in place – paras 3.21.13, 3.20.2, 3.20.3.1 & 3.20.3.40 (note 211 above) 716-717, 722.
[238] Act No. 94 of 1979.
[239] Act No. 28 of 1956.
[240] The Native Trust and Land Act No. 18 of 1936 (renamed the Development Trust and Land Act) followed on from the 1913 Land Act by expanding the reserve land set aside for African use and occupation from approximately 7% to 13% of the South African land mass, while reiterating the unequivocal prohibition of ownership of fixed property outside of these areas it devising a peculiar kind of ownership within the allotted areas. Section 49 described an owner as one who occupied land as the lessee or had a license corresponding thereto, a 'certificate of allotment or other form of title conferring a right of occupation'.
[241] Bantu Authorities Act No. 68 of 1951; Bantu Self-Government Act No. 46 of 1959; section 2 of the Bantu Homelands Citizenship Act No. 26 of 1970 provided that all Africans were to be either citizens of self-governing territories or citizens of a 'territorial authority' within the country. Those attached to territorial authorities, though constrained to exercise their rights within such authority, remained citizens of the Republic. Nonetheless section 5 of the Act stated that citizenship of a territorial authority would be reflected on citizenship certificates.

the operation of a trade union connected to a political party. Section 4(6) continued the stipulation of racially exclusive trade union membership for purposes of registration, except with the consent of the Minister under certain prescribed circumstances.[242] Much of the Act deleted references to white and coloured, and, in a few instances, Bantu employees, replacing them with the more nuanced understanding of employees. Thus the Africans working in largest industries such as the mining industry, which relied on a migrant workforce, and those attached to reserves and self-governing territories were disqualified from trade union membership. The amendment in effect continued to omit most African workers from the definition of an employee, which in turn would ensure that African trade unionism would not become a dominant force in industrial relations.[243]

Section 17(1) repealed section 77, the job reservation section aimed at safeguarding the standard of living white employees. But section 17(2) stated that whatever resolutions had been implemented prior to the repeal of section 77 were to remain 'in force until cancelled in terms of that section as if that section had not been so repealed.' This provision was counterintuitive to the abolition of job reservation. Established job reservation was to continue until the Minister, so advised by the industrial tribunal in terms of a repealed provision of law – section 77, had first to receive a recommendation to which he was prepared to accede to eliminate the hierarchy in place. In order for this piece-meal dismantling of discrimination to commence, the Minister, assuming he was so inclined, would have to initiate an investigation into an identified categorisation, with no guarantee of what the outcome of the board, comprised entirely of white people, would be. Even in the best of circumstances the board might recommend only a partial removal of the racial restrictions.

7.5.2.2. Labour Relations Amendment Act of 1981

The Labour Relations Amendment Act of 1981[244] amended the definition of an employee in Act No. 28 of 1956 in a manner that deleted all the exclusions which were found in all previous

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[242] Section 4A was inserted to give the registrar wide powers and discretion to register or withdraw existing registration of a trade union or employers' organisation, without having to provide reasons – s 4 Industrial Conciliation Amendment Act No. 94 of 1979.
[243] The Act in effect excluded 'migrants, commuters, domestic servants and Africans working on the mines and in agricultural employment' - de Clercq (note 207 above) 75-76.
[244] Act No. 57 of 1981.

revisions of the Act.[245] This definition integrated African workers, without distinction, into the scheme of the Act. Section 4 was revised to read that eligibility of members of trade unions was the only determining factor for registration purposes. In this vein many of the overt barriers to African unionisation in the Industrial Conciliation Act, now renamed Labour Relations Act, were removed. Moreover section 63 of the Act repealed the Black Labour Relations Act No. 48 of 1953 as well as its amendment Acts.

7.5.2.3. Amendments to the Occupational Diseases in Mines and Works Act of 1973

It was the Pension Laws Amendment Act of 1988[246] which eventually abolished the Black Compensation Fund, and by so doing eradicating the Black affairs authority amending the 1973 Occupational Diseases in Mines and Works Act.[247] Section 78(3), which had provided that Africans had to apply for compensation through the Bantu affairs authority of Act 78 of 1973, was substituted by section 94 which was amended incorporate Africans in the provision of lump-sum benefits and pensions. Before, this it was only applicable to white and coloured people. The special award lump-sum in terms of section 101, also until then only applicable to white and coloured persons, was also substituted by section 94.[248] The section 106 lump-sum benefit payable to African workers which was still operational at 1990 increased by twenty percent.[249] It was only in 1993 that the Occupational Diseases in Mines and Works Amendment Act finally removed racial discrimination in the award of benefits.[250] The terms 'Black person', 'White person', 'Coloured person' and 'Coloured female' were deleted from the definition section.[251] Section 37 of the amendment Act repealed chapter 7 of the principal Act which had been titled 'Compensation to Bantu Persons.' It is at this juncture that all racial groupings

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[245] Therefore 'employee' was defined as one: 'who is employed by or working for any employer and receiving or entitle to receive any remuneration, and any other person whatsoever who in any manner assists in the carrying on or conducting of the business of an employer' – s 1 Industrial Conciliation Amendment Act No. 57 of 1981.
[246] Act No. 89 of 1988.
[247] By this time references to 'native' which had initially been changed to 'Bantu' had been renamed 'Black'.
[248] Arrangements on the payment of benefits to Africans by the under by the Bantu affairs commission in terms of sections 108 to 119 were thus all repealed – s 12 Pensions Amendment Act No. 89 of 1988.
[249] Section 9 Pension Laws Amendment Act No. 117 of 1990.
[250] The Occupational Diseases in Mines and Works Amendment Act No. 208 of 1993 was enacted 'to do away with all provisions which differentiate between persons on the ground of their sex or population group; … to make possession of a certificate of fitness by all persons performing risk work in controlled mines and works compulsory; … to change the basis on which benefits are calculated'; by this time the Abolition of Racially Based Land Measures Act No. 108 of 1991 had already abolished the 1913 Land Act as well as the Group Areas Act and was in the process of rationalising law connected thereto.
[251] Section 1 Occupational Diseases in Mines and Works Amendment Act No. 208 of 1993.

working in South African mines and works, as defined by the Act, were fully integrated into a single non-discriminatory compensation scheme with respect to occupational diseases.

7.6. Conclusion

This chapter has recounted the development of South African policy and labour regulation in the apartheid era. The highlighted strategy and law repeatedly etched the grading of human beings as foundational. The manner of inscription acted far from creating standards which, as a general rule, value and attempt to safeguard workers. This evoked the normative stance of undervaluing labour and the labourers performing it. The privileges accorded to white people and to non-white people who were not Africans were an anomaly, rather than representative of the general rule. At the mines Africans undertook the most dangerous and laborious tasks whilst receiving the least remuneration, the least preventative protective entitlements, and, in the event of debilitating injury, disease or death only meagre recompense. Because of this, the legitimacy of the cultural values which have moulded labour law remain at issue.

In South Africa the framework of enforceable entitlements was designed to be availed to few, at the expense of many. This type of structuring has guaranteed exponential profit through 'the partial de-commodification of labor and the establishment of expensive social contracts' because such concession was received by 'a small percentage of … workers.'[252] Fanon has aptly observed the following:

> 'During the period of decolonization the colonized are called upon to be reasonable. They are offered rock-solid values, they are told in great detail that decolonization should not mean regression, and that they must rely on values which have proved to be reliable and worthwhile.'[253]

To this the question ought to be: 'Durable and worthwhile for whom?' When a concerted effort is made to ensure that whatever changes do come do not significantly disrupt Eurocentric normative arrangements, 'what we should never forget is that the immense majority of

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[252] Wallerstein's understanding of the practice of capitalist accumulation is that it rests on who is 'cut in' and who is 'left out' since cutting in the majorities of African workers would leave less than the desired accumulation margin – I Wallerstein 'Response: Declining States Declining Rights?' (1995) 47 *International Labor and Working Class History* 24, 25; B Silver *Forces of Labor: Workers' Movements and Globalization Since 1870* (2003) 21.
[253] Fanon (note 2 above) 8-9.

colonized peoples are impervious to such issues.'[254] Adherence to the colonial binary ensures that when seeking to devise more inclusive conceptions of justice by a simplistic resort to so-called African frames proves to be of limited use in the long term, since this too has tended to occur within predetermined colonial boundaries.[255] This thinking is inadvertently attentive to the 'contested humanity of the African', at pains to disprove the denial of full recognition in European thought.[256] In this vein, much defensive effort is expended seeking to discard the internalised negative perception of Africans. But deeper reflection would produce an outward perception that questions assertions of settled morality or identity, such as race, and look more fully at the spatial (geographic, cultural, economic and political) positioning of its narrators.

Having thus recognised that the hierarchies do not merely exist, but are propped up by violent structures, 'deconstructive reversal' should begin.[257] Disruption of the 'conceptual order', which is the subject of this thesis, begins with examining the array of laws enacted to manage workers for the purpose of subduing them and extracting their labour. Then, having illustrated the unsoundness of the erected binary the laws follow, the next step entails imagining a reversal of roles – deconstructive reversal. This is not the kind of reversal that replaces whites with Africans at the apex. The aim is not to try to replace a debunked white supremacy with an equally counterfeit African supremacy. Rather, the process seeks to imagine that African humanity has not been queried and then devalued in practice.[258] What then? The issue is then to ponder what kind of morality would be obtained. Would the pastoral lives of African communities have been deemed unacceptable? What of access to territory? Would land grabs, dispossession and the prohibition of access to resources have been foundational to governance? These questions lead to numerous others. Only after grappling with these can it finally be asked whether the laws enumerated in this chapter would have been conceived in this way, if at all.

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[254] Fanon argued that '[f]or colonized people, the most essential value, because it is the most meaningful, is first and foremost the land: the land, which must provide bread and, naturally dignity' – Fanon (note 2 above) 8-9.

[255] Indeed Mbembe has counseled against the tendency to represent the prolonged agonies and obfuscations of imperialism as if they encapsulate the entire experience and unavoidable identity of African people, because it disseminates belief in stunted moral fortitude and a fanciful 'motif of darkness' or primitivity that confines African subjectivity to universalised stereotype – Mbembe (note 1 above) 630-633.

[256] Mbembe (note 1 above) 635. African concepts such as Ubuntu have often suffered the fate of being introduced and explained in conjunction and comparison to the right to human dignity as articulated in the Constitution - *S v Makwanyane* 1995 (6) BCLR 665 para 300-317; T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11(2) *African Human Rights Journal* 532-559.

[257] J Derrida *Positions* (1972) (trans A Bass, 1981) 41; J Derrida *Margins of Philosophy* (1972).

[258] If Africans remained ordinary people rather than becoming 'natives', at the behest of the colonial establishment, then the binary also does not exist. That is a reversal which does not follow Eurocentric mythology and method.

The contention is that the overarching Eurocentric structure cannot be understood without spotlighting its tentacles in the above probing of sections of law.

As the reading of law turns to the current post-1994 era, analysis of the reach toward reform continues to query the rationale of law. Thus far, the chapters have recounted labour law which was deliberate in its discrimination. The next chapter considers whether labour regulation has shed its discriminatory tendencies and now aims to achieve equitable incorporation of the majorities it has shunned. Examination of the ideology promoted by the Constitution and selected illustrative labour provisions will be cognisant of the law and reasoning already discussed.

CHAPTER 8

THE POST-APARTHEID HEGEMONY OF LABOUR LAW

8.1. Introduction

The ability to grapple with the damaging effects that the law has visited on Africans shall be the litmus test for whether the constitutionalism of the present South African Constitution is fit for its purpose. Whether labour policy and the law now function to eliminate practices that devalue the subjectivity of African people in this era will be the focus of this chapter. Some questions must be confronted. Has the law remained largely as it was, save for the redaction of racial categories? And, if so, does it matter? Can the goals of transitioning to a more just society still be met under the current arrangements? With constitutionalism what is at issue is the dominant rationale about why colonialism and apartheid have rightfully been maligned. The reasoning propagated has hinged mainly on the withholding of 'an enlightenment set of entitlements based on supposed rights inhering in postulated free selves.'[1] Even-handedness, equality and the achievement thereof has been understood not as making the world equal, but generally as the deserved entitlements of those presumed civilised. Historically, access to rights has been predicated on suppressing those who subsist in the colonial zone of non-being. Characterised as liberal, the logic tends to broadcast an understanding of racial inequity from a totalising white perception.[2] Consequently Fletcher has argued that the South African imagination 'has been held hostage by apartheid' so that while there remains 'great power and moral urgency', the constraints on latitude of thought whittle the available avenues.[3] Therefore this thesis argues that the existence, legitimacy or appropriateness of the promoted rights regime requires some scrutiny.

The discussion to follow charts the historical tenet of constitution law making in South Africa before inquiring into what, in real terms, has been offered to Africans as indicative of repaired respect of humanity, dignity, and the process of equalising the society. The pre-democratisation discussion, confident of the redistributive capacity of corporatist industrial

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[1] P Fletcher *Black and White Writing: Essays on South African Literature* (1993) 12
[2] J Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* 300, 302
[3] Fletcher (note 1 above) 12.

relations model, is inspected. Whether the current structure of industrial relations is in fact able to reverse the strangle-hold on resources by few, such as mining conglomerates, and achieve equitable distribution thereof is measured. Along a similar vein, the utility of collective bargaining under the Labour Relations Act of 1995 is evaluated. The position of African mine workers is assessed using the compensation scheme entitlements accorded for injury, disease and death. The inquiry is into the propensity of aspects of labour law to catalyse a meaningful upgrade of the status of workers. Furthermore, analysis of the applicable money metric utilised for compensation of workplace incidents reflects the extent to which African humanity may have been reasserted in this arena.

8.2. The Ethics of South African Constitution-Making

8.2.1. The Ideology of the South African Constitution

As seen in earlier chapters, South African law endorsed and shored up the ethics of a taxonomy of humanity. Such has been the grounding of legal thought and constitution making. The boundaries of accepted and acceptable human conduct and status were erected in compliance with this overarching grading, which has been painstakingly encrusted and then repeatedly revamped over the centuries-long period under review. It is thus prudent to enquire into whether a similar process of scrupulous erasure of the multifaceted and layered methods of oppression that law has historically wrought has in fact occurred or at least commenced. What follows is discussion of the broadly accepted values and principles of the current South African constitution (the Constitution), 'less as [genuine] statements about the world than as tools and weapons of ideological debate'.[4] Revisiting some origins of canon and its evolution in South Africa will assist to shed light on whether past thinking has been embedded in the Constitution, in the law, as well as in the social and economic positioning of peoples.

Thinking on institutional change, Lindahl has asked, 'How radically are we prepared to conceptualise "disorder"?' since 'disorder is always another order.'[5] Christodoulidis has stated

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[4] For Skinner 'such professed ideals will be *ex post facto* rationalisations, and … the actions … will generally be undertaken for motives of a very different and often inadmissible kind' - Q Skinner *Visions of Politics Volume 1 Regarding Method* (2002) 145, 177.

[5] H Lindahl 'Acquiring a Community: The Acquis and the Institution of European Legal Order' (2003) 9 *European Law Journal* 433-450, 433-434; M Merleau-Ponty *The Prose of the World* (1973) 63; Van Merle ponders the following: 'Has post-apartheid constitutionalism become another spectacle, a monument, a modernist (Enlightenment) construction to the detriment of the ordinary, the memorial, the lives of people that take place in

that, '[i]f we are to claim that a politics of self-determination is possible, then there should be no "structural givens," no elements in the symbolic order that remain structurally inert'; instead revision of the temporal of 'the way that perception is institutionalized, sedimented and historicized in … constitutional culture' is warranted.[6] The quintessential "I" of humanity (subjectivity) must be questioned and open for alteration as well, because it is this that will shape the essence of constitutional perception.[7] So the repetition which has constructed the norms themselves has to be deconstructed through a repetition that reveals the environmental disposition that has assembled the norms – '[d]isentrenched and disaggregated, exclusionary codes are laid bare, inviting attentiveness to what representation misses.'[8] Coupled with illuminating the silenced must be the exposure of the fundamentalisms embedded in the discourse under review. The problem of immovable legends which are intertwined with the historicised development of constitutionalism or *Grundnorms* is marked in the telling of its evolution, the founding episode which has been 'held to be irreversible'.[9] And so the gaze of this overarching norm has disciplined imaginings on feasible futures.

Ramose has traced the norm to the professed 'divine right of conquest' in European law through the centuries as key in legitimising colonialism. The papal bulls which permitted the systematic killing of colonised peoples as a redemptive measure to install Christianity 'defined the spheres of morality and amorality as well as legality and lawlessness for the colonisers.'[10] Regarding British conquest, the principle established in *Calvin's case* (1608) was that since indigenous people were considered heathen in relation to Christianity – 'infidels' – whatever modes of property occupation had subsisted came to an end on colonisation.[11] The matter of *Campbell* has been referenced for pronouncing that:

> '[i]t is left by the constitution to the King's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him.

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the shadows, the private, away from public light?' - K Van Merle 'The spectacle of post-apartheid constitutionalism' (2007) 16 *Griffith Law Review* 411, 412

[6] E Christodoulidis 'Constitutional Irresolution: Law and the Framing of Civil Society' (2003) 9 *European Law Journal* 401, 402

[7] Christodoulidis (note 6 above)402.

[8] Christodoulidis (note 6 above)403.

[9] Christodoulidis (note 6 above)407.

[10] M Ramose 'In Memoriam: Sovereignty and the New South Africa' (2007) 16 *Griffith Law Review* 310-, 314.

[11] Where conquest was over the infidel 'ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against God and the law of nature' - *Calvin's Case* (1608) 7 Co. Rep. la, 17a-17b; 77 ER 377, 397-9 cf: B Morse *Aboriginal Peoples and the law* (1985) 59; P Oliver P Macklem & N Des Rosiers *The Oxford Handbook of the Canadian Constitution* (2017) 925.

> If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield upon the conquest, or retain it upon what terms he pleases. These powers no man ever disputed'.[12]

In 1835, while contemplating the forcible ejection of the Xhosa during incursion, Harry Smith reasoned: 'are the Kaffirs, the possessors of this soil by right of conquest, not to be ejected by the same right? Are they alone, of all the rest of the Aborigines from whom England has wrested her possessions to be thus favoured?'[13] Later on, in the South African matter of *Cook v Sprigg* (1899), and again in the comparable Maasai case of *Ol Ole Njogo v Attorney General*, the legal conundrum of conquest and attendant land appropriation was addressed as follows:

> '[o]f the propriety or justice of the act neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy.[14]

Consequently, the behaviour of the British authorities in colonial sites toward African people had been afforded a measure of impunity by declaration of the Privy Council since courts were absolved of the duty to pronounce upon the legitimacy of action. The appellate court in *Ol Ole Njogo* clarified that the rules of international law only 'applied to intercourse between civilised states' and in the event of Britain interacting with uncivilised peoples they 'are not subject to a law of which they never heard'.[15] The court emphasised as trite in law that 'the King can neither do nor authorise a wrong.'[16] The reasoning in *Ol Ole Njogo* is similar to that of the Appellate Division in *Mokhatle & Others v Union Government (Minister of Native*

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[12] *Campbell v. Hall* (1774) 1 Cowp. 204, 98 E.R. 1045 (K.B.); G Cleve 'Mansfield's Decision: Toward Human Freedom' (2006) 24 *Law and History Review* 665, 668-669; M Ramose 'In Memoriam: Sovereignty and the New South Africa' (2007) 16 *Griffith Law Review* 310-329.
[13] A Lester *Imperial Networks: Creating Identities in Nineteeth-century South Africa* New (2001) 79.
[14] *Cook v Sprigg* [1899] AC 572, 579; *Ol Ole Njogo and Others versus The Attorney General Civil Case* No. 91 of 1912 (E.A.P. 1914), 5 E.A.L.R. 70; *Secretary of State in Council for India v Kamachee Boye Sahaba* (1859) 15 ER 9, 13 Moo PC 22, 86; *Doss v Secretary for India in Council* (1875) L. R. 19 Eq. 534.
[15] *Ol Ole Njogo* (note 14 above) 91-92 cf: J Gathi 'Imperialism Colonialism and International Law' (2007) 54 *Buffalo Law Review* 1013, 1040.
[16] Ibid 1044.

Affairs) regarding the placement of the Governor-General as 'supreme chief' over Africans.[17] The court held that 'elementary justice, universally observed by the civilised world' had been defined and was applicable to societies at 'advanced stage[s] of social development', which discounted the Barolong – an indigenous African society.[18] As demonstrated in earlier chapters, the constitutional validity of South African law has been premised on this type of suspension of conventional European morality, as a precondition for lawfulness, in relation to African people, with the resolve never to query their deliberate diminution and resultant maltreatment.[19]

Madlingozi has charged the current legal framework as having used western human rights norms to solidify the pre-existing 'anti-black' socio-economic structure of 'patronage, appropriation, and repression' because Africans, except for a co-opted emergent bourgeoisie, have remained unseen and thus omitted by the frame devised.[20] This means that it has only been to the extent of adherence to the set controlling *Grundnorms* that pluralism or diversity may be accommodated in the constitutional arrangements. The rhetoric has recast the conventional understanding of African majorities 'not [as] casualties of historical structural societal problems but … because "the past is in the past" [the Africans] … themselves are the problem.'[21] Similarly, for Modiri the perceived 'faultless[ness]' of 'Western liberal democracy' lies at the heart of the misguided conception of constitutionalism in South Africa.[22]

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[17] *Mokhatle & Others v Union Government (Minister of Native Affairs)* 1926 AD 71.
[18] Ibid 79.
[19] Wolfe explains that 'behind the screen of the frontier, in the wake of which, once the dust has settled, the irregular acts that took place have been regularized and the boundaries of White settlement extended. Characteristically, officials express regret at the lawlessness of this process while resigning themselves to its inevitability' – P Wolfe 'Settler colonialism and elimination of the native' (2006) 8 *Journal of Genocide Research* 387-409, 392. Likewise Christodoulidis has observed that '[l]aw … allows the casting of *conflicts as resolvable* and gives us norms and procedures to do just that'; and so 'indeterminacy becomes settled *by* the system but only *for* the system' – Christodoulidis (note 6 above) 413-414.
[20] A constitution that 'perpetuates the monoculture of western modernity in terms of which time unfolds in a linear, evolutionary, and homogenous manner, and thus rendering invisible those groups that exist according to the times of "non-western" cosmologies, epistemologies and legalities' has been installed - T Madlingozi 'Social Justice in a time of neo-apartheid constitutionalism: critiquing the anti-black Economy of Recognition, Incorporation and Distribution' (2017) *Stellenbosch Law Review* 123, 125-126; T Madlingozi 'On Settler Colonialism and Post-Conquest Constitutionness: The Decolonising Constitutional Vision of African Nationalists of Azania/South Africa' available at https://www.academia.edu/33747352/On_Settler_Colonialism_and_Post-Conquest_Constitutionness_The_Decolonising_Constitutional_Vision_of_African_Nationalists_of_Azania_South_Africa, accessed on 12 January 2020.
[21] Madlingozi (note 20 above) 126.
[22] Modiri has reflected on the veneration of the Constitution which is treated as if embodying '*supreme rationality*' - J Modiri 'Race, history, irresolution: Reflections on *City of Tshwane Metropolitan Municipality v Afriforum* and the limits of "post"- apartheid constitutionalism' (2019) *De Jure Law Journal* 27-46, 32; for Modiri 'defining the social and political life of a polity mainly through constitutions, constitutionalism and constitutionality represents a closure of politics, rather than its opening – since in binding a political community together through its sovereign

In this arena, 'democratic' is interchangeable with the notion of 'civilisation' that so marked the colonial-apartheid period, much like the 'native question'. The intent, now seen as benign, has been to introduce Africans into the polity in a way that does not dislocate the privilege of the elite.[23] The limited incorporation of elite Africans continues to reflect 'elite minority rule' rather than the triumph of the *demos*.[24]

The understanding of historical injustice has been limited largely to a situation that may be cured chiefly through the overt erasure of the withholding of entitlements from Africans.[25] This means that the Constitution has been premised on the legitimation of the colonial-apartheid polity. It has disregarded genuine 'restoration of subjugated indigenous sovereignties' and the return of appropriated material resources – *the* pre-requisite of decolonisation.[26] Ramose described the thinking underpinning the slogan *Izwe Lethu* – that the forcible territorial and material dispossession of African people through colonialism has not erased their legitimate claim to title – hence the justice imperative 'Our land'.[27] Thus, where change or transformation does not first address the unsettled issue of righting past wrongs, such as 'sovereign title to territory', and the institutionalised sustained material and psycho-social deprivation of African people which lasted for hundreds of years, it is superficial.[28] Since the humanity, or reputed subordinated humanity, of African people is a core tenet of colonialism and Eurocentrism, the assertion of the right to inhabit the world as African must found any future credo – an unconstrained African existence as foundational resistance to racism.[29] Under

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devices, a constitution and its devout proponents must also be blind to its own failures and exclusions', this is more so particularly since it (the Constitution) has been 'made in the image of Western liberal democracy' – Modiri (note 2 above) 304-305, 307.

[23] Madlingozi (note 20 above) 127; P Denis 'Abbot Pfanner, the Glen Grey Act and the Native Question' (2015) 58 *Southern African Historical Journal* 271*,* 271.

[24] The multitudes continue to subsist beyond legal recognition and have no access or influence on the structures of governance – J Ranciere 'Introducing Disagreement' (trans S Corcoran, 2004) 9 *Angelaki Journal of the Theoretical Humanities* 3-8.

[25] Madlingozi (note 20 above) 131.

[26] Ramose (note 10 above) 3119-320; the Constitution is problematic because: '(a) it leaves the original iniquities of colonialism – land dispossession and subjugation of indigenous sovereignties – unexpiated; (b) it reconfirms the myth of the ontological and epistemological superiority of colonisers since it is the colonisers that get to do the work of recognising the "previously" unrecognised; and (c) it reasserts that most insidious beast of Western modernity and colonialism, the politics of identity' – Madlingozi (note 20 above) 134.

[27] M Ramose '"To whom does the land belong?" Mogobe Bernard Ramose talks to Derek Hook' (2016) 50 *Psychology in Society* 86-98; Wolfe has explained the following: '[w]hatever settlers may say— and they generally have a lot to say—the primary motive for elimination is not race (or religion, ethnicity, grade of civilization, etc.) but access to territory' – Wolfe (note 19 above) 388.

[28] Ramose (note 27 above) 93.

[29] Ramose argues that African humanity and intrinsic dignity does not need to be either created or resuscitated because it has always been there, it merely needs to be made visible in the midst of the sustained detractions – Ramose (note 27 above) 94; N Mahao 'O se re ho moroa "morao towe!" – African jurisprudence exhumed' (2010)

an African philosophical understanding of *Ubuntu*, Ramose described '[j]ustice as the restoration of equilibrium', and since the purpose of law ought to be to 'actualize' justice, 'restitution and reparations' for African people must therefore be called for.[30] For Africans, justice entails '*molato ha o bole*', meaning that 'culpability does not prescribe'.[31] Of the South African Constitution, Ramose noted that it was construed precisely within the racialised patterns it claimed to disavow.[32] But it is 'the reversal of the dehumanizing consequences of colonialism' that ought to have foreshadowed the constitution-making process.[33] Therefore Nkosi has aptly said that the post-1994 South Africa 'polity represent literally "an unexamined life"'.[34]

Mutua has also observed that the South African Constitution has ratified and cemented the segregation of apartheid, meaning that rights will more likely be 'deployed to protect the powerful' rather than to elevate the marginalised.[35] This shortfall closed the door to anything more than minimal inroads into the systematised power dynamics – by according notional rights which are inapplicable for many Africans.[36] Sibanda alluded to the systematised poverty which pervades the majority communities of South Africa that historically have been deliberately marginalised.[37] The manner of current constitutionalism has been charged with

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XIII CILSA 317-329; N Mahao 'Can African Juridical Principles Redeem and Legitimise Contemporary Human Rights Jurisprudence?' XLIX *CILSA* 455-476.

[30] M Ramose 'An African Perspective on Justice and Race' (2001) *Polylog* available at https://them.polylog.org/3/frm-en.htm, accessed on 20 December 2019; Mahao 'Can African Juridical Principles Redeem and Legitimise Contemporary Human Rights Jurisprudence?' (note 29 above) 466. Madlingozi urges the need to 'Re-member Africa', not as reviving a fabled pre-colonial but as strategy 'to enable historically conquered peoples to reclaim belonging in the world' – T Madlingozi *Mayibuye iAfrica? Disjunctive Inclusions and Black Strivings for Constitution and Belonging in 'South Africa'* (unpublished PhD thesis, University of London, 2018) 25, 126-160.

[31] This is a Sesotho, Sepedi and Setswana justice maxim 'Molato ga o bole, go bola nama: A wrong does not go bad, it is the … [flesh] that goes bad' – *Tholego and Another v Tholego* 2008 (2) BLR 125 (HC); *Lijo v Nkhasi* (CIV/A/15/84) [1985] LSHC 50.

[32] Ramose (note 27 above) 95.

[33] Ramose (note 30 above); L Nkosi 'The ideology of reconciliation: its effects on South African culture' in L Stiebel & M Chapman (eds) *Writing Home: Lewis Nkosi on South African Writing* (2016) 240.

[34] L Nkosi 'The republic of letters after the Mandela republic' (2002) 18 *Journal of Literary Studies* 240-258; Chanock has asked: 'How far can the existing practices and means stretch? … how far can they continue to be useable as part of a fundamental rejection of the order of which they were part?' and also commented that '[l]imitations on our ability to imagine the future may falsify all prevision' - M Chanock *The Making of South African Legal Culture 1902-1936: Fear Favour and Prejudice* (2001) 524.

[35] Indeed '[f]or white beneficiaries of apartheid … the rights based state, with its independent courts and multiple rights commissions and watchdogs, is a golden opportunity to protect most of their privileges and legitimize the results of apartheid' - M Mutua 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 *Harvard Human Rights Journal* 63, 68, 83; I Gassama 'Reaffirming Faith in the Dignity of Each Human Being: The United Nations NGOs and Apartheid' (1996) 19 *Fordham International Journal* 1464,1540

[36] Mutua (note 35 above) 69-71.

[37] S Sibanda 'Not Purpose-Made! Transformative Constitutionalism Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22 *Stellenbosch Law Review* 482.

complicity in this happenstance. Aligned with this is the understanding that constitutionalism 'is an expression of choices made by those [who have positioned themselves] collectively responsible for establishing a particular system of constitutionalism.'[38] And so the coined 'transformative constitutionalism'[39] has been queried.[40] Madlingozi proposes the preferable approach thus:

> '[i]f post-settler colonialism's foundation law and its accompanying processes are to be genuninely constitutive enterprises, rather than being a grafting onto the rotten and "invisibilising" foundations of the settler-created house, they must at the same time aim to de-constitutionalise the settler-created world, its state form and underwriting normative structures.'[41]

This has not yet occurred and South African constitutionalism continues readily to accede to established colonial hegemony.

8.2.2. Inside the Constitutional Text: Rule of Law and Human Rights

It has been established that the powerful decide on freedoms, the content of such liberties, and the extent to which some must yield to others. Law is the product of these determinations. Law decides which scenarios are 'normatively justified'.[42] Hence perception is shaped largely by the philosophies which buttress legal representations of liberty, fairness and success. This encloses political dialogue in restrictive patterns that allow the validation of existing oppressive structures as indispensable.[43] Pugliese has observed astutely that the rule of law circumscribes the subject matter of the debatable in that it 'inscribes the limits of its exteriority, beyond which lies cultural mutism or unintelligibility.'[44] Thus institutions have been assembled to manage these legitimated boundaries in a manner that suppresses or discards non-compliance –

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[38] Sibanda (note 37 above) 484.
[39] Albertyn and Goldblatt have described transformative constitutionalism as bring to fruition 'a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines. The … eradication of systemic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality … [and] the development of opportunities which allow people to realise their full human potential within positive social relations' – C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248, 249
[40] Sibanda (note 37 above) 486.
[41] Madlingozi (note 20 above).
[42] J Singer 'Anti Anti-Paternalism' (2015) 50 *New England Law Review* 277, 286.
[43] K Klare 'The Public/Pricate Distinction in Labor Law' (1981) 130 *U. Pa. Law Review* 1358.
[44] J Pugliese 'Rationalized Violence and Legal Colonialism: Nietzsche "contra" Nietzsche' (1996) 8 *Cardozo Studies in Law and Literature* 277; B de Sousa Santos "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges" (2007) 30 *Review* 45.

'nullifying the contestatory possibilities of prior claims and alternative systems of law.'[45] The idea of the rule of law is founded on the deployment of coercion, sanctioned violence which began by delegitimising African communal arrangements as savage. At best, African law (or African custom) was to be tinkered with to make it applicable in the management of these so-called lesser beings, as they perpetually progressed toward betterment.[46] As demonstrated in earlier chapters, in South Africa the rule of law has been employed to justify acts of forcible enslavement, theft, kidnapping, murder, territorial dispossession, corporeal deprivation and the degrading of Africans.

Nonetheless, Eurocentric law, though directly connected to colonial legalism, has been presented as '*meta-legal*' (transcendent); as though having the prerogative 'to evaluate other systems aspiring to the status of law.'[47] The confirmation of believed omniscience in western perspectives is evident in the installation of the rule of law as a founding value of the Constitution.[48] The Constitution has declared itself as supreme law, in the main immutable, effectively as all-seeing, all-knowing, and universally applicable.[49] Yet an examination of South African realities belie this claim since the tabulated human rights entitlements continue to elude those subsisting below its threshold of recognition.[50] Ramose asserted that constitutional supremacy, which in effect imposes and ossifies '*supreme rationality*, is an indefensible conception of justice for South Africa.[51] *Ubuntu*, a key component of African ethics, has been grounded on the understanding that 'motion is the principle of being' meaning that change is ever-present and inevitable, in stark contrast with the transcendence, fixedness and immutability peddled by constitutionalism.[52] A constitution should be 'open to change and not … block it by imposing an arbitrary finality' on matters which cannot be resolved in finite terms.[53]

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[45] Pugliese (note 44 above) 278; J Comaroff & J Comaroff 'Colonialism Culture and the Law: A Foreword' (2001) 26 *Law and Social Inquiry* 305, 309-311.
[46] Chanock (note 34 above).
[47] Pugliese (note 44 above) 280; D Ndima *Re-Imagining and Re-Interpreting African Jurisprudence Under the South African Constitution* (unpublished LLD thesis, University of South Africa, 2013) at 109-110.
[48] Section 1(c) Constitution of the Republic of South Africa, 1996.
[49] Section 1(c) & section 2 Constitution of the Republic of South Africa, 1996.
[50] Madlingozi (note 20 above).
[51] M Ramose 'Ubuntu: Affirming a Right and Seeking Remedies in South Africa' in L Praeg and S Magadla (eds) *Ubuntu: Curtiling the Archive* (2014) 133; Modiri (note 22 above) 32-33.
[52] Note 51 above.
[53] Note 51 above.

The inscribed human rights of the Constitution have been defended as universal ideals for the regulation of human conduct, promoted as the most preferable option. Broadly, human rights claim to be premised on the belief in the intrinsic co-equal value of human beings. Yet Darrow noted that people are given 'liberty so far as the law goes – and that is only a little way. Freedom comes from human beings, rather than from laws and institutions. … The law has made … [the Negro] equal, but man has not.'[54] The contradictory lived experiences of many African people appear at odds with the professed reality of enforceable human rights. Hence Douzinas has reminded that rights were at first conceived for the rich, in order to secure property, and the creation of a legal personality was for business entities in order to advance capitalism.[55]

In particular the notion of the achievement of equality has been inscribed as a foundational norm of the Constitution.[56] But from the outset the Constitution resigned itself to the continued generalised material poverty of Africans for the foreseeable future because, under the Constitution, the realisation of equality was conceived within the limits of the entrenchment of pre-1994 private property entitlements.[57] In this way the Constitution sidestepped the necessity to delegitimise the principles established in *Calvin's Case*, *Cook v Sprigg* and *Mokhatle*, which 'abrogated' *ipso facto* the modes of territorial occupation and the customs of Africans as 'against God and the law of nature'.[58] *Molato ha o bole* means that the land grabs and material dispossesion on which property entitlements were established created an

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[54] *Congressional Record: Proceedings and Debates of the 85th Congress First Session Volume 103 Part 7* (1957) 9024; when identifying the fictions of law Benthan famously stated that '…the supreme rulers have given the name of wrong … [r]ights are, then, the fruits of the law, and of the law alone. There are no rights without law—no rights contrary to the law—no rights anterior to the law.' Thus there were no immutable truths to be discerned from rights - J Bowring (ed) *The Works of Jeremy Betham* Vol III (1843) 221 available at https://oll.libertyfund.org/titles/bentham-the-works-of-jeremy-bentham-vol-3, accessed on 21 November 2019; L Rosenblatt *Buckets From an English Sea: 1832 and The Making of Charles Darwin* (2017) 122.

[55] Douzinas has dismissed credulity in mythical beings of the western world: knowledgeable, autonomous, classless, genderless, who think deeply and supposedly analytically, without biases to cloud their judgment – C Douzinas 'The End(s) of Human Rights' (2002) 26 *Melbourne University Law Review* 447, 452.

[56] Section 1 Constitution; section 9(2) was installed to facilitate progressively the achievement of equality for those who have over many years suffered the abjection of colonialism and apartheid. The Employment Equity Act No. 55 of 1998 was enacted to carry forward the constitutional mandate of eliminating discrimination and for a time advantaging previously disadvantage populations in the workplace.

[57] The section 25 preservations of private property entitlements, that may only be involuntarily alienated on payment of compensation, must be read with the notional award of access to land, housing, education, health care, food, water and social security for which progressive attainment by the deprived majority has been envisaged – sections 25, 26, 27 & 29 the Constitution of the Republic of South Africa, 1996. Section 25 has ratified as constitutional the land grabs and withhold of other material resources occasioned by colonialism. A major objective of the Consitution has been 'preservation of white people's material, phychic and cultural interests and the assimilation of black elites into' their rulership – Madlingozi (note 20 above) 8.

[58] Note 11 above, note 12 above, note 14 above.

expanding series of unjust arrangements that have generated obligations of restitution. These culpabilities have not prescribed, and justice, understood as the pursuit of equilibrium – *ubuntu*, requires restoration of 'sovereign title to territory.'[59] Since the forcible territorial and corporeal deprivation of African people has not erased their legitimate claim to title, *Izwe Lethu*, the section 25 property clause of the Constitution, represents the nullification of 'the contestatory possibilities of prior claims and alternative systems of law.'[60]

The state governs within a structure that has limited its access to resources, and is charged by the Constitution with the mammoth task of gradually alleviating the distress of most citizens.[61] With this in mind the next part proceeds to describe the process of constructing the post-apartheid industrial relations model as well as the manner in which it has operated thus far. The policy and legislative framework that has been established to administer labour relations is examined. The framing of interactions between organised labour, capital and the state has had significant effects on the position of workers and how influential they might be in matters affecting their wages and working conditions.

8.3. Assembling Post-Apartheid Labour Relations

8.3.1. The Rationale for Corporatism

As is evident from the discussion so far, imposed colonial ideas have remained largely unchallenged. This includes a lack of antipathy toward the very notion of work, which has been conceptualised and developed by the colonial extraction agenda, in the discipline of labour law. Law and policy makers have accepted that the industrial capitalism framed and developed throughout colonialism and apartheid inevitably had to be ratified.[62] Thus the measures of what work is, work production, and the grading of work which deliberately rendered the so-called 'unskilled' laborious occupations of Africans the least value and therefore worthy of the least remunerations possible, remain intact. Alternative notions of work, recreation and working

[59] Note 30 above.
[60] Note 45 above..
[61] The Constitution has charged the state with the task of ensuring, within available resources, the progressive realisation of equality, property , housing, health care, food, water and social security – s 9(2), s 25, s 26, s 27 Constitution of the Republic of South Africa, 1996.
[62] The statement is made cognisant of the constraints of developmental and other participation in the global structures of capitalism and governance – the structural adjustments of the International Monetary Fund (IMF) and World Bank – conditions for supposed financial bail-outs. The contention is that the global (in reality western) neoliberal capitalism has helped to maintain the reach of colonial influence in SouthAfrica.

hours have not been explored seriously from the perspective of the most vulnerable worker, with a view to dispelling the pervasive notion of African idleness consequent on perceived lingering backwardness that apparently rears its head when draconian controls are relaxed.[63] It should therefore not be surprising that the labour laws, save for some redactions, continue to resemble its colonial and apartheid forerunners closely. Of greater concern is the realisation that the deepening of proclaimed post-apartheid reform appears to be solidifying patterns of institutionalised large-scale deprivation.

In South Africa the wealthiest, most influential and labour intensive component of business has been the mining sector, the Minerals Energy Complex (MEC). This sector has opted to invest in overseas territories rather than domestically, resulting in a sustained 'capital flight' since the 1970s.[64] Therefore, although a corporation such as Anglo-American has owned much of the Johannesburg Stock Exchange (JSE) – a reputed seventy percent in 1996 – it is also possibly 'the single largest foreign investor in the United States', along with owning shares in numerous other South African companies and financial institutions.[65] The MEC combined with other corporate entities continues to wield substantial economic power compared to their negotiating counter parts, labour and the state. Hence, in the late 1980s and early 1990s, as formal apartheid was winding down, the significant influence of capital on industrial relations was evident.[66] By 1992 the 1.2 million member strong Congress of South African Trade Unions

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[63] In 2015 the South African president is reported to have claimed that South Africans had revealed themselves as lazy since the fall of putative colonialism (apartheid). President Zuma, as he then was, remarked that 'people don't work fast, people say they are free. The white man has left, they are now free' - news24 'Zuma complains about lazy South Africans' (25 March 2015) available at https://www.news24.com/SouthAfrica/Politics/Zuma-complains-about-lazy-South-Africans-20150325, accessed on 13 August 2019; Biko has described the lingering damaging 'black equals lazy and incompetent … white equals all-knowing and powerful' belief system – H Biko 'Racist stereotyping threatens South Africa' (19 April 2017) available at https://mg.co.za/article/2017-04-18-racist-stereotyping-threatens-sa; F Barchiesi 'The Violence of Work: Revisiting South Africa's "Labour Question" Through Precarity and Anti Blackenss' (2016) 42 *Journal of Southern African Studies* 875; J Comaroff & J Comaroff *Of Revelation and Revolution: The Dialects of Modernity on a South African Frontier* Volume Two (1997) 119.

[64] Z Magubane 'The Revolution Betrayed? Globalisation, Neoliberalism and the Post-Apartheid State' (2004) 103 *The South Atlantic Quarterly* 657-671, 659-660

[65] B Fine and Z Rustomjee *The Political Economy of South Africa: From Minerals-Energy Complex to Industrialisation* (1996) 10.

[66] In response to increasingly combative and unstable employment relations the 1988 Labour Relations Amendment Act, spurred by business persuasion of the government, withdrew some powers from newly recognised African trade unions. In particular the Act in effect allowed unfair dismissals and retrenchments while also curtailing the right of workers to engage in industrial action or stay-aways. The Labour Relations Amendment Act No. 83 of 1988 redefined an unfair labour practice to exclude the dismissal of an employee by an employer, where an employer failed to hold an enquiry if the industrial court judged that the such employer could not reasonably have been expected to hold such hearing under the circumstances (s 1(h)(a)(ii) & (iii)) and the selective re-employment of workers in certain instances (s1(h)(a)(iv)); the act also limited the frequency permissible for employees to embark on strike action (s 1(m)). Furthermore, cognizant that trade unions could be racially

(COSATU) had positioned itself as a strategic partner in endeavours to adjust the legal and economic framework to advantage and advance the interests of trade union affiliated workers and workers in general as much as possible.[67] A notion of 'strategic' unionism, aiming to participate more directly in governing structures in order to achieve desired change, gained ground.[68] This notwithstanding, labour failed to dissuade the propagation of a neoliberal economic trajectory. Cope argued that the basis of reform was a more benign 'class compromise with capital.'[69]

At the time the criticism that corporatism leads to the profit-making desires of capital being prioritised by the state ahead of the needs of workers was largely dismissed.[70] Maree had faith that corporatist arrangements would negate the dominance of a single actor and noted Cawson's assertion that in advanced industrialised countries trade unions were significant actors in governance, that in corporatism labour is not a junior partner, and that the relationship between unions and ruling parties becomes 'mutually interactive with each influencing the other's power.'[71] Some mention was made of the possibility that corporatism, in the form of singular centralised union federations, could be utilised as an instrument to 'restrain workers from acting militantly' in response to circumstances of dire poverty, but on the whole there was confidence that parityof influence could be achieved in South Africa.[72] Nonetheless, with

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exclusive the Amendment Act stipulated that for an assessment of the representativeness of a union, a pre-requisite for recognition as a bargaining agent and the grant of organizational rights, the employer had to take account only the employees that could gain membership to the particular union (a special concession on the matter of numeric representativeness) - P Benjamin & J Campanella 'Labour Law' (1991) *Annual Survey* 327-35. The swift protest of the Congress of South African Trade Unions (COSATU) and other federations led to the concession that future changes to the Act would require extensive consultation which would include representatives from labour; the Laboria Minute. Consultation between primarily African labour representation, business and the state yielded the 1991 Labour Relations Amendment Act (Act No. 9 of 1991) which largely removed the impugned prohibitive stipulations that had been introduced in 1988. J Maree 'Trade Unions and Corporatism in South Africa' (1993) 21 *Transformation* 24-54.

[67] C Bassett 'Labour and Hegemony in South Africa's First Decade of Majority Rule' (2005) 75 *Studies in Political Economy* 61.

[68] Von Holdt described 'a strategy for far reaching reform of the state, of the workplace, of economic decision-making and of civil society. …[D]riven by a broad based coalition of interest groups, at the centre of which is the labour movement' – K Von Hold 'What is the future of labour?' (1992) 16 *South African Labour Bulletin* 30-37.

[69] A Cope 'Labor in Transitional Societies: Conflict Democracy and Neoliberalism' (2014) 17 *The Journal of Labor and Society* 474.

[70] A corporatist system weaves cooperation between labour, capital and the state seen as *the* three representation of interests groups, then arranges labour 'into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, … granted a deliberate representational monopoly … in exchange for observing certain controls' - P Schmitter 'Still the century of corporatism?' (1974) 36 *The Review of Politics* 85-131; Maree (note 66 above) 39.

[71] A Cawson *Corporatism and Political Theory* (1986) 12 cf: J Maree 'Trade Unions and Corporatism in South Africa' (1993) 21 *Transformation* 26-54, 39

[72] Maree (note 66 above) 46.

hindsight, the following possible drawbacks are somewhat predictive in the South African scenario that such arrangements:

- lead to the bureaucratisation of trade unions, that is, they undermine trade union democracy;
- are implemented at the expense of the working class so that the state and capital benefit, but it is workers who have to pay for it with declining real wages, closures and soon;
- result in the incorporation of trade unions, and trade unions are then demobilised and co-opted into state structures;
- restore an ailing capitalism rather than transforming it into socialism; and
- worsen the dualism that exists in the South African working class between those who are employed in the formal sector belonging to trade unions versus those who are unemployed or working in the informal sector unrepresented by the unions.[73]

Van der Walt was sceptical of the view of that trade unions could use their access to structures of governance and influence decision making to reform the ugly aspects of capitalism.[74] This 'strategic unionism' was meant to increase worker participation in industrial management and improve overall productivity, arguably as a step toward socialist democracy.[75] But for business, the embracing of corporatism forecasted less volatility, and more manageable industrial relations which bode well for commerce. Van der Walt criticised the use of first world countries such as Sweden as exemplars for overall raised economic conditions engendered by corporatism.[76] Apart from the fact that such countries had more advanced capitalist economies, the literature relied upon to extrapolate a correlation between corporatism, quiescent labour and material wealth has been shown to have ignored contrary situations in other countries.[77] Centralised sectoral bargaining has been shown to mollify,

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[73] Maree (note 66 above) 48-49; Kim and van der Westhuizen observe that '[a]long with the high unemployment rate, the South African labour market has been fragmented, now consisting of "insiders" and "outsiders" … [l]arge numbers of the population remain outside of the corporatist institutions, and they do not benefit from agreements made under corporatism.' – Y kim & J van der Westhuizen 'Why Corporatism Collapsed in South Africa' (2015) 50 *Africa Spectrum* 94.

[74] L Van der Walt 'Against Corporatism: The Limits and Pitfalls of Corporatism for South African Trade Unions' (1997) *African Studies Association of South Africa Third Biennial International Conference* (8-10 September 1997).

[75] E Webster 'Defusing the Molotov Cocktail in South African Industrial Relations: The Burden of the Past and the Challenge of the Future' (1995) (unpublished paper, University of the Witwatersrand).

[76] Van der Walt (note 74 above) 8; Maree (note 66 above) 30.

[77] Van der Walt (note 74 above) 9.

ignore or overwhelm dissent in the rank and file.[78] In this context, bargaining tends to be wedded to the wieldy legislative procedures, deviation from which is quashed by securitised state measures rather than conciliation.[79] Van der Walt did dispute that there could ever be an approximation of equal partnership in corporatism because:

> 'on the one hand, capital not only owns and controls the predominant part of the means of production, including media and key sources of information, but has the extremely sympathetic ear of a State apparatus financed by taxes on the accumulation process and loans raised on the financial market; on the other hand, labour's power is restricted to its ability to work and its negative ability to disrupt production.'[80]

Van der Walt exhorted that corporatist partnership connote the discreet capitulation of labour, subordinating itself to the vagaries of capital criteria – 'as the very system which played a key role in immiserating the South African working-class is seen now as the saviour of the Black impoverished!'[81]

Nonetheless, a three-way alliance was formed between the African National Congress (ANC), the South African Communist Party (SACP) and the 1 317 000 member strong COSATU shortly before the 1994 elections.[82] Arguably the post-apartheid 'reintroduction' of an ostensibly rehabilitated South Africa into world markets tipped the scales of power favourably toward western multinational commercial titans, further diminishing the reach of labour.[83] Gibson described an 'elite pact' between white bounty and the fledgling black bourgeois of the ANC, founded on the implementation of widespread neoliberal commercialism.[84] This in turn consigned the possibility of attaining the aspirational

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[78] P Madlala C Govender 'Current collective engagement stakeholder strategies for South African labour relations' (2018) *South African Journal of Human Resource Management* 1, 2.
[79] Van der Walt (note 74 above) 12.
[80] Van der Walt (note 74 above) 13.
[81] Van der Walt (note 74 above) 14.
[82] F O'Connor 'The Marikana Massacre and Labor Protest in South Africa' in D Porta (ed) *Global Diffusion of Protest* (2017) 118.
[83] Cope (note 69 above) 475; V Satgar 'Neoliberalized South Africa: Labour and the roots of passive revolution' (2008) 41 *Labour, Capital and Society* 40, 52 – 'a transition from monopoly capitalism to transnationalized domestic capitalism.'
[84] N Gibson 'What Happened to the Promised Land: A Fanonian Perspective of Post-apartheid South Africa' (2011) *Antipode* 54; Neocosmos charges this 'politics of grabbing and enrichment [with] … equating private enrichment with the public good and quick profit with development' M Neocosmos 'Politics of Fear and Fear of Politics: Reflection on Xenophobic Violence in South Africa' (2008) *Journal of Asian and African Studies* 587

constitutional rights to the caprices of 'a free-market, an authoritarian economism of cost recovery backed by the state's force.'[85]

8.3.2. 'New' Corporatist Realities

Albeit in a new guise, the advent of democracy solidified the longstanding corporatist industrial relations of South Africa. The National Economic Forum (NEF), established by the National Manpower Commission of the 1980s and 1990s Labour Relations legislation morphed to the National Economic Development and Labour Council (NEDLAC) in 1995.[86] Government, business, organised labour and civil society organisations may in terms of the NEDLAC Act be represented on NEDLAC, a council whose mandate is to:

- strive to promote the goals of economic growth, participation in economic decision-making and social equity;
- seek to reach consensus and conclude agreements on matters pertaining to social and economic policy;
- consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament;
- consider all significant changes to social and economic policy before it is implemented or introduced in Parliament; and
- encourage and promote the formulation of co-ordinated policy on social and economic matters.[87]

The advisory capacity of the NEDLAC stakeholders would then strive for consensus in socio-economic planning as well as legislation. However, this could not supersede the designated constitutional functions of the legislature and the executive. Indeed, the earlier optimism of Adler and Webster that the 'consensus between social partners would be difficult for parliamentarians to disregard', has not proven on the whole warranted.[88] Labour has, for the most part, been unable to insist on participating in the formation of or even preventing the

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[85] Gibson (note 84 above) 60.
[86] National Development and Labour Council Act 35 of 1994; K Gostner & A Joffe 'Negotiating the future: Labour's role in NEDLAC' (1998) *Law Democracy & Development* 131-151.
[87] Section 5 National Development and Labour Council Act No. 35 of 1994
[88] G Adler & E Webster 'Exodus without a map? Participation, autonomy and labour's dilemmas in a liberalising South Africa' (Unpublished Historical Paper, University of Witwatersrand, 1996) 16; Kim & van der Walt (note 73 (above).

implementation of the neo-liberal economic scheme dubbed GEAR, the Growth Employment and Redistribution strategy of 1996. This initiative courted the business community in the hope of attracting investment while simultaneously halting anticipated programmes of radical socio-economic reform.[89] COSATU did criticise the neoliberal slant of GEAR in the Draft Programme for Alliance document, instead recommending continuation of social reform plans similar to the abandoned Reconstruction and Development Programme (RDP). Apart from a tepid response, following protracted dialogue that GEAR would not be cast in stone, GEAR did remain firm economic policy.[90]

Neoliberal notions of capitalism were held out to be the viable option for sustained and rehabilitative economic growth. Neoliberalism 'centres on free markets: the state is not gone, but is manifestly an agency for massive interventions to subsidise capital, expand commodification and discipline the popular classes.'[91] This economic ideology holds fast to the claim that 'state *abstention* from economic protection' is key to achieving a prosperous society.[92] Individuals are held responsible for their own advancement, evidenced by their performance in the deregulated market place. Objectives of equalising the distribution of assets and resources are held to be separate from the economic paradigm. A strange divide has thus been invented between socio-economic and other disparity, and attaining economic and other valued achievement, in this mode of thinking.[93] Madlingozi has noted that in South Africa systemic 'privatization and commodification of municipal services has meant that basic services such as health care and the provision of water and electricity have become inaccessible to the majority'.[94] At every turn capitalist expansion has thus been prioritised, inflating the influence of possessors of means and financial institutions. The result has been that the South African society has largely continued patently to favour the well-to-do, which in turn has

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[89] The initially advanced the socio-economic policy, the Reconstruction and Development Programme (RDP) which promised 'to mobilize all our people and our country's resources towards the final eradication of apartheid' through 'reconstruction and redistribution' was soon abandoned in favour of GEAR – A Adelzadeh 'From the RDP to GEAR: The Gradual Embracing of Neo-liberalism in the Economy' (1996) 31 *Transformation* 66-95

[90] Ultimately the 'wage restraint' and privatisation implements of GEAR was pronounced 'non-negotiable' and opposition was disregarded – T Madlingozi 'Post-Apartheid Social Movements and the Quest for the Elusive "New" South Africa' (2007) 34(1) *Journal of Law and Society* 77-88 at 79-80; H Marais *South Africa Limits to Change: the Political Economy of Transition* (2001) 164.

[91] K Helliker & L van der Walt 'Politics at a Distance from the State: radical, South Africa and Zimbabwean praxis today' (2016) 34 *Journal of Contemporary African Studies* 312 313.

[92] M McCluskey 'Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State' (2003) 78 *Indiana Law Journal* 784

[93] McCluskey (note 92 above) 788-789.

[94] T Madlingozi 'Post-Apartheid Social Movements and the Quest for the Elusive "New" South Africa' (2007) 34(1) *Journal of Law and Society* 77 80.

validated the gendered racism and new-fangled classism upon which such privilege has been built.[95] As such, given that there has been no significant reordering of value metrics, an assessment of the present-day racial wage gap remains a viable measure of the status of African workers. To date, Africans continue to lag behind in earnings and earning capacity. 75 percent of semi-skilled work and 83.7 percent of all unskilled work is performed by African people, while at top management level 66.5 percent is performed by white people and 15.1 percent is performed by African people. This occurs despite the fact that from the data collected, 78 percent of the economically active population was African, 9.6 percent was coloured, 2.6 percent was Indian and 9 percent was white.[96] South Africa also reflects a corresponding poverty racial profile with 70.75 percent of African people being poor and only 4.06 percent of white people being poor.[97]

Also salient in present day South Africa is the expansion of the difference in incomes received by the working populace.[98] Neoliberal economic policies have not delivered the touted generalised advantageous outcomes. Evidence reveals that for the past two decades workers' wages comprise a smaller and smaller share of the revenue generated every year.[99] Even arguments highlighting benefits of the profitability of mines for the South African economy have failed to identify the actual beneficiaries of the prosperity. This larger picture has not consolidated and aggregated the wellbeing of South Africans as a whole. A telling example is that the exponential profitability of platinum mining in the first decade of this century did not 'trickle down' to enhance the wages and standard of living of the most vulnerable workers.[100] In reality, 'worker's wages actually fell in real terms during the platinum boom of the early

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[95] McCluskey (note 92 above) 785; insidious beliefs that certain groups are inherently deficient and therefore incapable of maximising opportunities to gain in wealth and social status – were they to be granted to them.

[96] At senior management level white people occupy 54.4% of position with Africans occupying 23.2% - 2019 Annual Employment Equity Report available at http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2018-2019/19th%20Commission%20for%20Employment%20Equity%20Report%202018-%202019.pdf, accessed on 30 October 2019.

[97] 56.78% of coloured people and 20.47% of Indian people are poor - D Francis & E Webster 'Poverty and inequality in South Africa: critical reflections' (2019) *Development Southern Africa* 5.

[98] Piketty has observed that 'the share of total income to the top 10% of income earners in South Africa is between 60% and 65% of total income' – 'Confronting Inequality' (2017) *New Agenda: South African Journal of Social and Economic Policy* 28-30.

[99] P Burger 'Wages Productivity and Labour's Declining Income Share in Post-Apartheid South Africa' (2015) 83 *South African Journal of Economics* 159, 160.

[100] During this time the price of platinum rose by 350% and the mine owners are reputed to have made exorbitant - P Bond & S Mottiar 'Movements protests and a massacre in South Africa' (2013) 31 *Journal of Contemporary African Studies* 283 294; N Pons-Vignon & A Segatti '"The art of neoliberalism": accumulation, institutional change and social order since the end of apartheid' (2013) *Review of African Political Economy* 510.

2000s.'[101] Burger has been troubled by the noticeable decline in labour's income and profit share as well as the marked increased share of capital, in contemporary post-apartheid decades.[102] This has been attributed, in part, to an obvious shift in fiscal programmes toward alignment with business interests on the part of the state, creating lopsided power differentials in the corporatist co-op.[103]

Certainly technological advancement explains some of the increased share of capital.[104] The ability of business to move to cheaper transnational manufacturing sites has also been identified as shrinking the bargaining position of labour.[105] Therefore the efficiency of corporatism for South African workers is questionable.[106] Cope has argued that unless trade unions reject free-market commerce in its neoliberal form they will continue to be less and less effective in advancing the socio-economic needs of workers.[107] In line with this thinking the labour movement would challenge neoliberalism rather than accept its legitimacy and then attempt to react to its excesses from within its structures. This is particularly because the faith in unrestrained capitalism as the solution for overturning effects of historic subjugation appears to be falling short of expected outcomes.

In light of the above, the capacity of unions to fulfil their mandate to improve working conditions for their members and to increase the influence of workers in industrial relations, must be assessed. The next part considers whether the manner in which the Labour Relations Act (LRA) has structured collective bargaining in the current era, compares favourably with the situation during the colonialism-apartheid period.

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[101] D Rajak 'Hope and Betrayal on the Platinum Belt: Responsibility, Violence and Corporate Power in South Africa' (2016) 42 *Journal of Southern African Studies* 929 932

[102] Burger (note 99 above) 159.

[103] A Chhachhi 'Introduction: The "Labour Question" in Contemporary Capitalism' (2014) 45 *Development and Change* 895, 902.

[104] [T]he decline of the labor share can be explained by the decline in the relative price of investment goods. Efficiency gains in capital producing sectors, often attributed to advances in information technology and the computer age, induced firms to shift away from labor and toward capital to such a large extent that the labor share of income declined.' - L Karabarbounis & B Neiman 'The Global Decline of The Labor Share' (2013) *Working Paper 19136* available at http://www.nber.org/papers/w19136, accessed on 20 January2020.

[105] 'The hypermobility of capital and relocation to low-wage sites created competition between workers and a "race to the bottom" initiated at a global scale' – Chhachhi (note 103 above) 901.

[106] N Bernards 'The International Labour Organization and African trade union: tripartite fantasies and enduring struggles' (2017) *Review of African Political Economy* 2.

[107] Cope (note 69 above) 458; after all 'the market is not, and can never, be "free"; it is always contingent upon the ambivalent legal structure and its consequences are … shaped by that structure' – M, Brassey 'Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?' (2013) 34 *Industrial Law Journal* 823, 825.

8.4. The Utility of Collective Bargaining under the LRA

Following on from the 1909 Transvaal provincial Act, the Industrial Conciliation Act (ICA) of 1924 ushered in the recognition and management of collective bargaining, based on negotiations between recognised trade unions and employers or employers' organisations. To date, trade union led collective bargaining remains the back bone of industrial relations management in South African law. As discussed earlier, the 1924 Act along with the successive ICAs of 1937 and 1956, specifically excluded African workers from participating in the formalised trade union system and its bargaining processes.[108] African grievances were managed through the substandard Natives (Settlement of Disputes) Act of 1953, which was repealed in 1981.[109] Though Africans were temporarily incorporated as employees by the 1981 Act, other laws as well as the 1988 amendment sorely inhibited the capacity of recognised African trade unions to organise and to participate in collective bargaining.[110] Following the ending of formal apartheid, the LRA became the premier law for administering inclusive (racially non-discriminatory) collective bargaining.[111] Therefore it is at this juncture that the focus turns to review the structure of collective bargaining and also what its outcomes have been for South African mine workers.

In reality, trade unions represent a small of percentage of the entire South African workforce that has at times been held out as 'the aristocracy of labour'.[112] Hence, even assuming collective bargaining is a 'good', it remains elusive for the vast majority of workers

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[108] The laws excluded Africans from the definition of 'employee', which was the gate-way to recognised trade union membership. As disccussed in Chapter 6 of this thesis, the registered trade unions could form industrial councils for purposes of engaging in centralised bargaining that created yielded agreements on conditions of service. Once published by the Minister the agreed conditions would be applicable to the particular industry as a whole.

[109] The Labour Relations Amendment Act No. 57 of 1981 repealed the Native (Settlement of Disputes) Act/Black Labour Relations Act.

[110] Labour Relations Amendment Act No. 83 of 1988; during this time there was still a raft of laws that inhibited the unconstrained participation of African workers in trade unions; the Natives (Abolition of Passes and Co-ordination of Documents) Act was still in force and was only repealed in 1986 by the Identification Act No. 72 of 1986; the Group Areas Act and the Black Land Act 1913 was repealed by the Abolition of Racially Based Land Measures Act No. 108 of 1991; the Black Labour Act was replaced by the replaced by the Black Community Development Act No. 4 of 1984 which was also abolished by Act No. 108 of 1991. The Labour Relations Amendment Act No. 9 of 1991 removed the restrictive provisions of 1988.

[111] S 1(d) Labour Relations Act No. 66 of 1995.

[112] P Dibben, G Klerck & G Wood 'The Ending of Southern Africa's Triparte Dream: The Cases of South Africa, Namibia and Mozambique' (2015) 57 *Business History* at 462; M, Brassey 'Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?' (2013) 34 *Industrial Law Journal* at 823-825. This does not discount the reality that trade unions have historically successfully advocated for political change and legislation beneficial for workers as a whole. The statement pertains to activities of unions when negotiating with employers for enhanced working conditions for theirmembers.

both in formal and informal employment settings.[113] Conceptual underpinnings of collective bargaining stem from the routinely unequal bargaining power relations between employees and their employers, and it has been conventionally argued that laws seek to ameliorate the imbalance by regulating interchange.[114] Yet Arthurs has more accurately described the traditionally vented (contradictory) purposes of labour regulation and attendant bargaining processes thus:

> '… to make it possible for workers to conform to the tenets of Christian morality, to confer on them a sense of membership to "one nation", to prevent them from destroying "that property which is the source of their own support and comfort in life", to wean them from materialism or radical ideologies, to give them a stake in the success of the enterprise and/or the capitalist system, to restore their capacity to consume and hence their incentives and opportunities to produce, to enable them to claim in the workplace the constitutional guarantees provided by liberal democracies to all citizens in the larger polity, to enlist their support for the national war effort and ongoing nation building, to legitimate and reinforce the "web of rule" they help to spin in every workplace, to create a system of counter-vailing power which facilitates the operation of labour markets and improves their outcomes, and to incorporate workers into enterprise-level structures designed to manage their discontent, broker compromise amongst them, and implement workplace practices that contribute to productivity andprofitability.'[115]

Klare has railed against depictions of collective bargaining as the 'industrial rule of law', comparable to the 'governance of society.'[116] Whether, or the extent to which trade unions do perform public functions, despite their privately ordered mandates, is debatable. While collective bargaining attains some private gains, by improving wages and working conditions for members of the unions, it has an ancillary result (sometimes labelled its primary aim) of safeguarding 'the uninterrupted flow of commerce' by dissuading strikes – arguably a public function.[117] Arrangements in the context of private businesses owned and run by employers have been likened to governance under law, thus re-framing industrial relations as

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[113] A Blackett and C Sheppard 'The Links between Collective Bargaining and Equality' (2002) *ILO Working Paper* 2.
[114] Blackett & Sheppard (note 113 above) 5; P Davies & M Freedland *Kahn-Freund's Labour and the Law* (1983) 15.
[115] H Arthurs 'Labour Law After Labour' in G Davidov & B Langille (eds) *The Idea of Labour Law* (2011) 13-14.
[116] K Klare 'The Public/Private Distinction in Labor Law' (1981) 130 *University of Pennsylvania Law Review* 1358, 1359.
[117] Klare (note 116 above) 1375.

a public concern.[118] Yet a curious feature of the regimen is that significant decisive power rests with employers. Thus the functions of collective bargaining are contradictory at best and have the capability of advancing the working classes only within prescribed legislatedlimits.

Much of the collective bargaining regulatory tools were developed in relation to the now outdated Fordist workplace configurations. This arrangement of assembly line mass production has shaped the prevailing vision of collective bargaining. The resultant pecking order has historically simply erased certain types of workers from legal safeguards.[119] There are systemic exclusions grafted to the arrangements of collective bargaining which are discriminatory.[120] The informal or atypical labour which cannot be easily incorporated into collective bargaining in its current form has become the norm rather than the aberration.[121] More and more collective bargaining is seen as an added burden on production costs which lowers profitability.[122] But in this arena the notion of waning union power does not bode well for workers as a whole, as it would inevitably enhance the already strong bargaining power of employers.

The law which institutionalises workplace bargaining developed in colonial metropoles like Britain during an industrialisation that was enabled by resource extraction using 'free' African and other colonial labour.[123] The transposition of collective bargaining, with its disputed rationales, for application in South Africa, was only meant to apply to white workers.

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[118] Klare (note 116 above) 1389.

[119] Blackett & Sheppard (note 113 above) 8; in South Africa African workers as a whole, domestic workers, farm labourers, public sector employees and atypical forms of work have historically been excluded from the ambit of collective bargaining – Industrial Conciliation Act 11 of 1924; Native Labour (Settlement of Disputes) Act 48 of 1955.

[120] Blackett and Sheppard describe the position thus**:**
'[s]imply put, in the design and application of machinery to give effect to the fundamental principle and right to collective bargaining, there were forgotten, overlooked or quite simply excluded categories rendered invisible to collective labour relations because they did not fall within the range of the dominant paradigm' – Blackett & Sheppard (note 113 above) 4; Brassey (note 112 above) 823-825; B de Sousa Santos 'Beyond Abyssal Thinking From Global Lines to Ecologies of Knowledges' (2007) 30 *Review* 45-89, 45; J Conway 'Cosmopolitan or Colonial? The World Social Forum as "contact zone"' (2011) 32 *Third World Quarterly* 217-236, 218.

[121] M Tomei 'Freedom of Association Collective Bargaining and Informalization of Employment: Some Issues' (ILO, Geneva 1999) available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.35.2856&rep=rep1&type=pdf, accessed on 6 December 2019; arguably in South Africa the excluded majority of labour exploits have always been the norm; E Fourie 'Voice Representation and Women Workers in the Informal Economy' (2019) 40 *ILJ* 1400.

[122] C Craver 'Mandatory Worker Participation Is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy' (1997) 66 *George Washington Law Review* 137.

[123] Mahmud describes the 'accumulation by dispossession' of colonialism which 'filled the coffers of the fledgling mercantile class of Europe and generated the financial resources to engage … ["free"] labor in production governed by profit maximization' - T Mahmud 'Cheaper Than a Slave: Indentured Labor Colonialism and Capitalism' (2013) 34 *Whittier Law Review* 215-243, 217-220.

The centralised nature and other structural components of bargaining deliberately barred African workers from access.

The following analysis of work by Davis is comparable to the South African experience of colonialism, apartheid and transition to the current era:

> '… educational reforms, antislavery ideology served to isolate specific forms of human misery, allowing issues of freedom and discipline to be faced in a relatively simplified model. And by defining slavery as a unique moral aberration, the ideology tended to give sanction to the prevailing economic order. … Liberation from slavery did not mean freedom to live as one chose, but rather freedom to become a diligent, sober, dependable worker who gratefully accepted his position in society. *Freedom required the internalization of moral precepts in the place of less subtle forms of external coercion* (current researcher'semphasis).'[124]

In this way, interrogation of the immorality of 'wage slavery' has been sidestepped based on wholesale acceptance of merit in socio-economic and political arrangements in force.[125] Atleson agreed that since the labour started and was maintained for a long time as 'bound, unfree to leave or change circumstances', the manner in which the conduct of workplace relations is understood has not changed merely because the overtly coercive elements have been removed.[126] This means there has been insufficient examination of the links between unfree labour and the rights accorded to the workers of today. The historical tenets of South African labour regulation are steeped in the deliberate destruction of African modes of life and the forcible means used to resolve the 'native problem'. This has entailed systematic cheapening of African personhood as well as the under-valuing of the wage labour they have been obliged to undertake, as menial and deserving of the least possible remuneration. Hence the steadfast adherence to the fallacy of creating equitable relations

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[124] D Davis *The Problem of Slavery in the Age of Revolution 1770-1823* (1999) 254.
[125] Haskell argues that '[t]hese conventions allow us to confine our humane acts to a fraction of suffering humanity without feeling that we have thereby *intended*, in any way, or *caused*, in any morally significant way, the evils that we leave unrelieved' – T Haskell 'Capitalism and the Origins of Humanitarian Sensibility: Part 1' (1985) 90 *The American Historical Review* 339, 346, 352. Moreover Klare has reminded that 'there is no natural or "a-legal" form of bargaining or markets. All … are structured by law. Legal concepts are malleable and not self-defining. The design and application of legal rules is always a product of historical contingent, value-laden human choices' K, Klare 'Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform' (1988) 38(1) *Catholic University Law Review* 1, 21.
[126] J Atleson *Values and Assumptions in American Labor Law* (1983) 88.

between employers and employees through use of the employment contract – in reality mostly a contract of service – has been misguided.[127]

The current collective bargaining prescripts of the LRA hail from the bargaining implements of the 1909 Industrial Disputes Prevention Act (Transvaal). This was the first Act to regulate the management of industrial disputes with the aim of preventing the resort to strikes and lockouts, by introducing conciliation as a dispute resolution device.[128] The 1909 Act applied only to white workers in mining and other industries. A board of conciliation and investigation was established to facilitate dispute resolution on work related matters including wages and working conditions. Any proposed changes to wages and other conditions could, on application, be referred to the board for examination as a dispute.[129] The board would convene and summon the parties (employer and employees) to give an address with whatever evidence they wished to present.[130] The primary purpose of the board was 'to induce the parties to agree to a fair and equitable settlement'[131] to be noted in an agreed memorandum of settlement, signed by the parties and transmitted to the minister of labour with the accompanying report of the board.[132] Where settlement could not be reached a report on the merits of the disputealong with the recommendations of the board would be forwarded to the minister, who would publish them.[133] Along a similar vein, the Industrial Conciliation Act of 1924 that of 1937 and the 1956 version provided for incorporation of trade unions, albeit ones excluding African workers, into the management of the industrial disputes for the country as a whole. As earlier demonstrated, the more formalised registration and the establishment of industrial councils, which could determine sector wide wage determinations and conditions of service, worked hand-in-glove with the Wage Act(s) to administer lesser outcomes for Africans. This centralised bargaining

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[127] Atleson (note 126 above) 89-90; A Rycroft & R le Roux 'Decolonising the Labour Law Curriculum' (2017) 38 *ILJ* 1473, 1479; this is all the more so since there has been no meaningful revision of the notions of work and the grading of occupations engaged in.

[128] A lockout was defined as closing of employment premises or suspending work or 'refusal by an employer to employ … employees … for the purpose of compelling … employees … to accept specific terms of employment'; while a strike was defined as 'the cessation of work by a body of employees acting in combination, or a concerted refusal, under a common understanding, of any number of employees, to continue to work for an employer in consequence of a dispute … for the purpose of compelling … their employer to accept specific terms of employment' – Industrial Disputes Act No. 20 of 1909.

[129] The investigative powers of the board included: summoning of witnesses, 'the power to call for the production of books, papers, and other documents', examining witnesses on oath, enter and inspect premises – s 21 & 22 Industrial Disputes Act No. 20 of 1909

[130] Section 16 Act No. 20 of 1909.

[131] S 24 Act No. 20 of 1909.

[132] S 26 Act No. 20 of 1909.

[133] S 27 Act No. 20 of 1909.

system that has been adopted by the LRA, with industrial councils now renamed bargaining councils, has always privileged bargaining through 'representative' trade unions.[134] Under the Industrial Conciliation Act of 1937 the registrar could even withhold registration from a qualifying trade union if the registrar believed there was already a trade union in that arena which could represent the interests of workers adequately – a single entity representation of workers that promoted majoritarianism.[135]

Throughout the twentieth century there was outright rejection of appeals to include African workers as partners in the labour regulatory scheme. This occurred despite clear indication of the substantial damage being wrought by the draconian methods of controlling African labour such as the establishment of reserves, the migrant labour system, influx control and the NLR, the Mines and Works Act, the Native Labour (Settlement of Disputes) Act, Bantu labour Act, Mining Rights Act and other laws. Alexander *et al* have described the similarities between old and the new laws succinctly:

> 'Labour Relations Act (LRA) of 1995, a relatively recent iteration of the Industrial Conciliation Act (ICA) of 1924, whose precepts have proved remarkably durable. The ICA, passed in the wake of the Rand Revolt and its defeat, introduced industrial councils that comprised unions and employers' associations within a specified industry. This was a corporatist arrangement whereby the unions disciplined workers and the employers' associations brought rogue capitalists into line. Employers were generally willing to deduct union dues from wages (the 'check-off') and strikes were prohibited for the duration of an agreement.'[136]

For Kondlo, the 'old' has merely been dressed in counterfeit newness so as to legitimate its ever expanding reach.[137]

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[134] By this is meant that legislation has always favoured recognition of few bargaining agents with what is judged significant enough worker membership in a particular workplace or sector.

[135] Section 1 Industrial Conciliation Act No. 36 of 1937; para 282 Report of the Industrial Legislation Commission of Enquiry UG 62 of 1951 (1951) 51; this has been echoed in section 21(8)(a) LRA which encourages a system of a single representative trade union as the recognized bargaining agent.

[136] They add that the only major difference between the Industrial Conciliation Act 1924 and the LRA was the exclusion of Africans from actively participating in its operations - P Alexander, L Sinwell, T Lekgowa, B Mmope & B Xezwi *Marikana: A View from the Mountain and a Case to Answer* (2013) 148; D Du Toit 'The Extension of Bargaining Council Agreements: Do the Amendments Address the Constitutional Challenge?' (2014) 35 *ILJ* 2637, 2637-2638.

[137] Kondlo has made the observation that:
'[t]he "old" and the "new" in South Africa's political economy are the dominance of continuities and the subordination of change to the patterns of the "old". The "old" is the economic exclusion of the black majority despite the political "inclusion" paradigm of the new dispensation … the dominance of continuities with the past and the muted position of transformation and change is the issue' - K Kondlo 'Paralysed by Flaws of First-

It is true that the template of industrial relations management did not change with gradual inclusion of African workers by the Labour Relations Amendment Acts of the 1980s and early 1990s, nor was there any marked shift with the enactment of the LRA. The privileging of union majorities for purposes of recognising bargaining agents and the bargaining process has been a mainstay of South African industrial relations. Closed shop agreements exemplify *the* most majoritarian feature of collective bargaining arrangements.[138] Closed shop agreements between majority trade unions and employers have been a centrepiece of industrial relations in the South African mining and other industries.[139] Under the 1956 Act it was permissible for industrial council agreements to stipulate that only members of the unions belonging the council could be employed in the sector.[140] Indeed, in *Mynwekersuine v O'Okiep Copper Co Ltd & ander*, when the issue was whether a closed shop agreement constituted an unfair labour practice by denying employees the right to decide on the union of their choice, the industrial court affirmed that closed shops were an accepted practice in South Africa industrial relations and were therefore in principle not an unfair labour practice; it did not prejudicially affect workers so as to constitute an unfair labour practice.[141] A modification to the definition of an unfair labour practice, which caused the same court in *Mazibuko v Mooi River Textiles Ltd* to find such agreements were unfair, promoted swift deletion of the offending section 1(j).[142] This

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Instance? Reflections on the Political Economy of South Africa Twenty Years into Democracy' (2015) 45(3) *Africa Insight* 9.

[138] A closed shop agreement concluded between an employer and a trade union requires every employee gaining employment in that workplace to become a member of the trade union party to the agreement. Apart from limiting the right to choose to join (freedom of association) and other rights such as equality, opinion, the of agreement ensures that the trade union would inevitably have an overwhelming majority membership (at times 100% membership) for an indefinite period in the workplace.

[139] Starting from 1 June 1937 the Chamber of Mines agreed to a closed shop agreement for white workers that recognised eight trade unions – F Wilson *Labour in the South African Gold Mines 1911-1969* (1972) 76; United States Bureau of Labor Statistics *Monthly Labor Review Volume 45* (1937) 635; section 48 Industrial Conciliation Act No. 36 of 1937; *Rex v Daleski* 1933 TPD 47; *Rex v Transvaal Panel Beaters (Pty) Ltd and Another* 1946 TPD 460; *Garment Workers' Union v Schoeman, NO and Others* 1949 (2) SA 455 (A) 460; *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A); para 808-842 Report of the Industrial Legislation Commission of Enquiry UG 62 of 1951 (1951) 115-119.

[140] By the late 1970s 49 closed shops covering '22 different industries and trades' had been established by industrial council agreements - para 3.95.1 – 3.96 N Wiehahn *The Complete Wiehahn Report* (1982) 66.

[141] *Mynwekersuine v O'Okiep Copper Co Ltd & ander* (1983) 4 ILJ 140 (IC).

[142] *Mazibuko & others v Mooi River Textiles Ltd* (1989) 10 ILJ 875 (IC); Section 1(h) of the Labour Relations Amendment Act 83 of 1988 added para (j) to the definition of an unfair labour practice which then amended it to include:

'… the direct or indirect interference with the right to of employees to associate or not to associate, by any other employee, any trade union employer, employer's organisation, federation or members … including but not limited to, the prevention of an employer by a trade union, a trade union federation … to liaise or negotiate with employees employed by that employer who are not represented by such trade union or federation'; Labour Relations Amendment Act No. 9 of 1991; the court in *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 174H-J, 176A held that closed shop agreements were 'not contrary to public policy.'

prominent feature of the old regime has now become a constitutionally enabled feature of labour relations.[143] In terms of the LRA, closed shop agreements compel specific trade union membership and the payment of union dues, while agency shop agreements exact the payment of union dues to a fund which is administered by majority trade unions (or trade union coalitions) as a condition for the retaining of employment.[144] Significantly, in 2016 a closed shop agreement was concluded between the National Union of Mineworkers (NUM) and Rustenburg Platinum Mines (a subsidiary of the Anglo America Group). NUM already represented 80 percent of the workers in the mine and the agreement was held out as a step toward 'sound industrial relations' for all involved because, as stated by NUM General Secretary David Sipunzi, '[i]f we don't sign agreements like this our stability as a country can't be guaranteed.'[145]

Notions of majoritarian monopoly have persisted and been used to great effect by all-white trade unions such as the Mine Workers Union which was the principal bargaining agent with the Chamber of Mines for most of the twentieth century. Such arrangements were not deployed to secure rights for all workers, but rather for the recognised white workers within an enclosed arena. During this time the majoritarian posture of union recognition, supported by corporatist relations with the state and employers, was used by unions representing a tiny minority, to secure wages matching a standard of living required for 'civilised' people and favourable working conditions as overseers in mines. The exponential achievements of these select trade unions for white workers within the lopsided system described, was largely based on the super-exploitation of the African majorities. The tightly controlled migrant system issued standard non-negotiable employment contracts at intentionally depressed wages and inferior conditions of service.[146] The compound system maintained confining surveillance on Africans, who performed the dangerous work that routinely shortened their life span. The methodical abuse of Africans assured a surplus with which to keep white workers to the standards desired by the recognised community. To extrapolate that this has demonstrated the

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[143] Section 23(6) of the Constitution permits 'union security arrangements' such as the establishment of closed and agency shop agreements to safeguard the majority status of trade unions.
[144] Section 25 & 26 Act 66 of 1995.
145 'NUM signed closed shop agreement with Rustenburg Platinum Mine' 24 June 2016 available at https://shopstewardonline.org.za/2016/06/14/num-signed-closed-shop-agreement-with-rustenburg-platinum-mine/, accessed on 15 October 2019.
146 Following directive of the Chamber of Mines to keep wages low the NLR facilitated centralised recruitment by the Witwatersrand Native Labour Association (WNLA), which issued standardised labour contracts at low wages for Africans. African workers were also unable to access adequate compensation for occupational injury, disease or death - NLR; Workmen's Compensation Act; Miners' Phthisis Act.

efficacy of this form of bargaining by trade unions in South Africa is ill-advised, especially because the legitimacy of the operative economic relations in South Africa has not been subject of profound query.

As discussed earlier, the failure to shed the colonial motif has shaped the constitutional rationale. This reasoning accepts merit in the labour laws of old. Section 23 of the Constitution implants labour rights into the Bill of Rights and opens by guaranteeing everyone the right to fair labour practices along with granting every worker rights to form and join trade unions, to participate in union activities and to strike.[147] Unions are permitted to form and join federations.[148] Furthermore unions have a right to organise.[149] All trade unions are granted the right to engage in collective bargaining and legislation governing the parameters of the exercise of collective bargaining and other rights may impose permissible restrictions.[150]

The LRA readily holds out facilitation of centralised collective bargaining and dispute resolution as vehicles for achieving its primary objectives 'to advance economic development, social justice, labour peace' and workplace democracy.[151] This occurs despite the reality that many workers remain outside its purview. Arguably, economic prosperity under the existing neoliberal arrangements is anathema to the authentic social justice required. Under these economic conditions the trickle-down promise of gradual palpable elevation, much like the attainment of civilisation in earlier discourse, remains out of the reach of the side-lined majorities. The acceptance of imposed gatekeeping, evident in the similarity of the LRA to its predecessors, obscures the coercions in force.[152] This regulatory design permits a superficial modification that continues to confine itself 'to a fraction of suffering humanity', thereby absolving itself of responsibility for the remaining 'unrelieved' ills.[153] Thus the goal of labour peace denotes acquiescence of workers to the protraction of limited recognition and restricted access to concrete change-making in the world of work.

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147 Section 23(1) & (2) the Constitution of the Republic of South Africa, 1996.
[148] Section 23(4)(a) the Constitution.
[149] Section 23(4)(b) the Constitution.
[150] Section 23(5) the Constitution.
[151] Section 1 Labour Relations Act No. 66 of 1995
[152] Even with the ending of formal apartheid the pre-existing order has been retained, now justified as non-racial, so the liberty 'required the internalization of moral precepts in the place of less subtle forms of external coercion' – Davis (note 124 above); the retention of the so-called 'reliable and worthwhile' 'rock-solid values' described by Fanon – F Fanon The Wretched of the Earth (1963) (translated by R Philcox 2004) 8-9; Modiri (note 22 above) 35.
[153] Haskell (note 125 above) 346.

The LRA has maintained a bargaining framework that patently favours the creation of majority unions (ones that have the membership of the majority of employees), both at workplace and sectoral levels. Organisational rights are disbursed in a tiered fashion to registered trade unions that have adequate membership in the workplace. In terms of the LRA, 'sufficiently representative' trade unions are entitled to a few rights, namely, access to the workplace, deduction of unions subscriptions by employers and leave for union office bearers.[154] In general, sufficiently representative falls short of a majority and has not been granted a numerical figure in the LRA. Whether or not a trade union is sufficiently representative in its composition is initially negotiated between the union and the employer, with the Commission for Conciliation, Mediation and Arbitration (CCMA) capacitated to make a final context specific determination in the event of disagreement.[155] In contrast, the majority trade union or union coalition, one whose membership constitutes a majority of employees in the workplace or the sector, has been advantaged by the LRA in that it is automatically entitled to be recognized as a bargaining agent and has access to most of the organisational rights available. These include having shop stewards, disclosure of pertinent information, and concluding collective agreements which are binding on non-members, such as establishing the threshold for acquisition of organisational rights, agency shop and closed shop agreements, bargaining councils, as well as workplace forums.[156] The Constitutional Court has been at pains to explain that the majoritarian collective bargaining of the LRA may only be lawful if it does not unduly restrict the participation of minority trade unions in the process. The court has held that its earlier decision in *Bader Bop*, which construed section 20 of the LRA read with other provisions as granting overarching and enabling protection on minority trade unions to acquire

[154] Section 11 states that a representative trade union is a sufficiently representative union which is entitled to section 12, 13 and 15 rights. In terms of s 12 the representative trade union is entitled to enter the employer's premises to recruit members or communicate with its members and serve their interests. It can hold meetings on the premises (outside working hours); organise an election or ballot subject to reasonable and necessary safeguards to life and property or to prevent undue disruption or work. Members of representative trade unions can authorise the employer to deduct union dues from their wages for the union (section 13). Section 15 relates to leave entitlement for a trade union office bearer – an office bearer may take reasonable leave during working hours to perform functions of trade union for an agreed upon number of days.

[155] Section 20 & 21 Labour Relations Act 66 of 1995; *Kem-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC) *NUMSA v Bader Bop* (2003) 24 ILJ 305 (CC*); POPCRU v SACSWU* (2018) 39 ILJ 2646 (CC).

[156] Section 14, 16, 18, 23, 25, 26, 32, 78, 80 & 81 Labour Relations Act; the constitutional court in endorsed the permissibility of extending collective agreements in line with majoritarianism - *Transport and Allied Workers Union of South Africa v Putco Ltd* 2016 (4) SA 39 (CC) para 63; - *AMCU v Chamber of Mines of South Africa* (2017) 38 ILJ 831 (CC).

organizational rights; meaning that when majoritarianism permits smaller unions 'to co-exist, to organise … and to seek to challenge majority unions' it is permissible.[157]

In recent 'post-apartheid' times, violence characterised by unruly picketing, damage to property, injury to persons, loss of life and prevention of the continuance of work at focal and other nearby workplaces has become a mainstay of South African strike action.[158] In response to the inability of the corporatist partnership of trade unions, business and the state to control or contain the violent insurrection of striking African workers whose living conditions remain unsatisfactory, conventional wisdom has been to direct efforts toward modifying *inter alia* the perceived deficiencies of majoritarianism, matters including the casualisation of work, and advocating for the removal of protections afforded to workers during industrial action. Increased insecurity has progressively displaced permanent employment, marked by the proliferation of labour broking, which has contributed in further destabilising the efficiency of collective bargaining.[159] That South Africa has especially high unemployment, particularly of young people,[160] must also be linked with acknowledgment that a significant amount of work is performed in the informal non-unionised employment sector which has not been adequately accounted for by the LRA. It is in more structured formal employment that trade unions operate. Even there union density is mostly concentrated in the public sector, and particular industries such as mining.[161] This means that unions are not necessarily agents of South African workers in general.

On 16 August 2012, following a protracted strike characterised by lethal incidents at the Marikana mine at Lonmin, the South African Police Services dispatched a unit that fired upon workers. Thirty-four mine workers died and approximately seventy-eight others were

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[157] *AMCU* (note 156 above) para 52; *NUMSA v Bader Bop* (note 155 above); *POPCRU* (note 155 above).
[158] The Labour Court stated has found it 'regrettable that acts of wanton and gratuitous violence appear inevitably to accompany strike action … a scourge [which] poses serious risks to investment and other drivers of economic growth - *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers & others* (2016) 37 ILJ 476 (LC) paras 37; M Tenza 'An investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions' (2015) 19 *Law Democracy & Development* 211.
[159] T Cohen & L Moodley 'Achieving "Decent Work" in South Africa?' (2012) 15 *PER* 320.
[160] B Ngcaweni 'Understanding Youth Unemployment and Social Inclusion in South Africa' (2016) 46 *Africanus Journal of Development Studies* 1.
[161] Between 1997 and 2013 (of the sample surveyed) private sector employees belonging to trade unions dropped from 36% to 24.4%, but during the same time the mining sector rose to 80% union coverage – H Bhorat, K Naidoo, D Yu 'Trade unions in an emerging economy: the Case of South Africa' *WIDER Working Paper 2014/055* (2014) 5.

injured.[162] This spectacle at Marikana has led to calls for the rethinking and reworking of majoritarian components of the LRA.[163] Yet it is argued that the seeds of what arose in 2012 at Lonmin as a wage demand by rock drill operators were sown well before the failures of that specific instance of bargaining. From the beginning of industrial scale mining in South Africa, the job levels were framed such that the most treacherous occupations, which exposed workers to risk of injury, chronic terminal illness and death have been categorised unskilled. This entailed working underground doing the manual and machine-aided task of extracting mineral deposits from the earth. Though the 'hammer-boys' of the 1900s worked twelve hour days drilling holes, and came to enjoy a slightly elevated status due to the difficulty and danger associated with their work, their wages were and, it is argued, still are a comparable pittance. What culminated in a bloodbath at Marikana began as a quarrel arising from miners being unhappy with an asymmetrical wage increase they thought had been agreed between the recognised bargaining agent NUM and the employer.[164] Chinguno has argued that the corporatist labour relations framework which the LRA implements was adopted chiefly to subdue labour truculence;[165] and that NUM, the most representative union at the mines, had been successfully integrated in the structured bargaining process of the LRA as the principal bargaining agent.[166] In reality this, in effect, gave NUM generally subsidiary status at the

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[162] A total of 44 people died from incidents during the strike and 275 were arrested – M Montsho 'Lonmin Remembers 44 People Killed in Marikana' (15 August 2018) IOL available at: https://www.iol.co.za/news/south-africa/north-west/lonmin-remembers-44-people-killed-in-marikana-16579194, accessed on 20 December2019.

[163] Brassey declared that: '[m]ajoritarianism, the leitmotief of both industry bargaining and plant-level organizational rights, is too crude to give proper expression to the interests of minority unions, which frequently represent skilled or semi-skilled workers but, as the Marikana experience demonstrates, who may simply be acting on behalf of workers who feel alienated from the majority union - M Brassey 'Labour Law after Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?' (2013) *ILJ* 823-835, 834; T Cohen 'Limiting Organisational Rights of Minority Unions: *POPCRU v LEDWABA* 2013 11 BLLR 1137 (LC)' (2014) 17 *PER* 2209, 2221-2222; Alexander et al (note 136 above) 149-150; D Du Toit 'The Extension of Bargaining Council Agreements: Do the Amendments Address the Constitutional Challenge?' (2014) 35 *ILJ* 2637, 2640; J Theron, S Godfrey, E Fergus 'Organisational and collective bargaining rights through the lens of Marikana' (2015) 36 *ILJ* 849; J Kruger & C Tshoose 'The impact of the Labour Relations Act on minority trade unions: A South African perspective' (2013) 16 *PER* 285-326; T Esitang & S van Eck 'Minority trade unions and the amendments to the LRA: Reflections on thresholds, democracy and ILO conventions' (2016) 37 *ILJ* 763; S van Eck 'In the Name of "Workplace and Majoritarianism": Thou Shalt Not Strike — A*ssociation of Mineworkers & Construction Union & others v Chamber of Mines & others* (2017) 38 ILJ 831 (CC) and *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 305 (CC)' (2017) 38 ILJ 1496.

[164] An 18% pay rise was given to selected supervisory personnel, over and above the amount agreed upon during the bargaining process with NUM – P Stewart 'The material basis of worker subjectivity: Rock drill operators in South African platinum mines in historical perspective' (2019) *Journal of Asian and African Studies* 11. NUM's perceived indifference and hostility to, what was characterised by the employer, the unreasonable demands failed to quell the discontent. Mine workers embarked on an unprotected strike in support their demanded wage increase.

[165] C Chinguno 'The Unmaking and Remaking of Industrial Relations: The Case of Impala Platinum and the 2012-2013 Platinum Strike Wave' (2015) 42 *Review of African Political Economy* 577,579.

[166] Chinguno (note 165 above) 580.

negotiating table with the structure having allowed Impala Platinum (the employer) to solidify its dominion.

At present courts waver on the cusp of developing the law to permit the removal of protected strike status under section 67 of the LRA as the proposed antidote for eliminating the pervasive violence of picketing under section 69.[167] The phrase 'strike violence', described as rogue 'collective brutality', has been coined to describe this widespread rebellion by workers against the legislatively prescribed limits of industrial action.[168] Yet there is another ubiquitous violence at hand, evident in

> 'rejection or neglect as well as attack – a denial of needs, a reduction of persons to the status of objects to be broken, manipulated, or ignored. The violence of bombs can cripple bodies; the violence of miseducation can cripple minds. The violence of unemployment can murder self-esteem and hope. The violence of a chronic insecurity can disfigure personalities as well as persons.'[169]

The violence is 'built into the structure[s]' of acceptable governance themselves, meaning that the much desired and applauded peacefulness generally detracts from seeing the magnitude of the existing deprivation, for the affected.[170] Much like Christoudilidis' understanding of the pre-determined limits of constitutional theorising, Galtung has attributed the same disciplining forces to one's capacity to discern violence as follows:

> '[a]s a point of departure, let us say that violence is present when human beings are being influenced so that their actual somatic and mental realizations are below their potential realizations.'[171]

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[167] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 *ILJ* 998 (LC), and *National Union of Food Beverage* (note 158 above); A Rycroft 'Can a Protected Strike Lose Its Status?' (2012) 33 *ILJ* 821; A Rycroft 'What can be Done about Strike -related Violence?' (2014) 30 (2) *International Journal of Comparative Labour Law and Industrial Relations* 199; E Fergus 'Reflections on the (Dys)functionality of Strikes to Collective Bargaining: Recent Developments' (2016) 37 *ILJ* 1537; A Myburgh 'Interdicting Protected Strikes on Account of Violence' (2018) 29 *ILJ* 703;

[168] *Tsogo Sun Casinos* (note 167 above) 11.

[169] Institute for Peace Justice (IPJ-PPJ). 2014. *Activity: How Violence Works* cf: W Gumede 'Marikana: a crisis of legitimacy in the institutions that form the foundations of South Africa's 1994 post-apartheid political settlement' (2015) 41 *Social Dynamics* 327, 330.

[170] J Galtung 'Violence Peace and Peace Research' (1969) 6 *Journal of Peace Research*, Vol. 6, No. 3 (1969) 167, 170; A Dilts , Y Winter , T Biebricher , E Johnson , A Vázquez-Arroyo & J Cocks 'Revisiting Johan Galtung's Concept of Structural Violence' (2012) 34 *New Political Science* e191, e192.

[171] Galtung (note 170 above) 168.

Ngcukaitobi has pinpointed structural violence as contributorily culpable in the multiplicity of factors which have led to destructive behaviour during strike picketing.[172] In recent times African mine workers have been living in crudely assembled shanty settlements with no amenities such as water and sanitation, making their communities susceptible to preventable maladies.[173] In addition, the historically established migrant worker patterns which created the pockets of extreme poverty in former reserves have persisted, which then means that the wages of mine workers support many members of such communities, who receive little to no institutional support from state entities.[174] The lack of infrastructure in both communities, the rural ones and the ones adjacent to the mines, have had the effect of making life more costly than it otherwise would have been for the miners and their dependants. No proper schooling means little to no education for children. Inadequate nutrition and primary healthcare access leads to the germination of preventable disease and stunted physical and mental development in children, which has in turn been exacerbated by crowded and unsanitary living conditions. Thus the long-established cycle of deprivation has been repeating itself.

Concerted reassessment of socio-economic and political arrangements, in a manner exterior to dominant rationalisations and alive to the debasement of such communities, might have called for more drastic reform of systems.[175] This has not occurred. Instead, the prevailing sentiment was captured in the award of *Great North Transport v TAWU*, which remarked that any 'violation of an individual's right[s] … must be examined in the context of collective bargaining. Collective bargaining has been described as the great social invention … aiming "to advance economic development, social justice (and) labour peace"'.[176] The notion that incremental material gains could be achieved through a majoritarian labour relations framework constrained to operate in line with structures built to accommodate only a few has been flawed. This is all the more so since the vast majority of wealth (95%) and means –

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[172] T Ngcukaitobi 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 *ILJ* 836.
[173] Ngcukaitobi (note 172 above) 839-840; J Pelders & G Nelson 'Contributors to Fatigue of Mine Workers in the South African Gold and Platinum Sector' (2019) 10 *Safety and Health at Work* 188.
[174] Ngcukaitobi (note 173 above) 840-842; Pelders & Nelson (note 173 above).
[175] Rycroft and Le Roux explain that '[h]owever dramatic and comprehensive recent labour legislation is, these changes took place in a historical context in which state and corporate control of employment relations was extensive and remains stubbornly pervasive under new, cloaked guises' – Rycroft & Le Roux (note 127) 1475.
[176] *Great North Transport v TAWU* [1998] 4 BALR 470 (IMSSA) 473; a similar stance to that expressed in the objects of the LRA which emphasize facilitation of orderly collective bargaining as a primary vehicle 'to advance economic development, social justice, labour peace and democratisation of the workplace' – section 1 Labour Relations Act 66 of 1995.

resources needed to create new wealth – is held by so few.[177] In this context even the most rigorous collective bargaining is likely to be an exercise in collective begging.

In the wake of sustained post-apartheid volatility in labour relations, the Marikana episode being a stark example, the call has been for processes and institutions of the LRA, now justified as democratic, to become more 'responsive, accountable, inclusive' and perhaps better geared toward the interests of the masses.[178] In reply, the legislature has reacted by making some amendments to address these complaints in the Labour Relations Amendment Act No. 6 of 2014.[179] Du Toit has correctly surmised that the amendments were negligible and made no difference to the overarching majoritarian structure.[180] Indeed, the Constitutional Court has endorsed the viability of majoritarian industrial relations.[181] The remediating steps miss the point that the problems remain rooted in the long established systematic abjection of labour. The shift toward '*neutralization*' of labour norms was not preceded by a deconstructive reversal – a disruption of the conceptual order. The hierarchical master-servant, employer-employee binary has remained intact in law.[182] Collective bargaining is structured to occur between these two separated entities. But reversal of the construct entails acknowledging that without the inferiorised position of employees the privilege enjoyed by employers ceases to exist. The notion that employers are somehow entitled to have the upper hand ignores the fact that there is no upper hand without first subordinating the employees.[183] Like Said, this thesis asserts that 'the [employee] … is not an inert fact of nature. It is not merely there … The relationship of the … [employer] and … [employee] is a relationship of power, of domination, of varying degrees of a complex hegemony'.[184] In the current paradigm: can alterity be heard as anything

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[177] The wealthiest '10% of the population own approximately 95% of all wealth' - Orthofer (2016) cf: Fancis & Webster (note 97 above) 6.

[178] Gumede (note 169 above) 327; Brassey (note 163 above) 834; Cohen (note 163 above) 2221-2222; Alexander et (note 136 above) 149-150; D Du Toit 'The Extension of Bargaining Council Agreements: Do the Amendments Address the Constitutional Challenge?' (2014) 35 *ILJ* 2637, 2640; Theron et al (note 163 above) 849; Kruger & Tshoose (note 163 above); Esitang & van Eck (note 163 above); van Eck (note 163 above).

[179] Section 21(8A), (8B), (8C), (8D) Labour Relations Amendment Act 6 of 2014.

[180] Du Toit (note 178 above) 2640.

[181] *AMCU* (note 156 above)) para 52; *Bader Bop* (note 155 above); *POPCRU* (note 155 above)(.

[182] Derrida reminds that 'we are not dealing with the peaceful coexistence of a *vis-à-vis*, but rather with a violent hierarchy. One of the two terms governs the other …, or has the upper hand' - J Derrida *Positions* (1972) (trans A Bass, 1981) 41.

[183] Historically employees have been subordinated through pogroms, kidnap of women and children for domestic service, enslavement, land grabs, dispossession, prohibition of access to material resources, restrictions on mobility and livelihood, forced wage labour, paltry wages and inadequate recompense for occupational injury and death.

[184] E Said *Orientalism* (1978) 4-5.

except 'cries of hunger, rage, or hysteria'?[185] No. Yet in this space where equity is always out of reach the disqualification of rebellious voices needs to be acknowledged, because it is here that 'the project of retrieval' ought to commence.[186]

When the rock dill operators of Lonmin at Marikana demanded a R12 500 basic salary it was deemed to be especially unreasonable. At the time R12 500 was reputed to be the average wage of white people and was well above the wages the striking mine workers had been earning up to that point.[187] The NUM leader is alleged to have described the workers as 'mainly uneducated and backward tribesmen from Lesotho and the Transkei because "township boys" were unwilling to do the dreadfully hard and dangerous work of rock-drillers miles beneath the ground.'[188] Contemporaneous television coverage focused on, *inter alia*, a mineworker 'licking the tip of his spear' has been described as giving 'the message that masses of black men were on the loose, wild and uncontrollable and … needed to be contained, disarmed and suppressed.'[189] Ironically, this post-apartheid process of delegitimising the concerns of the mine workers copied the colonial form.[190]

8.5. Post-Apartheid Occupational Compensation

This part critically evaluates the compensatory law which pertains to mine workers; the Occupational Diseases in Mines and Works Act (ODIMWA), and the Compensation for Occupational Injuries and Diseases Act (COIDA). As in previous chapters, the value of monetary award prescribed in law shall be used as a gauge for the worth accorded to recipients.

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[185] J Ranciere 'Introducing Disagreement (translated by S Corcoran) (2004) 9 *Angelaki Journal of the Theoretical Humanities* 3-8, 5; A Amkpa 'Drama in South Africa and tropes of postcoloniality' (1999) 9 *Contemporary Theatre Review* 1, 14.

[186] G Prakash 'Postcolonialism Criticism and Indian Historiography' (1992) 31/32 *Social Text* 12.

[187] At the time the rock drill operators were earning approximately R4 000 – D Magaziner and S Jacobs 'Notes from Marikana South Africa: The Platinum Miners' Strike, the Massacre, and the Struggle for Equivalence' (2013) 83 *International Labor and Working-Class History* 137, 139.

[188] Described as a 'leading labour historian' Charles van Onselen of the University of Pretoria allegedly stated the following: '… there were a lot of sangomas (witchdoctors) up there on that hill for the last few days and you can see on film that many of the workers were wearing muti (magic charms) of one kind or another' - R Johnson 'Massacre at Marikana' (19 August 2012) politicsweb available at https://www.politicsweb.co.za/opinion/massacre-at-marikana, accessed on 12 November 2019.

[189] 'No weapons at start of Marikana strike' (20 November 2012) Independent Online available at https://www.iol.co.za/news/south-africa/no-weapons-at-start-of-marikana-strike-1427242, accessed on 14 April 2020; South African Broadcasting Cooperation (SABC) and eNews Channel Africa (eNCA) new programmes - G Schutte 'Colonial Tropes and the Media Coverage of the Marikana Massacre' (2015) 4 *French Journal For Media Research* 3.

[190] Bhabha has observed that '[t]he desire to emerge as "authentic" through mimicry – through a process of … repetition – is the final irony of partial representation[;] … they emerge as "inappropriate" colonial subjects' - H Bhabha *The Location of Culture* (1994) 88.

In so doing comment will be made on the prognosis for achieving anticipated equality under the current arrangements. Discussion turns to the current compensation scheme for debilitated mineworkers, cognisant of the following aspects in the South African terrain:

- The law has historically proclaimed a deficit in Africans when judged against the normative 'civilised' white person;
- The occupations which Africans were forced to perform, though dangerous, were labelled the least valuable;
- African mine workers have historically been accorded the least recompense for occupational loss suffered; and
- the normative frame for what is due continues to be unequally rated.

The Compensation for Occupational Injuries and Diseases Act (COIDA) has replaced the Workmen's Compensation Act[191] and is now the principal legal instrument for 'compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting' therefrom. Section 35 confines claims for compensation for occupational disability or death to the prescripts of the Act and eradicates recourse to a claim for damages.[192] Therefore mine workers who suffer accidental debilitating injury or die may only claim under COIDA. Section 56 does provide for additional damages should the injury, disease or death have been caused by the negligence of the employer. Section 56(1) states that where the injury or occupational disease occurs as a result of the employer's negligence, the compensation due to the employee may, on application to the commissioner, be increased 'in addition to the compensation normally payable'. Section 56(2) states that the negligence may be found in the fact there has been 'a patent defect in the condition of the premises, place of employment, equipment, material or machinery used in the business concerned, which defect the employer … has failed to remedy or cause to be remedied.'

The COIDA compensation scheme awards lump-sum payments and in some instances monthly pensions. Section 47, read with Schedule 4, or schedule 3 in the event of an

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[191] COIDA Act No. 130 of 1993; section 100(1) repealed the statutes itemised in Schedule 1 including Workmen's Compensation Act No. 30 of 1941 and all its amendments.
[192] Section 35(1) states that an employee has shall have '[n]o action … for the recovery of damages in respect of an occupational injury or disease resulting in disablement or death … against such employee's employer' – COID Act No. 130 of 1993.

occupational disease, provides that for temporary disability, seventy-five percent of monthly wages to the maximum of R28 658, the minimum being R4 012, shall be paid for a period of up to twenty-four months, which is extendable in certain situations.[193] For permanent disability of thirty percent, a lump-sum award is payable. The minimum payment is R80 250 and the maximum is R320 985. At one hundred percent permanent disability, a monthly pension of between R28 658 and R4 012, calculated according to the recipient's salary, shall beawarded, whereas between thirty percent and one hundred percent permanent disability the pensionable amount is calculated based on the degree of impairment and the salary.[194] In terms of section 65(6), '[t]he provisions of … [the] Act regarding an accident shall apply *mutatis mutandis* to a[n] [occupational] disease'. Schedule 4 of the COIDA payment scheme that has been applicable since 3 May 2019[195] may be seen in AppendixD.

A recent description of the disease progression of occupational silicosis secondary to mining work bears repeating:

> 'When the smallest particles of crystalline silica are raised into the air as part of dust in the mining process, and mineworkers are exposed to such dust, the mineworkers inhale the crystalline silica particles. Once inhaled the dust particles are deposited in the alveolus region of the lung. Once deposited in the alveolus, the particles attack the lung cells and thus damage the lung tissue resulting in scarring or fibrosis of the lungs. … Silicosis is an irreversible, incurable and painful lung disease. It is characterised by fibrosis of the lungs, which entails the replacement of normal tissue with connective ("collagenous" or "scar") tissue that obstructs and impairs the normal functioning of the lung. It can be a completely disabling disease, and in many cases it is fatal.'[196]

It is now known that in some instances the disease has a long incubation and can take ten and sometimes fifteen years or more to manifest in obvious ways.[197] Furthermore, 'its symptoms worsen over time, even after exposure to crystalline silica dust has stopped.'[198] At first

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[193] Schedule 2 sets out percentages of permanent disability accorded to particular injuries. Monetary compensation in schedule 4 was adjusted by GN 627 in GG42431 of 3 May 2019 Compensation for Occupational Injuries and Disease Act No. 130 of 1993

[194] S 49 read with schedule 4 Act No. 130 of 1993.

[195] GN 627 in GG42431 of 3 May 2019 Compensation for Occupational Injuries and Disease Act No. 130 of 1993

[196] Nkala v Harmony Gold Mining Company Ltd [2016] 3 All SA 233 (GJ) 13 & 14.

[197] *Nkala v Harmony Gold* (note 196 above) 15; A Trapido et al 'Prevalence of Occupational Lung Disease in a Random Sample of Former Mineworkers, Libode District Eastern Cape Province South Africa' (1998) 34 *American Journal of Industrial Medicine* 305, 306-307.

[198] *Nkala v Harmony Gold* (note 196 above) 15.

'shortness of breath may occur during exercise but eventually it will appear even at rest.'[199] South African miners continue to be plagued with a high risk of lung disease and carry the disease burden of lung disease contracted at work. In-country migration from rural areas (the formerly legislated African reserves), as well as other African migrant labour from neighbouring countries, comprises most of the mining workforce.[200] As more systematised post-mortems were performed on the available bodies of deceased African miners since 1975, the identified incidents of silicosis rose 'from 3 per cent in 1975 to 32 per cent in 2007'.[201] There has been a rise in the reported incidents of silicosis and TB during the first decade of the twenty-first century.[202] TB is frequently comorbid with human immunodeficiency virus (HIV) infection.

The Occupational Diseases in Mines and Works Act No. 78 of 1973 (ODIMWA) continues only to provide compensation for occupational diseases contracted on controlled mines – 'compensatable diseases'.[203] There is still no award of a pension under this Act, except for the remaining mainly white miners who became eligible for pensions under the previous Act. The payable amount is generally a lump-sum payment which varies according to the disease, disease progression and any compensatable comorbid conditions. Section 44 sets out degrees of compensatable diseases as follows: First-degree includes pneumoconiosis resulting in over ten percent and up to forty percent permanent disability or other compensatable diseases also causing permanent impairment of between ten percent and forty percent; Second-degree is generally deemed present if the person is suffering from more than one compensatable

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[199] J McCulloch 'Dr G.W.H. Schepers and the Politics of Silicosis in South Africa' (2009) *35 Journal of Southern African Studies* 835, 835.

[200] J Murry, T Davies & D Rees 'Occupational lung disease in the South African mining industry: Research and policy implementation' (2011) 32 *Journal of Public Health Policy* 65, 66.

[201] The authors have described the development of a 'perfect storm' in the 1990s, a combination of silicosis, HIV infection and TB. Additionally the accommodations at compounds and migrancy conspire to encourage the increase of habitual high-risk sexual activity, resulting in HIV rates soaring among South African gold miners - Murry et al (note 200 above) 67; McCulloch has pointed to evidence that revealed that silicosis among African mine workers 'in 2004 was 200 times higher than it had been 70 years earlier.' This anomaly may be due to sustained lack of health checks, health care and reporting seen in previous statutes for African workers in mines - McCulloch (note 199 above) 837.

[202] R Ehrlich 'A Century of Miners' Compensation in South Africa' (2012) 55 *American Journal of Industrial Medicine* 560.

[203] Compensatable diseases include pneumoconiosis, pneumoconiosis comorbid with TB, TB contracted while performing risk work or within 12 months of having done risk work, obstruction of airways attributable to risk work, permanent cardio-respiratory disease attributable to risk work, progressive systemic sclerosis due to risk work, or any other disease that the committee declares a compensatable disease – s 1 Occupational Diseases in Mines and Works Act No. 78 of 1973

disease which permanently impairs function by more than forty percent, or pneumoconiosis causing more than forty percent permanent damage, or other compensatable diseases with more than forty percent impairment. Section 80(2) sets out the formula for determining the compensation due to a person suffering from a compensatable disease under the conditions prescribed, namely:

(A x 12) x B.

where

'A' is personal earnings not exceeding R4 195[204]

'B' is the degree of impairment (first or second).[205]

For first-degree disability, 'B' is 1.31 and for second-degree disability 'B' is 2.917 if it is the first time the applicant mineworker has contracted the disease and it is already in second stage. If the mineworker has previously been awarded a first-degree benefit then upon acquiring a second-degree disability 'B' will be 1.607. Some other criteria are applied by section 80 for the varied forms in which compensatable disease manifests.

Therefore the maximum payable once-off first-degree impairment under the ODIMWA formula is (R4 195 x 12) x 1.31 which is equal to R65 945. In the case of a second-degree impairment picked up for the first time the formula is (R4 195 x12) x 2.917 which is equal to R146 842.[206] By comparison, under the COIDA a permanent impairment of thirty percent attracts a minimum lump-sum of R80 250, the maximum being R320 985. The employee that suffers only temporary disability under COIDA (entitled to seventy-five percent of monthly wages for a maximum of twenty-four months) is entitled to a maximum of R515 844, much more than the R65 945 due to mineworkers under ODIMWA.[207] Furthermore, bearing in mind

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[204] R4 195 was adjusted as of 1 October 2019 from the previous amount of R4 014. Section 80A guides the calculation of personal earnings and stipulates that the value of food and accommodation supplied by the employer + any regular overtime is included but intermittent overtime, non-recurrent occasional services, ex gratia payment are excluded. If the person is not doing risk work anymore the personal income will be what he would probably be earning if he still was (s 80B).

[205] TB which does not render a person permanently unfit while doing risk work or acquiring TB within 12 months of risk work entitles a mineworker to 75% of lost wages but for no more than 6 months - s 80(1) Act No. 78 of 1973

[206] Section 80(2)(b)(i) Act No. 78 of 1973

[207] 75% of the maximum salary payment allowable for temporary disability under COIDA is R21 494. If payments are made for 24 months a temporary disability can attract up to R515 844. These payments may be extended on

that first-degree impairment under ODIMWA is up to forty percent, it is notable that at between thirty percent and one hundred percent permanent disability a worker under COIDA is entitled to a pension of between R4 012 and R28 658 per month. It is curious that such a wealthy enterprise as mining has throughout South African history been permitted through legislation to continue to compensate African mine workers at such depressed rates. When compared with the other occupational compensatory obligations of sectors administered by the COIDA in the present day, where occupational lung diseases occur, the scheme devised for mine workers is low.[208] This current state of matters requires some focal contemplation by stakeholders in light of the identified failure to revise the foundational ethos of law and the purposes its structures were devised to implement.

Comparing the current position of African mineworkers with their former status during colonialism and apartheid illustrates the functions of the compensatory schemes better. At the inception of the ODIMWA in 1973, first-degree impairment related to forty percent impairment or more. Africans afflicted with first-degree disablement due to pneumoconiosis or compromised cardio-respiratory functions were entitled to R1 000. The R1 000 of 1973 is now approximately R56 418 in 2019.[209] The R65 945 currently payable to mineworkers with first-degree impairment is equal to the R1 169 of 1973. In 1973, the maximum payable amount to African workers with second-degree impairment (usually due to those with a compensatable disease plus TB) was R2 000, R112 837 in today's terms. Today a second-degree compensation under the ODIMWA is R146 842 which in 1973 would have been approximately R2 600. These adjusted figures represent the real terms adjustment made to the compensation owing to African workers who are suffering chronic incurable progressively worsening lung disease. In 1973, white mineworkers at first-degree were entitled to R12 000 which is equal to R677 020 in today's terms. Actually, in 1973 white workers were being awarded more than 10 times what

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application in certain situations. At the lowest end of the scale a minimum of R3 009 might be paid for 24 months, totaling R72 216 – still higher than the maximum allowable payment for 1st degree impairment under ODIMA which could be as high as 39% impairment.

[208] Schedule 3 COIDA list of numerous occupational diseases including respiratory diseases such as silicosis and the other disease variations provided for in ODIMA. Industries such as textile, cement manufacturing, wood furniture manufacturing, paper manufacturing, grain milling, building construction, waste management also place workers at a high risk of exposure to harmful particles that can cause chronic respiratory diseases.

[209] 'The inflation rate in South Africa between 1973 and today has been 5,528.78%, which translates into a total increase of R55,287.79. This means that **1,000 rand in 1973 are equivalent to 56,287.79 rand in 2019**. In other words, the purchasing power of R1,000 in 1973 equals R56,287.79 today' – available at https://www.inflationtool.com/south-african-rand/1973-to-present-value?amount=1000, accessed on 12 October 2019.

is currently due to Africans in 2019. At second-degree disablement a lump-sum of R18 000 was awarded to white workers in comparison to the R2 000 that Africans received. R18 000is approximately R1 015 531 in today's terms, which is nowhere near the R146 842 compensation of today.

COIDA has replaced the Workmen's Compensation Acts of the twentieth century beginning in 1907 which for a time completely excluded Africans from their ambit.[210] The incorporation of Africans by the Workmen's Compensation Act of 1934 provided little relief in that the compensation was calculated in proportion to personal monthly earnings. This served to exacerbate the systematised maltreatment of Africans which was already hundreds of years in the making at that time. To date, the occupational compensation due under COIDA is dependent on the earning capacity of individual - monthly wages. This signifies that currently the worth of human beings is still graded monetarily through occupation level. Since the measures of value in the occupations undertaken in mines was not radically re-evaluated and completely revised to reflect equivalent human consideration, the majority of Africanworkers still perform at the lower levels. The gap between those receiving lump-sums of R80 250 and those receiving R320 985 is significant, so too the pension of R4 195 versus that of R28 658 per month.

What do current compensation rates reveal?[211] Serious questions need to be asked of South Africa's constitutionally acclaimed understanding of human dignity, equality, transformation and the progress toward it. In South Africa the prototypical human situation remains fixed on the material possessions, social status and economic status that white people have historically enjoyed. As yet there has been no meaningful redistribution of wealth and resources. The slight increases in compensation do not reflect an attempt to bridge the gulf between the lowest and the highest rates of pay, nor do they address the systematised hardship this has visited on Africans. Under these conditions, the structural violence being experienced by mine and other African workers is likely to continue. The identified provisions of the ODIMWA and the COIDA illustrate that erasing the sections which exhibited obvious

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[210] From 1912 the NLR awarded African mine workers compensation of between £1 and £20 for permanent injury causing partial disablement, £30 to £60 for permanent total disability and £20 for death. In comparison, white workers were awarded a portion of wages during convalescence following temporary disability, £750 for total permanent disability, £375 pounds for permanent partial disability and £500 for death – beginning in 1907.

[211] Has the nominal adjustment of compensation for chronically ill and dying mineworkers been sufficient to counteract what was deliberately withheld in the past?

discrimination without interrogating the ideology underpinning the prevailing order has not shifted the way workplace relations are understood. It has tended to make 'race … legally invisible.'[212]

Of late, some valiant if limited steps have been taken on behalf of mineworkers to address the deprivation caused by the compensation that has historically been paid for contracting silicosis in mines. Section 100(2) of the ODIMWA restricts mineworkers to being compensated under its provision if the disease in issue is a 'compensatable disease' as defined by the ODIMWA. Thus, a person 'who has a claim to benefits' as a result of being a mine worker or a former mine worker in a controlled mine cannot claim under the COIDA 'or any other law.'[213] In *Mankayi v AngloGold Ashanti Ltd*, where a claim for damages was sought to be brought against a mining company, the interpretation of section 100(2) was placed at issue.[214] Mr Mankayi alleged that the mine was liable for negligence for his prolonged unsafe workplace exposure to dust inhalation, which led to chronic illness. The Constitutional Court held that the delictual common law right to redress injury or death caused by negligence is an expression of section 12(1)(c) of the Constitution, the right 'to be free from all forms of violence from either public or private sources'.[215] The question was whether section 35(1) of the COIDA, which specifically extinguishes recourse to a claim for damages necessarily means that persons eligible for compensation under the ODIMWA are also precluded from resorting to a delictual claim, because of section 100(2) of the ODIMWA. The court noted that the limitations on avenues for claiming compensation in sections 35(1) COIDA read with section 100(2) ODIMWA would, if read too narrowly, in effect leave an injured party with no remedy to enforce the breach of a Chapter 2 right under section 38 of the Constitution, by eradicating recourse to delictual remedy in this instance.[216] Unlike section 56 of the COIDA, there is no provision for additional damages in the ODIMWA if the employer was negligent and such negligence caused the occupational 'compensatable' disease. Moreover, section 100(2) specifically bars any additional claim under 'any other law' which means that mineworkers do not have recourse to section 56 of the COIDA. Regrettably, as has been shown by comparison,

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[212] M Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001) 530-531.
[213] Moreover section 100(1) states that '[n]o person shall be entitled to benefits under this Act in respect of any disease for which he or she has received or is still receiving full benefits under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941).'
[214] *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC).
[215] Ibid 13 & 15.
[216] Ibid 18.

the benefits received under the ODIMWA are already far lower that what may be received under the COIDA. Mineworkers are already at a disadvantage as a consequence of the location of the workplace which caused their malady. The Constitutional Court noted this anomaly.[217] The court held that since the ODIMWA predates the COIDA by more than two decades '[h]ad the legislature intended for ODIMWA to entitle employees to be covered under [section 56] COIDA [where employer negligence had caused the disease], it would have been easy for it to have included references to ODIMWA'.[218] The court held that the ODIMWA is 'entirely silent about exclusion or otherwise of an employee's common law right to claim delictual damages against an employer arising from contracting diseases at the workplace.'[219] This opened the door for mineworkers covered by the ODIMWA to institute a claim for damages against employers.

Even so, section 100(2) clearly excludes the use of any law, other than the provisions of the ODIMWA, to settle a claim for compensation like that of Mr. Mankayi. The delictual right to claim compensation under the common law is one such other law. That the legislature in more recent times chose specifically to exclude a common law claim, according to the COIDA, does not detract from the reality that the common law is law. Nonetheless the Constitutional Court fittingly resolved to safeguard Mr Mankayi's right not to be suffer grave injury because of the sustained neglect of his former employer without recourse. In order to avert the perpetuation of longstanding injustice, the court purposively required there to be an explicit embargo on the application of the common law to the ODIMWA.

Following the *Mankayi* decision, the matter of *Nkala v Harmony Gold* was brought before court for certification of a class action to be instituted against mining companies for damages occasioned by occupational silicosis and TB in controlled mines.[220] Members of the class were estimated to 'range in numbers from … 17 000 to approximately … 500 000'. The alleged delict consisted of the unlawful exposure of miners to harmful dust during their employ, the failure to take adequate protective measures to create healthy work and living spaces, the breach of a common law duty of care owed to employees, the statutory duties dating back to

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[217] Ibid 79-86.
[218] Ibid 91 & 107.
[219] Unlike section 35(1) COIDA which specifically excludes that right to claim for damages, meaning that this exclusion applied solely to the compensation claimed under the COIDA. I.e. s 35(1) COIDA does not extend to control or limit common law damages claims in the ODIMA especially because it is completely silent on matters to do with ODIMA – Ibid 102-105.
[220] *Nkala v Harmony Gold Mining Company Ltd* [2016] 3 All SA 233 (GJ).

the Mines and Works Act of 1911 and including the Mine Health and Safety Act,[221] and the constitutional duties of mining companies to not breach rights to life, human dignity, bodily integrity and the section 24 right to an environment that does not cause harm.[222] The proposed evidence was to show that 'mineworkers were forced to live in crowded and unsanitary conditions' and that the compounds exacerbated the spread of TB, and that the rate of pay for Africans was particularly low ('as low as ten percent (10%) of that which white mineworkers were paid').[223] This in turn hampered their physical ability to ameliorate the effects of exposure to dust and receive appropriate palliative and other care for less serious effects once disease had set in. This issue was argued to be particularly relevant to assessment of any proposed quantum of damages in that lack of adequate care health facilities in rural areas to which miners repatriated has never been addressed, despite promises to do so by mining companies.[224] At issue also was that the Chamber of Mines has consistently worked to discredit scientific findings of the health risks entailed in being exposed to underground dust and has suppressed reporting on the extent of post-exposure silicosis and TB. Also of relevance was that the discrimination against Africans, in favour of white workers, for much of the period under review has had the effect of causing higher disease contraction rates in Africans. It was also argued that the established migrant labour system has readily excused mining companies from fulfilling their duties of care, and that mining companies played a significant role, together with state actors, to advance the maintenance of African migrancy.[225]

The class action matter has recently been resolved and the settlement was made an order of court in *Ex Parte Nkala and Others*.[226] The settlement agreement aims to augment the compensation provided for the applicant mineworkers under the ODIMWA. In assessing the fairness of the settlement the court exercised a 'fiduciary' duty toward members of the class, particularly as a fair number would be bound by the agreement without having participated in the proceedings at hand.[227] While the court noted the American dicta of *Seymour* that 'any settlement is the result of compromise – each party surrendering something in order to prevent

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[221] Act No. 29 of 1996.
[222] *Nkala* (note 220) 58 & 59.
[223] Ibid 61.
[224] Ibid.
[225] Ibid; indeed Murry, Davies and Rees have argued that the migrant labour recruitment system 'weakened incentives to control dust and disease by externalizing cost of disease, moving them away from the gold mining industry to [rural] communities' – Murry et al (note 200 above) 67.
[226] *Ex Parte Nkala and Others* (44060/18) [2019] ZAGPJHC 260 (26 July 2019).
[227] *Ex Parte Nkala* (note 226 above) 17.

unprofitable litigation' and that it behoves the court to avoid engaging 'in a trial of the merits,' the court pronounced that the interests of justice would be the primary consideration.[228] In assessing the reasonableness and fairness of the settlement, the court noted that it had been observed that between thirty and forty percent of identified potential beneficiaries had died as the matter was progressing in the court, and that since this litigation could take up to a decade to complete this did not bode well for the surviving claims or members of the class.[229] Furthermore, the court heard evidence on the declining stability and prosperity of the mining sector, the argument being that it was better to settle sooner before many mines went bankrupt or otherwise became unable to pay in the event of a positive result for claimants.[230] Uncertainty in the outcome of litigation was also taken into account.

The court endorsed the following settlement agreement as reflective of the requirements of justice:

i. A Trust will be established to administer a fund in total amount of R5 billion for the purpose compensation.
ii. Mineworkers who had been engaged in risk work, whether underground or surface in listed gold mines after 12 March 1965 are eligible for compensation.
iii. The compensation is available to miners who were exposed to dust before the Trust became effective (in the identified gold mines) 'but who only developed a qualifying disease after that date, to the extent that such symptoms manifest during the 12-year period of operation of the Trust'
iv. Compensation to be paid will be in addition to what might be payable under the ODIMWA and the amount will depend on the severity of disease progression:
    a. Silicosis Class 1 which requires up to ten percent impairment of respiratory function will receive R70 000, bearing in mind that the ODIMWA does not compensate for this category.
    b. Silicosis Class 2 which requires between ten and forty percent impairment will receive R150 000 over and above the R63 100 currently payable under the ODIMWA; when combined with the ODIMWA award the total amount is R213 000

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[228] *US V Seymour Recycling Corp* 554 F Supp 1334, 1337-38 (SD Ind 1982); Ibid 19 & 20.
[229] *Ex Parte Nkala* (note 226 above) 50.
[230] Ibid 51.

c. Silicosis Class 3 (second-degree under ODIMWA) requires more than forty percent impairment and will receive R250 000 in addition to the R140 506 that is currently payable under ODIMWA; when combined with the ODIMWA award the total amount is R390 506[231]

The projected combined amounts pertain to mineworkers that are currently employed in controlled mines who have not yet received compensation under the ODIMWA.

The settlement also provides for a discretionary special award of up to R500 000 to those certified as Class 3 silicosis sufferers, who were employed for a total of ten or more years, doing risk work during that period, and now have either 'progressive massive fibrosis for mineworkers aged less than 50 years; lung cancer; *car pulmonale*; or massive fibrosis involving the lungs or oesophagus'.[232] Dependants of miners who died before 2008 'in respect of whom the Medical Certification Panel determines that silicosis was the primary cause death' get R100 000 while those associated with miners who died after 2008 and where it is difficult to prove the principal cause of death and the Trust Certification Committee concludes the miner had class 2 or 3 silicosis will receive R70 000.[233]

The compensation accorded mineworkers in the class action matter still falls far short of the compensation which was due to white mineworkers from the 1970s onwards, until applicable deletions were made in 1993. The R18 000 an estimated R1 015 531 in today's terms overshadows the hard won *Nkala* settlement. The R500 000 due to the gravest silicosis sufferers is watered down by the stipulation that those miners need to have performed risk work for more than ten years. In the context of the identified scourge of comorbid TB and HIV infection, coupled with the persisting weakened socio-economic position of mineworkers which further compromises their health status, this time factor is likely to reduce the number of claimants. The majority of silicosis sufferers are due to receive between R70 000 and R250 000 in the form of contestable damages, while dependants may receive between R70 000 and R100 000. Significantly, mineworkers who engage in risk work exposing them to illness

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[231] Ibid 23, 24, 27, 33, 35 , 36 & 37.
[232] Ibid 38.
[233] For 1st stage TB the claimant will receive R50 000 from the Trust, when combined with 1st degree TB under ODIMWA of R65 945 the claimant will get R115 945 and for 2nd stage will receive R100 000 from the Trust, when combined with 2nd degree TB under ODIMWA of R146 842 the claimant will get R246 842 – Ibid 39, 40, 65 & 71.

inducing dust after the Trust comes into effect, shall not automatically be eligible for further compensation. These mineworkers will have to institute and prosecute claims for damages against any applicable controlled mines and will only be eligible for automatic compensation under the ODIMWA.

8.6. Conclusion

The Constitution and its supporting jurisprudence has evaded the task of adjusting the grounding of South African law to reflect affirmed African subjectivity. Constitutionalism has instead legitimised the so-called 'divine right of conquest' by attempting to close the door to the imperatives of justice which inhere in the African maxims '*Izwe lethu*', and '*molato ha o bole*' – 'Our land', and 'culpability does not prescribe'. Placing pre-eminence on constitutional supremacy and the rule of law has circumscribed the parameters of conceptualising alternative methods of perceiving humanity and its undertakings. The failure to engage adequately with genuine recompense has led to fidelity to the very laws that erected structures which subjugated African workers. The law defining and regulating work and workplace arrangements remains faithful to colonial and apartheid norms. The embrace of corporatist relations under an economic system of neoliberal policies has maintained the continued abjection of the majority, coupled with the concentration of wealth in the hands of a few. In this context, the bargaining prescripts of the LRA have been fated to assist in the upkeep of the 'old'.

The Constitutional Court has stated that '… equality should not be confused with uniformity; in fact uniformity is the enemy of equality.'[234] But when attempting to remove discrimination, the legislature has adjusted the ODIMWA toward a seeming uniformity that ignores more than one hundred years of deliberate deprivation. In reality, there is no uniformity in the award of compensation for occupational injury, disease and death in South African law. Mineworkers, who in many respects represent the worst affected by debilitating occupational disease, continue to be the least compensated in law. The compensation receivable under COIDA, which includes monthly pensions for chronic impairment, far exceeds that of small once-off payments under the ODIMWA for 'compensatable' diseases. On the whole it appears that the post-apartheid revisions of these laws have continued to look to the lowest denominator to source the expression of acceptable norms for Africans. The legislature has desisted from

[234] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 132.

establishing the basis of award from a stance of reflecting generalisable equity. The scales of compensation still rank workers from lowest to highest, based on established patterns of tallying human value.

This chapter has revealed that the position of African mineworkers has not been bettered significantly, but instead is marked by continued neglect by institutions of power. Therefore thorough understanding of the injustice – the protracted assault of conquest and the imperative to reassert African personhood as well as retrieve material and other resources long withheld – endures as *the* precondition for initiating the design of alternate understandings. This study is located in endeavours to salvage a comprehensive account of injustice, a situation that must happen first before more dependable African agency may be fashioned.

CHAPTER 9

CONCLUSIONS AND RECOMMENDATIONS

This chapter brings the study to a close. Brief comment shall be made on the contents and findings of the prior chapters. Some conclusions about the philosophical underpinnings of labour and labour law both in the past and in the current South African epoch shall be reiterated. The conclusions will include recommendations on the steps necessary to create a more emancipatory arena, fashioned through reassessment of appropriate norms by the *demos*.

9.1. Summary of Propositions and Method

This study has concerned itself with the formation of labour law in South Africa. The aim has been to distil the ethos underlying the regulation of labour. To this end a 'contrapuntal' reading of law as a device to manage the colonial 'native question' has centred the excavation. The main task has been to reveal the extent to which colonialism and apartheid policy pertaining to Africans has directed the functions of labour regulation. A secondary pursuit entailed discerning the hegemony of present-day labour law.

Beyond the obvious manifestations of conquest like killings, land grabs and dispossessing African peoples of territory and material resources, the justifying ideology has also been important. In order to advance the extractive purposes of imperialism, evident in the colonial incursion, the African was fabricated as the 'native,' which then produced the 'native question' or problem. European mores that endorsed conquest and the othering of Africans have produced Eurocentrism.[1]

The purpose has been to reveal the often overlooked objectives and results of particular provisions of the law. Analysis of labour regulation has been undertaken from a perspective that seeks to marry the provisions of law with the underlying scheme which has been faithful to particular moral equivocation – that of inferiorising Africans and their modes of living. Using early labour law, the purpose has been to dispel notions of neutrality in the fashioning

[1] The certainty that Europeans 'were specifically endowed' with a 'divine right' to subdue other peoples based on invented racial profiles and de-legitimation of their cultures – C Orser 'An Archaeology of Eurocentrism' (2012) *Cambridge University Press* 737, 738; *Cook v Sprigg* [1899] AC 572, 579; M Ramose 'In Memoriam: Sovereignty and the New South Africa' (2007) 16 *Griffith Law Review* 310, 314; *Mokhatle & Others v Union Government (Minister of Native Affairs)* 1926 AD 71.

and implementation of regulations. In order better to assess how the tentacles of colonialism have embedded and may continue within Eurocentrism, the postcolonial theoretical framework has been used as the perceptive lens of analysis. Provisions of law which have been directed at regulating African labour have been scrutinised. Prominent in the examination is the endeavour of law-makers to resolve the 'native question'. Furthermore, an inextricable link between the sub-human perception of Africans and their position in the scheme devised has been glaring in the legal provisions recounted.

Discussion of the early regulatory controls on Africans and their labour in the Cape showed that they were an influential template in the creation of subsequent law. The study confined itself mainly to the situation of African mineworkers, beginning in Griqualand West and then focusing on the Transvaal. The proposition has been that in highlighting the effect of twentieth century labour laws on these Africans so central in deliberations about the 'native question', it will clarify the true import of labour and its management in South Africa.

In line with postcolonial theory, the study has accepted that colonialism has entailed an uneven merging of two cultures, that of the white community bent on an unstable conquest constantly being re-asserted, and that of Africans who, while resentful of oppression, have also internalised the precepts of colonial logic.[2] Selected law has been discussed in a manner attentive to the muted presence of Africans. This method of reading law has been intended to unsettle the conventionalised norms of the statutes and to trigger deeper thought on the motives behind South African labour law. The inspection alludes to the possibility of discovering a 'third' space – an in-between space devoid of certitudes – in which the rethink of mores may occur.

9.2. Research Findings

The nexus between racism, imperialism, colonialism and eurocentrism or western norms has been demonstrated. Having noted the wholesale disqualification of Africans from substantive recognition in the polity, the normalised understanding of democracy was also queried. Colonialism and imperialism both entail the exercise of authority by a foreign entity over societies and assets for purposes of acquiring material and political affluence. Imperialism

[2] L Noel *Intolerance: A General Survey* (1994) 79; A Quijano 'Coloniality and Modernity/Rationality' (2007) 21 *Cultural Studies* 168 168-169.

concerns itself with the justificatory rationale for these undertakings and its motif has been to denigrate the personhood, knowledges and modes of living of the indigenous societies being dominated. Eurocentrism is in close proximity, as *the* corollary of the denigration of Africans, since it has installed and continues to prop-up European misdeeds, culture and epistemology as universal 'evolutionary doctrine'.[3] From the outset it has also been argued that where the *demos* have been discounted, approximations based on formalised periodic voting do not amount to true democracy.[4] The idea that 'government by minorities' that in reality disregards the wishes of the majority of citizens is the best that can be hoped for, the alternative being authoritarianism, has been rejected by this study. Using this barometer, present-day South African arrangements where governance is effected through privileged minorities that have been legitimated through 'universal suffrage', still fall short of real democracy.[5]

Since this study has aligned itself with endeavours to displace the normalisation of parochial western values, when reading of the historical management of Africans as labour, the discussion has been concerned that legal and other discourse should admit the extent of the indignities visited. The process occurs through deconstructing the purposes and effects of the regulations. This offers the possibility of engaging with the projected misrepresentations of Africans ('natives') scattered throughout legislation, initiating dialogue with a marginalised range of experience.

Importantly, the law itself spotlights the centrality of ideological racism as the fulcrum of the rationales adopted – a realm where being African has signified 'poverty of spirit … and constitutional depravity.'[6] It has legitimated killings, extermination raids and the kidnapping of African women and children as bonded workers, along with the misappropriation of land and other resources. In South Africa this has been the grounds for creating workplace hierarchies and the strikingly unequal wage disparities.

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[3] Orser (note 1 above) 738.
[4] R Krouse 'Polyarchy & Participation: The Changing Democratic Theory of Robert Dahl' (1982) 14 *Polity* 441, 443; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123, 143; J Ranciere 'Introducing Disagreement' (translated by S Corcoran) (2004) 9 *Angelaki Journal of the Theoretical Humanities* 3, 5.
[5] The primary goal of the thesis has been to 'intervene in those ideological discourses … that attempt to give a hegemonic "normality" to the uneven development' within a society – H Bhabha *The Location of Culture* (1994) 171.
[6] F Fanon *The Wretched of the Earth* (1961) (trans C Farrington, 1963) 42.

In chapter 3 this study demonstrated that the land grabs of colonialism, the introduction of private property, the withholding of property, citizenship and other rights from Africans, the mobility restrictions and the influx control measures were all integral to creating an overarching structure of managing labour. Moreover, early mining law readily demonstrates the development of industrial labour management in South Africa. Put simply, the development of mining law is labour law. The discussion has shown the significance of the evolution of the mining sector and mining laws to the fashioning of labour law. In order to grasp why African mineworkers were positioned as they were, it was necessary to reveal the historical morals and law from which the legislatures drew. Therefore, this thesis has traced the establishment of labour and its management, as it has become understood in South Africa. Beginning in the seventeenth century, but focused mainly on the enactments of the nineteenth century, a motif of ill-treating Africans was rationalised through disseminated discount of their humanity.

The establishment of the settlement which became the Cape colony initiated the forcible seizure of territory and a re-definition of 'African subjectivities' primarily as 'free' labour by the white colonists.[7] The inward maraud, sanctioned by edict and proclamation to exterminate the savage '*schepsel*' ('creature') through commando raids, included enslaving African women and children.[8] The British method of supposed humane utilisation of Africans was codified by the 1809 Caledon Code, which created a regime of contracts of hire. The code required Africans to be assigned to a white employer and be confined to fixed places which they could occupy lawfully. Africans were channelled by the Code to relinquish their 'useless' lives and find their purpose in servicing the white inhabitants.[9] Once an African was locked into a contract, non-compliance with the directives of a master could lead to grievous corporal punishment and even imprisonment. The system of Africans being required to carry passes in order to control their presence and movements within the colony is also a feature inaugurated by the Code. Thus Africans were restricted to the property of their masters and were not allowed to relocate

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[7] 'Free' served to distinguish Africans from the slave labour that was being imported for ownership and use by the colonising community - C Tafira & S Ndlovu-Gatsheni 'Beyond Coloniality of Markets: Exploring the Neglected Dimensions of the Land Question from Endogenous African Decolonial Epistemological Perspectives' (2017) 46 *Africa Insight* 9, 12; P Delius and S Trapido 'Inboeksellings and Oorlams: The Creation and Transformation of a Servile Class' (1982) 8 *Journal of Southern African Studies* 214, 218.

[8] *Report of the Parliamentary Select Committee on Aboriginal Tribes* (British settlement) House of Commons Select Committee on Aboriginal Tribes Report (1837) 32; N Penn 'The British and the "Bushmen": the massacre of the Cape San, 1795 to 1828' (2013) 15 *Journal of Genocide Research* 186; J Parada-Samper 'The Forgotten Killing Fields: "San" genocide and Louis Anthing's Mission to Bushmanland' (2012) 57 *Historia* 172-187.

[9] Hottentots were to be allocated a 'fixed Place of Abode' recorded by district officials or the Landdorst (article 1) Proclamation 1 of 1809 (Caledon Code).

or move from place to place without a written permit. Arguably the Caledon Code was an adaptation of the precepts of the slavery, already in place, to procure and control African labour involuntarily.

The long established kidnapping of children and their use as bonded labour was ratified by the Apprentice Proclamation of 1812. Children could now be apprenticed from the age of eight, and where a master did not want to apprentice the child of a servant, such child could be given to another willing master for the purposes of effecting the stipulated ten-year indenture. Separate influx and mobility control law was devised to procure the labour of Africans dwelling outside of the declared colonial territories, who were labelled 'native foreigners'.[10] The notion of Africans being or occupying spaces and places illegitimately, based on a supposed right of conquest, was formalised and implemented in the Caledon Code, Ordinance 49 of 1928, and other early law. The presence of Africans could only be countenanced where they were engaged as servants to white community. The Master and Servants Ordinance 1841 which became the Act of 1856 was geared towards former slaves and mixed-race people and only administered a small population of Africans, those within the colony and not those belonging to '[t]ribes beyond the frontier'. So the Master and Servants laws did not apply to most Africans. Africans were largely governed through a series of 'Kaffir' laws.[11]

The founding rubric of the ZAR, the Thirty-Three Articles of 1844, declared separation by at least ten notches of humanity between Africans and white people. The Articles also mandated heed of conscription to engage in slave raids – attacks on African groupings and kidnapping children and some women as spoils. Following disqualification of the legitimacy of possessing and using territory by Africans, private property rights which were not availed to Africans were introduced. The 1858 *Grondwet* (constitution) explicitly declared the inequality of the races, accounted mainly for white people and inscribed African inferiority as

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[10] Ordinance No. 49 of 1928.

[11] After the passing of Ordinance 49 of 1828 the following laws were enacted to regulate the entry into movements of Africans in the Cape: Act No. 23 of 1857 intituled '[a]n Act for more effectually preventing Kafirs from entering into the Colony without Passes'; Act No. 27 of 1857 intituled '[a]n Act for regulating the terms upon which Natives of Kafirland and other Native Foreigners may obtain employment in this Colony; Act No. 24 of 1859 intituled '[a]n Act to amend the Laws for regulating the admission of Kafirs and other Native Foreigners into the Colony'; Act No. 23 of 1860 intituled '[a]n Act for preventing unauthorised Persons from granting to Kafirs or other Native Foreigners Passes or Papers pretending or supposed to be such , and for preventing Kafirs or other Native Foreigners from being harboured on the premises of persons who do not employ such Kafirs or other Native Foreigners'; Act No. 17 of 1864 intituled '[a]n Act for amending the Law regarding Certificates of Citizenship'.

foundational in law. From the beginning the procurement of African labour to work on awarded farms was a major preoccupation of law.[12] The taxation of African tribes for the purposes of forcibly getting labour was instated as early as 1853, along with mobility surveillance through the carrying of passes in 1958.[13] The regulations pertaining to Africans thus call into question the supposed race-neutrality of the ZAR Master and Servant Act of 1880, much like matters in the Cape.

Discussion turned to the regulation of mining first in the diamond fields of Griqualand West and then in the ZAR. It was the white workers organised as Digger's Committees who violently propelled the racialised issuance of permits to dig. A servant's registry was established to account for the presence of all Africans through a series of pass documents, while they were employed by white permit holders. Once again the law and policy established was geared toward supplying the mines with cheap African labour. In the ZAR, Gold laws routinely reiterated the racial hierarchy that entitled only white people to licenced prospecting and digging under vetting performed by Diggers' Committees. The laws pronounced repetitively that no African could be granted licences and that Africans could only be permitted on gold fields as labour for a white person. Residential and mobility restrictions were more comprehensively administered through the periodical modification of the pass and squatter laws.[14] In an effort to secure a steady supply of mine labour, expanded taxes were levied on Africans and specific pass laws were enacted.[15] A separate employment regime was applicable to Africans by laws aimed at 'facilitating and promoting the supply of native labour on public diggings … and for the better controlling and regulating of the natives employed , and relations of employer and native labourer.'[16] The activities of organised white mineworkers, starting with the Diggers' Committees and then under the banner of the Transvaal Miners' Association,

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[12] Instructions to the Field-Cornets – Volksraad Resolution 9 April 1849; Volksraad Resolution 17 September 1858; Volksraad Resolution No. 181 18 June 1855.

[13] Volksraad Resolution No. 68 of 19 September 1853 - S Barber W Macfadyen & J Findlay *The Statute Law of the Transvaal* (1901) 11; Resolution No. 183 Instructions to Field-Cornets (17 September 1858) superseded the Instructions of 9 April 1849; Ordinance No. 2 of 1864; Law No. 9 of 1870; Taxation of Natives Law No. 6 of 1880.

[14] The report of the Transvaal Labour Commission 1904, noted that taking away access to even larger areas of land needed to be done so that Africans would have to resort to labouring for money in order to survive – para 72, 80, 88 & 90-91 *Reports of the Transvaal Labour Commission* Majority Report (1904) 2 available at https://catalog.hathitrust.org/Record/011984084, accessed on 21 October 2019.

[15] Law No. 24 of 1895; Ordinance 20 of 1902.

[16] Native Pass Law for Gold Fields Law No. 23 of 1895; Native Pass Law (Law No. 32 of 1896); Gold Law (Law No. 21 of 1896); Gold Law (Law 15 of 1898); Diamond Law (Law 22 of 1898); Native Pass Law on the Goldfields (law No. 23 of 1899); Transvaal Proclamation No. 37 of 1901; Native Passes Amendment Ordinance No. 27 of 1903; in reality the Master and Servants Law of 1880 was not applied to Africans.

which turned into the Mine Workers' Union, were most influential. It was unrest caused by disaffected white mineworkers in the early 1900s that prompted the enactment of the first industrial disputes management legislation, the Industrial Disputes Prevention Act 1909, which laid the groundwork for the current law.

A recount of the early law reveals that the forcible labouring of Africans has been vital in the development of colonial settlements and enterprise endeavours. The supposed worthwhile 'modernization' of South Africa has been accomplished by the brutality imposed on Africans. Yet normalised accounts advance concrete separations, white leadership alongside legitimised African servitude. Fidelity to this paradigm of thought demands an either-or response to historical events (either it was good – a necessary evil or it was bad), without making room for nuanced deliberation. It presumes a capacity to escape colonial manipulaton when interrogating its misdeeds. But the formations of this type of thought themselves are flawed, and have failed to create the certitudes they profess.[17] This is the narrow thinking which leads to belief that solutions lie in according Africans access to the spoils of conquest, such as privatised property. Instead the route of 'simultaneously privileging and distancing the colonial narrative' so as to move 'beyond it', by unsettling the premise upon which dispossession occurred in the first place, is proposed.[18] This way avoids legitimation through the controlled insertion of Africans into colonised spaces.

In chapter 4 the study has argued against the applicability of conventional theories that have deliberated on the functions of labour regulation. As examination of the way the law assembles particular perceptions of reality has ensued, the misconception that law merely depicts reality has been discarded. The climate under which labour regulation has been developed dispels the notions of voluntary exchange. Consensus has not been a core feature of labour contracts. Instead African workers were forced, by the cumulative effect of a number of laws, to accept predetermined exploitative situations.[19] The notion of social redistribution

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[17] Bhabha (note 5 above) 86.
[18] E Shohat 'Notes on the "Post-Colonial"' (1992) 31/32 Social Text 99, 107.
[19] Proclamation 1 of 1809 (Caledon Code); Proclamation 23 of 1812 (Apprentice Proclamation); Ordinance 49 of 1928; the Thirty-Three Articles 1844; Article 159 Volksraad Resolution 1855; *Grondwet* 1858; Ordinance 2 of 1864; Law No. 9 of 1870; Gold Law No. 8 of 1885; Native Pass Law (Law 22 of 1895); Native Pass Law for Gold Fields (Law 23 of 1895); NLR; Mines and Works Act 1911; Industrial Conciliation Act; Wilderson has questioned the existence of consent even in western settings, complaining that it has been '… manufactured by intellectuals of the ruling class … backed up by coercive-in-reserve' - F Wilderson 'Gramsci's Black Marx Whither the Slave in Civil Society' (2003) 9 *Social Identities* 225, 228.

though industrial relations management is also not suitable because it presumes the legitimacy of existing employer-employee relations. It does not query the prerequisite commodification of Africans into implements for purposes of resource extraction.[20] Labour law operates as a designated space of regulation within particular socio-economic and political arrangements. It has been developed to work 'with and not against the [so-called] logic of the markets', not for purposes of achieving fairness (dubbed workplace democracy) in employment relations.[21] The bargained attainments of labour have to some degree been the allowances made to keep control of labour within the structures created.[22] South African labour law has historically discounted the majority of labour from claim to the comprehensive labour facilities of the law. The non-compulsory recruitment of 'free' workers into a system of free enterprise does not reflect the South African experience. Labour laws have simultaneously generated both legal subjects (white people) and 'abject beings' – Africans.[23] On its formation, the Union was resolute in efforts to create a white British colony, with a corresponding native policy that banned access to land and resources in order to fashion Africans into a sub-class of servants.[24] Since Africans were objectified as tools, the law and policy on or about Africans reads as a depiction of the denigration of African humanity, rather than objective reality. Thus the entitlements claimed by white workers have been premised directly on this commodification. In this milieu, a peculiar corporatism that accommodated only white workers within the tripartite relations with the state and capital took shape in South Africa.[25]

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[20] The thingification described by Cesaire – A Cesaire *Discourse on Colonialism* (1950) (trans J Pinkham, 2000) 42. Wilderson has stated that the plight of Africans 'calls into question the legitimacy of productivity itself' – Wilderson (note 19 above) 231.

[21] R Dukes *The Labour Constitution The Enduring Idea of Labour Law* (2016) 2; D Davis 'Functions of Labour Law ' (1980) *CILSA* 214; N Haysom 'Introduction to Industrial Conflict' (unpublished paper) cf: D Davis 'Functions of Labour Law ' (1980) *CILSA* 214.

[22] K Klare 'The Public/Private Distinction in Labor Law' (1981) 130 *U. Pa. Law Review* 1375; D Kennedy 'Critical Labor Law Theory: A Comment' (1981) 4 *Industrial Relations Law Journal* 503, 504; J Conaghan 'Critical Labour Law: The American Contribution' (1987) 14 *Journal of Law and Society* 334, 335.

[23] J Butler Bodies *That Matter: on the Discursive and Limits of "Sex"* (1993) 3; M Davies 'Towards the Common Law – The Limits of Law and the Problem of Transition' (1993) 2 *Asia Pacific Law Review* 65, 67; F Barcheisi 'The Violence of Work: Revisiting South Africa's "Labour Question" Through Precarity and Anti Blackenss' (2016) 42 *Journal of Southern African Studies* 875, 883; Industrial Disputes Prevention Act 1909 NLR; Mines and Works Act; Industrial Conciliation Act, Workmen's Compensation Act(s).

[24] Reports of the Transvaal Labour Commission 1904; South African Native Affairs Commission 1903-1905: Reports with Annexures no. 1 to 9 (1905); R Bright *Chinese Labour in South Africa 1902-10: Race Violence and Global Spectacle* (2013) 2.

[25] D Yudelman *The Emergence of Modern South Africa: State Capital and the Incorporation of Organised Labour on the South African Goldfields 1902-1939* (1983) 2-4; Y Kim & J van der Westhuizen 'Why Corporatism Collapsed in South Africa: The Significance of NEDLAC' (2015) 50 Africa Spectrum 87,88.

On unification by the South Africa Act, 1909 the conferral of citizenship hinged on racial profiles. At every turn the legislature allotted and withheld rights and duties based on the race of people as defined in numerous statutes. Chapters 5 and 6 of the study began the reading of labour law mindful that it has not 'been merely a question of a gap occurring in the record, but [that] the space had been filled with nonsense that was made credible' and that '[f]or the unaware, nothing was amiss.'[26] The discourse revealed that the primacy of an assigned racial profile required judicial interpretation on accurate appraisal and degrees of permissible dilution. From this evolved contradictory tests on the appearance of an individual on inspection, habits of life and parentage.[27] Africans were separated from whites, then also distinguished from 'Asiatics' and people of mixed parentage.[28] The gold and diamond laws, taxation and mobility laws as well as residential and occupation laws continued to have significant labour regulatory objectives and effects. The Native Labour Regulation Act of 1911 was key in setting up the tightly controlled migrant labour system that funnelled African labour to the Transvaal mines and was replaced by the similar, if more complex, 1964 Bantu Labour Act. Once at the mines, the regulations of the Mines and Works Act 1911 solidified the inferior status of Africans by establishing job reservation in favour of white employees, which was expanded by other laws, replicated in other sectors and lasting for most of the century.[29]

In labour relations the differing value accorded to workers is reflected monetarily. This quantification has been based firstly on racial profile and then secondly, in a manner linked to racial identity, on the station workers hold in the workplace. Job titles were also designed and populated based on assigned racial identity. For purposes of quantifying human worth, the workplace compensation arrangements established in the twentieth century have been telling. Initially Africans received no compensation.[30] When compensation for workplace injury, disease or death was finally offered to African workers, the gap between what was payable to Africans that the amount payed to white workers was staggering. The maximum amount payable for partial permanent impairment to white workers ranged from 18.75 times and to over 370 times that payable to Africans, and in cases of death dependants of white workers

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[26] C Robinson *Black Marxism* (2000) 175.
[27] The appearance, parentage and associations or habits of a person were used to determine the correct racial profile - *Rex v Kogan* 1918 AD 521; *Rex v Swarts* 1924 TPD 421; *Rex v Sonnenfeld* 1926 TPD 597
[28] *Rex v Fakiri* 1938 AD 237; *Rex Radede* 1945 AD 590.
[29] Mines and Works Act 27 of 1956; Native Building Workers Act 27 of 1951; Natives (Settlement of Disputes) Act No. 48 of 1953; Industrial Conciliation Act No. 28 of 1956; Industrial Conciliation Amendment Act No. 41 of 1959.
[30] Workmen's Compensation Act No. 36 of 1907.

received 25 times more than those of Africans workers – £500 versus £20.[31] Recompense for silicosis acquired in mines has also been doled out in a manner that reflected this racialised determination of human value, since it only accounted for white workers and relegated African workers to the provisions of the NLR.[32] The 1934 Workmen's Compensation Act incorporated Africans at diminished compensation levels. Since the compensation formula was based on monthly wages it was inevitable that Africans would receive a comparable pittance.[33] By 1967 there was still no provision for the receipt of pensions by African workers or their dependants. Injured African workers could receive a minimum lump-sum payment of R480 for one hundred percent permanent impairment; while white workers were entitled to a pension equal to seventy-five percent of of their salary for life.[34] Likewise, a segregated incorporation was effected for occupational silicosis compensation with Africans continuing to receive far less than white and other non-white racial groups.[35] Throughout the twentieth century Africans were legislatively deprived of the protective health screening and health care afforded to white workers.[36] This inevitably resulted in the under-diagnosis of occupational diseases acquired by African mineworkers.

African presence has appeared in muted and disposable form or deliberate silence in the text of the law; a tangential incorporation inducted by the manufacture of lesser beings in

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[31] Partial incapacity required payment of between £1 and £20 for Africans and a maximum of £375 for white people, moreover while white workers received significant portions of wages during convalescence no payment was made to Africans –Workmen's Compensation Act No. 36 of 1907; Native Labour Regulation Act No. 15 of 1911, Workmen's Compensation Act (Transvaal) No. 37 of 1907; Workmen's Compensation Act No. 25 of 1914; *Ngcema v Gilber Harmer* 1928 AD 34.

[32] During this time white miners were receiving up to £400 and later as much £750 Miners' Phthisi Allowances Act No. 34 of 1911; Miners' Phthisis Act No. 19 of 1912; Miners Phthisis Amendment Act No. 29 of 1914; Miners' Phthisis Act No. 44 of 1916; Miners' Phthisis Act No. 40 of 1919.

[33] Workmen's Compensation Act No. 59 of 1934; Workmen's Compensation Act No. 30 of 1941.

[34] Comprehensive provision was also made for pensions for spouses and children if the white worker had died - Workmen's Compensation Amendment Act 58 of 1967; when pensions were permitted for widows and children there was no clear stipulation on the amount due to the African dependants and it was left at the discretion of the Compensation Commissioner what if any amounts would be paid - Workmen's Compensation Amendment Act No. 28 of 1977; Workmen's Compensation Amendment Act No. 29 of 1984.

[35] Miners' Phthisis Acts Consollidation Act No. 35 of 1925; Silicosis Act No. 47 of 1946; Pneumoconiosis Compensation Act No. 64 of 1962; Occupational Diseases in Mines and Works Act No. 78 of 1973.

[36] Due to the recognised high risk of contracting lung disease by performing underground work, a health certification process was established for white and other non-white mine workers except African workers. Legislative provisions deliberately placed the health and well-being of African miners in jeopardy by permitting their habitual exposure to harmful dust without necessary certification. Moreover while other race groups were required to undergo regular health screenings Africans were not. Even if, in the unlikely event of a health check, disease symptoms were noticed a report requiring additional investigation was not required for Africans. For white and non-whites (other than Africans) the further testing was mandatory and was funded by the state - Section 16, 19, 22, 24, 33, 34 Pneumoconiosis Act No. 57 of 1956; Pnemoconiosis Act No. 64 of 1962; Occupational Diseases in Mines and Works Act No. 78 of 1973.

regulatory thought and practice. Focal re-enactment of these laws tends to subvert the resort to 'principled forgetfulness', because past law has not been recalled in a manner detached from its morality.[37] So revealed, the 'nonsense' on which racial and workplace hierarchies have been built points to possibilities of unsoundness in the structure.[38]

This is all the more apparent from the discussion of official chronicles of policy *vis-à-vis* Africans at the mines and other relevant spaces. The discourse has revealed that from its formation the Chamber of Mines had a strict policy of keeping African wages particularly low,[39] so much so that in 1914 wages at the mines were on average lower than they had been in 1896.[40] In the twentieth century the Chamber of Mines steadfastly held on to its policy of 'maximum average' wage for African workers.[41] Africans were kept in heavily surveilled compounds managed by *Indunas* and 'compound police', under the authority of a white overseer. The standard contracts under which they were employed routinely short-changed them of actual amounts due, when considering the work being done, even under the already depressed metric of African wages.[42] It becomes apparent that there was no voluntary exchange of services, no freedom of contract.

The urban areas influx control law, premised on the principle that African presence was only tolerable to the extent that it was engaged in labouring to service white communities, outlawed '[r]edundant natives.'[43] A vast permit system of periodic reporting and registration for employment purposes was devised. Africans suspected of being unemployed ('idle') were taken before authorities for expulsion from assigned locations, or other punishment, such as forcible placement in work.[44] Law separated families for purposes of utilising Africans as labour. African youth became homeless and had to leave home and apply for housing, which

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[37] A Nandy 'History's Fogotten Doubles' (1995) 34 *History and Theory* 44-66, 47
[38] Robinson (note 26 above) 175.
[39] Annual Report of the Chamber of Mines for 1892; Colonial Office Archives, C.O. 291/30. 45779 Milner to Chamberlain, 6th December 1901; *Transvaal Labour Commission* (1904); *South African Native Affairs Commission 1903-1905: Reports with Annexures no. 1 to 9* (1905); *Native Grievances Inquiry*, U.G. 37 of 1914
[40] Para 254, 255 UG 37 of 1914 *Native Grievances Inquiry*.
[41] Para 67 *Report of the Witwatersrand Mine Natives' Wages Commission* UG 21/1944 (1944) 5.
[42] Native Grievances Inquiry, U.G. 37 of 1914
[43] Para 5 The Transvaal Local Government Commission (T.P. 1-1922) cf: *Report of the Native Laws Commission 1946-48* UG No. 19 of 1948 (1948) 4; Natives (Urban Areas) Act No. 21 of 1923; Native (Urban Areas) Consolidation Act No. 25 of 1945; Africans had 'no permanent home' outside reserves and once the white establishment had utilised their labour they would have to return there - para 18 & para 19 *Report of the Native Laws Commission 1946-48 UG No. 19 of 1948* (1948) 14.
[44] *Hashe v Cape Town Municipality* 1927 AD 380; *Native Commissioner & Union Government v Nthako* 1931 TPD 234; *Simango v Buitendag* 1943 WLD 85; section 17 Natives (Urban Areas) Act No. 21 of 1923; Work Colonies Act No. 20 of 1927.

was contingent on getting a job at the age of eighteen years. Similarly, taxation law kept up the need to work. Throughout the twentieth century, courts seized with such matters did comment in passing on 'the harshness and possible wrong … inflicted' yet pronounced their role as merely 'to give effect to the laws … whether we approve of them or not.'[45]

The prohibiting of Africans from reaping monetary gain from the profits of mining has been key in attempts to settle the 'native question' of South Africa; it has also been the cornerstone of economic development and the attainment of prosperity by white society. Hence mining law relegated Africans to peripheral cheapened labour, incapable of obtaining rights to prospect, peg, and have digging licenses throughout most of the twentieth century. The Precious and Base Metals Act of 1908 administered gold mining rights until it was replaced by the similar Mining Rights Act of 1967, which continued to bar Africans from access to substantive mining rights.[46] The definitions 'Bantu' or 'black', 'coloured' and 'white person'; along with the section 48(2)(b)(ii) and (iii) prohibitions on the granting of claims licences, which was gave the right to peg and then subsequently dig, to anyone who was not white were removed from the Act by the Amendment Act of 1991.[47]

The Industrial Conciliation Acts of 1924, 1937, and 1956 are notable for banishing Africans from recognition as employees, when trade unions were licensed to engage in collective bargaining. These enactments served to impair the already precarious position of African workers further. Though Africans could not bargain, the determinations of industrial councils were able to change their employment conditions.[48] Under this regime Africanwages remained extremely low, in line with supposed tribal needs, while the 'civilized community' reaped far greater benefits.[49] The effects of this were evident in the poverty and economic pressure experienced by African workers and their dependants. By 1944 there had been hardly any increase in the wages of African mineworkers, but the working conditions had become

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[45] *Rex v Kolokoto* 1936 OPD 136; *Hashe v Cape Town Mumicipality* 1927 AD 380, 388
[46] Precious and Base Metals Act No. 35 of 1908 (Transvaal); section 7 Mining Rights Act No. 20 of 1967
[47] Mining Rights Amendment Act No. 12 of 1991; the Minerals Act No. 50 of 1991 then repealed and replaced the 1967 Act; likewise the Diamond laws also retained the same racially discriminatory structuring - *Precious Stones Act* No. 44 of 1927; Precious Stones Act No. 73 of 1964.
[48] Allowing industrial council agreements to cover Africans was done 'not in their interest to prevent the defeat of the objects of an agreement which was not entered into for their protection' – *Parisian Bakery v Ben* 1934 TPD 245; section 9(5) ICA (as amended by Act 24 of 1930); *Rex v Meltzer* 1933 TPD416.
[49] *Report of Native Commision* 1932; UG 37 of 1935 *The Van Reenen Commission* of 1934-35.

more onerous.[50] Invariably the rationale was that an improvement in the wages of African mineworkers would have the effect of damaging the economy irreparably, and thus the well-being of white South Africans, which in turn was taken to mean the country as awhole.[51] This occurred despite evidence clearly showing that the wages were so inadequate that they resulted in the widespread progressive impoverishment of African communities. Avoiding the possibility of the 'catastrophic dislocation of the industry and consequent prejudice to the whole economic structure' has generally been the priority.[52]

The exclusion of Africans from participating in industrial council bargaining structures of the Industrial Conciliation Acts, through recognised trade union membership, was justified on the grounds that it would allow Africans to lead labour representation,[53] hence the tepid Native Labour (Settlement of Disputes) Act 1953, which continued to prohibit incorporating Africans into the *de facto* bargaining structures. Furthermore, the Industrial Conciliation Acts provided conspicuously for officials 'to preserve occupational positions for certain race groups … [so as to] safeguard the standard of living of the White workers of South Africa'.[54]

The retelling of the historical law which introduced Africans as peripheral in the larger tale of labour following colonial conquest has the objective and effect of rearranging the narrative somewhat. Undoubtedly the story of Africans is still being told through colonial and apartheid law,[55] but by reading the law focusing on Africans, rather than the community it was intended to serve, a shift in consciousness is likely to occur – a disarticulation of 'the voice of authority' at its source.[56] A more noticeable spillage of vexed African presence disturbs the integrity of the law and its purposes.[57] The 'small voices' hidden within the hegemony begin to animate.[58] The intercession of discourse that points out the folly of dominant reasoning exposes the reality that the African mineworker too is a creature of colonial and apartheid

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[50] *Report of the Witwatersrand Mine Natives' Wages Commission* UG 21/1944 (1944) 7; 'Conditions of African Employment on the Rand Gold Mines' (1945) 51 *International Labour Review* 55-65, 60
[51] Note 50 above; Para 1591 *Report of the Industrial Legislation Commission of Enquiry* UG 62 of 1951.
[52] Note 50 above para 211.
[53] UG 62 of 1951 (note 51 above) para 1556; it was been feared that in industrial relations racial equality spells doom for 'Europeans as a … race and … European civilization in Southern Africa' – UG 62 of 1951 (note 51 above) para 1593.
[54] Section 77 Industrial Conciliation Act No. 28 of 1956.
[55] The tale is told in opposition to the charted logic – E Said *Culture and Imperialism* (1994) 51.
[56] H Bhabha 'Translator Translated: WJT Mitchell Talks to Homi Bhabha' (1995) 80 *Artforum* 80-83.
[57] Bhabha (note 5 above) 37.
[58] S Webber 'in between is as much a place to be at home as any other' (1997) 31 *Middle East Studies & Subaltern Studies* 11-16, 12.

appropriation – a hybrid entity. If the African wretchedness found in the law does not depict who and what Africans really are, then South Africans need to consider the kind of ethics required for the 'restoration of subjugated indigenous sovereignties'.[59] At the first instance this means a validation of the right to participate in society with an African disposition – an unrefined African existence – contrary to the embeddedness of Eurocentrism 'as a silent referent in … knowledge'.[60]

Ultimately this study considered whether the current labour relations arrangements have shed colonial and apartheid rationales sufficiently. The bargaining framework of the LRA and the worker compensation scheme of the ODIMWA and the COIDA were selected for assessment. At the outset, the disciplining features of the Constitution were discussed. The *Grundnorm* status of the Constitution was queried, since it advocates 'irreversible' 'structural givens' like the endorsement of the enterprise of conquest.[61] Consequently an 'anti-black' system of 'patronage, appropriation, and repression' has been ratified.[62] Alternative notions of fairness which call for amends in the form of extensive restitution, in order to first approximate equilibrium, have not been accorded due consideration. The corporatist relations withinwhich the LRA is confined to perform have shown trade unions to be the subsidiary partner in the neoliberal economic arrangements, even while they are already 'the aristocracy of labour'.[63] Most of the income generated is received by the top ten percent of income earners.[64]

The unqualified acceptance of the efficacy of a colonially contrived collective bargaining scheme has been misplaced. The contradictory assessments of its efficiency have been based on its omission of the majority of workers – Africans. Moreover, the morality of the system of work that has effectively amounted to 'wage slavery' for Africans has not been

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[59] M Ramose 'In Memoriam: Sovereignty and the New South Africa' (2007) 16 *Griffith Law Review* 310-329, 319-320.
[60] D Chakrabarty 'Provincializing Europe: Postcoloniality and the Critique of History' (1992) 6 *Journal of Cultural Studies* 337-357.
[61] E Christodoulidis 'Constitutional Irresolution: Law and the Framing of Civil Society' (2003) *9 European Law Journal* 401-432, 402-407; *Cook v Sprigg* [1899] AC 572; *Mokhatle & Others v Union Government (Minister of Native Affairs)* 1926 AD 71, s 25 Constitution of the Republic of South Africa, 1996.
[62] Madlingozi (note 4 above) 126; J Modiri 'Race, history, irresolution: Reflections on *City of Tshwane Metropolitan Municipality v Afriforum* and the limits of "post"- apartheid constitutionalism' (2019) *De Jure Law Journal* 27-46; S Sibanda 'Not Purpose-Made! Transformative Constitutionalism Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22 *Stellenbosch Law Review* 482-500.
[63] The reality is that trade unions do not represent the major part of workers except in industries such as mining.
[64] B Turok 'Confronting Inequality' (2017) *New Agenda: South African Journal of Social and Economic Policy* 28-30.

queried.[65] The bargaining provisions of the LRA largely imitate the 1924 Industrial Conciliation Act, which in turn followed on from the 1909 Industrial Disputes Act. The supposed new regime of the LRA is in reality mostly the continuation of past law, with the proviso that inserts recognisable African workers – recognisable per its strictures. Turbulent labour relations have been a hallmark of the post-apartheid times. Even though it is widespread, courts have denounced the riotous refusal of workers to proceed as prescribed by the LRA as indefensible violence.[66] But it is contended that the pervasive structural violence characterised by 'neglect … a denial of needs, a reduction of persons to the status of object to be broken, manipulated, or ignored' has played a crucial part in the volatility of South African labour relations.[67] Furthermore, collective bargaining alone cannot cure the replicating past ills that plague South Africa – not while operating within an environment where resources are monopolised by so few. This emphasises the arrested development of liberatory consciousness in the post-apartheid era. Collective bargaining continues to follow the colonial form of superior versus inferior. In these circumstances the non-conformity of workers to the LRA provisions can readily been seen as: 'rage or hysteria';[68] 'acts of wanton and gratuitous violence
… [that] poses serious risks to investment and other drivers of economic growth.'[69]

A review of the treatment of mineworkers by the ODIMWA and the COIDA compensatory schemes was used to assess progress toward equity in this sector. Though both those Acts provide for the compensation for occupational lung diseases such as silicosis the ODIMWA, which pertains only to mineworkers, awards compensation at a lower scale than the COIDA. When comparison is made between payments to Africans during apartheid and those made currently, the difference is negligible. Additionally, by way of example, the ODIMWA R65 945 payable to mineworkers today is far less than the comparable R677 020 (in today's terms) that was payable to white mineworkers in 1973, for first-degree impairment.

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[65] T Haskell 'Capitalism and the Origins of Humanitarian Sensibility: Part 1' (1985) 90 *The American Historical Review* 339, 352.
[66] *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers & others* (2016) 37 ILJ 476 (LC) 37.
[67] Institute for Peace Justice (IPJ-PPJ). 2014. *Activity: How Violence Works* cf:W Gumede 'Marikana: a crisis of legitimacy in the institutions that form the foundations of South Africa's 1994 post-apartheid political settlement' (2015) 41 *Social Dynamics* 327, 330; T Ngcukaitobi 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 *ILJ* 836.
[68] J Ranciere 'Introducing Disagreement (translated by S Corcoran) (2004) 9 *Angelaki Journal of the Theoretical Humanities* 3, 5
[69] Note 66 above.

The COIDA is also problematic because it has retained monthly earnings as the scale in terms of which the amount of compensation is calculated. The lowest earners still receive the least compensation, even though it is these workers who likely performed the most dangerous labour intensive work. As such, post-apartheid hegemony is firmly directed by the colonial motif. Rethinking ways to view human beings, modes of living and critically evaluating the purpose of wage labour has not occurred.

9.3. Recommendations

This study has revealed that far from an inevitable evolutionary trajectory, the story of South African labour law has been marred in violence, enslavement and the prolonged diminutionof Africans – both as people and then also as workers. The framework on which the conceptualisation of labour and then labour regulation has continued to be based is flawed because it proceeds from a belief that workers are inferior and rightfully supervised by employers. This thesis therefore recommends that current notions of labour and labour law require revision in several respects.

Firstly, a more accurate log of the multiple interlocking strategies that were mounted to repress African workers must be compiled. This task requires the detailed dissection of the processes and their protracted effects. However, a thorough understanding of the degree of historical injustice is not an end in itself. It should be followed by efforts to restore faith in the conceptual terminologies of Africans. This in turn requires the admission that as Africans were 'worked over' by the composite labour and other oppressions, they were compelled to re-shape their thinking and lived cultures – they were not totallyoverwhelmed.

Secondly, there must be an undertaking to fashion more comprehensive systems of restitution. The imperatives of *molato ha o bole* ('culpability does not prescribe') and *ubuntu* are endorsed as legitimate guiding principles for a pivot toward the instatement of Africans and their cultures into normative policies and the laws. Past wrongs require concrete addressing. The disgraceful effects of colonialism and apartheid must be scrupulously reversed. Once this has happened, South Africans can then begin to conceptualise outside the ordering structures of colonialism, since rights will not be geared toward protecting its misdeeds.

Thirdly, following the instatement of a more even-handed design, the LRA also needs to be reconsidered. This primary piece of labour regulation is based on and continues to

resemble its colonial and apartheid predecessors. The LRA continues to equate the institutions established by colonialism with progress and civility. In reality, all along collective bargaining has privileged trade union members and membership, which only accounts for a small percentage of workers. The 'moral relativism' that cheapened Africans in juxtaposition to their elevated white counterparts has been the premise of the LRA. The LRA is complicit in maintaining a status quo that continues to visit large-scale structural violence on many workers. There is therefore a need to re-conceptualise work and workplace relations cognisant of what the true underpinnings and purposes of regulatory provisions have been. A deconstructive reversal that denounces the cogency of the devaluation of workers must transpire first.

Fourthly, the workplace compensation schemes of both the ODIMWA and the COIDA require a radical revision which takes account of the indefensible morality on which they have been based. The moral equivocation that has created a taxonomy of humanity, to which scales of compensation adhere, must be dissected and disordered. Presently, some urgent stop-gap changes can be made to alleviate the pressing harm. The longstanding ODIMWA aim of inhibiting the compensation available to mineworkers, as compared with that available in other industries, can be thwarted immediately as follows:

- Section 80 of the ODIMA should be repealed; and
- The determination of compensation should be modelled on that obtainable under section 47 of the COIDA, including the provision of a pension in certain situations.

9.4. Future Research

This study has confined itself primarily to the experience of African mineworkers in the Witwatersrand gold mines. It has used this limited, if large, grouping of workers to demonstrate the manner in which labour law has been and continues to be colonial in nature. The study has thus not focused on other occupations and settings in which Africans have been engaged historically, which have also significantly influenced the concept of Africans as labour such as the forcible apprenticeship of African women and children in the South African colonies, domestic workers, farm labourers, and Africans working in the texile and other industrial settings. The study also has not delved into the situation of atypical workers who remain largely outside the purview of law. Therefore more research on these issues is still required. Regarding current law, this study has considered only the efficacy of collective bargaining per the LRA as well as compensation under the ODIMWA and the COIDA. Further, similar research in

respect of other regulatory aspects of the LRA as well as the provisions of other labour laws, such as the Basic Conditions of Employment Act 75 of 1997 or the Employment Equity Act 55 of 1998, is still required.

The primary goal has been to discern alterity from within the margins of colonial and apartheid discourse (eurocentrism), and then to assess its possible residue in the current South African arena. Certainly alterity or othered realities can be gleaned, though somewhat peripherally, in an otherwise palatable Eurocentric account of things. But this alterity cannot be given full expression in a dominant thinking and decision making, bent on refuting and suppressing it. There is therefore a need firstly to give respectful credence to alterity on its own merits, rather than in conformity to the preordained eurocentrism so deeply embedded in current thinking and practice. Thereafter the process of reconfiguring of modes of thinking and acceptable behaviour may begin.

The first step of recognising the binaries appears deceptively simple. But it must be done with the understanding that the separations between the recognised zone of being and the invisible zone of non-being were fabricated and are kept in place forcibly. Having recognised the mechanisms of this replicating violence, it becomes all the more necessary to deconstruct the logic on which the hierarchy has been established. This is the process that has eluded the South African polity. It is not a question of denigrating or defending what was, it is supposed, obtained before the violence. Doing that validates the binary. Instead it is the conceptual order that is in issue. Illuminating the destructive binary is not an end in itself, it only serves to highlight the rickety system of thought. It creates the impetus to look beyond dominant logic. Like Ramose, this thesis asserts that Africans have had normative human capacities all along. These do not need to be bestowed or explained through eurocentrism. Eurocentrism is merely a system of thought among others which have routinely been suppressed, through epistemic violence. The goal is to establish an arena 'for the widest possible convergence of critical forces', not wholesale eradication of eurocentrism.[70] Gqola has re-iterated that despite being burdened by 'interlocking oppressions', the 'six mountains on our backs', Africans have continued to 'move with them.'[71] African agency was not obliterated by colonialism and has

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[70] R Sugirtharajah (ed) *The Postcolonial Biblical Reader* (2006) 9; Said has reminded that 'there is always something beyond the reach of dominant systems, no matter how deeply they saturate society, and this … makes change possible' – E Said *The World The Text and Critic* (1983) 247 cf: J Cocks *The Oppositional Imagination (RLE Feminist Theory): Feminism Critique and Political Theory* (2012) 64-65.

[71] P Gqola Ufanele Uqavile: Blackwomen, Feminisms and Postcoloniality in Africa' (2001) 50 *Agenda* 11, 12.

continued to develop its paradigms of thought, even while they have been affected by its coercions.

Using the medium of postcolonial theory when effecting analysis creates a bridge between alterity, which has been deemed incapable of performing recognisable speech acts in ratified discourse, and mainstreamed perceptions – making room for possible legitimation of oppressed narratives.[72]

[72] D Landry & G Maclean (eds) *The Spivak Reader* (1996) 299-302.

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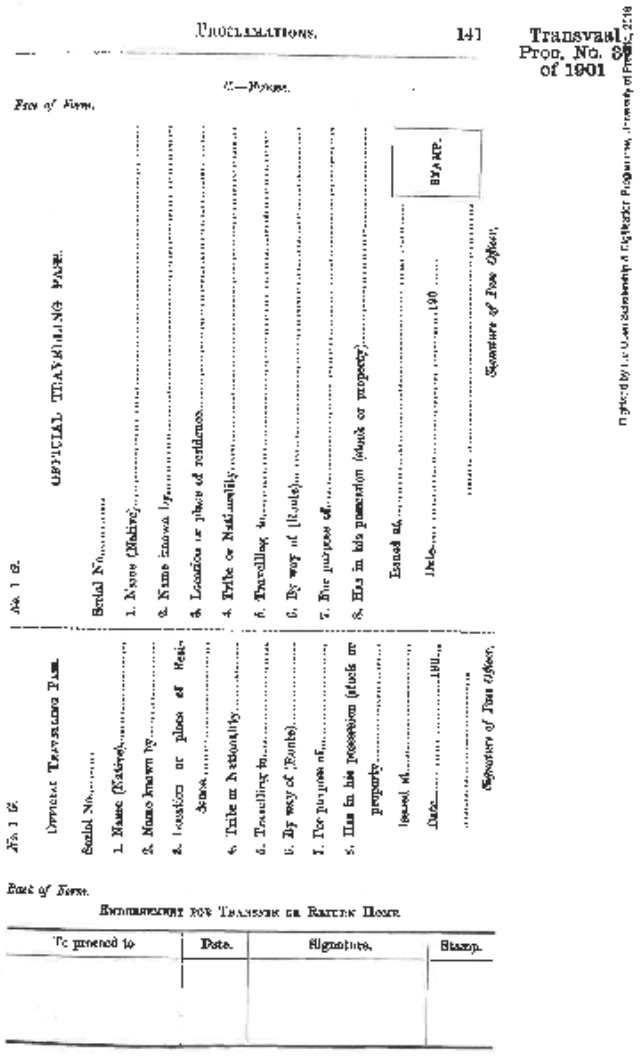
APPENDIX A

Pass Form No. 1 G



PROCLAMATIONS. 141

Transvaal Proc. No. 8 of 1901

G.—Boers.

Face of Form.

No. 1 G.

OFFICIAL TRAVELLING PASS.

Serial No.....

1. Name (Native).....
2. Name known by.....
3. Location or place of Residence.....
4. Tribe or Nationality.....
5. Travelling to.....
6. By way of (Route).....
7. For purpose of.....
8. Has in his possession (stock or property).....

Issued at.....

Date.....190.....

Signature of Pass Officer.

STAMP.

No. 1 G.

OFFICIAL TRAVELLING PASS.

Serial No.....

1. Name (Native).....
2. Name known by.....
3. Location or place of Residence.....
4. Tribe or Nationality.....
5. Travelling to.....
6. By way of (Route).....
7. For purpose of.....
8. Has in his possession (stock or property).....

Issued at.....

Date.....190...

Signature of Pass Officer.

Back of Form.

ENDORSEMENT FOR TRANSFER OR RETURN HOME.

To proceed to	Date.	Signature.	Stamp.

APPENDIX B

Schedules of 1912 and 1913 Rates of Pay

ANNEXURE 12.

SCHEDULE B.—SCHEDULE OF RATES OF PAY.

(1) NATIVES EMPLOYED IN HAND DRILLING IN HARD ROCK.

Under 30 inches not to count against the period of service, and not to be paid for. Pay for 30 inches and over to be at the following rates for each completed hole —

30 inches to 35 inches	1d. per inch.
35 inches	2/-
35 inches to 41 inches	an additional 1d. per inch.
42 inches	3/6

and 1d. per inch for every inch over 42 inches.

Natives not to be allowed to come out of the Mine before the end of the shift unless they have completed not less than 42 inches.

Boss Natives .. .. An average of 2s. 3d. per shift.

(2) NATIVES EMPLOYED IN KAFFIR DRIFTING.

Handle and Spanner Natives (including special Natives engaged rigging machines, but excluding drill carriers), 1s. 9d. to 2s. per shift.

Handle and Spanner Natives on bonus-plus-day's-pay, such rates of pay that the average pay of such Natives as a class on any member's property shall not exceed 2s. 3d. per shift, excluding drill carriers.

Drill Carriers .. .. 1/- to 1/6 per shift.

The question of pay of machines Natives on bonus-plus-day's-pay may be reopened at any time by any member of the Board of Management upon each member giving one month's notice of his intention to do so.

(3) NATIVES EMPLOYED IN SHOVELLING AND TRAMMING.

Trammers	1/6 to 2/- per shift.
Shovellers	1/6 to 1/8 per shift.

Trammers and Shovellers on contract, such rates of pay that after 31st of January, 1914, the average pay of such contract Natives as a class on any member's property shall not exceed 2s. 3d per shift.

Natives employed on both Shovelling and Tramming may be paid at the tramming rate.

Sweepers	1/- to 1/6 per shift.
Boss Natives	a maximum of 2/3 per shift

(4) All natives on piece work who have contracted for three months up to six months to be allowed a probationary period of 14 shifts, and all natives who have contracted for six months or over to be allowed a probationary period of 30 shifts, and during such probationary periods to be paid not less than 1s. 9d. per shift irrespective of the amount of work done.

(5) NATIVES EMPLOYED IN OTHER CLASSES OF WORK.

(a) UNDERGROUND.

Class of Work.	Maximum rate of pay for natives other than Head and Boss natives. (Per shift.)	Maximum rate of pay for Head native and Boss natives. (Per shift.)
Mine Captains' Natives	2/3	—
Shift Bosses' Natives	2/-	—
Surveyors' Natives	2/-	2/3
Samplers' Natives	1/9	2/3
Platelayers' Natives	2/-	2/3
Timbering: Shafts and Stopes Natives	2/-	2/3
Rockwalling Natives	1/9	2/3
Scrapelling Natives	1/9	2/3
Pump Natives	2/3	—
Pipelaying Natives	2/-	2/3
Skips and Onsetters' Natives	2/-	2/3
Underground Hoists Natives	2/-	—
Mechanical Haulage Natives	2/-	2/3
Station and Drill Distribution Natives	2/-	2/3
Sanitation Natives	1/9	2/3
Ventilation Natives	2/-	—
Underground Boss Drill Fitters' Natives ..	2/-	—
Underground Track Repairers' Natives	2/-	—
Other classes of underground natives	1/9	2/3

ANNEXURE 12—(*continued*).

(b) SURFACE.

Class of Work.	Maximum rate of pay for natives other than head and boss natives. (Per shift.)	Maximum rate of pay for head natives and boss natives. (Per shift.)
LABOUR RATE.		
Sorting	1/- to 1/3	2/-
Crushers	1/- to 1/3	2/-
Waste Rock Transport	1/- to 1/3	2/-
Ore Transport	1/- to 1/3	2/-
Stamp Mill:		
General	1/- to 1/3	2/-
Cam Boss	1/3 to 2/3	—
Tube Mill	1/- to 1/3	2/-
Extractor House:		
General	1/- to 1/3	2/-
Zinc Ladles	1/3 to 2/6	—
Tanks:		
General	1/- to 1/3	2/
Slimes vats	1/3 to 1/10	2/-
Slimes Dam:		
General	1/- to 1/10	2/-
Return Pump	1/6 to 2/-	—
Filling and Discharging Tailings. Dumping Tailings, Ashes or Waste Rock	No rate fixed	
Samples and General	1/- to 1/3	—
Assay Office	1/3 to 2/-	2/3
ENGINEERING:		
Smiths:		
General	1/ to 1/10	—
Strikers	1/3 to 2/3	—
Drill Sharpeners (including underground):		
General	1/- to 1/10	—
Strikers	1/3 to 2/3	—
Boiler Makers	1/- to 2/-	
Fitters	1/- to 1/3	2/-
Carpenters	1/- to 1/3	2/-
Mechanicians	1/- to 1/3	2/-
Riggers	1/- to 2/-	2/3
Masons	1/- to 1/3	2/-
Fire	1/3 to 2/3	—
Ash	1/- to 1/3	2—
Surface Gangers	1/- to 1/3	2/-
Plate Layers	1/- to 1/3	2/
Engine Room Attendants	1/- to 1/3	—
Boiler and Condenser Cleaners	1/3 to 1/10	2/-
Compressors	1/- to 1/3	—
Other classes of surface engineering boys	1/- to 1/3	—
Compound:		
Police Natives and Night Watchmen	No rate fixed.	
Cooks	1/- to 2/	2/3
Boss Natives	1/- to 2/-	2/3
Sweepers	1/- to 1/6	2/-
Sanitary	1/- to 1/3	2/-
Whitewashers	1/- to 1/3	2/
GENERAL:		
Office and Store	1/- to 2/-	2/3
Bankmen	1/ to 1/3	2/-
Change House	1/- to 1/3	—
Headgear	1/- to 1/3	2/-
Hospital	1/3 to 2/-	2/
Stables (excluding head natives and special drivers)	1/- to 2/	Not limited.
Ventilation	1/- to 1/3	—
Other classes of surface natives	1/- to 1/3	—
Under age natives	4d. to 1/-	—

(a) VARIOUS SHIFTS.

It is permissible to pay Natives employed on overhead shifts in process of sinking a rate of pay exceeding Newcastle rate of pay for similar Natives on ordinary work by not more than 1s. per shift.

(f) DEVELOPING MINES.

No extra payment is allowed to Natives working on mines developing only.

(g) NATIVES FEEDING THEMSELVES.

Payments to Natives for feeding themselves are not to exceed 4d. per shift, in addition to the loaf of bread supplied daily by the Mines to every underground Native.

No payment of beans in kind such as meat, etc., is to be given to any Native.

ANNEXURE 12—*continued.*

(9) NATIVES RE-ENGAGING.

It is permissible to pay underground Natives a bonus in the way of increased pay during any period of re-engagement without break of service, after having completed 180 shifts or their contracted period of service, whichever is the longer, such bonus not to exceed 5s. per month in the case of Natives re-engaging at monthly engagements, and to be paid monthly in one sum in the form of a bonus, and not in any way included in the payment per shift. Further, in the case of Natives re-engaging for a period of three months or more, it is permissible to pay the bonus as a lump sum on re-engagement (*i.e.*, 15s. for a three months' Native, 20s. for a four months' Native, and so on), and in the case of Natives re-engaging for six months or more to make an additional lump sum payment of 10s. (*e.g.*, a total of 40s. for a six months' Native, 45s. for a seven months' Native, and so on), in both cases in place of the monthly bonus.

(10) LOCAL AND VOLUNTARY NATIVES.

It is not permissible for any mine to pay rail fare or travelling expenses or to give any other inducement in cash or kind to voluntary or local natives.

(11) PAY OF COLOURED LABOURERS OTHER THAN PASSIVE NATIVES.

SCHEDULE C.

Apex Mines, Limited.
Arbkandee Proprietary Gold Mines, Limited.
Aurora West United Gold Mining Company, Limited.
Bantjes Consolidated Mines, Limited.
Brakpan Mines, Limited.
Bonsul Consolidated Gold Mines, Limited.
Cinderella Consolidated Gold Mines, Limited.
City Deep, Limited.
Crown Mines, Limited.
Consolidated Langlaagte Mines, Limited.
Consolidated Main Reef Mines and Estate, Limited.
Glencairn Mines, Limited.
Durban Roodepoort Deep, Limited.
East Rand Proprietary Mines, Limited.
Ferreira Deep, Limited.
French Rand Gold Mining Company, Limited.
Geldenhuis Deep, Limited.
Geduld Proprietary Mines, Limited.
Glencairn Main Reef Gold Mining Company, Limited.
Glenlarg Gold Mining Company, Limited.
Government Gold Mining Areas (Maddorfontein) Consolidated, Limited.
Jupiter Gold Mining Company, Limited.
Knight Central, Limited.
Knights Deep, Limited.
Lancaster West Gold Mining Company, Limited.
May Consolidated Gold Mining Company, Limited.
Main Reef West, Limited.
Meyer and Charlton Gold Mining Company, Limited.
Maddorfontein B. Gold Mines, Limited.
Maddorfontein Deep Levels, Limited.
New Eckelsrug Gold Mines, Limited.
New Goch Gold Mines, Limited.
New Kleinfontein Company, Limited.
New Maddorfontein Gold Mining Company, Limited.
New Primrose Gold Mining Company, Limited.
New Rietfontein Estate Gold Mines, Limited.
New Unified Main Reef Gold Mining Company, Limited.
Nourse Mines, Limited.
Princess Estate and Gold Mining Company, Limited.
Rand Collieries, Limited.
Rand Klip, Limited.
Randfontein Deep, Limited.
Robinson Gold Mining Company, Limited.
Roodepoort United Main Reef Gold Mining Company, Limited.
Rosebery Minerals Development Company, Limited.
Ross Deep, Limited.
Simmer and Jack Proprietary Mines, Limited.
Simmer and Jack East, Limited (in Liquidation).
Simmer Deep, Limited.
Springs Mines, Limited.
Sub Nigel, Limited.
Treasury Gold Mines, Limited.
Tudor Gold Mining Company, Limited.
Van Dyk Proprietary Mines, Limited.
Van Ryn Gold Mines Estate, Limited.
Van Ryn Deep, Limited.
Village Deep, Limited.
Village Main Reef Gold Mining Company, Limited.
Vogelstruis Consolidated Deep, Limited.
West Rand Consolidated Mines, Limited.
Witwatersrand Deep, Limited.
Witwatersrand Gold Mining Company, Limited
Wolhuter Gold Mines, Limited.

ANNEXURE 13.

SCHEDULE B.—SCHEDULE OF RATES OF PAY.

Under 36 inches not to count against the period of service, and not to be paid for. Pay for 36 inches and over to be at the following rates for each completed hole :—

36 inches to 36 inches	½d. per inch.
36 inches	2/-
37 inches to 41 inches	an additional ½d. per inch.
42 inches	2/6

and 1d. per inch for every inch over 42 inches.

Natives not to be allowed to come out of the mine before the end of the shift unless they have completed not less than 42 inches.

As little shovelling as possible to be done and not to exceed 2 tones per shift.

Boss Natives .. .. An average of 2s. 3d. per shift.

(2) NATIVES EMPLOYED IN MACHINE DRILLING

Handle and Spanner Natives (including special Natives engaged clipping machines, but excluding drill sharpers), .. 1s. 9d. to 2s. per shift.

See attached Circular.

Drill Carriers .. .. 1/- to 1/6 per shift

The question of pay of machine Natives on tonne-plus-day's-pay may be reopened at any time by any member of the Board of Management upon such member giving one month's notice of his intention to do so.

(3) NATIVES EMPLOYED IN SHOVELLING AND TRAMMING.

Trammers	1/6 to 2/- per shift.
Shovellers	1/6 to 1/3 per shift.

See attached Circular.

Natives employed on both Shovelling and Tramming may be paid at the intervening rate.

Sweepers	1/- to 1/6 per shift.
Boss Natives	a maximum of 2/3 per shift.

(4) All natives on piece work who have contracted for three months up to six months to be allowed a probationary period of 14 shifts, and all natives who have contracted for six months or over to be allowed a probationary period of 30 shifts, and during such probationary periods to be paid not less than 1s. 6d. per shift irrespective of the amount of work done.

(5) NATIVES EMPLOYED IN OTHER CLASSES OF WORK.

(A) UNDERGROUND.

CLASS OF WORK.	Maximum rate of pay for natives other than head and boss natives. (Per shift.)	Maximum rate of pay for head native and boss natives. (Per shift.)
*Mine Captains' Natives	2/3	—
*Shift Bosses' Natives	2/-	—
Surveyors' Natives	2/-	2/3
Samplers' Natives	1/9	2/3
Platelayers' Natives	2/-	2/3
*Timbering ; Shafts and Stopes Natives	2/-	2/3
*Rockwalling Natives	1/6	2/3
*Stopefilling Natives	1/6	2/3
*Pump Natives	2/3	—
Pipelaying Natives	2/	2/3
*Shaft and Crosscut Natives	2/-	2/3
Underground Hoist Natives	2/-	—
Mechanical Haulage Natives	2/-	2/3
Station and Drill Distribution Natives	2/-	2/3
*Sanitation Natives	1/9	2/3
Ventilation Natives	2/-	—
Underground Rock Drill Fitters' Natives	2/-	—
Underground Trees Repairers' Natives	2/-	—
Other classes of underground natives	1/9	2/3
Natives cleaning up Incline	1/6 to 2/-	—
Natives cleaning Sumps	2/-	2/3
Natives on underground crushers	2/-	2/3

Natives filling waste tanks which boxes to be considered as filling and discharging tailings.
Natives bagging concentrates may be paid and cannot thus 2s. per shift.
Natives on filter presses in discharging ordinary slimes may be paid not more than 2s. 3d. per shift.
Natives on construction work to be paid ordinary surface rates.

ANNEXURE 13—(*continued.*)

(B) SURFACE.

CLASS OF WORK.	Maximum rate of pay for natives other than head and boss natives. (Per shift.)	Maximum rate of pay for head natives and boss natives. (Per shift.)
REDUCTION WORKS:		
Sorting	1/- to 1/8	2/-
Crushers	1/- to 1/8	2/-
Waste Rock Transport	1/- to 1/8	2/-
Ore Transport	1/- to 1/8	2/-
Stamp Mill:		
General	1/- to 1/8	2/-
Cam Boys	1/8 to 2/3	—
Tube Mill	1/ to 1/8	2/-
Slime Plant:		
General	1/- to 1/8	2/-
Zinc lathes	1/8 to 2/3	—
Tanks:		
General	1/- to 1/8	2/-
Slimes vats	1/6 to 1/10	2/-
Slimes Plant:		
General	1/- to 1/10	2/-
Return Pump	1/6 to 2/-	—
Filling and Discharging Tailings, Dumping Tailings, Ashes or Waste Rock	No rate fixed.	
Samples and General	1/ to 1/8	—
Assay Office	1/6 to 2/-	2/6
BOILERMAKING:		
Boilers:		
General	1/- to 1/10	—
Strikers	1/8 to 2/6	—
Drill Sharpeners (including underground):		
General	1/- to 1/10	—
Strikers	1/8 to 2/6	—
Boiler Makers	1/ to 2/-	—
Fitters	1/- to 1/8	2/-
Carpenters	1/- to 1/8	2/-
Blacksmiths	1/- to 1/8	2/-
Riggers	1/- to 2/-	2/6
Masons	1/- to 1/8	2/-
Pipe	1/6 to 2/6	—
Ash	1/- to 1/8	—
Surface Gangers	1/- to 1/8	2/-
Plate Layers	1/- to 1/8	2/-
Engine Room Attendants	1/- to 1/8	—
Boiler and Condenser Cleaners	1/8 to 1/10	2/-
Compressors	1/- to 1/8	—
Other classes of surface engineering boys employed:	1/- to 1/8	—
Police Natives and Night Watchmen	No rate fixed.	
Cooks	1/- to 2/-	2/6
Boss Natives	1/- to 2/-	2/6
Sweepers	1/ to 1/8	2/-
†Sanitary	1/- to 1/8	2/-
Whitewashers	1/- to 1/8	2/-
GENERAL:		
Office and Store	1/- to 2/-	2/6
*Bankmen	1/- to 1/8	2/-
Change Rooms	1/- to 1/8	—
*Hoodsmen	1/- to 1/8	2/
Hospital	1/6 to 2/-	2/-
Stables (excluding head natives and camel drivers)	1/- to 2/-	Not limited.
Ventilation	1/- to 1/8	—
Other classes of surface natives	1/- to 1/8	—
Under age natives	4d. to 1/-	

†Where difficulty is experienced in obtaining sanitary natives Mines have permission to pay up to 2s. 6d. per shift.

*Mines have discretion to pay up to 2s 6d per shift for hospital boys.

(6) VERTICAL SHAFTS.

It is permissible to pay Natives employed in vertical shafts in process of sinking a rate of pay exceeding the schedule rate of pay for similar Natives on ordinary work by not more than 1s. per shift.

(7) DIFFERENCE MINES.

No extra payment is allowed to Natives working on mines developing only.

(8) NATIVES FEEDING THEMSELVES.

Payments to Natives for feeding themselves are not to exceed 4d. per shift, in addition to the loaf of bread supplied daily by the Mines to every underground Native.

No payment of bonus in kind such as meat, etc., is to be given to any Native.

(9) NATIVES RE-ENGAGING.

It is permissible to pay underground Natives a bonus in the way of increased pay during any period of re-engagement without break of service, after having completed 180 shifts or their equivalent period of service, whichever is the longer, such bonus not to exceed 5s. per month in the case of Natives re-engaging on monthly engagements, and to be paid monthly in one sum in the form of a bonus, and not in any way included in the payment per shift. Further, in the case of Natives re-engaging for a period of three months or more, it is permissible to pay the bonus as a lump sum on re-engagement.

ANNEXURE 13—*continued.*

(i.e., 18s. for a three months' Native, 20s. for a four months' Native, and so on), and in the case of Natives re-engaging for six months or more to make an additional lump sum payment of 10s. (e.g., a total of 40s. for a six months' Native, 50s. for a seven months' Native, and so on), in both cases in place of the monthly bonus.

(10) LOCAL AND VOLUNTARY NATIVES.

It is not permissible for any mine to pay rail fare or travelling expenses or to give any other inducement in cash or kind to voluntary or local natives.

(11) PAY OF COLOURED LABOURERS OTHER THAN PASSPORT NATIVES.

It is permissible for Mines to make their own arrangements as pay for such labourers.

(12) NATIVES WORKING 12 HOUR SHIFTS.

It is not permissible to pay such natives in excess of Schedule Rates.

(13) SUNDAY WORK.

Work of Sundays must be avoided as far as possible, but, where necessary, only Schedule Rates are to be paid.

NATIVE RECRUITING CORPORATION, LIMITED. JOHANNESBURG.

MINES.

Circular Letter No. 118. 11th February, 1914.

TO ALL MINE MANAGERS.

DEAR SIR,

For some little time my Board has been considering the question of the rates of pay for natives employed on Tramming and Shovelling Piece-work and Machine Piece-work, and you have already been advised of certain of their decisions in the matter (*vide* Circular Letters Nos. 112, 113 and 116), but I now quote below all the decisions come to in this connection, which, you will note, include certain alterations in the rates for machine piece-work, of which you have not yet been advised.

NATIVES EMPLOYED ON MACHINE PIECE WORK.

The present maximum average of 2s. 3d. for machine boys on day's pay plus bonus has been abolished and the following maximum rates have been adopted, which may be paid at your discretion :—

RECIPROCATING DRILLS (LARGE AND SMALL).

Stoping.

Handle Boys.—3s. for the first 24 feet drilled, and an additional one and one-third pence per foot drilled thereafter, with a minimum of 2s. per diem.

Sparmer Boys.—1s. 9d. for the first 24 feet drilled, and an additional one penny per foot drilled thereafter, with a minimum of 1s. 9d. per diem.

RECIPROCATING DRILLS.

Developing.

In developing with reciprocating drills it shall be optional with the Mines to pay the above rates, or to pay 2s. and 2s. 3d. per shift to the sparmer and handle boy respectively in cases where the drilling of the round is completed during the shift.

HAMMER DRILLS.

In the case of hammer drills of the jack hammer type, when used for stoping, or of the Waugh drill type, when used for stoping or raising, either when mounted on a bar or otherwise, and run by one boy, the maximum rate shall be one penny per foot drilled with a bonus of sixpence to any native drilling 18 feet or over in one shift.

In the case of hammer drills of the jack hammer type when used for cut-welling, and run by one boy, the rate shall be one penny per foot drilled with a minimum of 2s. per diem.

In the case of water fed hammer drills (other than drills of the jack hammer or Waugh drill type), as these drills are still in the experimental stage, a final standard cannot be fixed at present, but in the meantime, a minimum standard of 30 feet per shift has been fixed, for which 1s. 9d. and 2s. per shift may be paid the sparmer and handle boy respectively, but any Mine may raise this standard to meet its particular conditions or requirements, and for such additional feet drilled above whatever standard is adopted, a maximum rate of five-sixths of a penny and one penny per foot may be paid the sparmer and handle boy respectively.

With regard to the above rates of pay for hammer drills, it is understood that natives employed on such drills must be paid the same minimum wage per diem as those on reciprocating drills, *i.e.*, 1s. 9d. for sparmers and 2s. for handles.

NATIVES EMPLOYED ON TRAMMING AND SHOVELLING PIECE-WORK.

Up to the 31st January, 1914, the maximum average for tramming and shovelling on piece-work, irrespective of the percentage of natives employed on such work, was fixed at 2s. 3d. This has now been abolished and, as from the 1st February, 1914, it is permissible to pay natives employed on this work according to the following sliding scale :

Number on Contract, being percentage of all natives employed on Tramming and Tasking.	Maximum Average Per Shift.	Equivalent Amount Per 30 Shifts.
Not more than 25 %	2/9	82/6
" " 37.5 %	2/6	90/–
" " 50 %	2/5	77/6
" " 62.5 %	2/4	75/–
" " 75 %	2/3	72/6
" " 87.5 %	2/2	70/–
" " 100 %	2/1	67/6

DAY'S PAY RATES.

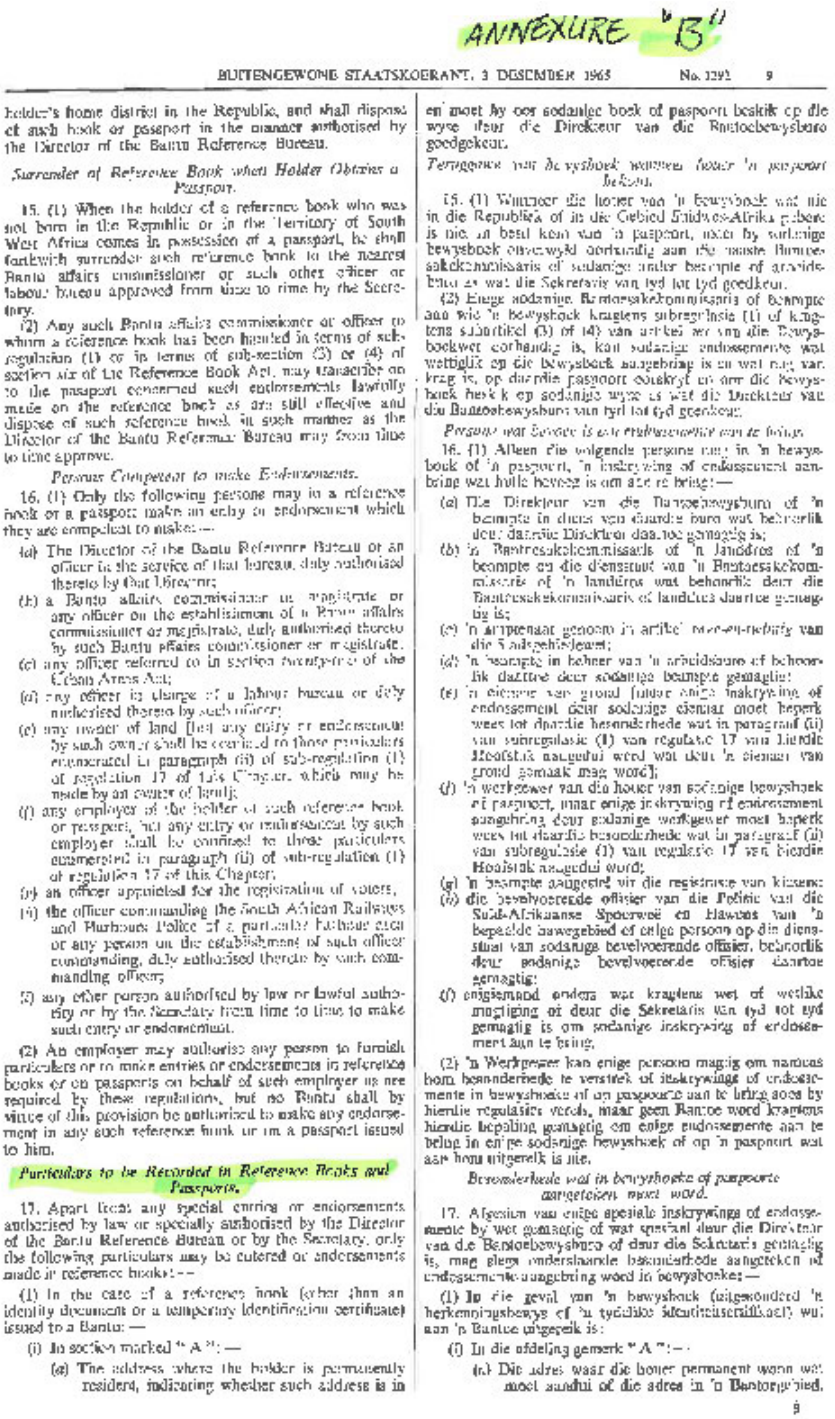
The Day's Pay rates for natives employed on machines and tramming and shovelling remain as at present laid down in the Corporation's Schedule of Wages.

Yours faithfully,

E. MARTENSSEN, Secretary.

APPENDIX C

Particulars to be Recorded in Reference Books and Passports



ANNEXURE "B"

BUITENGEWONE STAATSKOERANT, 3 DESEMBER 1965 No. 1292 9

holder's home district in the Republic, and shall dispose of such book or passport in the manner authorised by the Director of the Bantu Reference Bureau.

Surrender of Reference Book when Holder Obtains a Passport.

15. (1) When the holder of a reference book who was not born in the Republic or in the Territory of South West Africa comes in possession of a passport, he shall forthwith surrender such reference book to the nearest Bantu affairs commissioner or such other officer or labour bureau approved from time to time by the Secretary.

(2) Any such Bantu affairs commissioner or officer to whom a reference book has been handed in terms of sub-regulation (1) or in terms of sub-section (3) or (4) of section six of the Reference Book Act, may transcribe on to the passport concerned such endorsements lawfully made on the reference book as are still effective and dispose of such reference book in such manner as the Director of the Bantu Reference Bureau may from time to time approve.

Persons Competent to make Endorsements.

16. (1) Only the following persons may in a reference book or a passport make an entry or endorsement which they are competent to make:—

(a) The Director of the Bantu Reference Bureau or an officer in the service of that bureau, duly authorised thereto by the Director;

(b) a Bantu affairs commissioner or magistrate or any officer on the establishment of a Bantu affairs commissioner or magistrate, duly authorised thereto by such Bantu affairs commissioner or magistrate;

(c) any officer referred to in section twenty-two of the Urban Areas Act;

(d) any officer in charge of a labour bureau or duly authorised thereto by such officer;

(e) any owner of land [but any entry or endorsement by such owner shall be confined to those particulars enumerated in paragraph (ii) of sub-regulation (1) of regulation 17 of this Chapter which may be made by an owner of land];

(f) any employer of the holder of such reference book or passport, but any entry or endorsement by such employer shall be confined to those particulars enumerated in paragraph (ii) of sub-regulation (1) of regulation 17 of this Chapter;

(g) an officer appointed for the registration of voters;

(h) the officer commanding the South African Railways and Harbours Police of a particular harbour area or any person on the establishment of such officer commanding, duly authorised thereto by such commanding officer;

(i) any other person authorised by law or lawful authority or by the Secretary from time to time to make such entry or endorsement.

(2) An employer may authorise any person to furnish particulars or to make entries or endorsements in reference books or on passports on behalf of such employer as are required by these regulations, but no Bantu shall by virtue of this provision be authorised to make any endorsement in any such reference book or on a passport issued to him.

Particulars to be Recorded in Reference Books and Passports.

17. Apart from any special entries or endorsements authorised by law or specially authorised by the Director of the Bantu Reference Bureau or by the Secretary, only the following particulars may be entered or endorsements made in reference books:—

(1) In the case of a reference book (other than an identity document or a temporary identification certificate) issued to a Bantu: —

(i) In section marked "A":—

(a) The address where the holder is permanently resident, indicating whether such address is in

en moet by oor sodanige boek of paspoort beskik op die wyse deur die Direkteur van die Bantoebewysburo goedgekeur.

Teruggawe van bewysboek wanneer houer 'n paspoort bekom.

15. (1) Wanneer die houer van 'n bewysboek wat nie in die Republiek of in die Gebied Suidwes-Afrika gebore is nie, in besit kom van 'n paspoort, moet hy sodanige bewysboek onverwyld oorhandig aan die naaste Bantoesakekommissaris of sodanige ander beampte of verskaffingsburo as wat die Sekretaris van tyd tot tyd goedkeur.

(2) Enige sodanige Bantoesakekommissaris of beampte aan wie 'n bewysboek kragtens subregulasie (1) of kragtens subartikel (3) of (4) van artikel ses van die Bewysboekwet oorhandig is, kan sodanige endossemente wat wettiglik op die bewysboek aangebring is en wat nog van krag is, op dieselfde paspoort oorskryf en aan die bewysboek beskik op sodanige wyse as wat die Direkteur van die Bantoebewysburo van tyd tot tyd goedkeur.

Persone wat bevoeg is om endossemente aan te bring.

16. (1) Alleen die volgende persone mag in 'n bewysboek of 'n paspoort, 'n inskrywing of endossement aanbring wat hulle bevoeg is om aan te bring:—

(a) Die Direkteur van die Bantoebewysburo of 'n beampte in diens van daardie buro wat behoorlik deur daardie Direkteur daartoe gemagtig is;

(b) 'n Bantesakekommissaris of 'n landdros of 'n beampte op die diensstaat van 'n Bantesakekommissaris of 'n landdros wat behoorlik deur die Bantesakekommissaris of landdros daartoe gemagtig is;

(c) 'n arrpenaat genoem in artikel twee-en-twintig van die Stedegebiedewet;

(d) 'n beampte in beheer van 'n arbeidsburo of behoorlik daartoe deur sodanige beampte gemagtig;

(e) 'n eienaar van grond [maar enige inskrywing of endossement deur sodanige eienaar moet beperk wees tot daardie besonderhede wat in paragraaf (ii) van subregulasie (1) van regulasie 17 van Hierdie Hoofstuk aangedui word wat deur 'n eienaar van grond gemaak mag word];

(f) 'n werkgewer van die houer van sodanige bewysboek of paspoort, maar enige inskrywing of endossement aangebring deur sodanige werkgewer moet beperk wees tot daardie besonderhede wat in paragraaf (ii) van subregulasie (1) van regulasie 17 van Hierdie Hoofstuk aangedui word;

(g) 'n beampte aangestel vir die registrasie van kiesers;

(h) die bevelvoerende offisier van die Polisie van die Suid-Afrikaanse Spoorwee en Hawens van 'n bepaalde hawegebied of enige persoon op die diensstaat van sodanige bevelvoerende offisier, behoorlik deur sodanige bevelvoerende offisier daartoe gemagtig;

(i) enigiemand anders wat kragtens wet of wetlike magtiging of deur die Sekretaris van tyd tot tyd gemagtig is om sodanige inskrywing of endossement aan te bring.

(2) 'n Werkgewer kan enige persoon magtig om namens hom besonderhede te verstrek of inskrywings of endossemente in bewysboeke of op paspoorte aan te bring soos by hierdie regulasies vereis, maar geen Bantoe word kragtens hierdie bepaling gemagtig om enige endossemente aan te bring in enige sodanige bewysboek of op 'n paspoort wat aan hom uitgereik is nie.

Besonderhede wat in bewysboeke of paspoorte aangeteken moet word.

17. Afgesien van enige spesiale inskrywings of endossemente by wet gemagtig of wat spesiaal deur die Direkteur van die Bantoebewysburo of deur die Sekretaris gemagtig is, mag slegs onderstaande besonderhede aangeteken of endossemente aangebring word in bewysboeke:—

(1) In die geval van 'n bewysboek (uitgesonderd 'n herkenningsbewys of 'n tydelike identiteitsertifikaat) wat aan 'n Bantoe uitgereik is:

(i) In die afdeling gemerk "A":—

(a) Die adres waar die houer permanent woon wat moet aandui of die adres in 'n Bantorgebied,

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a Bantu area, on a farm or in a prescribed area, and the magisterial district.

(b) Registered as a work-seeker at the local/district labour bureau at.....

(c) Permitted to be in the prescribed area of .....in terms of section *ten* (1) (a) of Act No. 25 of 1945.

(d) Permitted to be in the prescribed area of .....in terms of section *ten* (1) (b) of Act No. 25 of 1945.

(e) Permitted to be in the prescribed area of ..... in terms of section *ten* (1) (c) of Act No. 25 of 1945 as holder is the wife of and ordinarily resides with .....who qualifies to be in the area.

(f) Permitted to be in the prescribed area of .....in terms of section *ten* (1) (c) of Act No. 25 of 1945 as holder is the unmarried daughter of and ordinarily resides with.....who qualifies to be in the area.

(g) Permitted to be in the prescribed area of ..... in terms of section *ten* (1) (c) of Act No. 25 of 1945 as holder is the son under the age of eighteen years of and ordinarily resides with..... who qualifies to be in the area.

(h) Permitted to be in the prescribed area of ..... in terms of section *thirteen* of Act No. 25 of 1945 while employed by ..... at .....

(i) To report to ..... at ..... before ..... for the purpose of .....

(j) Permitted to remain in the prescribed area of ..... while employed by ..... as .....

(k) Permitted to reside at ..... and to seek work as (indicate class of work) ..... within the prescribed area of ..... until .....

(l) Permitted to be in the prescribed area of ..... until ..... for the purpose of ..... and to reside at .....

(m) Permitted to work in the prescribed area of ..... as a casual labourer/ trader/independent contractor/ ..... until ..... and to reside at .....

(n) Permitted to proceed to ..... for the purpose of taking up employment with ..... under attested contract of employment, Requisition No. ..... dated .....

(o) Permitted to proceed to ..... for the purpose of ..... until .....

(p) Labour tenant/squatter farm ..... Owner ..... Licence No..... (This endorsement may only be made by a Bantu affairs commissioner.)

(q) Labour tenant, Farm ..... Owner ..... Obliged to render service to one during the period from ..... to ..... (This endorsement may only be made by the owner of the land in question.)

op 'n plaas of in 'n voorgeskrewe gebied is, as die landdroskantoor.

(b) Geregistreer as 'n werksoeker by die plaaslike/distrikswerkbedieningskantoor te .....

(c) Kragtens artikel *tien* (1) (a) van Wet No. 25 van 1945 toegelaat om in die voorgeskrewe gebied van ..... te wees.

(d) Kragtens artikel *tien* (1) (b) van Wet No. 25 van 1945 toegelaat om in die voorgeskrewe gebied van ..... te wees.

(e) Kragtens artikel *tien* (1) (c) van Wet No. 25 van 1945 toegelaat om in die voorgeskrewe gebied van ..... te wees aangesien houer die vrou is van ..... wat kwalifiseer om in die gebied te wees en gewoonlik by hom woon.

(f) Kragtens artikel *tien* (1) (c) van Wet No. 25 van 1945 toegelaat om in die voorgeskrewe gebied van ..... te wees aangesien houer die ongetroude dogter is van ..... wat kwalifiseer om in die gebied te wees en gewoonlik by hom woon.

(g) Kragtens artikel *tien* (1) (c) van Wet No. 25 van 1945 toegelaat om in die voorgeskrewe gebied van ..... te wees aangesien houer die seun onder die ouderdom van agtien jaar is van ..... wat kwalifiseer om in die gebied te wees en gewoonlik by gemelde houer woon.

(h) Kragtens artikel *dertien* van Wet No. 25 van 1945 toegelaat om in die voorgeskrewe gebied van ..... te wees terwyl hy in diens is van ..... te .....

(i) Moet hom by..... te..... vir die doel van..... aanmeld voor.....

(j) Toegelaat om in die voorgeskrewe gebied van .....te wees terwyl by in diens is van.....as.....

(k) Toegelaat om te..... te woon en om tot.....hierna die voorgeskrewe gebied van..... .....werk te soek as (meld klas werk).....

(l) Toegelaat om in die voorgeskrewe gebied van .....te wees tot..... .....met die doel om..... en te woon te.....

(m) Toegelaat om in die voorgeskrewe gebied van .....te wees as los arbeider/ handelaar/onafhanklike kontrakteur/..... .....tot.....en te woon te.....

(n) Toegelaat om na..... te gaan met die doel om volgens 'n geattesteerde dienskontrak *dienste* te aanvaar by .....Rekwisisie No....., gedateer.....

(o) Toegelaat om na..... te gaan tot.....met die doel om.....

(p) Plakkerdiensbode/plakker, Plaas..... .....Eienaar..... Lisensie No.....

(Hierdie endossement kan slegs deur 'n Bantoesakekommissaris aangebring word.)

(q) Plakkerdiensbode, Plaas..... .....Eienaar.....Verplig om gedurende die tydperk van..... tot.....aan my dienste te lewer.

(Hierdie endossement kan slegs deur die eienaar van die betrokke grond aangebring word.)

(r) Labour tenant contract cancelled/terminated. (This endorsement may only be made by a Bantu affairs commissioner or owner of the land in question.

(s) Holder is between 16 and 18 years of age and has permission to take up employment during the period ..... (This endorsement may only be made by the owner of the land in question and shall be countersigned by the holder's guardian.)

(t) Holder is no longer a squatter on my farm. (This endorsement may only be made by the owner of the land in question.)

(u) Referred to the aid centre at ..... on .....

(v) Admitted to the aid centre at ..... on .....

(w) Permission extended to .....

(ii) In section marked "B":—

(a) On the left-hand pages the employer's full name and address and on the right-hand pages the employer's signature for each month of duration of a contract of service or employment.

(b) In the event of leave of absence being granted, the employer is to endorse: On leave from ..... to .....

(c) In the case of a pupil at a school or a student at a university, the head of the institution concerned may endorse: Enrolled at ..... school/university for quarter ending.....

(iii) In section marked "C": Republican and hospital tax.

(iv) In section marked "D": District tax levies such as local tax, levy payments or Bantu authorities' tax.

(v) In section marked "E": Particulars regarding concessions, exemptions and privileges:—

(a) Holder is in possession of a letter of exemption from Bantu law and custom No..... dated ..... issued at .....

(b) Exempted from the labour bureau system as holder is .....

(c) Exempted from curfew restrictions at..... ..... subject to following limitations ..... Exemption by Minister dated.....

(d) Registered as a voter in the ..... electoral division of the Transkei.

(e) Old age pension number .....

(f) Disability grant number .....

(g) Blind persons number .....

(h) Needy ex-soldier grant number.....

(i) Leprosy grant number .....

(j) Pneumoconiosis award number .....

(k) Maintenance grant number .....

(l) Foster parent grant number .....

[Endorsements (e) to (l) may be made only by a Bantu affairs commissioner or an officer authorised by him.]

(m) Holder is hereby authorised to enter the harbour area of ..... at ..... on duty. Valid for .....

(This endorsement may only be made by the officer commanding the South African Railways and Harbours Police of the particular harbour area.)

(2) In the case of an identity document or a passport, any of the entries or endorsements referred to in subregulation (1) may be made in the appropriate sections of such document.

(r) Plakkerdienshopdekontrak gekanselleer/beëindig. (Hierdie endossement kan slegs deur 'n Bantoesakekommissaris of die eienaar van die betrokke grond aangebring word.)

(s) Houer is tussen 16 en 18 jaar oud en het vergunning om gedurende die tydperk..... .....diens te aanvaar.

(Hierdie endossement kan slegs aangebring word deur die eienaar van die betrokke grond en moet medeondertekend word deur die voog van die houer.)

(t) Houer is nie langer 'n plakker op my plaas nie. (Hierdie endossement kan slegs aangebring word deur die eienaar van die betrokke grond.)

(u) Verwys na die Hulpsentrum te..... .....op.....

(v) Toegelaat by die hulpsentrum te..... .....

(w) Vergunning verleng tot.....

(ii) In die afdeling gemerk „B":—

(a) Op die linkerkantbladsye die werkgewer se volle naam en adres en op die regterkantse bladsye die werkgewer se handtekening elke maand gedurende die duur van die dienskontrak of diens.

(b) As afwesigheidsverlof toegestaan is, moet die werkgewer endosseer: Met verlof van..... ..... tot.....

(c) In die geval van 'n skolier of 'n student aan 'n universiteit kan die hoof van die betrokke inrigting endosseer: Ingeskryf te..... .....skool/universiteit vir kwartaal eindigende.....

(iii) In die afdeling gemerk „C": Republikeinse en hospitaalbelasting.

(iv) In die afdeling gemerk „D": Distriksbelastingheffings soos plaaslike belasting, heffingbetalings of Bantoe-owerheidsbelasting.

(v) In die afdeling gemerk „E": Besonderhede betreffende vergunnings, vrystellings en voorregte:—

(a) Houer is in besit van 'n vrystellingsbrief van Bantoereg en -gebruik No....., gedateer ....., uitgereik te.....

(b) Vrygestel van die arbeidsbureustelsel aangesien houer 'n..... is.

(c) Vrygestel van aandklokbeperkings te ....onderworpe aan volgende perke .....Vrystelling deur Minister gedateer .....

(d) Geregistreer as 'n kieser in die kiesafdeling ....van die Transkei.

(e) Ouderdomspensioennommer.....

(f) Ongeskiktheidstoelaagnommer .....

(g) Blindepensioennommer.....

(h) Behoeftige oud-soldaatstoelaagnommer .....

(i) Lepraroelaagnommer.....

(j) Pneumokoniosetoekenningsnommer.....

(k) Onderhoudstoelaagnommer.....

(l) Pleegouertoelaagnommer.....

[Endossemente (e) tot (l) kan slegs deur 'n Bantoesakekommissaris of 'n beampte deur hom gemagtig, aangebring word.]

(m) Houer word hierby gemagtig om die hawegebied van.....by.....op diens binne te gaan. Geldig vir.....

(Hierdie endossement kan slegs aangebring word deur die Bevelvoerende Offisier van die Suid-Afrikaanse Spoorweë en Hawens-Polisie van die betrokke hawegebied.)

(2) In die geval van 'n herkenningsbewys of 'n paspoort kan enigeen van die inskrywings of endossemente vermeld in subregulasie (1) in die toepaslike afdelings van daardie dokument aangebring word.

APPENDIX D

Schedule 4 of the COIDA Payment Schedule

COIDA payment scheme applicable since 3 May 2019

Item	Section	Nature and degree of disablement	Nature of benefits	Manner of calculating benefits	Maximum compen-sation	Minimum compen-sation
1.	47 (1) (a)	Temporary total disablement	Periodical payments	75% of an employee's monthly earnings at the time of the accident.	R28 658	R4 012
2.	49 (1)	Permanent disablement of 30%	Lump sum	15 times the monthly earnings of the employee at the time of the accident using the formula: 15× earnings	R 320 985	R80 250
3.	49 (1)	Permanent disablement of less than 30% (1 – 30%)	Lump sum	An amount which bears to a lump sum calculated under item 2 the same proportion as the degree of permanent disablement to 30%. Using the formula: 15× earnings × PD%	R 320 985	R80 250
4.	49 (1)	Permanent disablement of 100%	Monthly pension	75% of an employee's monthly earnings at the time of the accident. Formula for 100% PD: 75% × earnings at time of accident	R28 658	R4 012
5.	49 (1)	Permanent disablement of less than 100% but more than 30%	Monthly pension	An amount which bears to a pension calculated under item 4 the same proportion as the degree of permanent disablement to 100%.	R28 658	R4 012
6.	54 (1) (a)	Fatal	Lump sum	Twice the employee's monthly pension that would have been payable under item 4 had he been totally permanently disabled.	R57 316	R8 024
7.	54 (1) (b)	Fatal	Monthly pension	A maximum of 40% of the monthly pension that would have been payable to the employee under item 4 had he been totally permanently disabled, is payable to a spouse. In case of more than one spouse the spouses will share 40% in equal proportions.	R11 464	R1 605
8.	54 (1) (c)	Fatal	Monthly pension	A maximum of 20% of the monthly pension that would have been payable	R5 732	R802

Item	Section	Nature and degree of disablement	Nature of benefits	Manner of calculating benefits	Maximum compen-sation	Minimum compen-sation
				to the employee under item 4 had he been totally permanently disabled, is payable to a child. In case of more than three children the children will share 60% in equal proportions.		
9.	54 (1) (d) (ii)	Fatal	Lump sum	Percentage dependence as portion of R165 115	R165 115	
10.	54 (2)	Fatal	Funeral costs	R18 251 per valid claim	R18 251	
11.	63 (1) (a)	Minimum for free food and quarters		Minimum for free food R285 per month and minimum for free quarters R128 per month.		R285 per month for free food R128 per month for free quarters
12.	28	Constant attendance allowance	Monthly allowance	Minimum amount of R2 117 per month		R2 117