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GRAVE MATTERS: THE CONTENTIOUS POLITICS OF GRAVESITE REMOVALS IN CONTEMPORARY SOUTH AFRICA – THE CASE OF TWEEFONTEIN, OGIES

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Thesis submitted in partial fulfilment of the

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ABSTRACT: This thesis examines the contestations over African grave site relocations in Tweefontein, Ogies in the post-apartheid South Africa. The contestations in this study are located within two legal frameworks, namely: The National Heritage Resource Act (1999) which protects graves; and the South African Mineral and Petroleum Resources Development Act (2002), which leases minerals and consequently land, for mining purposes. The thesis argues that despite the post-apartheid objective to remedy past injustices, an overriding market-driven rationale within the context of mechanisms of lawful exclusion works to dehumanise what is at stake for African people.

What is shown to have occurred is that inadequacies in the law has created conditions for a market-friendly mineral law to override the protection of heritage, which has led to new forms of exclusion that compels previously marginalised African people to find alternative ways to validate their belonging. In this case study, the families whom the graves belong to argue that graves matter as these are a form of evidence in the current political climate which requires evidence of historical injustice for political and economic redress. Thus, the thesis also makes the case that graves provide alternative means to validate dispossession because oral evidence, relied upon in courts, is sometimes considered unreliable unless it is backed up with written and archival records (which in any case must be considered tainted as these were typically created to fit the political objectives of white domination).

The thesis is located within relevant inter-disciplinary debates, and a combination of research methods – including legal history, expert interviews, oral history, and archival research – are used to explain why graves are subject to contestations. In particular, the review of legal histories helps contextualise and explain the contestations from the perspective of the law; revealing how both the heritage and mineral law are founded on Eurocentric legal principles that entrench and prioritise notions of property possession centered on the private ownership of minerals and land, even though these are state owned – such that when it comes to the provisions for graves both the heritage and mineral laws are incapable of providing proper redress for previously marginalised African communities. Through oral histories and archival work, the thesis shows the plight of those African families involved in the grave site removals and how contestation relates to broader questions of dispossession, traditional beliefs about the sacred, belonging, and citizenship.

DECLARATION

I declare that this thesis is my own unaided work. It has been submitted for the degree of Doctor of Philosophy at the University of the Witwatersrand, Johannesburg. It has not been submitted for any degree or examination at any other university.

Dineo Skosana

0513253t



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DEDICATION

IN LOVING MEMORY OF

EMERITUS

PROFESSOR

PHILIP BONNER

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I wish to thank all the families who let me into their lives; who shared their most intimate memories about their loved ones who have passed on, and who courageously recounted how their ancestral remains were dishonoured. This study would not have been possible without their patience, openness, and friendship – and, of course, their principled resistance to the force of circumstance.

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ABBREVIATIONS

ACTAG	Arts and Culture Task Group
ANC	African National Congress
AMAFA	KwaZulu-Natal's Amafa aKwaZulu-Natali
ASAPA	Association of Southern African Professional Archaeologists
BGG	Burial Grounds and Graves
CODESA	Convention for a Democratic South Africa
CP	Conservative Party
CRM	Cultural Resources Management
DMR	Department of Mineral Rights
EMP	Environmental Management Plans
HIA	Heritage Impact Assessment
HSRC	Human Science Research Council
NEMA	National Environmental Management Act
NHRA	National Heritage Resources Act, no. 25 of 1999
NUM	National Union of Mineworkers
MIACC	Mokopane Interested and Affected Communities Committee
MPRDA	Mineral and Petroleum Resources Development Act
PGS	Professional Grave Solutions
PPL	Potgietersrus Platinum Limited
RDP	Reconstruction and Development Programme
SAHRA	South African Heritage Resources Agency

SAHRIS	South African Heritage Resources Information System
TOP	Tweefontein Optimisation Project
UNESCO	United Nations Educational, Scientific and Cultural Organisation
XSTRATA	Xstrata PLC

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INTRODUCTION

COLLIERY MINING AND GRAVE RELOCATIONS: THE INTERSECTION OF SOUTH AFRICA'S MINERAL AND HERITAGE LAW

"My father and brothers who were all buried in Tweefontein- were exhumed by the mine and reburied in Phola. When everything was done, they gave me R4500 for the graves."[1]

John is one of many African family representatives whose graves were removed to make way for an opencast colliery mine in Tweefontein. His father's and two of his brothers' graves were relocated from the Tweefontein farm to the township's municipal cemetery (Phola) in 2013. He and many others come from families of either migrant labours- who worked in the colliery mines or labour tenants- who worked and lived on white-owned agricultural farms. When faced with death, many of the families buried on the farms, whereas, some voluntarily vacated the farms and left their graves behind. Other families were forced to relocate because of colonial and apartheid laws, while others moved as a result of changes in the ownership of the farms. Between 2009-2010, Glencore PLC (Glencore) contracted a Cultural Resources Management (CRM) company, Professional Grave Solutions (PGS), to mediate the relocations on their behalf. The consultant company began the negotiation with the owners of the graves in 2011, while, the grave relocations commenced in 2012.

This thesis investigates the contestations over the gravesite relocations of some African ancestral graves from Tweefontein, by Glencore.[2] The Tweefontein Optimisation Project (TOP) was initiated by the then Xstrata PLC (Xstrata) in 2008 to extract the remaining coal reserves in Ogies.[3] Ogies is a coal-mined town which is located 100 km east of Johannesburg and 29km south-west of Witbank. The town is administered by an African National Congress (ANC)-led Emalahleni

[1] John Mnguni, Interview by Dineo Skosana, Phola Park. 28 April 2016 Interview

[2] Renamed Glencore PLC after its merger with Xstrata PLC.

[3] According to J. Pistorius (2006) Heritage Impact Assessment (HIA) report, the Tweefontein complex and parts of the farms Waterpan 8IS, Zaaiwater 11IS, Grootpan 7IS, and Vlaklaagte 330IS, on the Eastern Highveld, were then identified for the Xstrata Alloys Lesedi Power Generation Project.

Local Municipality which falls within the Nkangala District Municipality in the Mpumalanga province. Found in 1928, Oogiesfontein (Ogies) town is currently known for being the country's leading electricity producer with small and large-scale mines concentrated in the area.[4] The optimisation project is located on the east of Ogies and to the south of Witbank. It occupies the Eastern Highveld which is bordered by Pretoria and the East Rand, Johannesburg. The eastern boundary of the project area runs from north to south along the border between the farms Tweefontein 13IS and Klipplaat 14IS (see Fig. 1) and (Fig. 2).



Figure 1: Map of South Africa illustrating the province in which the Tweefontein colliery project is located.

[4] National Archives of South Africa, Correspondence Files, MNW, Vol. 435, Ref MM2495/18.

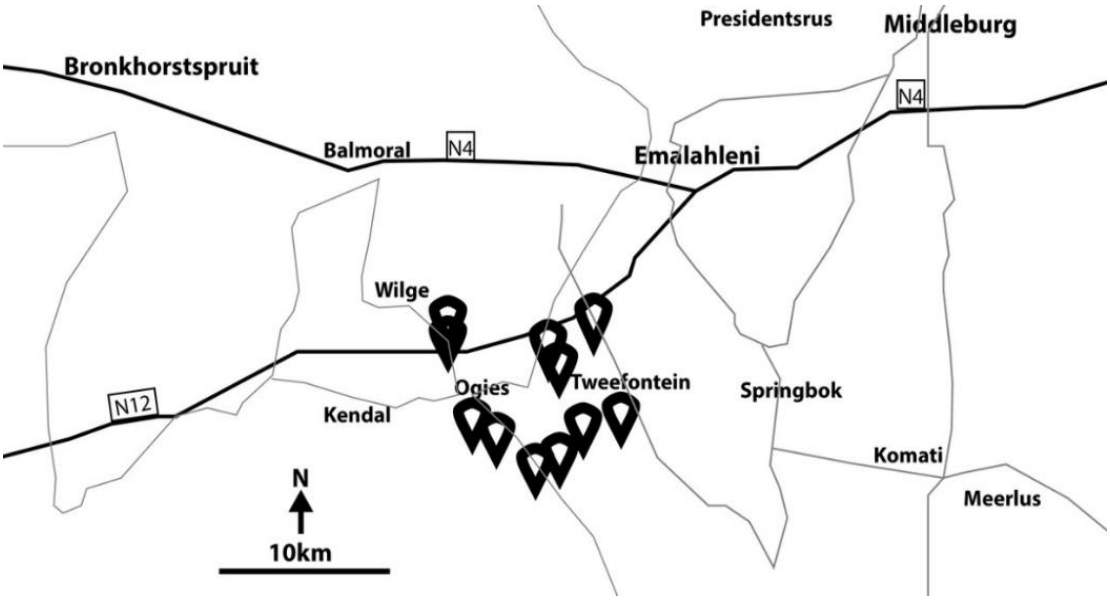


Figure 2: Map redrawn from mining-atlas.com illustrates Tweefontein and other areas affected by the optimisation project

The Tweefontein coal seams require open-cast mining, a form of extraction method used when the mineral deposits or rocks are placed near the surface and which, therefore, does not require underground tunnelling.[5] Three Heritage Impact Assessments (HIA) were conducted - over 2006, 2010, and 2013 - on the Tweefontein farm,[6] as well as the Boschmans, Waterpan, Zaaiwater, Grootpan, and Vlaklaagte farms, to identify the heritage resources that would be impacted by the intended mining projects.[7] The HIA surveys are conducted by heritage consultants to establish whether any of the types of heritage resources outlined in Section 3 of the National Heritage

[5] Mine Engineer Community, Open Pit Surface Mine (2000); accessed 19 December 2011, http://www.mine-engineer.com/mining/open_pit.htm

[6] This thesis focuses on the Tweefontein 13IS farm, which is the biggest portion of these farmsteads, and the site with the most graves.

[7] See, for instance, J. Pistorius (2006) "Heritage Impact Assessment (HIA) Report: A Base Line Heritage Impact Assessment Study for Xstrata Coal's Tweefontein Division - On the Eastern Highveld In the Mpumalanga Province of South Africa," Mpumalanga: Digby Wells & Associates; J. Pistorius (2013) "A Phase I Heritage Impact Assessment (HIA) Study for Xstrata South Africa (Pty) Tweefontein Optimisation Amendment Project - Top Amendment Project - On the Eastern Highveld In the Mpumalanga Province of South Africa," Mpumalanga: Digby Wells & Associates.

Resources Act, no. 25 of 1999 (NHRA), will be impacted during planned developments on an area. The surveys, thereafter, propose mitigation measures to reduce any possible impact on the heritage resources. The first appointed heritage consulting agency for this project, Digby Wells & Associates' reports- indicated, amongst other things, that residential areas, historical structures, and most importantly with regard to this thesis, the mining project, will impact ancestral graves. The 2006 HIA and its 2010 extended report recorded at least 13 grave sites consisting of single and cluster graves discovered in the Tweefontein project area; whereas the 2013 HIA indicated that there are at least 24 graveyards in the project area.[8] Both reports acknowledge that more grave sites could possibly exist in the project area as these are difficult to locate considering the vast expanse involved and the dense stand of the vegetation, particularly after high rainfall. Mining development impacts these formal and informal graves – some of which are new, but the majority are older than sixty years.[9] Grave relocations were recommended as a mitigation measure in all the HIA reports; a common recommendation in South Africa as far as mining and graves are concerned. The graves belong to African residents of the colliery location, former labour tenants and migrant labourers. Their living family members have remained in Ogies, with others having moved to Witbank and different parts of South Africa, and back for those who were recruited from Mozambique.

This thesis aims to present and analyse the nature of political contestation around such grave site removals. To this end, it is necessary to analyse the formal legal framework within which removals take place - which is constituted by two interacting, but often contradictory, pieces of legislation: the NHRA and Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002- to probe if Glencore adhered to the provisions set out in the regulations and to identify any

[8] Furthermore, the report indicates that "many of the graveyards contain between ten to hundred graves whilst at least one holds more than a thousand individuals. It is highly likely that more small graveyards or single graves may exist and that they have been missed during the different surveys that were conducted during the past decade;" see more details in J. Pistorius, J. (2013) "A Phase I Heritage Impact Assessment (HIA) Study for Xstrata South Africa (Pty) Tweefontein Optimisation Amendment Project - Top Amendment Project - On the Eastern Highveld In the Mpumalanga Province of South Africa,", Mpumalanga: Digby Wells & Associates, p. 31.

[9] This means that both require different forms of mitigation measures according to the heritage law.

gaps in the legislation which enables mining houses to exploit resources and communities. Moreover, the thesis examines why and how graves are subject to contestations by analysing the perspectives articulated by the families of those whose graves were relocated. In particular, focus falls on how the removal and reburial process were negotiated and carried out with the families who own the graves, as well as the contradictory meanings attached to the graves by the mine, administrators, and the families. Basically, this dissertation uses both policy analysis and social history methods to illuminate what turns out to be a fundamental political clash between a capital-friendly mineral law framework and the cultural imperatives of heritage ideas.

The thesis contributes to the studies of coal-affected communities, as well as the scarce literature about gravesite protection in South Africa. The interrogation of the laws that govern graves is important in this thesis because it demonstrates how the rights of the previously marginalised African communities are both asserted and undermined by legal frameworks in the post-apartheid South Africa. Moreover, the laws that protect the dead are worth studying because at the centre of everyday African life- is an emphasis on the dead and the role they play in safeguarding the living. As such, the living must constantly ensure the comfort of the ancestors by maintaining a good relationship through the performance of rituals and appeasement.[10] However, various historical factors such as land dispossession, forced removals, the migrant labour and tenancy system- have altered the preservation of the relationship between Africans and ancestors. This thesis adds to the literature by considering how modern economic development- mining- particularly, affects the politics of the sacred. The effects of modern development projects have not only impacted South Africa, but the African continent and the globe. It is, therefore, the aim of this dissertation to unpack the politics that arise out of wanting to preserve heritage and history in an economic-driven age.

Research Methodology

[10] Refer to M, Gluckman, (1937). ‘‘Mortuary Customs and the Belief in Survival after Death Among the South-Easter Bantu.’’ Bantu Studies, 11:1, pp119 and H, White, (2013). “Spirit and society: in defence of a critical anthropology of religious life”, *Anthropology Southern Africa,* 36(3&4)

This thesis utilizes a combination of methods that best highlight the multiple layers and the complexities of the contestations over grave relocations. Centrally, the study makes use of legal histories – the study of law[11] – in order to contextualise South African heritage and mineral law. This is to recognise as the historian Birla Ritu suggests, that "law constitutes society and society constitutes law."[12] Fisk and Gordon write that in legal history:

> The scholar's job is to examine how law arises out of activity in the social sphere and how, in turn, law reacts back upon and causes changes in that sphere. The scholar must also discover patterns and regularities in those interactions that would ideally allow causal generalisations. The theory is that law is a purposive or functional activity; people create law or make use of law in a particular way for a reason, and the result of these activities, whether intended or not, is that law becomes what it becomes, and society becomes what it becomes.[13]

In a nutshell, the legal history method takes cognisance that law is not created in a vacuum; as such, both the heritage and mineral laws are explored in this thesis to highlight how they are products of social processes developed over time to suit different contexts. The histories of both laws allow for an assessment of their novel development in relation to property and ownership, as well as traceable continuities over time – which may not be obvious when both sets of legislation are studied purely in terms of their promulgation.

To such ends, I was able to interview an expert who was part of the Arts and Culture Task Group (ACTAG) that was set up in 1996- by the Minister of Arts and Culture to produce a report on heritage policy. As a leading contributor to the heritage act, this person was able to provide important background to this legislation, as well as particular details about the aims, rationale, and objectives behind certain clauses in the act. Moreover, studying traditional legal rules and principles found for example in the Roman-Dutch law of property, and exploring how these principles were transmitted to the South African legal system, provides a necessary background to

[11] C. Fisk and R. Gordon (2011) "Foreword 'Law As…': Theory and Method in Legal History," *UC Irvine Law* Review, 1(3).

[12] R. Birla (2011) "Law as Economy: Convention, Corporation, Currency," *UC Irvine Law Review*, 1(3).

[13] C. Fisk and R. Gordon (2011), *op cit*, p. 521.

understanding the contemporary inadequacies and contradictions inherent in both legal frameworks. Overall, the intent was to expose the limitations inherent in the law of post-apartheid South Africa.

Further, the study also utilised archival documents such as the applications submitted by Professional Grave Solutions to the South African Heritage Resources Agency (SAHRA) and its Burial Grounds and Graves (BGG) Unit, for the relocations. The applications, as well as the Impact Assessments reports are considered public documents and were therefore obtained in digitised format from the South African Heritage Resources Information System (SAHRIS). The documents were drawn upon to reveal specific problems intrinsic to the NHRA and the MPRDA.

The SAHRIS online archive was of major assistance in helping to identify and locate the families affected by the removals. This was needed because contrary to a verbal agreement with the mine and PGS (in June 2014) about their assistance in this research, the workers and consultants stopped being responsive a few months later and failed to honour the agreement to furnish me with the records of their mining operations, affected farms, and graves. In fact, it was requested that I put my interviews with the affected families on hold for a year, so as not to disturb their negotiation process. Although it was not explicitly stated, the concern was that during the interviews I would conscientise the families and make them think thoroughly and critically about the demands of the mine. I did not stop interviewing but used an alternative approach.

Several visits were made to the National Archives of South Africa in Pretoria, which stores archival inventories – rich with the history of Witbank, its development, and the coal mining industry. Coal trade archives which date back to the mid-nineteenth century detail minutes, reports, parliamentary debates, correspondence, and legal documentation- all which provided important information on the establishment of the Witbank Colliery, and how it affected the town's growth. Certain archival records were, though, hard to trace – particularly relating to the Chamber of Mines and Witbank's town records. The Transvaal Provincial and Local Administration records, as well as the Town Council's records, do shed light about the transfer of ownership of mines, infrastructural development, town planning, and the construction and demolishing of residential areas in Witbank, Ogies and Tweefontein. Archival documents were useful to connect stories of land dispossession and the loss of graves to the expansion of coal mining in the 1970s in Ogies. The documents are mostly written in Afrikaans which compelled an appointment of a translator.

Archival visits were coupled with life history interviews conducted between September 2014 and August 2016. Through the life history interview technique, social historians focus on the interviewee's life holistically.[14] Therefore, instead of an immediate questioning about the contestations over the relocations of graves during the interviews, a prior examination of the participants' family history was sought. Through reconstructing the life histories of my participants, I was able to gain an insight and a more nuanced understanding of: where the late descendants and their living family members came from; how the families got to bury in Tweefontein and surrounding farms; what the historical processes of burials were and how these have changed over time; as well as their accounts about dispossession and other social, environmental, and health impacts of coal mining in the area.

Noteworthy is that life-history interviews in this study are not used as such, primarily because much attention and detail were provided on the process of grave relocation and the violation of ancestral remains than the historical background of the families or how they got to bury on the Tweefontein farm. This was not a premeditated plan or outcome. Often, for example, the families technically diverted questions about how long they lived on white agricultural farmland or gave brief answers so that they could tell their immediate problem of grave relocations. In this regard, an answer to how long had you lived on the farm and what kind of land tenure arrangement did you or your family have with the landlord, would be answered in this manner, ''we lived for an x amount of years, that is why we are upset by the manner in which our graves were relocated''. As a result, the interview transcripts do not reflect a typical chronologically organised oral history record. For these reasons, this study carefully selected excerpts in the interviews which the families emphasised the grave matter.

Be that as it may, grave matters cannot be discussed without reference to the land or a contextual history. Yet during the interviews, because of the pain of the relocations, many paid little attention to their histories. However, when families articulate why graves matter, they evoked memories of attachments to land and histories of belonging- all which they spoke about mainly towards the end of an interview; that is only after they had told the story about the violation of their ancestral remains.

[14] A. Portelli (1981) *What Makes Oral History Different in An Oral History Reader*, New York: State University of New York Press.

All together I conducted interviews with 14 families – which were identified from the PGS records, documented by SAHRIS. The records typically documented an individual family representative as the contact person; these being the individuals which the consultant company negotiates with during the relocation process. Such individuals are responsible for alerting the immediate family and relatives about the relocations – and receives the payment on behalf of the family. I spent weeks dialing each number that was listed to arrange the interviews on a date convenient for the family. As the application forms had been filled by PGS since 2010, some of the listed telephone numbers were no longer operative by 2014. In those cases where I managed to locate the family representative, I was often not given an immediate date as the representative often needed to consult with the rest of the family about a meeting. Most of the listed family representatives were the younger family members and as such felt reluctant to explain their history and events on their own. Consequently, even though the representatives were present during the relocations, some wanted their elders to be present for the interview in order for them to thoroughly explain their ordeal and grievances pertaining to the relocation. This meant that some interviews were with single representatives of the families, whilst others were with the representative as well as their extended family members. Interviews were conducted in isiNdebele, isiZulu and in some instances, sePedi (Northern-Sotho). No translation was required during this process because I understand and write all three languages. Being multilingual also ensured that the interviews are not lost in translation during the writing stage.

The families received me with enthusiasm. All were eager to share their experience of the relocations, particularly, the details about not being thoroughly compensated, tomb or head-stones not being erected as promised by the mine, and other related issues. Most family members mistook my position as that of a lawyer. I had to often make sure that they understood that I am a researcher whose study is conducted for academic purposes – not to build a legal case or to refer the case to the media. The news that I was a political science researcher was often received with disappointment, but one or two persons from the families, in my defence, highlighted the ability of research of this nature to make a difference – even if not immediately.[15] Certainly, a report to

[15] According to Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, "the researcher has a moral and professional obligation to be ethical, even when research subjects are unaware of or unconcerned about ethics." In line with this, I took into account that my research is focused

the South African Heritage Agency will be filled on behalf of the families to highlight the inhumane ways in which graves of African people are violated in the post-apartheid era.

My position as a young black woman-researcher from a major academic institution did not affect the emphasis the participants put on certain aspects or the way they expressed their experience. This was not difficult to judge because all fourteen interviews were consistent in their articulation of the process of grave relocations and issues such as compensation. This is regardless of that the families are scattered around the Mpumalanga area and they experienced this process in isolation.

The interviews evoked feelings of trauma, but they seemed eager to continue to share their experiences because no government official or mine's consultant cared to ask. Several times, I held tears back because if I sobbed, I reasoned, they might weed out their memories to lessen the burden on my emotions. I also cried at the thought of the continued violation of African bodies in the current political dispensation. The constant crying after interviews and whilst writing this thesis, had me realise that it might have provided therapy for the families to speak about their experiences. However, it left me disturbed. The families often wished me well, as I left their homes and I seemingly gave them hope as I was the first person to be curious about their contestations over graves.

As part of my research I also conducted a site visit to the Tweefontein farm during which the graves had yet to be relocated but were already fenced to demarcate the mine's operations – even though the negotiations between PGS and the families were still ongoing at the time. Although I arrived with a PGS consultant, we had to be escorted by the mine's security people, who interrogated our reasons for visiting the site. Evident on the site were notices to inform the families

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on human subjects and deals with a sensitive topic that rekindles feelings of loss and violation. I had to ensure that my research subjects clearly understood the nature of my research and its purpose. When my subjects agreed to participate in this research it was on the basis of a clear understanding that they were under no obligation to take part and that they could terminate their involvement at any time during the course of the research. Prior to interviewing my subjects, I guaranteed them anonymity, if they so wished; they insisted, however, that I should not hide their identities so that it can be known that *they* were the victims of Glencore mining interests.

about the relocations.[16] The graves were clustered together, some with modern tombs, most with old concrete headstones marked with the name of the deceased, as well as their date of birth and death.[17] Some graves simply had rod-like markings – with an engraved number on the grave for identification purposes.[18] Some graves had no numeral markings, but had personal items such as plates or cups which the deceased might have used whilst alive – and these serve as markers of the graves provided they are not washed-away with the soil during the rainy season.[19] I also conducted a site visit to the township cemetery, Phola- which is the new location of a few relocated graves. To my amazement, some graves did not have the family surname on; meaning that their owners could not be identified.[20] In some instances, the graves had the family name, but not the birth and death date- signifying that PGS and the funeral parlour could not find the dates.[21]

Thesis Structure

Each chapter in this thesis is carefully drafted to encompass the political contestations that arise from the laws that protect graves, the application of the legal frameworks and the experiences of the owners of graves. Chapter one introduces the Tweefontein case study and locates the contestations over grave relocation within the two legal frameworks, namely: The National Heritage Resources Act, 1999, and the Mineral and Petroleum Resources Development Act, 2002. It teases out the overarching contestations which are explored systematically in this thesis; these are about conflicting laws, difficulties related to the coordination of the removals and the impacts thereof, the contestations over compensation, and questions about ownership and belonging in the current political dispensation. The chapter submits that within these carefully studied and thematised contestations, are problems related to a market-driven rationale, mechanisms of lawful exclusion, and therefore dehumanisation. The chapter progresses by examining the literature that

[16] See Fig. 8 on the appendix

[17] See Fig. 3 and Fig. 4 on the appendix

[18] See Fig. 5 on the appendix

[19] See Fig. 6 on the appendix

[20] See Fig. 10 on the appendix

[21] See Fig. 7 on the appendix

has been published about the dead in the African context and points to some gaps and begins to point out just why grave relocations ignite deep contestations.

The thesis, therefore, follows a two-tier structure of argument. First, it explores the legal histories within which grave relocations take place. Second, it unpacks how both the legal frameworks impact communities, before it reflects on the families' perspective. As such, the second chapter provides an overview of the development of the National Heritage Resources Act (1999) in order to consider how this legislation regulates the resting place of certain remains after death. It analyses the historical background of this Act to show that attempts to reform South Africa's heritage law – grounded in Eurocentric notions of heritage and property laws – have resulted in broad yet undetailed legislative provisions of what constitutes heritage, what is to be protected, and how. It is argued that the ambiguities and loopholes in the NHRA allow mining houses to violate previously marginalised communities through the application of market-friendly mineral law.

Chapter three provides a historical overview of the state's regulatory power regarding the exploitation of South Africa's minerals. It demonstrates how post-1994, in the Mineral and Petroleum Resources Development Act of 2002, access to minerals is privatised by the state, so that the holder of the mining permit has absolute access akin to Roman-Dutch law of property. The chapter also demonstrates that the market-dominant rationale predates the transition to democracy. The chapter draws attention to how economic rationale operates so that, in practice, the MPRDA overrides the NHRA; that mining takes precedence over the protection of heritage.

Chapter four presents "The Barricaded Ancestors" as an epitome of what I term "lawful exclusion." The chapter speaks to the implications of Glencore and PGS's exploitation and disregard of the provisions in both the NHRA and the MPRDA and explores the actual process of grave relocation. Focus falls on how bureaucratic administration formalises all aspects of management to the detriment of the very people the system is meant to serve; what transpires is that the administrative functions within bureaucratic systems such as applications and consultations become a formality. The chapter also demonstrates how the lack of clarity about notions of consultation and participation in the two sets of legislation are exploited by the mine, creating new forms of exclusion within the confines of the law in the post-apartheid era.

Chapters five reflects on the families' experience during the relocations of their loved ones. It engages the argument that graves are subject to contestations because these are a form of evidence

in the current land restitution project in South Africa. It shows how the history of dispossession, tied to changing notions of belonging and citizenship, compels this form of evidence in the post-apartheid era. The chapter concludes from an epistemological stance that there are colliding views about the meaning of ancestral remains between the interviewed families and the mine.

Chapter six considers how the contestations over graves can be explained from multi-disciplinary theoretical perspectives. It draws from Max Weber's ideas on secularism, and its critique – political theology, to show that in the South African context not only is the state blended with religion it is significantly combined with Christian theology which raises legal problems because traditional spiritual heritage is neglected. The chapter also engages the argument that the sacred in market-driven African societies is commodified. It is argued that this stance be approached cautiously and that the contestations must be contextualised rather than be simply reduced to monetary issues; there are multi-faced reasons as to why grave relocations ignite contestations.

CHAPTER 1

CONTESTATIONS OVER GRAVESITE REMOVALS: DEHUMANISATION AND LAWFUL EXCLUSION IN POST-APARTHEID SOUTH AFRICA

The contestations stem from the legal framework set to protect graves, and how the laws are applied in ways that violate the owners of the graves. Professional Grave Solutions (PGS) replaced Digby Wells & Associates, as the outsourced heritage consultants for Glencore in 2010. Hence, it is PGS that has mediated the grave relocation process between the owners of the graves and the mine.[22] Glencore began to negotiate with the affected families in 2011. Communities were informed about the relocations through the local newspaper, the radio, and gravesite notifications.[23] Initially, PGS organised group meetings to inform the communities about the relocation process. As part of a strategy to cut costs, PGS organised group relocations in which the affected families were invited - a cow would be slaughtered and served after the relocations.[24] In this instance, slaughtering had no symbolic meaning other than catering for the number of family members. The group relocations were brief because families began to demand individual relocations and compensation to enable each family to perform specific rituals for their loved one. This represented a clear condemnation of the consultants' slaughtering of one cow for all; traditionally, rituals are performed for the deceased individual even if they died amid a group.

The consultants from PGS also learned about the effects of group meetings; for example, the families would influence each other to demand more compensation from the mine, and therefore, PGS began to conduct individual house visits. During the visits, families were informed about their affected graves, the date and time of the relocations and the reburial, as well as other logistics. The relocations began in 2012 and intensified in 2013. Although there were multifaced contestations

[22] For full details about these negotiations see chapter 5.

[23] See, for example, Figure 8 in the appendix.

[24] The families which were part of group relocations were not interviewed; baba Mqcina, a local man and heritage consultant for PGS, mentioned this in an interview conducted at Phola Park (Ogies), 13 May 2015.

that emerged from this study, the primary focus falls on contestations that illustrate multiple unfolding layers of injustice.

This chapter provides the background to this thesis by teasing out the overarching contestations which are explored systematically in this thesis; these are about conflicting laws, difficulties related to the coordination of the removals and the impacts thereof, the contestations over compensation, and questions about ownership and citizenship in the current political dispensation. In other words, the contestations show how previously marginalised African communities, who were historically denied citizenship in South Africa, are now excluded by the limits of post-apartheid law and policy. As such, the contestation over graves highlight a struggle for inclusion. The political contestations are located within the two legal frameworks, namely: The National Heritage Resources Act, 1999, and the Mineral and Petroleum Resources Development Act, 2002. The chapter submits that within these thematised contestations, are problems related to a market-driven rationale, mechanisms of lawful exclusion, and dehumanisation. The chapter progresses by examining the literature that has been published about the dead in the African context and points to some gaps and begins to point out just why grave relocations ignite deep contestations.
It is perhaps worth stating explicitly that I am not covering all the literature that I draw upon in the thesis for the review section. Instead, I introduce a few selected themes that help frame the study in a broader range of intellectual debates. Each chapter builds on a different framework of literature. This is because the contestations over grave relocations in this study bring together multiple layers of laws, academic disciplines, and literature. This interdisciplinarity means that this study can be explored in several scholarly fields, and different themes from the ones emphasised here could be raised elsewhere. As such, I deal with other literature on related themes as I highlight the contestations in the chapters.

Conflicting Legislation

The key contradiction that emerges is located into sections of the National Heritage Resource Act (1999) which protects graves, and the South African Mineral and Petroleum Resources Development Act (2002) which leases minerals and therefore, land for mining purposes. Both laws can be shown to intersect in ways that are contradictory and fail to attain the set-out objective to protect previously marginalised communities. This is mainly because both the heritage and mineral

law - like many laws in South Africa - are founded on the earlier precedents of colonial law. Both sets of legislation draw from European legal traditions whose basis rest in the Roman and Roman-Dutch legal systems. Although inherited legal traditions have been revised, it remains the case that the law often conflicts with the demands for social justice in South Africa's democratic dispensation. The inadequacies in both the heritage and mineral law, it is argued, result in both the perpetuation and creation of new forms of injustice.

The National Heritage Resource Act 25 of 1999

Graves,[25] under the NHRA, are rendered a heritage resource.[26] The National Heritage Resource Act established the South African Heritage Resources Agency (SAHRA),[27] a national management authority that plays a key role in spelling out procedures and guidelines for protecting heritage resources. However, not all heritage resources are equally protected. A relocation permit is according to Section 36 (Burial Grounds and Graves) only required to exhume graves older than 100 years; those of victims of conflict, royal or traditional leaders; historical graves or burial grounds; and, any grave or burial ground older than 60 years[28] which is situated outside a formal cemetery administered by a local authority. Most graves covered in this study are older than 60

[25] The Heritage Act defines a grave as "any place of interment, including its contents, headstone, or other markers of such a place, and any other structure on or associated with such a place."

[26] National Heritage Resource Act 25 of 1999, Section 2 (xiii).

[27] For any development, the developer must, at the earliest convenience, contact SAHRA and inform them of the intended development. SAHRA then has an opportunity to consider if the development will affect any heritage and instruct the developer to submit a Heritage Impact Assessment. SAHRA can also instruct the developer to contact a provincial or local heritage authority, if it decides the heritage should be administered on a provincial or local level. According to the Heritage Act, the permit should only be granted once SAHRA is confident that adequate arrangements have been made for the process of alteration (relocation) contemplated by the applicant.

[28] Graves that are over 60 years old require a qualified archaeologist to exhume. Archaeologists are required to conduct research on the grave, record the layout of the grave and objects found, and then consolidate all this into a report. This is a slower and more costly exercise as compared to hiring an undertaker who is not required to be in possession of an exhuming license. Developers often seek to find loopholes to enable relocations to be carried out by undertakers.

years and are situated outside a formal cemetery- which means that permission is required from SAHRA to relocate. In practice, therefore, as Esterhuysen and Saccaggi have observed, "not all graves are recognised and treated as heritage resources and not all graves need to be relocated in accordance with the requirements set out in the NHRA and its regulations."[29]

Depending on the category of graves,[30] different legislation - in addition to the NHRA - such as Graves and Dead Bodies Ordinance 7 of 1925, the Exhumations Ordinance 12 of 1980, and the Human Tissues Act 65 of 1983, may be relevant. There are, however, a fixed set of regulations that apply to the handling and transport of all human remains. Under all statutory provisions the person wishing to move a grave need to obtain signed consent from the closest living relative. The person or organisation is also obliged to cover the costs of coffins, transportation, and reburial; this includes the cost of performing the appropriate ritual and ceremony. However, as Esterhuysen and Saccaggi also found, there are, in practice, serious inadequacies when it comes to the monitoring, evaluation, and decision-making apparatuses related to the provisions in heritage law.[31] It transpires, for example, that there are no formalised guidelines for the application process, no definite framework for consultation with families or communities, and no clear regulation as to how much is considered adequate compensation when grave relocations are a result of development projects. This creates much contestation.

The Mineral and Petroleum Resources Development Act, 2002

The MPRDA, unlike the National Heritage Resource legislation, has received extensive scholarly attention.[32] Notably, scholars from various disciplines have traced the evolution of minerals

[29] B. Saccaggi and A. Esterhuysen (2014) "Sekuruwe Grave Relocation: A Lesson In Process And Practice," *South African Archaeological Bulletin*, 69 (200), p. 179.

[30] Section 36 categories graves along administrative sections: those inside and outside of a formal cemetery; and, those graves that are younger and those that are older than 60 years. To relocate graves under 60 years old and inside a formal cemetery, permission may be obtained from the Health Department or the local municipality.

[31] B. Saccaggi and A. Esterhuysen (2014), *op cit*.

[32] Dale, MO. (1997). "South Africa: Development of a New Mineral Policy", Resources Policy (23), 15, Van der Schyff, Elmarie. (2012). "South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals", *New Contree*, No. 64, pp-131-153 and Gavin

legislation in South Africa from the early model of the Roman legal system, in which "the owner of land had the right of possession of what was beneath the land extending to the space above the sky," to contemporary legislation that vests minerals in the state.[33] Section 3(1) of the Act states that mineral and petroleum resources are the common heritage of the people of South Africa and that the state is the custodian thereof for the benefit of the people. As a custodian of the nation's mineral and petroleum resources, the Department of Mineral Resources (DMR) is in a position to refuse or grant an applicant a prospecting mining permit depending on whether the applicant has adhered to deadlines, submission of heritage (HIA) and environmental management plans (EMP), other necessary documents, and compliance with other relevant legislation such as the Heritage Act.[34] In practice, the Act allows the Minister to make decisions on his or her own regarding the permission to prospect and mine. Far often, as far as development projects' applications are concerned, the MPRDA takes precedence over the NHRA. This is because the MPRDA is a capital-friendly mineral law operating within a market-driven economy and a state-led capitalism. The precedence of the MPRDA is also enabled by the fact that the DMR is a decision-making body for mining applications, whereas SAHRA is simply a commenting body.

Another setback for the operation of the MPRDA is that different and unrelated offices approve and comment on the HIA and EMP. The approval of the EMP occurs at the regional level, while licenses to mine are granted at national level.[35] In the case of heritage, the environmental officer in the regional DMR office must approach one of the heritage authorities (under a separate arm of

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Capps (2012): Victim of its own success? The platinum mining industry and the apartheid mineral property system in South Africa's political transition, Review of African Political Economy, 39:131, 63-84, p. 70

[33] See, for instance, F. Cawood and R Minnitt (1998) "A historical perspective on the economics of the ownership of mineral rights ownership," *Journal of South Africa Institute of Mining and Metallurgy*, 98(7), pp. 369-371; S. Lenahan (2002) *The Minerals Bill Presentation to the Diggers & Dealers*, conference paper, Kalgoorlie; and, E. Van der Schyff (2012) "South African Mineral Law: A Historical Overview of the State's Regulatory Power Regarding the Exploitation of Minerals," *New Contree*, No. 64.

[34] Mineral and Petroleum Resources Development Act, 2002, Section 9, Order of processing applications.

[35] This problem is articulated in more detail in B. Saccaggi and A. Esterhuysen (2014), *op cit.*

state) for comment on the initial EMP or an amended EMP. If heritage authorities want to view the EMP or HIA (submitted to DMR) they are required to request them formally. Moreover, consultation with communities may be overlooked during an extended HIA or EMP. In a nutshell, different arms of state at different tiers of government apply the regulations governing the relocation of human remains, with "no obligation for one officer to confer with, or crosscheck information with another."[36] Furthermore, it appears that no one from these departments carries out on-site inspections to check that exhumations are carried out properly. Thus, there are loopholes for heritage consultant agencies such as PGS to maneuverer the relocations process on behalf of the mines, in ways that are inhumane to the affected African communities.

The Logistics of Grave Removals: Social and Spiritual Rapture

Once the relocation has been approved, the moving of ancestral remains also raises contestations between the communities and the mine over the meaning and value of graves. For Glencore and PGS, the graves stand in the way of profit-making; whereas for the families, the ancestral remains as well as the gravesite maintain a connection between the living and the dead. As such, families are concerned about the process of the relocation of their graves. For example, families recounted that they were assured that extended relatives who wished to be part of the relocation process on the day would be accommodated. Amongst other things, there were promises of head-stones and tombstones for the graves in the new site.[37] However, on the day of the relocations: inadequate transport was provided; the number of people who could go to graveyards was limited to two per family; a hired priest was called to service all of the relocations, without taking into account the families' diverse spiritual beliefs; and, families found that at the original site of burial the remains were already dug. All the families had to do was to confirm which grave was which and then watch from a distance as the remains were packed in black plastic refuse bags and placed inside cheap, small, and wooden coffins which were not the size initially purchased by the family when their loved one had died.

Contestations are accentuated by the fact that the NHRA stipulates that the developer (the mine in this case), will cover relocation costs but does not set the amount or put processes in place to

[36] *Ibid*., p. 179.

[37] PGS records contain signed agreements with the families to erect the headstones after the relocations.

ensure that fees are covered. Rather, it is left to the discretion of the developer and the consultants. In the removals discussed in this dissertation, only one family, the Mathibela family, was able to negotiate their desired relocation fees and the process because they were aware of their legal rights. For example, the Mathibela representative demonstrated an understanding that a consultation is a negotiated process and therefore, challenged PGS's directive approach in which people were often simply told about the relocations. The inadequacies lie in the failure of both the NHRA and the MPRDA to clarify what constitutes enough consultation, and for not putting measures in place to ensure that the provisions outlined in both pieces of legislation are appropriately followed.

The relocation thus exacted a heavy psychological and physical toll from the families. As Esterhuysen and Saccaggi revealed in the case study of Sekuruwe, the spiritual consequences of the exhumations engendered feelings of uncertainty, guilt, and fear amongst the next-of-kin;[38] "the impact on the social fabric was marked."[39] This can be attributed to the fact that like many African families, the world of the ancestors is analogous and contiguous to the world of the living.[40] The state of health and economic success of the living is tied to, and depends on, the recognition and commemoration of the ancestor - and a fulfilment of the associated duties and responsibilities.[41] The improper and inappropriate removal of graves causes much spiritual insecurity for living community members.

Questions about Compensation, Land Ownership, and Citizenship

As Peter Mokalapa, a representative of the Mokalapa family put it: "Even the tyres of the car you are driving [*pointing to a Toyota Corolla, 2013 model*] are not worth the compensation we received for our ancestors. The mine robbed us. They opened our wounds."[42] The standard compensation

[38] B. Saccaggi and A. Esterhuysen (2014), *op cit*.

[39] *Ibid*., p. 176.

[40] See, for example, M. Gluckman (1937) "Mortuary Customs and the Belief in Survival after Death Among the South-Eastern Bantu," *Bantu Studies*, 11(1); and J. Comaroff and J. Comaroff (1991) *Of Revelation and Revolution: Christianity, Colonialism and Consciousness in South Africa*, Volume One, Chicago: Chicago University Press.

[41] This is articulated, for example, by H. White (2013) "Spirit and society: In defence of a critical anthropology of religious life," *Anthropology Southern Africa*, 36(3&4), pp.139–145.

[42] Peter Molapa, group interview by Dineo Skosana, Vorsman (Witbank), 28 April 2016.

(wake fee) was set at R1,500; and as such was one of the key points of contestation amongst the families. The amount was not negotiated with the families; it was pre-determined by Glencore and PGS. The families were simply informed about the mine's standardised figure and thereafter, discussed whether it would be paid in cash or deposited into the families' representative bank account. Whilst some families received the amount prior to the relocations, others received their payments after the relocations had taken place. The common complaint was that if the money was transferred after the relocations, the essential rituals which cost far more than the offered fee would be delayed. As a result, there would be ritual improvisation to inform the ancestors and the deceased that their remains will be moved. The key question is: how much should families be compensated for graves which contain their ancestors? [43] And how much more should families be compensated if they are also claiming the land site of their graves?

It is necessary to give a brief background of the families and their graves to contextualise the questions around land, compensation, and citizenship. Ogies' proximity to Witbank makes it impossible to not consider how the historical economic activities in the town have shaped local politics. Prior to the establishment of the local coal industry, Witbank was known as an agriculture hub and particularly for its production of corn. Agricultural production in the area, as in many parts of South Africa, depended on African labourers during the colonial, segregationist, and apartheid regimes.

The tenancy system developed in the nineteenth-century as a means for white farmers to gain access to cheap African labour; it is a system that "allowed African peasants to retain their place on white-owned farmland by paying rent in the form of labour, enabling white farmers to have access to the workforce at minimal cost, measured mostly in land dedicated to tenants' homesteads and grazing."[44] White farmers were able to extract surplus labour in a variety of ways such as labour tenancy, rent-paying tenancy, and share cropping.[45] Both rent tenancy and share-cropping occurred in the context of the development of an African peasantry, which emerged first in the

[43] This compensation is neither legislated, nor defined.

[44] T. Mc Clendon (2002) *Genders and Generations Apart: Labour Tenants and Customary Law in Segregation-Era South Africa, 1920s to 1940s*, Portsmouth, UK: Heinemann, p. 48.

[45] See G. Rennie (1908). *White Farmers and Labour Tenants: The Formation of Tenant Legislation in Southern and Eastern Africa in the Early Colonial Period, with Particular Reference to the Southern Rhodesia Private Locations Ordinance*, p. 40.

Cape in the late eighteenth-century but developed from the late 1860s; in Natal it developed about the same time, and in the Boer territories from the 1880s onwards.[46] Labour tenancy was strongly favoured by white settler-farmers, particularly in the early stages of colonialism when land (for white people) was plentiful and capital was scarce.[47] Tenant families preferred both labour tenancy and rent-tenancy for different reasons. Both forms of tenure conferred some advantages and disadvantages. For instance, while rent-paying tenants enjoyed some level of autonomy, they were subject to the threat of eviction, more especially after the 1913 Land Act.[48] Most African people viewed labour tenancy as less desirable but found it beneficial in that the system exempted tenants, to some degree, from the rule of the chiefs and also offered young men seeking to establish new homesteads an opportunity to do so.

The agricultural economy was, however, slowed by the growing mining activities taking place in the area of Witbank, and across the country. Large-scale coal mining in Witbank was only undertaken after the discovery of gold on the Witwatersrand in 1886.[49] Coal production and returns increased over the years, resulting in the establishment of the town in 1903.[50] The Delagoa Bay to Pretoria railway, which passed through Witbank, created a demand for steam coal and it eased access to Transvaal and Indian Ocean markets when it was opened in 1895. Whilst it continued to be more efficient to supply the gold mines from nearby collieries on the East Rand, by 1906, when a new railway provided a direct link between the Witwatersrand and Witbank, these closer sources were already in decline. Coal output from the Witbank coal fields expanded from 0.3 million tons in 1898 to 1.4 million in the year ending June 1906, and then grew to 5.6 million in 1920, by which date the district was producing 49 per cent of South Africa's total coal output (and 78 per cent of the Transvaal's).[51]

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[46] M. Wilson (1971) "The Growth of Peasant Communities," in *The Oxford History of South Africa*, Vol. 11 (M. Wilson and L. Thompson, ed.), Oxford: Clarendon Press, p. 40.

[47] *Ibid*., p. 40.

[48] McClendon, T. (2002), op cit., p. 52.

[49] R. Mendelsohn (1991) *Sammy Mark: The Uncrowned King of the Transvaal,* Cape Town: David Philip.

[50] *Ibid*.

[51] Union of South Africa, *Mines Department Annual Report*, 1911 (Government Printer, Pretoria, 1911), p. 118; Transvaal Mines Department, *Annual Reports* (Government Printer, Pretoria); Union of South Africa, *Official Year Book of the Union*, No. 17–1934/5 (Government Printer, Pretoria, 1926), p. 545;

Production of coal in Witbank, like the Transvaal and Orange Free State, depended very largely on Mozambican labour[52] - recruited by the Witwatersrand Native Labour Association (Wenela), the only organisation permitted to obtain mine and colliery labour from the then Portuguese territory.[53] Whilst coal production was heavily dependent on Wenela, it also relied, to a significant degree, on persuading some local and migrant recruits to settle permanently, close to the collieries.[54] Women too, joined their men. This was encouraged in order to promote the development of a stable workforce and thus migrants and their families were permitted to reside on the colliery locations and the population numbers increased drastically in the area of Witbank.[55] Alexander, in a study which argues against the anti-proletarianisation analytic views held by historians such as Harries and Moodie, shows that recruited labour in the Witbank colliery conformed to two models: "cheap, *oscillating* migrant labour, typically engaged on the Witwatersrand gold mines" and "stabilised labour." Consequently, by 1926, around 25 per cent of African workers were living in "married quarters."[56] What is clear is that these "locations" continued to accommodate generations of mine labourers from different parts of South Africa and surrounding countries over many years.

Staats-Mijningenieur, *Rapport,* 1898 (Zuid-Afrkaansche Republiek, Pretoria, 1899); Graham and Lategan, *Coals of the Witbank District,* p. 85.

[52] S. Katznellenbogen (1982) *South Africa and Southern Mozambique: Labour, Railways and Trade in the Making of a Relationship,* Manchester: Manchester University Press.

[53] S. Katznellenbogen (1982), *op cit*.; and A. H. Jeeves (1985) *Migrant Labour in South Africa's Mining Economy: The Struggle for the Gold Mines' Labour Supply 1890–1920*, McGill-Queen's University Press.

[54] P. Alexander (2001) "Oscillating Migrants, 'Detribalised Families' and Militancy: Mozambicans on Witbank Collieries, 1918-1927," *Journal of Southern African Studies*, 27(3), Special Issue for Shula Marks.

[55] *Ibid*.

[56] C. Soutter (1995) "Labour Migration and Stabilization on the Transvaal Coal Mines, 1920–1990," MA dissertation, Queen's University, Kingston. The high rates of settlement on Witbank collieries were noted in this thesis which draws a contrast between the recruitment policy of the gold mines and attempts at labour stabilisation on the Copper belt.

The supply of labour to both the agricultural and mining economy was aided during the colonial, segregationist, and apartheid eras by the Reserves and then the Bantustans which served as offload sites for those African people who had been forcefully removed from their land across South Africa. The systemic land appropriation laws, particularly, those of the early nineteenth century, forced Africans into constant shifting relationship with the land, labour, notions of home, and belonging. Both labour tenants and migrant families faced with death buried their loved ones at their birthplace, some within Bantustan areas, and some tenants opted to bury loved ones on the farms they occupied.[57] Currently, the graves of former migrant labourers and those of previous labour tenants face the same fate: relocation.

Adding to this complex web of issues is how the constitutional provision for land restitution in the post-apartheid era invites the previously marginalised to present evidence of dispossession in order to be compensated. This dissertation identifies problems here with the evidence-based legal system and redistribution process which requires communities who were not issued with land removal documentation to prove their status of occupation. Moreover, the existing archival evidence which could be of assistance in another context presents its own challenges because the archival sources have been heavily shaped by political conflicts and colonial narratives rooted in South Africa's history. Graves, therefore, in themselves, do serve as a form evidence which confirms the status of communities whose belonging was historically disregarded.

Grave Contestations: The Commercialisation of the Sacred?

Encompassing the contestations is a conflict about the sacred and the secular. Drawing from the early fathers of political theory, such as John Locke and Thomas Hobbes, Max Weber's writing about the state and religion suggested that with time science, rationality, bureaucracy, and commerce will replace traditional practices and forms of reasoning, magic, and beliefs in myths - disenchantment; and that the latter will give rise to the development of secular modern states and institutions where religion loses its authority in all aspects of social life and governance. On the

[57] R. Lee (2011) "Death on the Move: Funeral Entrepreneurs and Rural-Urban Nexus in South Africa," *The Journal of the International African Institute*, 81, pp. 226-247; and R. Lee and M. Vaughan (2008) *Death and Dying in the History of Africa since 1800*.

contrary, however, Carl Schmitt's political theology, argues that modern states are premised on Christian theology and that therefore, it is almost impossible for states to be completely disconnected from religion as Weber suggests.

Drawing from Schmitt's ideas this dissertation suggests that the current context in South Africa remarkably reflects a combination of secularist ideas, at the same time as exhibiting a strong leniency towards Christian theology, whilst catering to a society that is mostly Christian, but also embraces staunch traditional beliefs. The problem with Christian-based states is that traditional religious beliefs and values, though they may be constitutionally protected, are misunderstood and not fully protected. This can make such communities susceptible to dehumanisation; because the religious principles which make up the South African state are Christian-based, the protection of traditional beliefs may be minimal, unclear, and often done on an ad hoc basis - just as the matter of intangible heritage has become legislated after years of neglect.

It needs to be asked: to what extent are contestations rooted in what the Comaroffs have termed the commercialisation of the sacred in modern capitalist societies?[58] It is not that contestations over grave relocations can be said to be driven purely by money motives – as this is to miss other underlying causes as far as the sacred and markets are concerned. Rather, this thesis argues that contestation centres around preserving the sacred in a broader political context that is market-driven; that it is about conserving the sacred in a political dispensation tied to a legal system that results in new forms of exclusion or abuses; that it is about ensuring that market-friendly legislation, such as the MPRDA, do not override the protection of the dead. Contestation is about the struggle for justice and equity in life and in death for previously marginalised African people.

Dehumanisation through a Market-Driven Rationale and Lawful Exclusion in Post-Apartheid South Africa

There are three main underlying and recurring themes in the contestations explored throughout this thesis, namely: a market-driven rationale; lawful exclusion; and, the dehumanisation of African people. In what follows is a framework of my argument in which regardless of the post-apartheid constitutional and policy objectives to remedy continuing injustice, it is the workings of a market-driven mechanisms and legal exclusion that result in the dehumanisation of the very

[58] Comaroff, John and Comaroff, Jean. (2009). Ethnicity, Inc. Chicago and London: The University of Chicago Press

previously marginalised African communities in the new political dispensation. The hegemony of neoliberal market rationality has created an environment that sees the continuing and reworked legal exclusion of the previously marginalised - compelling the previously marginalised to find alternative ways to asserting their belonging.

Wendy Brown's ideas in *Undoing the Demos* help shape the argument this thesis builds up to. A market-driven rationale, in her view is one that has come to push neoliberal market principles into the very fabric of democratic states; and neoliberalism[59] is a distinct form of political rationality that is enacted through specific techniques of governance, through practices and legal tweaks.[60] Neoliberalism is a condition under which an economic rationality is normatively applied to all forms of human activity; *homo oeconomus* becomes the basis of a certain style of political governance.[61] As such, Brown argues that contemporary processes of neoliberalism undermine the core principles of democracy such as justice, rights, equality, liberty, and citizenship; and that this is because neoliberal governance understands the value of human life purely in economic terms and reason,[62] whereby "both person and states are construed on the model of the contemporary firm, both persons and states are expected to comport themselves in ways that maximise their capital value in the present and enhance their future value, and both persons and states do so through practices of entrepreneurialism, self-investment, and or attracting investors."[63]

One of the repercussions of neoliberal economic policy is that market-driven reasoning commercialises things unsuitable for marketisation (Brown, for example, refers to "Third World baby surrogates for wealthy First World couples"[64]). And in this thesis, it becomes clear that grave

[59] Brown defines neoliberalism as enacting and assembling economic policies in accord with root principles of affirming free markets; these include "the deregulation of industries and capital flows; radical reduction in welfare state provisions and protections for the vulnerable; privatised and outsourced public goods"; W. Brown (2015) *Undoing the Demos: Neoliberalism's Stealth Revolution*, New York, Zed Books.

[60] *Ibid*., p. 35.

[61] *Ibid*.

[62] *Ibid*., p. 17.

[63] *Ibid*., p. 22.

[64] *Ibid*., p. 29.

relocations have become a lucrative business for heritage consultants, as well as funeral parlours who are commissioned by the mines to facilitate the process.[65] Graves lose their sacred status as far as mining interests are concerned; and it is the case that some families are said to be guilty of fraudulently identifying graves that are not theirs so as to increase the total of their compensation fees.[66] As Brown concludes,"[t]he economisation of everything and every sphere, including political life, desensitises us to the bold contradiction between the alleged free-market economy and a state now wholly in service to and controlled by it."[67]

The critique of neo-liberal principles in a democracy, as well as its impact on the social and economic welfare of societies, have been documented across different academic disciplines.[68] In the South African context, one of the burning questions after South Africa's transition was: "why did a liberation movement [*the African National Congress (ANC)*] with a largely socialist agenda shift so quickly to a neoliberal position?"[69] Although there are various schools of thought in response to this question, those intellectuals who look to the socio-economic historical context of South Africa and the globe are most compelling. They argued that the South African political

[65] For example, in figure 7, at the bottom-right of the headstone, is the funeral parlour's, *Zenzele*-engraved for marketing purposes.

[66] For further details see: B. Saccaggi (2011) "Disenfranchised Heritage, Ancestral Graves and Their Legal Protection in South Africa," unpublished MA thesis, University of the Witwatersrand, Johannesburg.

[67] W. Brown (2015), *op cit*. p. 40.

[68] See, for example, M. Foucault (2008) *The Birth of Biopolitics*, Basingstoke: Palgrave Macmillan; D. Harvey (2003) *The New Imperialism*, Oxford: University Press; J. Stiglitz (2002) *Globalization and Its Discontents*, New York: Norton; S. Narsiah (2002) "Neoliberalism and privatisation in South Africa," *Geo Journal*, 57(1/2), pp. 29-38; and, J. Nattrass (1987) "Political Change and Capitalism in South Africa," in J. Butler, R. Elphick, and D. Welsh (eds) *Democratic Liberalism in South Africa*, Middletown: Wesleyan, University Press, pp. 353-362.

[69] S. Narsiah (2002), *op cit*., p. 30; also see C. Ceruti (1995) "How and why the ANC's Nationalisation Policy Changed: Economic Nationalism and the Challenging State–Capital Relation," unpublished MA thesis, University of the Witwatersrand, Johannesburg; A. Habib (2000) "Economic policy and power relations in South Africa's transition to democracy," *World Development*, 28(2), pp. 245-263; and, S. Terreblanche (2002) *A History of Inequality in South Africa, 1652-2002*," South Africa: University of Natal Press.

transition occurred within a global context in which neoliberal economic assumptions were dominant and rampant and that therefore, the ANC had no realistic alternatives. Narsiah states for example that: "It was clear that the ANC was going to inherit huge budget deficits and a socialist program would have hastened the decline into ruin and economic isolation."[70] Both Gelb[71] and Waldmeir[72] add in their different works that the ANC had little option but to follow and implement the programme initiated by the National Party during the 1980s. Thus, there is an essential continuity in the policies of national government from 1980s onwards. These are important and compelling arguments because they acknowledge that the neoliberal rationale in South Africa is not simply an outcome of the post-1994 socio-economic dispensation, but rather a continuous foundation paved prior to the birth of South Africa's democracy.

This thesis endeavours to show that the principles related to private ownership, minimal state regulation, and the maximisation of capital value, are also synonymous with historical property law principles embedded not only in the nineteenth and twentieth century neoliberalism, but also in the early days of Roman-Dutch Law. In other words, although modern day property laws may have altered over time to suit various social contexts, there remains are key remnants of the early forms of ownership of property.[73] The point which is evident in the next chapters is that the nature of the market-driven reasoning entrenched in South Africa's property law excludes communities which were historically marginalised. For instance, in the case study of this dissertation, the mine which is in possession of a mining permit indirectly secures the land rights use of the land being mined - compelling communities to abide to its demands.

To say this is not to discredit the efforts that have been made under South Africa's constitutional democracy to redress past injustices through the law. Certainly, apartheid witnessed dire cases of the dehumanisation of African people. For example, in his work *The Standard of Dying: Race, Indigence, and the Disposal of the Dead Body in Johannesburg, 1886–1960,* Dennie well illustrates that white paupers received "better" burials from the Witwatersrand municipal

[70] S. Narsiah (2002), *op cit*, p. 30.

[71] S. Gelb (1998) "The politics of macroeconomic policy reform in South Africa," paper presented to the conference on Democracy and the Political Economy of Reform, Cape Town, South Africa.

[72] P. Waldmeir (1997) *The Anatomy of a Miracle*, London: Penguin Books.

[73] M. Chanock (2001) *The Making of South African Legal Culture 1902-1936*, Cambridge, UK: Cambridge University Press.

authorities than black paupers.[74] Dennie contends that "the bodies of dead indigents, both blacks and whites, became a location of intense conflict where white municipal authorities and bereaved Africans sought to articulate profound and competing narratives of the sacredness of the dead bodies and the value of their lives."[75]

From 1906 the city council was on a mission to re-order cemeteries racially. Subsequently, racially divided cemeteries were established, with dead white people occupying an elevated status and buried at the Braamfontein cemeteries. Whereas, the African dead were allocated a cemetery in Klipspruit; their graves subdivided into smaller portions and their graveyard not as attractively landscaped as Braamfontein cemetery.[76] Dennie also points to a significant fact about the treatment of the African dead when he notes that in 1908 municipal councils budgeted £1 13s cost for African people. Noting the difference in the treatment of the African dead, Dennie writes that:

> not too much was demanded from the undertakers. The undertakers were expected to provide coffins for the corpses and to transport the body to the cemetery. These coffins were generally outfitted with a false bottom, which fell away as the body was lowered into the grave. The main frame of the coffin was thus recycled for use in future pauper burials. This policy of recycling coffins for the burial of indigent Africans remained in force until 1942. After 1942, all paupers, regardless of race, were buried in coffins whose bottoms remained attached to the rest of the coffins[77]

Although in the current dispensation the mismanagement of African ancestral remains often warrants an investigation and calls to hold those liable for the negligence to account, there are still mismanagement cases. For instance, Saccaggi and Esterhuysen record in their case study of Sekuruwe that on the "8 June 2008, community members opened a case against the mine at the Mahwelereng Police Station (case no. 549/06/08) after finding bone fragments and elements of

[74] Dennie reveals that the municipal authorities were concerned with how African's managed to spend at least £50 per funeral, when the province provided pauper burials at 30 shillings.

[75] G. Dennie (2009) "The Standard of Dying: Race, Indigence, and the Disposal of the Dead Body in Johannesburg, 1886–1960," *African Studies*, 68(3), p. 310.

[76] *Ibid*., p. 314.

[77] *Ibid*., p. 317.

skeletons lying on the surface of and around the ancestral graves."[78] This was subsequent to Potgietersrus Platinum Limited (PPL), a subsidiary of Anglo Platinum, agreeing to an undertaking in 2008 to exhume and relocate graves from Blinkwater to other new or more established graveyards in the area, in order to make way for the tailings dam.[79]

The point to be explored in this thesis is how the discriminatory misconduct of the post-apartheid era take place within the constitutionalised legal framework where inadequacies in the relevant legislation, in the context of a society driven by a market-driven rationality, paves the way for historic and new forms of exclusion and dehumanisation. Here, as Brown puts it: "law becomes a medium for disseminating neoliberal rationality beyond the economy, including to constitutive elements of democratic life,"[80] and "when there is only *homo oeconomicus,* and when the domain of the political itself is rendered in economic terms, the foundation vanishes for citizenship concerned with public things and the common good."[81] Thus, I will show how previously marginalised African communities, who were denied proper citizenship during the colonial, segregationist, and apartheid eras, are once more excluded by the limits of post-apartheid law and policy. As such, I will highlight the manner in which the contestation over graves signifies a struggle for inclusion - to be recognised as equal members of the South African political community.

Lawful Exclusion

Lawful exclusion is an analytical tool that explains the mechanism through which African communities, such as that examined in this thesis, are marginalised by reformed laws of the current democratic dispensation. The root cause of continuing exclusion is shown to lie in the fact that both the heritage and mineral law – common with many other laws in South Africa – are founded on earlier precedents of colonial law. However, much inherited legal traditions have been revised in post-apartheid South Africa, the law continues to conflict with demands for social justice. This results in new forms of exploitation and the marginalisation of African communities. Lawful

[78] B. Saccaggi and A. Esterhuysen (2014), *op cit*., p. 175.

[79] *Ibid*.

[80] W. Brown (2015), *op cit*., p. 151.

[81] W. Brown (2015), *op cit*, p. 39.

exclusion occurs in two ways: first, through the actual provisions in the legal framework that are incompatible with the country's constitutionally articulated vision of social justice; and second, it takes place because of the manner in which the reformed laws are applied by mining houses and government departments in post-apartheid South Africa.

To highlight the first point, for example, the NHRA as it is illustrated in chapter 2, conceptually draws from Australia, New Zealand, Canada, and to some degree- the British heritage legislation. This constitutes a problem because these countries- affiliated to the United Nations Educational, Scientific and Cultural Organization (UNESCO), had not defined or legislated intangible heritage[82] when the NHRA was passed in South Africa in 1999. So then, the country has a heritage law that attempts to protect physical graves but fails to safeguard the sacred beliefs attached to graves; the intangible aspect of heritage. A consequence of this shortfall in the law, is that the removal of graves by Glencore is not seen as a violation of the sacred.

The overlooking of intangible heritage is also rooted in the philosophical influence of Christianity on legal frameworks. In South Africa, the consequence of this influence has been a lack of comprehension and thorough provision for (non-Christian) indigenous African beliefs in ancestors. Ultimately, there is a misunderstanding of the sacredness of ancestral remains and this partly explains the contestations over the grave relocations. On the other hand, the market-driven MPRDA overrides the NHRA (the protection of heritage) and in turn, threatens the country's efforts to deliver social justice; which then threatens the consolidation of an inclusive citizenship. It is worth highlighting that citizenship is bound to the idea of lawful exclusion. The latter disturbs the attainment of full citizenship rights of the previously marginalised in the new democratic dispensation.

About the Dead

This is not only a struggle of the living, but one of the dead as well. The literature about the meaning of the corpse in the African context highlights the continued value of a human being during their lives *and* when they are dead; but equally how because of legislative gaps this meaning

[82] Early expert definitions generated by the United Nations Educational Scientific and Cultural Organisation (Unesco) focused on artistic creations like performance, but by the late 1990s emphasis also came to be placed on knowledge and values.

can be disturbed so that the dead are systemically dehumanised. Underlying the vast scholarly literature that focuses on a range of themes such as death, mortuary customs, burial rituals, mourning practices, funeral businesses, and the death of migrants in urban spaces is the meaning of the corpse - particularly in an African context.

A close read of the texts reveals that the corpse in African societies is not simply comprehended as lifeless and therefore valueless. Rather, the corpse is conceptualised as part of the fabric that holds society together; it has the potential to disturb social relations and social tranquility, yet it is also capable of inducing social cohesion, for instance through shared mourning.

Although prime focus falls on the meaning of the corpse – not the meaning of human remains – the literature can be drawn upon to help construct possible reasons as to why the removal of human remains trigger contestations. Focus on the cultural and symbolic resonances of the dead, and of burial practices – as well as the implication of these resonances for political identity and struggles across Africa – do help explain why the contestation of graves is so important. Arguably, it is in considering this meaning about the dead that we can begin to understand the status of culture and heritage in South Africa today, and how the dead body becomes bureaucratised in the moving of graves and the writing of policy to manage it.

Death and the Corpse in African Society

Africa has featured in the Western imaginary as a space of death.[83] In the introduction of his book *The State in Africa: The Politics of the Belly*, Bayart recounts that: "despite the knowledge that has been accumulated over a whole century of African Studies, there is still little understanding of African societies and little appreciation of the fact that they are ordinary."[84] Referring to Plantu, a French cartoonist who drew a cartoon of an African facing the prospect of death after a natural catastrophe in the Cameroon, Bayart's interpretation of the drawing is, "the wheel turned between famine, civil war, drought, apartheid, the invasion of locusts, corruption and the AIDS epidemic."[85] Lee and Vaughan suggest in their account of *Death and Dying in the History of Africa* that the

[83] Ibid., p. 341.

[84] J. Bayart (1993) *The State in Africa: The Politics of the Belly*, New York: Longman, p. 1.

[85] *Ibid*.

death-stricken Africa discourse developed concurrently with narratives that frequently represented Africans as "good" in dealing with death and able to maintain relationships with the dead as opposed to Western people.

Ideas on death and the meaning of the corpse in African societies have been articulated in literature that dates back to the 1800s. The same, however, cannot be said about the virtually non-existent literature which focuses on the meaning of human remains. The earlier literature on death and the corpse and more contemporary texts is extensive, as it pays attention to various topics linking death and the corpse to the interventions of the colonial and post-colonial state, demographic change, urbanisation, and the availability of new technologies. These forces, Lee and Vaughan argue, have contributed to re-inventions of practices and beliefs around death which are evidently "modern," yet rooted in a much longer history. Lee and Vaughan as well as Thomas[86] observe, however, that the common ground for both African and European people is that death poses a problem to the living. For these authors, the ultimate response to the fear of death amongst African people was to develop a complex spectrum of rituals intended to manage death. For instance, Lee observes that African-run, urban based, funeral parlours grew in the context of rapid industrialisation and international migration, and that in South Africa this rapid proliferation was evident from the 1980s onwards.[87] Technologies of death evolved; the African corpse was embalmed and refrigerated to extend the time between death and burial.[88]

A question that will be addressed in this thesis is the meaning of a corpse in African society. It is of course the case that such meaning is contested, and fluid yet is worth engaging as the idea of the corpse and the movement of remains forms the very core of this study. There at least two key bodies of academic literature from which the corpse and remains are conceptualised primarily as

[86] L. Thomas (1982) *On the Interpretations of African Beliefs about Death*, Paris.

[87] Lee, Rebekah. (2011). ''Death on the Move: Funeral Entrepreneurs and Rural- Urban Nexus in South Africa.'' The Journal of the International African Institute, 81, pp226-247 and Lee, Rebekah & Vaughan, Megan. (2008). ''Death and Dying in the History of Africa since 1800.'' The Journal of Africa History, 49, pp341-359

[88] S. Van der Geest (2006) "Between death and funeral: Mortuaries and the exploitation of liminality in Kwahu," *Africa*, 76(4), pp. 485-501; B. Page (2007) "Slow going: The mortuary, modernity and the hometown association in Bali-Nyonya, Cameroon," *Africa* 77(3), pp. 419-41.

"a signifier of the socio-psychological fabric of the society,"[89] and secondarily as a symbol of power.

A Symbol of Power

Many scholars from various disciplines have engaged with the idea of the corpse and its representation of power, some more unequivocally than others. In her study around the collapse and restoration of the Kekana Chiefdom under the rule of Chief Mugombane, Esterhuysen thoroughly captures this dimension when she examines the aftermath of the brutal clashes between the Kekana Ndebele and the Trekkers.[90] Esterhuysen writes of the historic moment when in September 1854 chiefs Mugombane (Kekana) and Mapela (Langa) instigated an attack on the Trekkers as an act of resistance, after which the Kekana took refuge in Makapan's cave. The Trekkers placed the Kekana under siege where, according to Esterhuysen, they suffered greatly from dehydration with many others shot trying to escape from the cave.

Esterhuysen suggests, based on the human and material remains found in the cave, that a complex web of spiritual and physical relationships held Mugombane's chiefdom together and these were threatened during the siege. In this analysis of the Kekana attack on the Boers, Esterhuysen suggest that the murders can, in the first instance, be seen as the sign of overt retaliation against colonial oppression. Although sceptical of the Trekker's descriptive narratives of the nature of the Makapan killings, Esterhuysen points to the fact that the dismemberment of the bodies bears resemblance to the captive killings of black or white enemies, where the mutilation of the colonial bodies symbolised the Kekana's intention to fracture and weaken colonial society.

[89] A. B. Esterhuysen, "Margins of Difference: A study of the collapse and restoration of the Kekana chiefdom under the rule of chief Mugombane," in F. Richard (ed.) *Materializing Colonial Encounters: Archaeologies of African Experience.* New York: Springer; J. Baglow (2007) "The rights of the Corpse," *Mortality,* 12(3), pp. 223-239; Z. Crossland (2009) "Of Clues and Signs: The dead body and its evidential traces," *American Anthropologist,* 111(1), pp. 69-80.

[90] A. B. Esterhuysen, "Margins of Difference: A study of the collapse and restoration of the Kekana chiefdom under the rule of chief Mugombane," in F. Richard (ed.) *Materializing Colonial Encounters: Archaeologies of African Experience.* New York: Springer

Moreover, according to Esterhuysen the mutilations symbolised "a confident statement of Mugombane's social, political and spiritual authority over that of the colonists."[91]

The interpretation of the corpse as a symbol of dominance can also be seen in Dennie's study concerning the differential treatment of the bodies of poor dead white and black people in Johannesburg. Dennie notes that 1906 marked the complete end of racially integrated cemeteries in Johannesburg; with Klipspruit becoming the first blacks-only cemetery to be opened in Johannesburg (in 1909). Clearly dead white people occupied an elevated status over their black counterparts. Budgets were approved for the burial of dead white people, while conversely burial budgets were cut for African. The differential treatment of dead bodies ignited intense conflict between municipal authorities and bereaved African people, with the latter opposing pauper burials because of the profane treatment of dead African people; and because Council members moved to oppose these burials on grounds of their "high" cost.

Subsequently, African migrants began to utilise burial organisations which were established as early as the 1890s with the intent to change the objectionable ways in which the African corpse was buried. These burial organisations changed African funerals in many ways. Dennie recounts that whilst many white people and some African people dismissed the self-redefined African funerals as moments of conspicuous consumption, the critics failed "to see how abused in life and valorised in death, the bodies of the African dead – with their dignity intact, their stilled bones shielded from the public eye… resurrected themselves to a new life and a new meaning in the world of the living."[92] Dennie demonstrates how white domination and its attendant dehumanisation were employed not just within the political and economic context of the living African, but also at the end of the African person's life. The racially divided graves served as a mechanism to continue the grand apartheid project in the world of the non-living where the burial of the African pauper was the final act of getting rid of a problem.

In a recent study the Comaroffs suggest that post-colonial South Africa has witnessed a remarkable rise of what they term "occult economies"- the engagement of magical means for

[91] A. B. Esterhuysen, "Margins of Difference: A study of the collapse and restoration of the Kekana chiefdom under the rule of chief Mugombane,", p. 179

[92] D, Garrey. (2009). ''The Standard of Dying: Race, Indigence, and the Disposal of the Dead Body in Johannesburg, 1886-1960.'' *African Studies*, 68, 3, p. 326

material ends.[93] The Comaroffs argue that the attractions of modernity, capitalism, and the culture of neoliberalism have elicited monstrous means that embrace "ritual murders," the sale of body parts, the alleged production of zombies, pyramid schemes and other financial scams, in order to satisfy the desire for consuming.[94] The Comaroffs find that corpses' parts are obtained and sold to generate profits - in line with the market-driven principles of neoliberal economics; rendering the corpse the ultimate ticket to wealth or power. This understanding of the corpse being an instrument to wealth or power can be shown, within reason, to be relevant to this dissertation in as much as the relocation of graves is an ultimate act of profit-making for Glencore.

Understanding the body as power also relates to a body of literature in forensic anthropology, criminology, and medicine – in which the body or remains were conceptualised in the eighteenth century during dissections and exhumations as evidence.[95] Zoe Crossland notes for example that in these disciplinary fields "the agency of people after death is understood within the framework of present-day forensic anthropological practice and how this is underwritten by a particular heritage of anatomical analysis."[96] In this school of thought, the body is conceptualised similar to Foucault's account of the dead body as a privileged site for understanding and knowing the living;[97] the body or remains have agency and can speak for themselves.[98] Power lies in the fact that the remains can provide an unmediated access to past events.[99] Crossland summarises how the body was understood in the eighteenth and nineteenth century when she writes that:

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[93] J. Comaroff and J. L. Comaroff (1999) "Occult Economies and the Violence of Abstraction: Notes from the South African Post-Colony Authors," *American Ethnologists*, 26(2), pp. 279-303.

[94] J. Comaroff and J. L. Comaroff (1999), *op cit*; also see P. Geschiere (1997) *The Modernity of Witchcraft, Politics, and the Occult in Postcolonial Africa*, Charlottesville: University of Virginia Press.

[95] M. William and M. Browning (1994) *Dead Men Do Tell Tales: The Strange and Fascinating Cases of a Forensic Anthropologist*, New York: Doubleday.

[96] Z. Crossland (2009) "Of Clues and Signs: The Dead Body and Its Evidential Traces," *American Anthropologist*, 111(1), pp. 69–80.

[97] M. Foucault (1973) *The Birth of the Clinic: An Archaeology of Medical Perception*, New York: Pantheon, pp. 145-146.

[98] B. Latour (2000) "When Things Strike Back: A Possible Contribution of 'Science Studies' to the Social Sciences," *British Journal of Sociology*, 51(1), pp. 107–123.

[99] Z. Crossland (2009), *op cit*.

> The dead body, although separated out from the living as dead and as evidence, still, in its indexical referentiality is endowed with force and potential to act. The indexicality of the dead body always brings it into relation with something else, whether its own past and identity or a history of violence enacted on it. In pointing to these past events and processes, the body as evidence demands that attention be paid, while the effacement of its mediating interpretants endows it with a life of its own in which its iconic and metaphorical content is masked but not suppressed.[100]

Although much of the evidentiary school of thought was generated in light of documenting and solving criminal cases, as well as recording diseases and documenting colonial subjects, this body of work is essential in unpacking graves as a form of evidence in the current political dispensation. The remains in this study tell a history of land dispossession and socio-political exclusion. And therefore, the graves matters are a symbol of power in as much as their recognition in the current South African land claims' programme promises redress.

A Signifier of the Socio-Psychological Fabric of Society

Many key ideas about the meaning of the corpse within different African societies can be drawn from the literature that engages with a variety of topics such as mortuary practices and, funerals, as well as how the experiences and practices of mourners shape African death cultures. Relatively few studies straightforwardly deal with the conceptualisation of the African corpse, but some do stand out: Posel and Gupta's, *The Life of the Corpse: Framing Reflections and Questions*; Dennie's *The Standard of Dying: Race, Indigence, and the Disposal of the Dead Body in Johannesburg, 1886-1960*; and, Lee's *Death on the Move: Funeral Entrepreneurs and Rural-Urban Nexus in South Africa*. Again, these studies about mortuary customs and funeral businesses assist in deconstructing the meaning of the corpse in African societies, as well as pointing to some substantive matters informing the contentions explored in this dissertation.

In their study, Posel and Gupta recognise the idea of an objectified dead body when they suggest that in most African societies the body's dirt is effaced before burial as a sacralising ritual of purification. This is understood as the final act of reclaiming the humanity of the dead body at the

[100] *Ibid*., p. 76.

onset of its material decay. Cultural rituals facilitate the transition between life and death but also help restore the equilibrium that is disturbed by death. Reflecting on mortuary custom, Radcliffe-Brown writes that "when a man dies his death breaks off a number of social relationships."[101] In similar fashion Gluckman, in *Mortuary Customs and the Belief in Survival after Death among the South-Eastern Bantu*, writes:

> In communities such as those of the South-Eastern Bantu where status is determined by consanguineous and affinal relationships every man and woman have his or her role in social life fixed by these relationships. On the death of, say, the head of a homestead, the relationship of his cognates and affine is altered. In addition, the relationships of his relatives towards each other are affected and are reconstituted in the mortuary customs.[102]

Mortuary customs restore relations amongst the living but also allow the survivors to continue with their lives.[103] In a study that illustrates the composite physical and spiritual relationships that played a role in the collapse and the restoration of the Kekana Ndebele Chiefdom, Esterhuysen draws from Stutz when she concludes that "mourning and death rituals have a restorative function both at the level of the family and society at large and that the corpse is dealt with in a culturally structured way whilst the ceremony provides the opportunity for the mourners to reconstitute relationships and heal the disturbance in the social fabric."[104] Failure to deal with the corpse in a "culturally structured way" is believed to invite the dead spirit into the lives of the living. Relating

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[101] A. Radcliffe-Brown (1923) "The methods of Ethnology and Social Anthropology," *South African Journal of Science*, p. 124.

[102] M. Gluckman (1937), *op cit*., p. 119.

[103] Lee and Vaughan (2008) suggest that death introduces "forces of physical, spiritual and social rapture'', p. 344. Also see, H. Ngubane (1976) "Some notions of 'purity' and 'impurity' amongst the Zulu," *African Journal of the International African Institute*, 46(3), pp. 274-284; and, D. Posel and Gupta, P. (2009) "The Life of the corpse: Framing reflections and questions,"' *African Studies*, 68(3), pp. 299-309.

[104] A. B. Esterhuysen (in press), *op cit*., p. 4, citing L. Stutz (2010) "The way we bury our dead: Reflections on mortuary ritual, community and identity at the time of the Mesolithic- Neolithic transition," *Documenia Praehistorica*, 37, pp. 33-42.

the idea of an encounter with a dead spirit, Lee alludes to one of her informants, Dwangu, who laments about being continually visited by his brother's dead spirit that was not at peace because of the site it had been buried on.[105]

Scholars have gone to great lengths to document the many and innovative efforts undertaken by African people to ensure that their dead are buried in "culturally structured ways," so as to avoid the awakening of dead spirits. A large volume of literature on death management focuses on migrants in South Africa. Urban apartheid policy, made manifest in coercive tactics such as forced removals and expulsions from the city of so-called "illegal" African people, forced a certain type of orientation towards movement, focused around state manipulation of the migrant labour system and the close surveillance and restriction of African mobility in urban areas more generally.[106] Documenting the experiences of migrants facing death in South Africa, Lee writes: "The prospect of being separated from one's ancestral home even in death – and burial without traditional burial rites administered through social and kin networks – was a fearful one, and motivated African migrants on the mines to construct South Africa's burial societies to prevent such an eventuality."[107] These informal funeral-finance associations tended to emphasise processes of ethnic identification already at work in mining compounds, and aided in the transport of the corpse and mourners back to the societies home area.[108]

Recent studies that focus on the West African context, such as that of Van der Geest, *Between Death and Funeral: Mortuaries and the Exploitation of Liminality in Kwahu* and of Page, *Slow Going: The Mortuary, Modernity and the Hometown Association in Bali-Nyonya, Cameroon,* problematize the link between migration and the modernisation of death. These studies, in part, explore the role of technological innovations that have facilitated the performance of burial rites over distance such as the introduction of refrigerated mortuaries which enable the preservation of

[105] R. Lee (2011), *op cit*., pp. 226-247.

[106] R. Lee (2011), *op cit*.; P. Bonner (1995) "African Urbanisation on the Rand between the 1930s and 1960s: Its Social Character and Political Consequences," *Journal of Southern African Studies*, 21(1).

[107] R. Lee (2011), *op cit*., p. 81.

[108] T. Maloka (1998) "Basotho and the experience of death, dying and mourning in the South African mine compounds, 1890-1940," *Cahiers d'etudes africaines*, 17-18 June; D. Moodie (1994) *Going for Gold: Men, Mines and Migration*, Berkeley, CA: University of California Press.

the corpse for longer periods.[109] What is emphasised in all this – and which is of importance for this dissertation – is that when the necessary rites of passage are not performed, the dead haunt the living; creating a state of spiritual insecurity until proper sacraments have been performed.

Studies on Grave Relocations

This brings us to studies on grave relocations and the disruption of the sacred. To some extent, grave relocations have been documented. Most scholarly records of exhumations, however, are not of commoners. For instance the repatriation of the Congolese president, Mobuto Sese Seko, was widely debated publicized and debated by the public, media, and academics.[110] In Zimbabwe, the dominant nationalist commemorative narrative surrounding the recently launched UNESCO-sponsored reburial of liberation war dead, has been uncomfortably contested by the resurfacing from shallow mass graves of bodies from the *gukurahundi* massacre in Matabeleland in the 1980s.[111] In the South African historical context, the exhumation and triumphant reburial orchestrated by the African National Congress in 1989 of Sabata Dalindyebo, three years after his having been consigned to a humiliating burial in the female section of a pauper's grave, recast the former Paramount Chief as a hero of the anti-apartheid struggle and the rightful authority over the Thembu people.[112] Similarly, the repatriation in 2002, to South Africa, of the remains of Sara Baartman enabled a fledging country to rescue a key icon of indigenous identity from the colonial

[109]S. Van der Geest (2011) "Between Death and Funeral: Mortuaries and the Exploitation of Liminality in Kwahu, Ghana," *Africa,* Volume 76, Issue 4 November 2006, pp. 485-501 and B. Page (2007) "Slow Going: The Mortuary, Modernity and the Hometown Association in Bali-Nyonga, Cameroon," Africa: *The Journal of the International African Institute*, Volume 77, Number 3, 2007, pp. 419-441

[110] See, for instance, F. Bernault (2006) "Body, Power and Sacrifies in Equitorial Africa," *Journal of African History*, 47(2), pp. 207-39; and, B. White (2005) "The political undead: Is it possible to mourn for Mobuto's Zaire?'' *Africa Studies Review*, 48(2).

[111] J. Fontein (2009) "The politics of the dead: Living heritage, bones and commemoration in Zimbabwe," *ASA Online*, 1(2), pp. 1-27.

[112] G. Dennie (1992) "One King, two Burials: The politics of funerals in South Africa's Transkei," *Journal of Contemporary African Studies*, 11(2), pp. 76-87.

repositories.[113] More recently, in 2013, Mandla Mandela made headlines in the South African media for exhuming bodies of three family members in Mvezo without the consent of the Mandela family. These cases illustrate the extent of attention allocated to the exhumation of notable figures. This dissertation diverges from this pattern by focusing on the exhumations of commoners whose graves have been targeted by the workings of modern capitalism.

Two contemporary studies stand out in relation to this thesis. The first is Deborah James's "Burial sites, informal rights and lost kingdoms: The contesting of land claims in Mpumalanga, South Africa," which focuses on the restitution programme and demonstrates how land in South Africa has rich symbolic meanings (i.e., graves) and concludes that restoration has become a point for contestations about the nature of citizenship.[114] To James, "the current importance of burial sites in South Africa appears to be motivated as much by the wishes of disrupted people to secure their own future burial, and hence their place in the genealogical line of shades, as by the need to live close to a long lineage of already-buried ancestors."[115] James also suggests that graves are increasingly becoming significant for cultural revival and in land claims processes.[116] Although James's study sheds important details on the relevance of graves, particularly to those without formal rights to land, it fails to go into detail about the gaps in various South African policies that enable citizens to find themselves denied access to their graves or faced with the predicament of grave relocation.

The second study that stands out is Benjamin Saccaggi's MA thesis, "Disenfranchised Heritage, Ancestral Graves and their Legal Protection in South Africa," which demonstrates the interconnected role played by ancestral graves in the community's battle with the mine.[117] Saccaggi's case study, Sekuruwe village, was moved by Potgietersrus Platinum Limited, a mine operating in Limpopo Province (owned by Anglo Platinum) near Mokopane. This community had

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[113] C. Crais and P. Scully (2009) *Sarah Baartman and the Hottentot Venus: A Ghost Story and Biography*, Princeton, NJ: Princeton University Press.

[114] D. James (2009) "Burial sites, informal rights and lost kingdoms: The contesting of land claims in Mpumalanga, South Africa,'' *Africa*, 79, pp. 228-251.

[115] *Ibid*., p. 248.

[116] *Ibid*., p. 247.

[117] B. Saccaggi (2011) "Disenfranchised Heritage, Ancestral Graves and Their Legal Protection in South Africa," unpublished MA thesis, University of the Witwatersrand, Johannesburg.

previously lived on Blinkwater farm in the Mapela area for at least one hundred years before their relocation in 2006. Saccaggi records that in 2008 about 150 of their ancestral graves were exhumed from the community's traditional land and transported to a new cemetery near Sekuruwe village. As a case study, Sekuruwe offers an insight into a significant set of issues, particularly around the inadequacies in the South African heritage legislation which contributed to the violation of Sekuruwe's ancestral graves – and therefore, an infringement of its inhabitant's constitutional cultural rights. Saccaggi, understandably, as an archaeologist, does not set the shortcomings of the South African heritage legislation against broader legislative inadequacies, particularly the mineral rights legislation.

Literature on the Site of Study

One further note: no studies have been conducted about Ogies. Moreover, the area is always taken as being synonymous with Witbank because of its close approximation to the town. The literature on Witbank is voluminous, especially with respect to the history of coal mining in the area.[118] Since the 1990s, there has been a shift from a focus on the economic history of coal mining in Witbank to studies that examine coal-based pollution in the area, as well as its impact on environmental policy.[119] Although some of this literature helps construct the history of coal mining in Witbank and some of the critical debates raised in environmental policy, there have not been any studies that touch upon the impact of different coal mining methods on the politics of the sacred.

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[118] See, for instance, A. Graham and P. Lategan (1931) *The Coals of the Witbank District (Transvaal)*, The Transvaal Chamber of Mines, Colliery Committee; P. Alexander (2008) "Culture and Conflicts – Witbank Colliery Life: 1900-1950," unpublished paper presented at the Centre for Sociological Research, University of Johannesburg; R. Mendelsohn (1991), *op cit*.

[119] See, for instance, J. Carruthers (2002). "Environmental History in southern Africa: An Overview," in S. Dovers, R. Edgecombe, and B. Guest, B (eds) *South Africa's Environmental History: Cases and Comparison* , Cape Town: David Philip; K. G. Aiken (1994) "Not long ago a smoking chimney was a sign of prosperity: Corporate and community response to pollution at the Bunker Hill Smelter in Kellogg, Idaho," *Environmental History* Review, 18(2), p. 67; M. Singer (2010) "Changing conceptions of South African coal-based population, with special reference to the Witbank coalfield, 1906-1978," unpublished MA thesis, University of the Witwatersrand, Johannesburg.

More recent literature focuses on the social impact of mining on workers and gives details of the living and working conditions of the early twentieth century migrant populations.[120] Duncan's assessment of the labour conditions between 1918 and 1948 highlights the attention drawn to labour conditions, but makes little reference to Witbank.[121] A critical assessment of the highly contested dynamics between mine owners and labourers is well addressed in Bozolli's edited volume, *Town and Countryside in the Transvaal: Capitalist Penetration and Popular Responses*, even though the selected studies found in this work provide little direct reference to coal mining.[122] Christie's history of energy politics is more influential as a comprehensive intellectual study of energy in South Africa.[123] It demonstrates the relevant stakeholders in the history of South African energy production, particularly the coal industry, and also contextualises the bid for coal within the broader framework of the apartheid. Basic details about the impact of different coal mining methods on the living patterns of communities are often noted in mining scoping reports and environmental impact assessment reports. And some medical journals have published occasional issues that examine the effects of open-cast mining on the health of the inhabitants of mine affected areas.[124]

There is a large volume of literature on labour tenancy in South Africa of which this study draws from.[125] Much of this work concentrates on the formation and the economic conditions of labour tenancy in the areas of the then Kwa-Zulu, Transvaal, Cape, and Orange Free State. There

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[120] See for instance, migrant workers' studies such as those by P. Alexander (2001), *op cit*.; D. Moodie (1994), *op cit*.; and, R. Turrell (1982) "Kimberley: Labour and Compounds, 1871-1888," in Marks and Rathbone (eds), *Industrialisation and Social Change*, London: Longman, p. 57.

[121] D. Duncan (1995) *The Mills of God: The State and African Labour in South Africa:1918-1948*, Johannesburg: University of the Witwatersrand Press.

[122] B. Bozzoli (ed.) (1983) *Town and Countryside in the Transvaal: Capitalist Penetration and Popular Responses*, Johannesburg: Ravan Press.

[123] R. Christie (1984) *Electricity, Industry and Class in South Africa*, Albany: State University of New York Press.

[124] Refer, for example, to the *British Medical Journal*.

[125] See for instance, T. Mc Clendon (2002), *op cit*., p. 48; G. Rennie (no date), *op cit*., p. 40; M. Wilson (1971), *op cit*., p. 40; Beinart. W, P. Delius, and S. Trapido (1986) *Putting a Plough to the Ground: Accumulation and Dispossession in Rural South Africa, 1850-1930*, Johannesburg: Ravan Press.

is less focus on the labour tenant system in what was then classified as the south-eastern Transvaal – today Witbank. James in her aforementioned study refers to labour tenancy in Mpumalanga but focuses more on the outcome of the system and land dispossession post-1994. In what follows, this dissertation draws on the above literature in order to outline how the communities in Ogies got to burry in Tweefontein, and how later generations have been affected by grave relocations.

Conclusion

This chapter first discussed the overarching contestations over grave relocations. The second part of the chapter locates the contestations within the literature about a market-driven economy and how its mechanisms can undermine efforts geared towards building an inclusive nation in a country like South Africa. The contestations are also discussed in relation to the literature that draws attention to the importance of the dead in African societies. In this literature, the dead body is abstracted as both a symbol of power, as well as a signifier of the socio-fabric of society. Both conceptual frameworks provide tools from which to understand why inhumane movement of remains ignites contestations. The thesis proceeds by drawing from the above literature to explain the contestations over graves in detail.

CHAPTER 2

PROTECTING THE DEAD: THE SOUTH AFRICAN NATIONAL HERITAGE ACT IN CONTEXT

This chapter provides a systemic legal history to explain how communities can be marginalised by the reformed laws of the current democratic dispensation. In particular, the chapter presents a historical survey of one part of the legislative framework that is intended to govern grave re-locations: The National Heritage Resources Act of 1999 (NHRA). The heritage law and the protection of graves is traced through the South African colonial and post-colonial eras, but the historical antecedents of this law can be traced to ancient Rome through medieval and early-modern Europe to colonial and apartheid South Africa; and then the post-apartheid era, culminating in the advancement and adoption of the Heritage Act. This legal history is important as it highlights the historic foundational principles of private ownership and the changes, as well as the continuities, in South Africa's heritage law. Analysis of the historical background illuminates that the attempt to reform South Africa's heritage from privatised to nationalised notions of heritage property post-1994 resulted in broad – yet undetailed – legislative provisions of what constitutes heritage, of what is to be protected, and how. The resultant ambiguity in the legislation makes the laws governing graves inadequate.[126] It will be argued that when exploited the existing loopholes, along with insufficient implementation, violate the cultural rights of African people; leaving people excluded within the boundaries and terms of the law in the post-apartheid era.

To fully comprehend the provisions of the NHRA, and how it constrains the regulation of graves, the discussion first turns towards the history of law in South Africa. It considers the degree of influence of European legal traditions, as well as the religious basis of Roman and Roman-Dutch legal systems, and ultimately examines how these shaped the regulation of heritage resources, in particular graves. It will be argued that the external legal influence that has its basis

[126] This is also articulated in A. Esterhuysen and B. Saccaggi, "Sekuruwe Grave Relocation: A Lesson in Process and Practice" (unpublished paper, 2014), who both point to the loopholes in legislation that protects heritage resources and graves in South Africa, and the weaknesses in the way that these legislated processes are implemented.

in Christian values, and the need to adhere to progressive international legislative standards, constructs a false projection of the heritage act being the most progressive in Africa. Scholars suggest that the Act is progressive because it is broad, inclusive, and represents a diverse South African nation.[127] In reality, the legislation does not take into consideration (non-Christian) indigenous African beliefs on ancestors – and as a result, undermines the rights of previously disadvantaged people to participate and exercise their cultural freedom that is endorsed in the South African Constitution.

External influence on South African legal traditions

A mixed legal system typifies modern South African law.[128] The foundation of the country's hybrid system can be found in the early codified Roman and Roman-Dutch law, as well as the English common law – whose principles have been modified in post-apartheid South Africa. Roman law, as understood in The Netherlands in the early-modern period was applied after the breakdown of the West Roman Empire in cases in which local customary law, Germanic common law, did not provide legal answers.[129] In South Africa, Roman law "mixed with versions of Dutch law was introduced at the present day Cape Town by Dutch settlers in the middle of the seventeenth century," marking the era of the first usage of the term Roman Dutch law at the colony.[130] After the British occupation at the Cape Colony in 1806, parts of the English law were combined with Roman-Dutch law.[131] The latter, however, continued to have a solid identity and existence, being a continuation of the common law in force in the Cape.[132] Chanock details the preservation of

[127] See for instance, Munjeri, D. Legislation and practices: implications and the way forward. In Ndoro, W. Pwiti, G. (eds) Legal frameworks for the Protection of immovable cultural Heritage in Africa: 2-4. (Rome: ICCROM, 2005) and Ndoro, W and Kamamba, D. The Ranking of Heritage Resources and sites in Legislation. In Ndoro. W, Mumma. A and Abungu, G (eds) Cultural Heritage and the Law: Protecting Immovable Heritage in English Speaking Countries of Sub-Saharan Africa ((Rome: ICCROM, 2005)

[128] François Du Toit, (2014) "Roman-Dutch Law in Modern South African Succession Law" p. 279.

[129] Beat Lene (2002) *The History of South African Law and its Roman-Dutch Roots*.

[130] Du Toit, op cit., p. 278; Lene, *op cit*., p. 9.

[131] Du Toit, *op cit*., p. 278.

[132] M. Chanock (2001) *The Making of South African Legal Culture 1902-1936*, p. 57.

Roman-Dutch law and its combination with English law when he explains that: "after the Union, the creation of Roman-Dutch canon was carried on by the Appellate Division which rolled back the advances that English common-law doctrines had made, particularly in Natal. Paradoxically, however, because judges were the primary agents, they saved the Roman-Dutch law by English common-law methods, case by case."[133] Over the years, the influence of English law has been most marked amongst other bodies of law in criminal and procedure, civil procedure, evidence, as well as constitutional law.[134] Laws relating to private property and succession preserved the Roman-Dutch character.[135]

Although Roman-Dutch law is formally beneath the new constitutional framework, below, I explore the Roman-Dutch law of private property and its influence on South Africa's legal system. A focus on private property principles, in particular the principle of absolute ownership in Roman-Dutch law, is important to help explain how South Africa in the current political context ends up with laws that protect an individual or single entity – that in turn threatens communities' rights of ownership and access to varied kinds of property. To be precise, the accepted principle advanced by Roman Dutch jurists that the owner of the land is the owner of everything built upon the land and everything below the surface,[136] is what earlier and contemporary South African legislation sought to address. The result was an interventionist state that regulates heritage resources, as well as minerals. State intervention which, as argued in the following chapter, has led to state-driven privatisation and the perpetuation of Roman-Dutch legal philosophy in which the owner of land – in this case, the miner with a permit – is able to dictate not only how they extract minerals, but also the land use rights of the mined area.

Religion and Roman Law

Graves are understood as imbued with some form of religious status by Roman law – and this exceptional status persisted from ancient Rome to early modern Europe. The religious status

[133] *Ibid*., p. 159.

[134] H. Hahlo and E. Kahn (1968) *The South African Legal System*, p. 19.

[135] Lene, *op cit*.

[136] J. W. Wessels (1908) *The History of the Roman-Dutch Law*, p. 486.

attached to graves made gravesites sacred; and therefore, not governed by ordinary property law – and inseparable, in classic law. Consequently, the focus on religion in the context of considering the legal status of graves is important to show the way religious beliefs have shaped how graves are legislated. Ancient Rome had no principle analogous to "separation of church and state."[137] For this reason, the same men who were elected public officials could also serve as the highest ranking priests.[138] Central to Roman religious law was the idea of the immortality of the soul and this served as the basis for the deification of Roman emperors as incarnations of divinity before and after life.[139] Beliefs about resurrection, exaltation, and that the head of state is the son of God had a long history.[140] Religious associations with gods would be halted when Christianity became a lawful religion under Constantine's Roman Empire. Before then, Christianity was considered blasphemous as such; persecution was official policy tended towards Christian and religious beliefs that were considered pagan.

After the ascendancy of the first Christian Emperor Constantine to power, laws were passed that prevented the persecution of Christians.[141] Thereafter, cathedrals were rapidly built all over the Roman Empire. Tracing the progression of Canon law in Rome, Sherman records that, in the year 315 AD Constantine empowered his subjects to bequeath their property to the Church.[142] So freely and frequently was this permission subsequently acted upon, that half a century later, Christian churches and religious orders were found to own vast quantities of property. With this accumulation came social abuses, so much so that in 364 AD, Emperor Valentinian enacted a mortmain law to prevent accumulation of property by churches and religious corporations.[143] This

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[137] Jörg Rüpke, (2007). *A Companion to Roman Religion*, Oxford: Blackwell Publishing Ltd, p.4.

[138] Priesthood was held by members of the elite classes.

[139] Anne Thomson (2008) *Bodies of Thought: Science, Religion, and the Soul in the Early Enlightenment*, Oxford: Oxford University Press, p. 42.

[140] David Haasbroek (1995) *The Mythology and Political Origins of Christianity*, Pretoria: V&R Printing Works.

[141] Christopher Kelly (2006) *The Roman Empire: A Very Short Introduction*, New York: Oxford University Press.

[142] Charles P. Sherman (1919) "Brief History of Imperial Roman Canon Law," *7 California Law Review* 93, p. 94.

[143] *Ibid*.

restraint soon withered and a century and a half later in the time of Justinian, it became a settled principle of law that legacies for charitable uses should receive special favour in courts and be regarded as privileged. Wills containing charitable dispositions of property became more liberally construed than other wills. A legacy to God was construed to go to the parish of the testator and Roman courts would designate the persons entitled to receive the gift.[144] As soon as the use of wills was permitted in England, these and other principles of the Roman law of charities were introduced into the English Common law by English Chancellors; who down to the 16th century and the time of Henry VIII were always ecclesiastics of the Roman Catholic Church and taught in the medieval Roman Canon Law, which was almost entirely of Roman Civil law origin as to things secular.[145]

The adoption of Christianity gave rise to the formation of congregations with many varying opinions about the Christian doctrine, and no centralised way of enforcing orthodoxy.[146] However, a set of guidelines meant to define Christian beliefs and differentiate them from heretical doctrines were proposed after the First Council of Nicaea.[147] Fundamental to the Roman's Nicene Creed (Christian belief) statements was the idea of the Trinity which refers to the teaching that the one God who comprises three distinct aspects: the Father (God), the Son (Jesus Christ – God's earthly incarnation), and the Holy Spirit, sometimes referred to as the Holy Ghost, is the maker of heaven and earth.[148] Equally important to this belief is that through the death and resurrection of Jesus Christ, sinful humans can be reconciled to God and thereby offered salvation and the promise of eternal life.[149]

The Nicene Creed meeting was meant to harmonise divergent Christian beliefs; many Christian followers continued to hold multifaceted theological views, and these would be evident during the

[144] *Ibid*.

[145] Charles Sherman (1917) *Roman Law in the Modern World*, University of Michigan: Boston Book Co., Vol. 1, pp. 379, 229.

[146] Rodney Stark (1996) *The Rise of Christianity*, Princeton: Princeton University Press.

[147] Julian Morgan (2003) *Constantine Ruler of Christian Rome*, New York: Rosen Central.

[148] *The Old Testament Bible* Genesis 1 refers to the Father, verse 2 the Spirit, and verse 3 the Son.

[149] *The Old Testament Bible*, John Chapter 2, verse 25.

sixteenth century's protestant reformation. Lutherans[150] and Calvinists[151] were the largest of the protestant community.[152] While the movement began in Germany, by the 1560s, it had gained significant influence in The Netherlands.[153] Some of the protestant core beliefs included ideas that: the Bible was the sole authoritative word of God – not a church leader or church tradition; salvation is by grace alone; and, that all are born sinners.[154]

A brief analysis of the religious basis of Roman law illustrates the dominance and influence of Roman political and religious philosophies which spread across Europe during different historical periods. Not only was this political influence transmitted to European territories under Roman invasion such as The Netherlands, but also passed onto African colonies in the modern age. Fundamental to the arguments of this thesis is the relationship between state law and religion in the regulation of graves. Hence, it is necessary to turn to explore the protection of graves during early-modern Europe, of how Roman-Dutch law of property and graves gets applied during colonial, apartheid, and post-apartheid South Africa. What is most evident is that Christian notions of culture and sanctity are central to the framing of the law which protects graves.

Protection of graves under Roman Law and Roman-Dutch Law

South African law in the colonial and apartheid era has in some respect conformed, yet at times disregarded, the law of the Romans who held much respect for graves. The work of Dutch jurists, Johannes Voet and Hugo Grotius – which has been central to the framing of the South African legal system for much of the past four hundred years – is fundamental to outlining the historical

[150] Lutheran churches were founded mostly in Germany, the Baltics, and Scandinavia.

[151] Reformed Calvinist churches were founded in Switzerland, Hungary, France, The Netherlands, and Scotland.

[152] There were differences between the Calvinist and the Lutheran churches over how Christ is present in the Lord's Supper: Calvin taught that Jesus was not physically present but was spiritually present through the work of the Holy Spirit in believers' hearts; Luther taught that Christ was in some sense still physically present in the bread and wine.

[153] Rives Standford (2008) *Did Calvin Murder Servetus?* South Carolina: Book Surge. p. 495.

[154] Simone Chambers and Peter Nosco (eds.) (2015) *Dissent on Core Beliefs: Religious and Secular Perspectives*, Cambridge, UK: Cambridge University Press.

law that protects graves. The work of these Dutch jurists reveals that the Romans' use the words "grave" and "tomb" interchangeably; occasionally, though, a clear definition between the latter and the former was made. A grave was defined as the space occupied by the deceased.[155] Graves in this regard were classified as things of religious law that were dedicated to gods of lower regions, *res religiosae*.[156] Under Roman law, things referring to corporeal objects[157] were classified into those which are subject to ownership *res commercio* and those not susceptible to ownership *res extra commercium.*[158] Graves were unsusceptible to ownership; as such, they were inalienable. Analysing the categories of religion and commerce in Roman law, Thomas writes that "the texts state quite clearly that neither the places reserved for the dead nor the monuments erected above them were heritable or marketable. They could not be sold."[159]

That being said, the outworks of a grave were alienable.[160] Grave violation was measured on the basis of the principle which states that "only that part of the soil in which the deceased was actually buried could benefit from prohibition against profanation, and only this particular part was excluded from the market."[161] Usually, however, violation consisted of "an alteration to the monument – which was defined as anything built above the religious place, the place of the tomb and into the air above it, according to the principle that ownership of the ground carried with it ownership of the upper levels."[162] To elaborate on the laws on grave violation, Thomas records that Roman law envisaged the harming of the dead only indirectly through the violation of their tomb. From this perspective, to exhume the body without the Governor's consent was to put the

[155] In Ulpian, it was recorded that "the place accorded to the tomb is not religious in its entirety, but only to the extent that a body is inhumed within it." A tomb without the remains was considered as a monument.

[156] Y. Thomas (2004) "Res religiosae: On the categories of religion and commerce in Roman Law."

[157] Jonker, *op cit*., p. 77.

[158] Lawsa vol. 27 (first reissue), pp. 211–212.

[159] Thomas, *op cit*., p. 41.

[160] C. J. Philip.

[161] Thomas, *op cit*., quoting Ulpian 25 ed. D.47, 12 de supulchro violato, 3, 2.

[162] Thomas, *op cit*., p. 57.

tomb itself to death.[163] Violation laws were concerned with that which constitutes a tomb, for to empty a tomb of its contents was to extinguish the *res religiosae*.[164]

Similarly, Dutch jurists who followed Roman law faithfully, such as Voet, commonly referred to by South African courts, accepted that the bones themselves were sacred but a cenotaph – an empty tomb erected to those buried elsewhere, or whose bodies are missing – was not.[165] Additionally, burying in the property of another person without consent did not make a place consecrated. This, however, did not mean that the land owner may exhume the bones; except with the authority of the governor. This was because according to the commentaries, "the very removal of the bones embraced in itself something of a religious nature."[166]Voet's view, though, differed from that of earlier Dutch practitioners when he suggested that "religious things such as graves could be alienated for a just cause – and could be sold together with land, that is, as an accessory to the sale of something larger. This was on condition that the thing continued to be used for its sacred purpose".[167] Simultaneously, there were Roman-Dutch commentators who differed on whether the Roman *res religiosae* was still recognised by the law of Holland. In an attempt to narrow these contested views, Grotius wrote that:

> In relation to man, many writers have distinguished things as belonging to God (*res divini juris*) and belonging to men (*res humani juris*); and under things belonging to God the Romans included dedicated things (*res sacrae*), the graves of the dead (*res religiosae*) and the walls of the cities (*res sanctae*): but upon a careful examination it will be found that all these things belong to men.[168]

In this regard, because graves were the private property of individuals, they were subject to commerce. Graveyards on private property formed part of the land; they were not inalienable

[163] *Ibid*, pp. 63–66.

[164] *Ibid*, p. 64.

[165] *Voet Commentaries*, xi 7 2.

[166] *Ibid*, xi 7 3.

[167] *Ibid*, xi 8 6.

[168] H. Grotius (1926) *The Jurisprudence of Holland*, (trans. R.Lee), Oxford: Clarendon Press.

because of their religious nature. As such, graves belonged to the landowner.[169] This change of legal standards, Cloete explains, was an outcome of the Reformation that had made itself felt in Holland in the mid-sixteenth century, with "religious freedom" being declared in 1572.[170] With the public practice of Roman-Catholicism banned in the Netherlands in 1580, the Roman Church had lost its authority and all things fell under worldly political authority.[171] Yet paradoxically, the violation of a tomb *sepulchri violatio* was still recognised as wrongful by Roman-Dutch law.[172]

Both Roman law and Roman-Dutch law recognised the sacredness of graves and made provisions to protect them accordingly. Most significant to the argument of this thesis is that both legal traditions, in some way, favoured the land owner. The land owner could not exhume a grave without a permit but could obtain authorisation from the governor. Noteworthy, are the remnants of both legal traditions in contemporary legislation in South Africa. Grave exhumation without a permit remains prohibited. And similarly, in the case that is central to this thesis, Glencore, which is in possession of a mining permit, holds leverage over African communities that are mired in South Africa's incomplete land reform project and whose graves are subject to relocations. By the twentieth-century, various cases concerning burial sites which came before the South African courts would illustrate an allegiance to the modified Roman-Dutch law, under which land with the presence of graves could be bought and sold. Julian Jonker notes, for example, that "while those things dedicated to religious worship (the old *res sacrae*) were susceptible to private ownership, for example by churches, municipalities or private persons, ownership would be exercised in a fashion that was compatible with religious worship."[173] This was because under Roman law, the prohibition of desecration of graves and exhumation of remains without authorisation remained in force.[174] In other words, the prohibition against alienating land with graves on it was abandoned

[169] Lawsa, vol 27 (first issue, note 383).

[170] Neville Cloete (1987) "*Res religiosae* en die stigtingsfiguur – 'n histories ondersoek na die juridiese aard en konstitusie van die sogenaamde religieuse sake in die Suid-Afrikaanse reg." *Transkei Law Journal* 136.

[171] *Ibid*.

[172] Wouter de Vos (1952) "Grafskending," *South African Law Journal* 296, pp. 298–299.

[173] J. Jonkers (2005) *The Silence of the Dead: Ethical and Juridical Significances of the Exhumations at Prestwich Place*, Cape Town, p. 86.

[174] *Ibid*, pp. 86–90.

in the nineteenth century, but the laws prohibiting interference with the actual graves remained. This meant that the purpose of graves would have to be retained even after alienation of the land on which they might be situated.[175] Although, Jonker explains that in the Union of South Africa it was not always a statutory offence to violate a grave, and there had not been any formal legislation that regulates graves.[176]

The earliest statute to regulate graves was the Bushman Relics Protection Act, enacted in 1911. At this time, there was increasing secularism of the modern state and an abandonment of the Roman conflation of the sacred and secular law. As a result, graves became administered within the framework of heritage rather than religion. It is for this reason that from this point onwards, analysis shifts from a focus on religious law (about graves) to a discussion of cultural heritage.

The Bushman Relics Protection Act sought to protect aboriginal paintings and sites of archaeological and anthropological interest, including burial grounds and skeletal remains, as well as other relics.[177] The Act initiated a series of laws[178] such as the Natural and Historical Monuments Act 6 of 1923 and the Relics and Antiques Act of 1934 (which consolidated the Bushman Relics Protection Act) and which were later followed by the National Monuments Act of 1969. Considering the later heritage legislation, Delmont suggests that, these legislative moves were designed to bolster the state ideology of Afrikaner Nationalism and separate development.[179]

As far as burial sites were concerned, the National Monuments Act of 1969 protected the "anthropological or archaeological contents of the graves" used by Bushmen or any other people who inhabited or visited the Republic before the settlement of Europeans at the Cape, alongside

[175] *Cape Town and Districts Waterworks Co. (Limited) v Executors of Elders* 1890 8 SC 9 at 11.

[176] F. Richings, "Historical Monuments, Wrecks and War Graves," *Lawsa* Vol. 10(2) (first reissue).

[177] Bushman Relics Protection Act 22 of 1911.

[178] The Removal of Graves and Dead Bodies Ordinance 7 of 1925 (Province Transvaal) which prohibited the destruction or removal of graves without consent from authorities. The Transvaal Ordinance has since been assigned to the Province of Gauteng, Northern Province, the Province of North-West, and Mpumalanga Province. Early Natal Ordinances have been consolidated as the KwaZulu-Natal Cemeteries and Crematoria Act 12 of 1996. In the Cape, the first such legislation dates back to 1980.

[179] Elizabeth Delmont (2004) "Re-Environing Greater Johannesburg: South African Heritage Development in the first Decade of Democracy," *African Arts* 37(4).

other Bushman relics and artefacts. It was an offence under the Act to destroy, damage, excavate, alter, or remove from its original site or to export from the Republic such objects without a permit.[180] Removal of such objects could only take place without felony if found during a normal course of mining, engineering, or agricultural activities. However, anything found would have to be immediately reported to a cultural institution by the finder or the owner of the land.[181] In common law, such found objects were regarded as *res nullius*, and ownership would vest in the finder.[182]

The National Monuments Act protected war graves after its amendment in 1981.[183] Previously, they had been provided for by separate statutes. In fact, the first legislation to administer war graves had been enacted as early as 1898, and provided for the maintenance of graves of officers and those who had fallen while serving the state.[184] After the South African War of 1899–1902, the protection and maintenance of war graves were further provided for by various provincial enactments.[185] In 1956, however, the Department of Public Works established a war graves commission to oversee the protection and maintenance of war graves at national level.[186] The commission became a statutory body with its establishment through the War Graves Act of 1967. The 1981 National Monuments Amendment Act repealed the War Graves Act and included provisions relating to war graves under the National Monuments Act, which then became known as the War Graves and National Monuments Act. It is worth noting that unlike Roman law, which deemed all graves sacred and significant, the War Graves Act and the National Monuments Act

[180] National Monuments Act of 1969 Section 12 (2A).

[181] *Ibid*.

[182] Section 12(3)(B). A permit system for excavations was added in 1935, and in 1969 permits became necessary for also collecting artefacts and fossils.

[183] National Monuments Act 13 of 1981.

[184] First Volksraad Resolution of the Zuid-Afrikaansche Republiek, 7 November 1898.

[185] Cape Imperial Colonial and Republican Forces Burial Grounds Act 14 of 1900; Natal Act 19 of 1901 (military burial grounds); Transvaal Imperial Colonial and Republican Forces Burial Grounds Proclamation 20 of 1902; Imperial Colonial and Republican Forces Burial Grounds Ordinance 5 of 1903 (OFS). The Orange Free State also established a statutory trust fund for the maintenance of such graves: Maintenance of Graves Trust Fund Ord 24 of 1905 (Orange Free State).

[186] Lawsa, Vol. 10(2) (first reissue),287.

only elevated the status of graves which belong to the dead war veterans – making them more sacred and of greater cultural significance than graves of ordinary people.

Townsend records that there were 11 Acts and amendments on the subjects of monuments and war graves between 1967 and 1981;[187] a flurry of legislative activity that demonstrates "apartheid's pre-occupation with heritage and its management in this period after South Africa's expulsion from the United Nations and the Commonwealth."[188] Indeed, the 1981 amalgamation of legislation governing war graves and national monuments established two separate committees for graves; namely, the *Burgergraftekomitee* and the British War Graves Committee.[189] The role of these committees was to protect the graves of those who had died in the war of 1899–1901, nineteenth-century rebellions, and the Great Trek of 1835–54.[190] Townsend observes that "the need for two committees… is revealing; it reflects and emphasises the symbolic value of the graves to a divided white establishment during this period at the lowest point of South Africa's international isolation."[191]

This was not the end of statutory protection. The Commonwealth War Graves Act was enacted in 1992 in order to protect graves of members of the armed forces who died during World War I

[187] S. Townsend (2003) "Development rights and conservation constraints: Urban conservations-oriented controls in the city centre of Cape Town," unpublished DPhil thesis, University of Cape Town.

[188] *Ibid*, p. 62.

[189] War Graves and National Monuments Act 28 of 1969, Section 3A.

[190] The committees were tasked with identifying burial grounds and graves in any area of the Republic of persons who had died as a result of wars other than the World Wars and rebellions within the area now included in the Republic (s 3A[2][a]); as well as burial grounds and graves in the Republic of members of pre-Union garrison troops (s 3A[2][b]), of Voortrekkers (s 3A[2][c]), and of those who had been exiled during the 1899–1902 war (s 3A[2][d]). This enabled the council to act towards preserving graves and burial grounds; the committees also reported on whether it was desirable to declare them monuments. Such graves and burial grounds could not be damaged, destroyed, or altered without a permit (s 12[2B][e]). The council could exhume and reinter the remains of a person buried in a war grave (for certain purposes such as moving graves to a central point for more convenient protection) (s 5[1] [CB]). However, the council could not do so where the owner of land was a descendant of the person buried there and objected to the reinterment (s5[4A]).

[191] Townsend, op cit., pp. 62–63.

and World War II.[192] But it is the most recent heritage legislation, the National Heritage Resources Act of 1999, that became effective as of April 2000 that occupies present concerns. The Act is relevant in its entirety, but only its general aims and specific provisions regarding burials places will be discussed.

Towards the Heritage Resources Act

After South Africa's transition to a constitutional democracy, there were attempts by the ANC-led government to remedy past injustices through a series of law passed at a local and national level. The dominant narrative in the political discourse after 1994 was centred on notions of redress and restoration. In particular, the need to restore neglected people and promote cultures to prominence in the political sphere played a role in the formulation of the heritage act. The Act was written in line with the South African Constitution that advocates, in chapter 2 of the Bill of Rights, an individuals' right to belong to and participate in one's cultural life. Subsequent sections[193] provide that persons may not be denied a right to enjoy their culture, practice their religion, use their language, and join related associations. Considering the background within which the Constitution was written, it would seem as if the idea to encourage individuals to practice their religion has as its premise the notion that South Africans are diverse citizens with wide-ranging religious beliefs. The reality, however, is that previous and current heritage legislation reflects an endorsement of Christian values, thereby overlooking indigenous beliefs in ancestors.

The Act was a product of recommendations submitted by the Arts and Culture Task Group (ACTAG), set up by the Minister of Arts and Culture. ACTAG produced two reports that detailed recommendations on Arts, Culture, as well as Heritage Policy. As a basis for that policy, the

[192] Act 8 of 1992. The Commonwealth War Graves Act 8 of 1992 prohibits the desecration, damage, and destruction of graves, tombstones, monuments, and memorials connected with the burials of members of the Commonwealth armed forces who died in the First and Second World War (s 1 and 2). The owner of land upon which such a grave is situated, nor any other body in control of the burial place, may not disinter or alter the grave, unless three months' notice is given to the commission (s 3(1)). The grave may not be removed except by the commission or with the written permission of the commission (s 3(4)).

[193] See in Constitution for the Republic of South Africa, 1996- Chapter 2: Bill of Rights, Section 15

Department of Arts and Culture put together a White Paper in 1996 and adopted principles proposed by ACTAG. Once the white paper had been published, a public participation process ensued and draft legislation for heritage was developed. A key policy expert[194] who at that time was a member of ACTAG, recollects that Penny Pistorius, an independent contractor and former National Monuments Council's employee, whose responsibility was to draft the Bill, went through other countries' heritage legislation. Australia, New Zealand, Canada, and to some degree the British heritage legislation were the most influential. The Burra Charter[195] principles adopted to create a national and international accepted standard for heritage conservation in Australia were, according to the policy advisor, very influential to the South African Heritage Act. In a nutshell, the principles endorsed in the charter were that conservation of heritage takes place in three stages: identification of the thing to be protected; evaluation of its significance; and then work out how the thing will be managed. The Bill was drawn up with those principles in mind.

Drawing from Comaroff and Comaroff, Delmont suggests that there were obvious anomalies in the formation of modern nation-states in an era of globalization. South Africa affirmed its sense of national identity at a moment in which currencies were amalgamating borders were becoming more permeable trade and industry barriers being reduced and, the global economic landscape was marked by the logos of multinational corporations.[196] In this context, it could be added that South Africa was faced with severe poverty problems, unemployment, as well as demands for economic development. In consequence, the recognition and according of some parts of South Africa the status of "world heritage sites" would, it was reasoned, prove beneficial for the tourism industry, and help with the government's jobs creation mandate. It would, however, seem that the language of development, job creation, and poverty eradication trumped that of the preservation of heritage (graves), especially as far as mining and grave relocations are concerned.[197]

[194] She wished to remain anonymous.

[195] First adopted in the Australian small town of Burra in 1979 and put together by the Australian International Council on Monuments and Sites (ICOMAS) to identify the principles that should be used for conservation of Heritage Resources, mainly places or built environment.

[196] Delmont, op cit.

[197] This is discussed in more detail in the following chapter, which looks at the development of the Mineral and Petroleum Resources Development Act.

In its preamble, the Act states that "heritage has the potential to affirm our diverse cultures, and in so doing shape our national character."[198] In essence, the process of nation-building rests upon diverse cultural resources being protected and managed by the state. Describing the context under which the NHRA was endorsed, Delmont observes that "the program of nation-building that underlies the Act was not without its problems." Deacon records that by 1994, out of the 4,000 national monuments no less than 98 per cent represented colonial and settler history, with the remainder comprising natural heritage geological, paleontological, archaeological, and rock art sites.[199] Pistorius has shown that the need for better definitions of heritage, and the mechanisms for its protection, brought about a number of amendments to the National Monuments Act, which was finally repealed in 1999, by the new National Heritage Resources Act.[200]

Debates about tangible and intangible heritage in South Africa's National Heritage Resources Act

International law makes a distinction between tangible and intangible heritage – a distinction that it repeated in the Heritage Act. At international level, definitions of heritage are generally equated to built structures, artefacts, or objects from the past. Thus, the material aspect was paramount in defining heritage. Tangible heritage was defined by the World Heritage Centre as "a monument, group of buildings or site of historical, aesthetic, archaeological, scientific, ethnological or anthropological value."[201] This definition, as incorporated into laws, reflected the perception that for heritage to be valued it had to be ancient. Accordingly, places of significance and objects or items were equated with monuments, relics, or antiques. This perception was reflected in the titles of most of the heritage legislation enacted: "Historic Monuments, Relics, and Antiquities Act."

Surprisingly, even after African independence, the definitions used by heritage laws remained unchanged. In fact, most of the heritage legislation of African countries still dates back to the

[198] *Ibid*, preamble.

[199] H. Deacon, S. Mngqolo, and S. Prosalendis (2003) "Protecting Our Cultural Capital: A research plan for the Heritage Sector," unpublished HSRC paper.

[200] P. Pistorius (1996) "Legislation and the National Monuments Act: In ICOMOS Monuments and Sites South Africa," ICOMOS, Sri Lanka.

[201] World Heritage Centre, 2003

1960s and 1970s.[202] Hence the conclusion of some scholars who suggest that heritage legislation and definitions reflect administrative Eurocentric views of heritage that has traditionally valued monuments and sites over the intangible values associated with them.[203] From this line of thought, Ndoro lays emphasis on the fact that the criteria for identification and definition of heritage resources in English-speaking Africa, as provided for in the historical and existing legislation, are heavily influenced by the national histories of colonisation.[204] As a result, rarely was intangible heritage (also named living heritage) incorporated in the definition of heritage. If incorporated, the definitions often emphasise only certain aspects of intangible cultural heritage. Early expert definitions generated by the United Nations Educational Scientific and Cultural Organisation (Unesco) focused on artistic creations like performance, but by the late 1990s emphasis also came to be placed on knowledge and values.[205] In South Africa, the Human Science Research Council (HSRC) therefore, argued in their findings that definitions at a national level reflect national cultural and political concerns, and that national instruments do not cover oral histories in the definition of intangible heritage – the National Heritage Resources Act of 1999 is unusual in doing so.[206] Part of the noted limitations is that many definitions of intangible heritage do not include religion or spirituality.

Like much legislation, the legal writing of the Heritage Act had its basis in the precedent of earlier National Monuments Acts which had to be revised to suit the new democratic dispensation. The Act set out to redress past inequalities and to promote the management of the national estate required to define the nation's multi-cultural identity, and to enhance nation-building. The urgent need to redress what Scheermeyer describes as "many years of neglect and disregard for the many facets of heritage and extensive cultural treasures associated with non-white communities,"[207] has

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[202] W. Ndoro (2005) "Legal definitions of Heritage," in W. Ndoro, A. Mumma, and G. Abungu (eds.) *Cultural Heritage and the Law: Protecting Immovable Heritage in English Speaking Countries of Sub-Saharan Africa*, Rome: ICCROM.

[203] See, for instance, Blake (2001), pp. 8–9; W. Ndoro (2005) "Legal definitions of Heritage," *op cit*.

[204] *Ibid*, p. 34.

[205] HSRC (2004), p. 27.

[206] *Ibid*.

[207] C. Scheermeyer (2005) "A Changing and Challenging Landscape: Heritage Resources Management in South Africa," *The South African Archaeological Bulletin* 60(182), pp. 121–123.

compelled the Act to work with a broader conception of heritage. In the Act, a Heritage Resource or National Estate is defined as: any place, building, landscape; geological, archaeological or paleontological site; grave and burial ground; and objects and records of cultural importance.[208] The latter may include aesthetic, architectural, historical, scientific, social, spiritual, linguistic, or technological value or significance. Taking this into consideration, it is generally accepted that South Africa has a fairly "progressive heritage legislation."[209]

Following the recommendations of the Arts and Culture Task Group, intangible heritage was included as one of the resources that required protection. The NHRA[210] describes living heritage as intangible aspects of inherited culture that may include "cultural tradition, oral history, performance, ritual, popular memory, skills and techniques, indigenous knowledge systems and the holistic approach to nature, society and social relationships."[211] One key policy advisor, who wished to remain anonymous recollects that when the Act was written intangible heritage was difficult to legislate for, because at that time the Unesco convention on intangible heritage had not been drafted. As a result, the policy advisor recounted, that there were no guidelines; given this, intangible heritage is only discussed in the preamble as "it was too difficult to define," subsequently: it has been defined through precedents and… if this Act was to be re-written that would be one of the issues they would want to include – be more specific."[212]

One of the limitations of the Act stems from its wide-ranging provisions. Although the NHRA incorporates different conceptions of heritage and acknowledges the value of such to those groups who were previously marginalised, Munjeri has argued that such a fluid conceptualisation of heritage poses difficulty in applying a legal framework.[213] In accord with Munjeri, Ndoro argues that "definitions of heritage in legal instruments have to be very precise so as to avoid ambiguity.

[208] The National Heritage Resources Act 1999, Chapter 3, Section 1-3.

[209] Ndoro *et al*. (2005) *op cit*.

[210] The National Heritage Resources Act 1999, section 2 (xxi).

[211] This definition is in line with Unesco's conceptual framework on intangible heritage.

[212] Policy advisor, interview by Dineo Skosana, Iziko Museum Cape Town, 20 July 2015

[213] D. Munjeri (2005), "Legislation and practices: Implications and the way forward," in W. Ndoro and G. Pwiti (eds.) *Legal Frameworks for the Protection of Immovable Cultural Heritage in Africa*, Rome: ICCROM, pp. 2–4.

Precision leaves no doubt with regard to what falls within the coverage of the law."[214] Ndoro also highlights the importance of such precision when he points out that definitions have a direct impact on the scope of the national legislative instruments; they determine the regulation of powers, what is to be protected, and how.[215]

Reflecting on heritage definitions in English-speaking sub-Saharan countries, Ndoro records that apart from South Africa, these countries have very narrow and specific definitions.[216] Ndoro's concludes that with such narrow and specific definitions, the danger is always that much heritage – such as intangible heritage, cultural landscapes, and itineraries – will not be covered. Broader definitions have an obvious advantage in being all-inclusive, they may however, suffer from lack of detail about the types of heritage protected.[217] As a result, loopholes on the legislation may be exploited – as transpires in the case at the heart of this thesis.

Also, of importance, is Blake's observation that the spiritual aspects of culture in definitions of intangible heritage can be controversial; so, spiritual culture is best safeguarded by providing religious freedoms at a national level.[218] This is certainly relevant for the diverse context of South Africa, where different groups of people belong to different religious and spiritual communities. The result is that aspects of intangible heritage are framed broadly for inclusion. Notably, about eighty percent of South Africans are Christians;[219] underlining the argument that Christian values have had a strong influence on the legal making of Western, European, the African continent, and South African legislation. Christian scriptures, such as (Exodus. 20.3) "you shall have no other gods before me" and (Jeremiah. 25. 6) "do not follow other gods to serve," frame the legislative thinking which protects graves, rather than beliefs about the dead or ancestors. As a result, development projects that require grave relocations take precedence over heritage protection – and

[214] W. Ndoro (2005) "Legal definitions of Heritage," *op cit*.

[215] *Ibid*, p. 34.

[216] *Ibid*.

[217] *Ibid*.

[218] J. Blake (2001) Developing a New Standard-Setting Instrument for the Safeguarding of Intangible Heritage (Traditional Culture and Folklore) UNESCO, Paris.

[219] *Census 2001*

this – as will be argued – is strengthened because of the lingering question of land in South Africa.[220]

Implementation of NHRA

In line with South Africa's three spheres of government – namely local, provincial, and national – the Arts and Culture department proposed a three-tier system for the management of heritage resources; a decentralised administrative system in which the national authorities make the decisions about the protection of heritage. The structures involved are worth understanding as they reveal how the Heritage Act is subject to different interpretation and forms of intervention at each level of the state. Reviewing the three-tiered system, Esterhuysen writes that, "unfortunately, rather than presenting a strong and united conservation unit, the tiered heritage system tends to be undeveloped, under-resourced and uncoordinated." Esterhuysen further suggests that the lines of communication between Heritage Departments, Agencies, and Councils; and, the National, Provincial, and Municipal Departments of health, environment, and planning result in slow and questionable decision-making.[221] The policy expert reiterates this point:

> What is happening especially within mining is that those departments are not working together with other departments. So, the mining people, the Department of Minerals... they are not interacting with the Department of Environmental Affairs for example. And they are not interacting with the Department of Arts and Culture. Ideally, they should be. But it's not happening. And because our constitution doesn't allow for one department to argue with another department, we are stuck in many ways.[222]

The three-tiered system required a change of the Monuments Council which had four regional branches (one for each of the four provinces that existed prior to 1994). This meant that decisions about the significance of heritage places should ideally be taken at the lowest competent level of governance; in other words, ideally at a local level (although it is not clear from the Act who constitutes local authorities). At the provincial level, the PHRA required implementation through

[220] See chapter 5.

[221] Esterhuysen, *op cit,* p. 1.

[222] Policy advisor, interview by Dineo Skosana, Iziko Museum Cape Town, 20 July 2015

Provincial Heritage Resources Agencies (PHAHs), except in cases where the South African Heritage Resources Agency (SAHRA) – which serves as the national implementation body that manages the functions of NHRA – acts on behalf of the provinces. Heritage resources considered of provincial significance are managed by PHRAs; those regarded as of national significance are managed by SAHRA. But as the key policy advisor relates:

> For some bizarre reason that I have never been able to understand when the Bill was going through to parliament and the department and I suppose it must have gone to the portfolio committee, it was never properly budgeted… And because it had not been budgeted and because National Treasury had then not allocated money for each province to establish a Heritage Resources Authority, the provinces said this is an unfunded mandate we cannot take on this job because we do not have the funding.[223]

The policy advisor added that the early debates about whether to include provincial authorities or not, led to a back and forth process of inclusion and omission of the section on provincial authorities. Subsequent to an investigation of this deliberate omission, the typist at the time retyped under pressure from the government which wanted the bill to be released before President Nelson Mandela retired from office. As a result, certain phrases were missed and, in some instances, "may" is used to expresses contingency (instead of usage of "will").[224] This state of affairs afforded room for some provinces not to act on the provisions of the legislation.

Thus, it took almost ten years for some provinces to establish the Provincial Authority correctly; and some provinces are still not fully operational. Provincial authorities such as Limpopo and Kwa-Zulu Natal are efficiently organised; however, the North-West and the Eastern Cape are in disarray. Those provinces which do not have sufficient staff or resources to undertake their responsibilities hand these over to the national level, SAHRA. KwaZulu-Natal's Amafa aKwaZulu-Natali (Amafa) is the most organised provincial authority, with its own provincial Act.[225] Amafa succeeded the National Monuments Council in the former Natal. This meant that

[223] Policy advisor, interview by Dineo Skosana, Iziko Museum Cape Town, 20 July 2015

[224] See, for example, chapter 1, section 6, of the National Heritage Resource Act, which reads that SAHRA, after consulting with the Minister, *may* by notice in the Gazette...

[225] The KwaZulu-Natal Heritage Act No. 4 of 2008.

post-1994, Amafa inherited the KwaZulu Provincial Heritage Resources Authority with its offices, budget, and staff – as well as their assets; so that the provincial authority was not then under the same kind of threat as those with an unfunded mandate.

All levels of authorities according to the Act coordinate the identification and management of the national estate that is graded from one to three. As the grading system stands in the NHRA, heritages are accorded legal protection based on these rankings: Grade I being the category of heritage resources that are of national significance; Grade II refers to the heritage resources that are of importance to provinces or regions; whereas, Grade III heritage resources are those which can be identified though a heritage assessment by local authorities. This grading system caused an outcry during the consultations over the heritage bill. One of the major concerns was that when the bill was put into law all previous monuments – which included a very large number of colonial buildings – became provincial heritage sites; immediately downgrading their significance to provincial, rather than national level. Opposition was driven by the owners of buildings who saw their property being demoted.[226] Additionally, there was also less funding opportunity across provinces for the heritage resources graded under provincial heritage. As Ndoro and Kamamba maintain, a ranking system is used by most countries in order to establish priorities for management by heritage organisations;[227] and that heritage rankings do affect property rights, determine public access, and impact on the management responsibilities of the state – all of which are likely in the African context to result in an inappropriate appreciation of cultural heritage – as in Africa, cultural heritage is not just manifest through monuments.[228] George and Weber record for instance, that:

> Africa is a continent where heritage is embedded in movable, immovable, tangible and intangible heritage. It is a continent of great antiquity and civilisations with many varied layers of history. It is a continent where the tangible and the intangible are in many cases intertwined and, as such, there is often no straight dividing line between tangible or intangible cultural or natural heritage.[229]

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[226] Policy advisor, interview by Dineo Skosana, Iziko Museum Cape Town, 20 July 2015

[227] W. Ndoro and D. Kamamba (2005) "The Ranking of Heritage Resources and sites in Legislation," inNdoro *et al*., *op cit*., p. 40.

[228] I*bid*.

[229] A. George and N. Weber (2005) "Introduction," in Ndoro *et al*., *op cit.,* p. vi.

The protection of graves in South Africa

In South Africa's mixed jurisdiction, the Heritage Act now provides the most comprehensive account of the legal status granted to graves – and of the legal mechanisms for their protection. It is, however, limited in several ways. Foundationally, it continues to operate in a context defined by the long history of Roman-Dutch law, as well as borrowed international conceptual frameworks. In practice his means that because these countries- affiliated to the United Nations Educational, Scientific and Cultural Organisation (UNESCO), had not defined or legislated intangible heritage when the NHRA was passed in South Africa in 1999, the country has a heritage law that protects physical graves but fails to safeguard the sacred beliefs attached to graves.

Graves are protected and regulated under section 36 of the NHRA; with a grave being defined as "any place of interment, including its contents, headstone, or other markers of such a place, and any other structure on or associated with such a place."[230] Graves are categorised in terms of administrative sections: those inside and outside of a formal cemetery, and those graves that are younger and those older than 60 years. To exhume archaeological graves (those over 100 years old), those of victims of conflict, royal or traditional leaders, historical graves or burial grounds, or any grave or burial ground older than 60 years which is situated outside a formal cemetery administered by the local authority, a permit must be obtained from SAHRA.[231] Graves that are under 60 years old and inside a formal cemetery require permission from the Health Department and/or a local municipality to relocate. There are no formalised guidelines for this application process, except that permission is needed to exhume and the developer must advertise. The reason as to why graves are classified into years is partly a carryover from the National Monuments Council which used cut-off dates and partly the influence of other similar legislation that attaches dates to things; moreover, it was a desire to separate things which would be defined as archaeological from those defined as historical. Very often, "for archaeological things it is virtually impossible to trace the previous owners of that place, so you have got to regard the archaeological

[230] National Heritage Resources Act, 1999, section 2, (xiii).

[231] *Ibid*.

things written in the act as things that belong to the state – in other words not individually owned."[232]

It is one of the key weaknesses of the Heritage Act that it only protects graves over 60 years of age, graves of victims of conflict, and those graves considered as of cultural significance; basically, only graves that are over 60 years are treated as heritage resources and only these can be relocated in line with SAHRA's guidelines. As the policy analyst involved in the legislative decision-making process put it:

> We felt that 60 years was a kind of cut-off point that you could have lost touch with where the graves of family members were – and would most likely have moved away and would not know about graves being exhumed for one reason or another. And we felt that it was necessary to put that into law and we also assumed, maybe it was a wrong assumption in some ways, that by 60 years, local authorities would have been organized enough to have made a list of all people who were buried there and so that they would be able to pick up on the consultation process. I don't know if that was a good idea. It's hard to say.[233]

Graves that are less than 60 years old, not of victims of conflict or of cultural significance, fall out of the Heritage Act's remit and are therefore regulated through the Human Tissue Act 65[234] of 198 and municipal ordinances. These regulations require an undertaker to exhume, although the Act does not make provisions for the process that needs to be followed by the local authorities to ensure that the employed undertaker has the necessary experience; whereas graves over 60 years old require a qualified archaeologist to exhume. Archaeologists are required to conduct research on the grave, to record the layout of the grave and objects found, and to provide a consolidated report. This is a slower and costly exercise as compared to hiring an undertaker (who is also not

[232] Policy advisor, interview by Dineo Skosana, Iziko Museum Cape Town, 20 July 2015

[233] *Ibid*

[234] The Human Tissue Act states that you may not store any human tissues anywhere other than at a medical facility. This was to prevent institutions such as museums from keeping human remains that have been fossilized, that technically are no longer remains but have turned into stone.

required to be in possession of an exhuming license). As a result, developers often seek loopholes to bring about the relocation through the quicker and cheaper process of using undertakers.

For any development, the developer is expected to contact SAHRA to inform the agency of the intended development.[235] SAHRA then has an opportunity to consider if the development will affect any heritage concerns and instruct the developer to submit a Heritage Impact Assessment.[236] SAHRA can also instruct the developer to contact a provincial or local heritage authority if it decides the matter should be administered on a provincial or local level. According to the Heritage Act, the permit should only be granted once SAHRA finds that adequate arrangements have been made for the process of alteration (relocation) contemplated by the applicant.[237] The latter is obligated to contact and consult with individuals and communities who have an interest in the graves, and thereafter, to enter into an agreement with them.[238] There is, however, no definite framework for consultation with communities; and as a result, there is no verification process in place to ensure that the person who gives permission to move the grave is actually the rightful member of the family. Meetings related to grave relocations are to be announced in local newspapers, in a language that communities understand.[239] Families are to be offered a "wake fee," which is intended to help prepare for the reburial ceremony. The mine- in the case of this thesis covers expenses such as a coffin and transport costs; and compensates families for the relocation of the graves. The question of compensation is a thorny issue, as it induces families to increase the number of graves belonging to them.[240] Compensation also creates family disputes, as members of the families do not always agree on what can be considered a reasonable compensation amount for the relocation of a grave.[241] Families are not the only ones negotiating their economic benefit

[235] National Heritage Resources Act, 1999, section 38 (5)(b).

[236] Section 38 (2). The processes and implications of the Heritage Impact Assessment submissions will be discussed in detail in the next chapter.

[237] National Heritage Resources Act, 1999, Section 36.

[238] *Ibid*, Section 36 (5)(a).

[239] Interview Henk Steyn, by Dineo Skosana, 30 October 2014.

[240] B. Saccaggi (2011) "Disenfranchised Heritage, Ancestral Graves and their Legal Protection in South Africa," MA thesis, University of the Witwatersrand, Johannesburg.

[241] Interview Henk Steyn, by Dineo Skosana, 30 October 2014.

from the relocation of graves; funeral parlours too, generate profits from this process[242] and so do heritage consultants.[243] Wake fees and other forms of compensation are not legislated; as a result, both developers, heritage consultants and communities are often at loggerheads.

Conclusion

To recapitulate, the chapter focuses on the development of the legal framework which protects graves, and in particular, how the Heritage Act was created. The approach to revisiting the early modern history of the church and state, Roman law, and the modification of the heritage law during colonial and apartheid South Africa, is advanced to explain the long-standing legal background of the current heritage act. The important point is that external legal systems such as Roman law and Roman-Dutch law, both which have a basis in orthodox and modified Christian values, have great influence on the South African Heritage Act. It has also been emphasised that continued adherence to international legislative standards has set the South African Heritage Act to be the most progressive heritage legislation in Africa. And yet, problematically, the international typologies of heritage do not adequately take into consideration non-Christian indigenous African beliefs on ancestors (intangible heritage). Taken as a whole, as presented herein, the legal history of heritage law points to inadequacies and injustices, such that it comes as no surprise to find that African communities continue to be marginalised within the boundaries of the law in the post-apartheid South Africa.

[242] See Figure 7 of the appendix. The photograph illustrates Zenzele funeral parlour inscribed on the relocated tombstones for marketing purposes. This highlights the ways in which the relocations have become a lucrative business niche.

[243] See the idea on the emergence of ritual economies in J. Comaroff and J. L. Comaroff (1999) "Occult Economies and the Violence of Abstraction: Notes from the South African Post colony Authors," *American Ethnologists*, 26(2), pp. 279–303.

CHAPTER 3

THE SOUTH AFRICAN MINERAL LAW: A STATE-LED PRIVATISATION

This chapter demonstrates how a market-friendly mineral law overrides the protection of heritage – leading to new forms of exclusion and injustice in the post-apartheid era. To this end, it is first necessary to present a historical overview of the state's regulatory power regarding the exploitation of South Africa's minerals.[244] This historical outline which begins in the seventeenth century presents the evolution of mineral law and ultimately, how it comes to interact with the Heritage Act. The historical account is best divided into three distinct periods: first, the history of mineral rights legislation and politics before the adoption of the Mineral and Petroleum Resources Development Act (MPRDA); second, the debates that led up to the adoption of the MPRDA and its final form; and third, how the MPRDA interacts with heritage law.

What is evident is that before 1994, access to minerals was intrinsically bound to land ownership similar to Roman-Dutch private property law that formed the basis of South African mineral law. This arrangement, however, was amended through the promulgation of the MPRDA. The latter vested the country's mineral resources to the state, a quasi-nationalisation. As the custodian, the state acquired the responsibility to grant, issue, or terminate mineral rights. Then, post-1994, there was a paradigm shift towards state authorized privatisation masquerading as nationalisation when in reality, the state sought to encourage the private exploitation of minerals. Hence, the source of the problem is that the mineral law in a market-driven economy has come to trump the heritage act – with mining eliminating all other possible land uses. This discussion about mineral law is important in so far as that it illustrates how power is distributed, through the MPRDA, away from the state to companies – reducing the state's role in resolving disputes and creating procedural anomalies that limit the impact of the Heritage Act. Consequently, in a country with an unfinished land reform project such as South Africa, communities who were once dispossessed continue to experience injustice. This is one of the fundamental reasons why grave relocations are contested.

[244] The focus is on mineral law and not the law relating to petroleum.

Mining in South Africa

South Africa is one of the world's major mining and mineral-processing nations. Mining accounts for about 260-billion or 8.3% of total annual production in South Africa.[245] According to the Department of Minerals Resources, South Africa produces more than 59 different mineral commodities from around 920 mines and quarries.[246] The country is ranked first in the world in the production of alumino silicates (and alunite), chromite, ferrochrome, gold, manganese, vanadium, and vermiculite; and second in production of titanium minerals (chiefly ilmenite) and zirconium.[247] Although there has been a downward trend from the industry's peak in 2013[248], the mining industry nevertheless continues to make a valuable contribution as the backbone of the South African economy.[249] The Billiton, Glencore, De Beers Consolidated Mines, and Anglo American Group are amongst the largest mining companies in South Africa; ranked in the top ten. [250] These and other giant mining companies earned R327 billion in 2013.[251] As of June 2014, their shares were worth R675 billion on the Johannesburg Stock Exchange.[252] These listed mining houses are, however, partly in the hands of multi-national corporations are either of European, Australian, or American origin or of SA origin but listed after 1994. Most mining permits are awarded to these international mining houses.

Statistical analysis also illustrates that South Africa is the world's third largest coal exporter. Glencore, being the leading coal producer in South Africa, produced 138.1 million tonnes of coal

[245] Centre for Law and Society (2015) "Contradictions in Legislation on Mining and its Community benefits," accessed online on 26 July 2016 www.larc.uct.ac.za/sites/default/files/image_tool/images/347/FactSheets/MiningandCommunityBenefits_Factsheet_Final_Feb2015.pdf

[246] Department of Minerals Resources, "Report 2016", accessed online on 26 June 2016 http://www.dmr.gov.za/

[247] United States Geological Survey (2003) "Mineral Study," South Africa.

[248] The 2013 statistics are important here because this was the time when Glencore PLC merged with Xstrata PLC

[249] Chamber of Mines of South Africa, Annual Report (2013/2014) p. 5.

[250] Mining Companies in South Africa, accessed on 20 June 2016, www.projectsiq.co.za/Mining-Companies-in-South-Africa.htm

[251] Centre for Law and Society (2015) *op cit,*

[252] *Ibid*.

in 2013, recording industrial revenues exceeding an expected $10 billion (USD).[253] Other figures illustrate that South Africa produces more platinum and similar metals than any other nation.[254] The country is currently ranked the largest world's producer of platinum- at 70%. Over 163,000 kilograms (5,200,000 ozt) of platinum was produced in 2010, generating export revenues of $3.82 billion (USD).[255] The country has, however, increasingly witnessed strikes related to the dissatisfaction amongst mine workers in relation to the dire working conditions in mines, low income and poverty levels.[256] This suggests that the large-scale production of minerals, and the profits gained thereof, are not adequately distributed to the workers and the public. Most importantly, the large-scale production of minerals in South Africa explains why mineral rights legislation has always been heavily politicized, subject to much debate; and furthermore, why such rights are often assumed to be of greater significance to the country than other forms of rights – such as cultural rights.

Mineral Rights in Roman Law and Roman-Dutch Law

It is important, once more, to consider the regulation of mineral rights under Roman law and Roman-Dutch law, so as to highlight the historic foundational principles of private ownership that continue to influence South Africa's current management of minerals. Ownership of land under Roman and Roman-Dutch law was regarded as almost absolute and unencumbered.[257] Some

[253] "Mining giants – the top ten richest mining companies," 27 March 2014, www.mining-technology.com/features/featuremining-giants---the-top-ten-richest-mining-companies-4203262/

[254] *CIA World Factbook, South Africa*, United States Central Intelligence Agency. Retrieved 2007-11-28.

[255] BusinessDay, "Platinum mines in SA — the world's top producer — are shrinking" accessed on, 26 March 2018*https://www.businesslive.co.za/bd/companies/mining/2018-03-26-platinum-mines-in-sa--the-worlds-top-producer--are-shrinking/*

[256] In particular, the August 2012 Marikana mineworkers strike represented a far-reaching outcry by mine workers to address their demands for socio-economic transformation.

[257] C. G. van der Merwe, *Sakereg* 2 ed (1989) in P. J. Badenhorst and H. Mostert *Mineral and Petroleum Law of South Africa* 1 ed (2004); Revision Service 4, 2008, 1–3.

minerals were regarded as fruits of the land and could only be separated by the owner.[258] The Roman-Dutch law system lacked legislation with regard to mineral rights.[259] As a result, Roman-Dutch jurists followed the Roman law and accepted the principle that the owner of land is the owner of everything built upon the land and everything below the surface.[260] The idea of mineral rights as separate real rights developed during the Middle Ages.[261] Before then, land belonged to wealthy landowners and one of the privileges of being a landowner was that mineral rights could be used for personal gain. In Roman-Dutch law, mineral rights were discussed in relation to usufruct but did not receive any further attention due to the lack of mining activities at the time.[262] As such, mineral rights were considered to be regulated under aspects of private patrimonial law dealing with property rights.[263] Also, despite the influence of the doctrine of absolute ownership, some state control was recognised.

The Roman-Dutch concept of absolute ownership was introduced in South African law after the Dutch settled at the Cape of Good Hope.[264] Meyer van den Berg notes in his study of the Evolving Nature of Mineral Rights in South Africa and Namibia that, "the Sir John Cradock Proclamation of 1813 provided that land granted by the Crown would be subject to reservation to the Crown of the rights to gold, silver and precious stones."[265] After the discovery of gold in 1886

[258] *Ibid*. In Roman law, a distinction was made between renascent (*renascentia*) and non-renascent (*non renascentia*) minerals. The Roman Dutch authorities held the view that only renascent minerals can be classified as natural fruits.

[259] Badenhorst and Mostert (2004) *op cit*, pp. 1–2.

[260] *Ibid*.

[261] Ibid., pp. 1–4.

[262] Ibid., pp. 1–3.

[263] *Ibid*.

[264] M. O. Dale (1997) "South Africa: Development of a New Mineral Policy," *Resources Policy* (23), 15.

[265] Hugo Meyer van den Berg (2009) "A Comparative Study of the Evolving Nature of Mineral Rights in South Africa and Namibia," p. 6. Notwithstanding the above-mentioned proclamation, state control or state interference in mineral rights was, up to the nineteenth century, extremely limited.

there were, however, concerns that the possible benefits of the development of minerals for the people could be curtailed if the landowner had the exclusive right to the minerals.[266]

The key question here concerns the role of the state in the regulation of minerals during the early-modern period, as well as the contemporary era: of whether the state was responsible for controlling mineral rights, or merely for administering private rights in the public interest? The state played both roles in the early-modern period but was more inclined towards the function of encouraging privately-mined minerals that were often attached to land ownership. In the post-apartheid era, though, the MPRDA – which is founded on the same historic principles of private property rights - sets out to control the mineral rights, but in practice only achieves the regulation of private ownership of minerals; which leaves an enormous amount of room for the persistence of conservative ideas about ownership and rights to impose themselves on the formal legal framework, and to shape sites of contestation such as grave-relocations.

Early South African Mineral Law

Scholars[267] suggest that the historic development of South Africa's minerals legislation was extremely uneven, "with each new legislative development promulgated to cater for the changing imperatives of either the state or the mining industry."[268] As a result, the four colonies had contradictory mineral rights framework. For example, the Transvaal had the Precious and Base Metals Act of 1908 and the subsequent Mineral Law Amendment Act of 1918; the Orange Free State had the Orange Free State Metals Mining Act of 1936 that incorporated the Gold Law; Natal had the Mines and Collieries Act 43 of 1899; while the Cape had the Precious Minerals Act 43

[266] J. W. Wessels (1908) *The History of the Roman-Dutch Law*, pp. 486–487; Dale (1997) op cit., *Resources Policy* , 23, pp. 15–16.

[267] See for instance, Elmarie Van der Schyff (2012) "South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals," and Gavin Capps (2012) "A bourgeois reform with social justice? The contradictions of the Minerals Development Bill and black economic empowerment in the South African platinum mining industry

[268] Gavin Capps (2012) "A bourgeois reform with social justice? The contradictions of the Minerals Development Bill and black economic empowerment in the South African platinum mining industry," *Review of African Political Economy*, 39, pp. 315–333.

and the Mineral Law Amendment Act.[269] The extent of state control over mineral rights varied according to the nature of the mineral in question, the classification of land, and whether the application was to mine or prospect.[270]

Apartheid Mineral Law and Its Discontents

State intervention in the administration of minerals continued into the 1920s, and again in the early 1940s. In the 1960s, all the mining laws were consolidated into four major Acts applicable throughout the Republic of South Africa, so as to simplify and unify the exploitation of the country's riches. These were the Precious Stones Act, 73 of 1964 (hereafter referred to as the PSA), the Mining Rights Act, 20 of 1967 (hereafter referred to as the MRA), the Mining Titles Registration Act, 16 of 1967, and the Atomic Energy Act, 90 of 1967.[271] Analysing apartheid mineral policy, Gavin Capps suggests that the framework regulating mineral ownership and exploitation turned on three key distinctions which "combined to generate a highly complex and fragmented structure of mineral property in South Africa."[272] First is the legal distinction between mineral and surface rights, and how over time, an ad-hoc combination of administrative practice and legislation led to the statutory recognition of the severance of mineral rights from surface rights. Second, Capps makes the distinction between public and private categories of mineral rights ownership, which evolved in tandem with surface and mineral rights. Although "Western-legal" conceptions of individualised private property had been ideologically dominant from the earliest days of conquest, South Africa's fledgling colonial administrations were not averse to expropriating mineral resources from private landowners when it suited their strategic purposes.[273]

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[269] Elmarie Van der Schyff (2012) "South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals," *New Contree*, 64, pp. 131–153.

[270] van der Schyff (2012) *op cit*.; Capps (2012), *op cit*.

[271] Van der Schyff (2012) *op cit*., p. 148.

[272] Gavin Capps (2012) "Victim of its own success? The platinum mining industry and the apartheid mineral property system in South Africa's political transition," *Review of African Political Economy*, 39:131, p. 70.

[273] Dale (1997) op cit, pp. 15–16; F. Cawood and R. Minnitt (1998) "A historical perspective on the economics of the ownership of mineral rights," *Journal of the South African Institute of Mining and Metallurgy*, November/ December, pp. 369–376.

In the late 1960s, the principle was established that any mineral rights attached to "state land" were a national resource under public control, which would remain in government hands, even if the surface rights were later sold on. The basis was thus laid for the development of a "dual" minerals ownership system in which mineral rights could be held both by private entities (individuals, corporations) and by the state, which would receive royalties arising from their exploitation.[274] Finally, Capps explains how the public/private duality closely mapped the contours of the racial order, with its generic distinctions between the property rights of white people and black people. Capps, therefore, concludes that "private minerals ownership was the exclusive domain of whites, who enjoyed not only the full rights of mineral property law and minimal state regulation, but a range of additional measures designed to maximise the benefits of minerals exploitation." Capps's historical analysis of the framework that regulates mineral ownership and exploitation is important because it is this that challenged the new government to make amendments that seeks to promote social justice in the new dispensation – and this framework is deeply implicated in post-apartheid conceptions of mineral law.

In the late 1980s, in the years prior to end of apartheid, there were concerns from the beneficiaries of the previous regimes that an incoming African National Congress (ANC) government would adopt the radical programme outlined in the 1955 Freedom Charter. The nationalisation discourse had always been part of the ANC's strong expression of anti-colonial nationalism in South Africa and these ideas came to be more schematically articulated in the mid-1950s. The ANC's focus on nationalisation, "suggested the growing influence of the Communists in the alliance, the rising importance of Marxist-Leninist concepts and terms and, most importantly, the emergence of the theory of national democratic revolution (NDR)."[275] As such, the NDR stipulated that, "the mineral wealth beneath the soil… shall be transferred to the ownership of the people as a whole."[276] Echoing this perspective, the ANC's draft Reconstruction and Development Programme of 1994 stated that "the minerals in the ground belong to all South Africans, including future generations. Thus, we must seek the return of the mineral rights to the

[274] Capps (2012) *op cit*., p.69.

[275] Ivor Chipkin (2007) Do *South Africans Exist?* Johannesburg, Wits University Press, p. 64. Chipkin observes how the NDR's vocabulary continues to inform ANC policy statements and the day-to-day language of politicians and senior government officials.

[276] ANC, The Freedom Charter (26 June 1955). Available at www.anc.org.za/ancdocs/history/charter.html

democratic government, which should in turn, give the people control over the optimum exploitation of this important natural resource."[277] Hence, the outgoing apartheid government pre-emptively moved against the threat of nationalisation by expanding privatisation.[278] In other words, the late apartheid state sought to accelerate the pace of mineral privatisation so as to forestall nationalisation, and to limit the potential influence of a post-apartheid state over existing economic arrangements. This is important because the government of the post-apartheid dispensation did not – as argued below – do enough to undo this process; and so, in effect, the MPRDA governs an ambiguously privatised mineral regime.

Allister Sparks (1994), and Heribert Adam and Kogila Moodley (1993) document at length the political and economic pressures that led to the National Party's turn in the 1990's towards negotiations with the ANC,[279] but not so much the legal approaches undertaken at this time by the white capitalist elite to protect their wealth. The process of dismantling the system of apartheid gathered unprecedented momentum after the unbanning of the ANC and the release of Nelson Mandela in February 1990.[280] The ANC formulated its transformation policies in the context of a potential political handover of power; it developed an economic programme by which to govern, and this implied that economic and political development would overlap quite explicitly.[281]

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[277] The Freedom Charter is, though, in some instances, ambiguous and open to competing interpretation. The mechanism by which the national wealth and the heritage of the country would be restored to the people; and how the mineral beneath the soil, banks, and monopoly industry would be transferred back to the people, was not articulated. For further discussion see: Claire Ceruti (1995) "How and why the ANC's Nationalisation Policy Changed: Economic Nationalism and the Challenging State –Capital Relation, unpublished MA thesis, University of the Witwatersrand, Johannesburg, p. 18.

[278] Capps (2012) *op cit*., p. 23.

[279] See, for instance, Allister Sparks (1994) *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution*, Sandton, Struik; Heribert Adam and Kogila Moodley (1993) *The Opening of the Apartheid Mind: Options for the New South Africa*, University of California Press, Berkeley; and Neslon Mandela (1995) *Long Walk to Freedom*, South Africa, Macdonald Purnell.

[280] Rajan Harshe (1993) "Understanding Transition towards Post-Apartheid South Africa," *Economic and Political Weekly*, 28(38),

[281] Ceruti (1995) *op cit*.

In this context, the Convention for a Democratic South Africa (Codesa), held in December 1991, can be treated as a milestone in the evolution of democratic processes. The Convention constituted a process of formal negotiations between the ruling National Party and representatives of opposition political parties who all signed a declaration of intent. Arriving at a negotiated settlement was not without controversial issues pertaining to governance, the economy, and redress. For the right, "nationalisation[282] meant economic disaster and the experience of the Eastern Europe and the USSR were conclusive proof of this."[283] For the ANC, on the other hand, nationalisation initially seemed the most efficient means to redress social inequality, restructure the economy, and regulate it to meet these ends.[284] Reflecting on this period, International Relations scholar, Rajendra Harshe highlights how, to begin with, the Conservative Party (CP) led by Andre Treurnicht and Koos Van der Merwe emerged as a significant opponent to the entire process of reforms initiated by de Klerk. Members of the CP were dreading the nightmare of black domination in post-apartheid South Africa. With its support base among small farmers, white blue-collar workers, small traders, shopkeepers, the army, and the police force, the CP was desperately keen to cling on to classical structures of apartheid to defend the privileges of its sympathisers.[285]

Despite the strong opposition the Minerals Act 50 of 1991, was promulgated and came into force in January 1992.[286] The Act was considered, a product of the National Party government's policy of privatisation and an attempt to restore the common law rights of the holder.[287] Capps and Dale suggest that its principal aim was to narrow the scope of statist control and the redistribution

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[282] Nationalisation, according Dianne Bolton (1985) *Nationalisation, A Road to Socialism: The Case of Tanzania* (London: Zed Press) "first appeared in the Constitution of Mexico and its first decree of the USSR after 1917. State intervention in economic life had occurred centuries prior to these developments…. The fundamental innovation in this new attitude towards property was that the basic aim of nationalisation was to be the utilization of all or part of the means of production in the interest of society as a whole, and not individuals. The act of nationalisation would remove the means of production from private ownership, and they would, instead, become communal property." p. 2.

[283] Ceruti (1995) *op cit*., p. 4.

[284] *Ibid*.

[285] Harshe (1993) *op cit*.

[286] Proclamation 123 of Government Notice 13682 of 20 December 1991.

[287] Badenhorst (1991) *op cit*.

of mineral property in the new dispensation, with the furthering of privatisation of mineral rights through the selective deregulation of the minerals property system.[288] In practice Capps, explains that:

> This legislation provided for the disposal of state-owned mineral rights in 'white' South Africa, so releasing them for market acquisition by the mining houses; encouraged the market transfer of private rights from 'small' holders (like farmers) to the same; enhanced the protection of any mineral leases acquired in terms of previous legislation; and radically reduced overall state regulation of the industry. This would in future prevent any restructuring attempts by the new government. [289]

This is important because it suggests that a critique of current government legislation must be located within broader historical economic and political developments.

The Post-Apartheid Mineral Rights Regime

As expected, after South Africa's first democratic elections in April 1994, efforts were geared towards remedying the past mineral ownership structure which was concentrated in the hands of a few. In September 1995, the Mineral Policy Process Steering Committee, comprised of representatives of business, labour, and government was formed.[290] The Committee was chaired by Marcel Golding, chairperson of the Parliamentary Portfolio Committee on Minerals and Energy Affairs, former National Union of Mineworkers (NUM) official, and Member of Parliament at the time.[291] The mandate of the Committee was to conduct an extensive consultative process to canvass stakeholder opinion for the preparation of a new minerals and mining policy.[292] In 1995,

[288] Capps (2012) *op cit*., p. 74 and Dale (1997) op cit, pp. 15–16

[289] *Ibid*, Capps cites the DME 1998, p. 12; Smith and MacDonald (1998) *op cit*., pp. 513–515.

[290] Cawood and Minnitt (1998) *op cit*., p. 375.

[291] *Ibid*.

[292] See the Introduction to the Department of Minerals and Energy *White Paper on a Minerals and Mining Policy for South Africa General Notice 2359* (1998). This white paper was promulgated by Government Notice 2359 of 1998 in *Government Gazette* 19344 of 20 October 1998.

a discussion document on minerals and mining policy for South Africa was composed using the policy proposals received from stakeholders.[293] Cawood and Minnitt record that:

> …in the chapter on Resource Management, the discussion document made the following policy proposals amongst others, (1) Mineral rights must be returned to the state (publicly owned) and a system of state (crown) held mineral rights, which are leased to companies, be introduced, (2) The freezing or sterilising of mineral rights should be discouraged by the imposition of a mineral tax.[294]

The authors note, however how in contradiction to these statements, it was also proposed in the same document that: "the existing system of public and private ownership of minerals rights should be retained."[295]

Written submissions were received and meetings and debates with interested parties were held. The Minister of Minerals and Energy and the Cabinet ratified this document as a Green Paper on Minerals and Mining Policy for South Africa. The Green Paper was finally published, and the public was invited to respond only in February 1998.[296] The reason for its delay was the controversy around mineral ownership. After necessary amendments flowing from written submissions and heated public hearings, the Minister of Minerals and Energy ratified this document as a Draft White Paper. Further amendments were made at the request of the Cabinet Committee on Economic Affairs. On 23 September 1998, Cabinet approved the draft as a *White Paper on Minerals and Mining Policy for South Africa*. The White Paper is substantially the same as the Green document. The White Paper discussed various issues regarding the mining sector, including environmental management, regional co-operation, people issues such as mine safety, housing and living conditions, and human resource development, governance and business

[293] Cawood and Minnitt (1998) *op cit*., p. 375.

[294] *Ibid*.

[295] *Ibid*.

[296] P. J. Badenhorst (1998) "A Few Preliminary Comments on the Mineral Law Aspect of: A Green Paper on a Minerals and Mining Policy for South Africa, 1997," *Obiter*, 143, for a discussion of this Green Paper.

climate, and mineral development.[297] The White Paper acknowledged that new investors needed opportunities for access to mineral rights,[298] and that equitable access to all natural resources is required – based on economic efficiency and sustainability.[299] It also pointed to the need to provide security to investors and to allow them to exercise their rights to exploit minerals, subject to statutory requirements.[300] Here, the white paper explicitly illustrates the state's desire to attract and protect large-scale mining activities at all costs and set precedent for a mineral policy that overrides interrelated laws on heritage and the environment, as well as the welfare of local communities. Such injustice would occur regardless of that the mineral law intended "to promote economic and social benefits to local communities through a range of measures including black economic empowerment (BEE) mine-community partnerships, continued royalty payments, and social labour plans".[301]

Various other White Papers were published in respect of the mineral and petroleum industry. These include the White Paper on the Energy Policy of the Republic of South Africa[302] and the White Paper on Environmental Policy for South Africa.[303] The Draft White Paper on Integrated Pollution

[297] See the Introduction to the Department of Minerals and Energy *White Paper* (1998), *op cit*.

[298] Clause 1.1.3.1(vii), Department of Minerals and Energy *White Paper on a Minerals and Mining Policy for South Africa General Notice 2359* (1998).

[299] *Ibid*, Clause 1.1.3.2(i).

[300] *Ibid,* Clause 1.1.3.1(v).

[301] Mnwana, Sonwabile. (2015). "Between 'Locals' and 'Foreigners': Mining and rural politics of belonging in North West province, South Africa", LABOUR, Capital and Society 48:1&2, p.176

[302] This White Paper was released on 17 December 1998 in Government Notice 3007 of *Government Gazette* 19606.

[303] This White Paper was released on 15 May 1998 in Government Notice 749 of *Government Gazette* 18894.

and Waste Management for South Africa was also released.[304] Various other statutes that impact the Mining Industry also came into effect during this period.[305]

The first Mineral Development Draft Bill was published for public comment in 2000.[306] The constitutionality of this Bill was questioned, especially with regards to the omission of provisions relating to compensation where existing rights are infringed.[307] A substantially revised Mineral and Petroleum Resources Development Act (MPRDA) was approved and came into operation on 1 May 2004.[308] The MPRDA ostensibly appears to be a replacement of privately owned mineral rights with an egalitarian system of ownership;[309] when in reality, it promotes continued privatisation that is highly regulated by the government.

Mineral and Petroleum Resources Development Act, 2002: State-led Mineral Privatisation

[304] This Draft White Paper was released on 19 August 1998 in Government Notice 1686 of *Government Gazette* 19161.

[305] For a summary of these acts and their effect on the mining industry, see M.O. Dale, (1979) *A historical and comparative study on the concept and acquisition of mineral rights*. PhD thesis, University of South Africa,
pp. 1–12

[306] Government Notice 4577 of *Government Gazette* 21840 of 18 December 2000.

[307] P. J. Badenhorst and R. Malherbe (2001) "The constitutionality of the Mineral Development Draft Bill 2000 (part 1)," *TSAR*, 3, 462; P. J. Badenhorst and R. Malherbe (2001) "The constitutionality of the Mineral Development Draft Bill 2000 (part 2)," *TSAR*, 4, 765.

[308] Proclamation 25 of 2004, *Government Gazette* 26264 of 23 April 2004.

[309] P. J. Badenhorst *et al*. (2006) *Silberberg and Schoeman's The Law of Property*, 5th edition, (LexisNexis Butterworths: Durban), p. 670.

In its preamble, the Mineral[310] and Petroleum Resources Development Act states, in line with the Freedom Charter, that mineral rights[311] belong to the nation and that the minerals are the common heritage of the people of South Africa – the state is the custodian thereof.[312] A closer look at the mineral legislation promulgated after the first democratic election of 1994, reveals a shift during this period towards a quasi-nationalisation which continues to inform the ANC's policy statements, as well as some of the country's statutory law.[313]

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[310] A "mineral" is broadly defined in Chapter 1, Section 45, of the Act as "any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, in or under water or in tailings and have been formed by or subjected to a geological process, excluding water, but including sand, stone, rock, gravel and clay, as well as soil, other than topsoil." The Act distinguishes between unsevered and severed minerals. The latter referring to when mineral ownership is separated from surface ownership; also called split estate. A close analysis of the MPRDA illustrates that ownership or access to minerals in some way grants ownership to land, when the ownership of land may not necessarily afford the land owner access to the minerals.

[311] "Mineral rights" being defined as an entitlement to search for and to mine minerals. Mining permits can be allocated for the duration of about 20 to 40 years in some instances. Prospecting or mineral rights are sometimes referred to as a quasi-servitude or limited real rights and are therefore, distinguished from the ownership of the minerals as such. However, the lack of clarity about the ownership of severed minerals in the Act, can arguably be translated as that the ownership of minerals is transferred to the holder of prospecting or mining rights; that the moment the mining permit is granted to a mining corporation, the mineral intended for excavation ceases to belong to the state or the nation.

[312] Chapter 2, Section 3.

[313] What is evident is that post-1994, the ANC turned to neoliberal policies. To explain this shift, Sagie Narsiah's. (2002) "Neoliberalism and privatisation in South Africa," *GeoJournal,* (2002) 57: 3, pp. 4–7], points to what is called "tactical privatisation," which she argues was employed by the National Party government as "an exit strategy" during the 1980s to satisfy a political constituency – upon seeing the denouement of apartheid. Narsiah notes, however, other reasons such as how multilateral institutions like the World Bank brought discursive power to bear on the ANC; thus, converting the organisation to neoliberal orthodoxy. Also see: M. Kentridge (1993) "Turning the Tanker: The Economic Debate in South Africa," Centre for Policy Studies, Johannesburg; P. Bond (2000) *Elite Transition: From Apartheid to Neoliberalism in South Africa*, Pluto Press. London. Another view suggests that the ANC had no alternative, but to change; otherwise, the new ruling party would inherit huge budget deficits and a

Explaining the millennial political context, Industrial Sociologist, Claire Ceruti observes that the free market had won hegemony – ideologically and practically. This was manifest in the ANC's increasingly frequent statements that "a more pragmatic approach to the economy was required."[314] This shift in policy did not occur overnight – it was, in fact, a complex and often contradictory process, influenced by a variety of factors.[315] This complexity, with all its contradictions, is patent in South Africa's mining legislation. For example, an amended section 2 of MPRDA of 2002 provides that the 2008 Bill, "substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities in South Africa, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources," whilst, in contrast, the MPRDA is a compromised piece of legislation that places too much power in the hands of mining companies.

The MPRDA introduced a system of authorization over access to mineral rights. According to section 5(2) of this act, no person could prospect or mine for any mineral without the necessary authorization granted to them in accordance with the act. Before commencing prospecting operations, a prospecting permit or temporary prospecting permit must be obtained from a Regional Director.[316] With this system of authorisation, the state has ultimate responsibility to decide who can mine South Africa's minerals and who can benefit thereof. In this regard, the state is an administrative body that regulates privatisation.[317] This state function, created by the

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socialist program would have hastened a decline into ruin and economic isolation. Consider, D. Innes and S. Gelb (1987) "Towards a Democratic Economy in South Africa," *Third World Quarterly*, 9(2), pp. 545–583; L. Harris (1990) "Building the Mixed Economy," paper presented to ANC Seminar (Department of Economics and Planning), Harare, 29 April–2 May.

[314] Ceruti (1995) *op cit*., p. 14.

[315] *Ibid*, p. 12.

[316] Section 6(1) and Section 10 of the Minerals Act 50 of 1991.

[317] The term "privatisation" did not gain wide circulation in politics until the late 1970's and early 1980's. According to Paul Starr's (1988) "The Meaning of Privatisation," [*Yale Law and Policy Review*, 6, pp. 6–41], with the rise of conservative governments in Great Britain, the United States, and France, privatisation has come primarily to mean two things: (1) any shift of activities or functions from the state to the private sector; and, more specifically, (2) any shift of the production of goods and services from

framework of the MPRDA, overrides[318] the protection of heritage by repressing all other possible land uses (disturbing graves). The role of the state also raises key questions about the inadequacies found in the Act's provisions relating to graves.

Provisions in Relation to Graves

The MPRDA does not make explicit provision for dealing with controversies around graves and gravesite relocations but it does create a set of advisory councils that could make recommendations on the issues, and that could be used to help regulate controversies. However, the fundamental tension in the functioning of the MPRDA and the NHRA, is that the Department of Mineral

public to private. Starr explains that the first, broader definition, of privatisation includes all reductions in the regulatory and spending activity of the state. The second definition of privatisation excludes deregulation and spending cuts except when they result in a shift from public to private in the production of goods and services. I employ part of Paul Starr's second definition which leaves open the possibility that privatisation may not actually result in less government regulation. In fact, Starr admits that: "regulation may be unexpectedly increased" p.11. Therefore, privatisation means increased intervention by the government with the purpose of growing the role of the private sector in the ownership of what is legislatively provided for as a national asset.

[318] The precedence of capital accumulation is evident in many cases of grave relocation. In 2003, for example, human bones were uncovered during construction activities at Prestwich Place in Green Point, Cape Town. The University of Cape Town Technical Report on Archaeological Excavations at Prestwich Place, Green Point, 2010, recorded that they found a graveyard with 343 individuals who are believed to have been Christian, Muslim, African, European, and Asians. Reflecting on this case, Jo-Anne Duggan (2010) "Prestwich Place Memorial: Human Remains" (www.archivalplatform.org/blog/entry/prestwich_place/), observed how despite an outcry from academics and the public to preserve the space for commemoration, apartments and an upmarket coffee shop were built in preparation for the 2010 FIFA World Cup. In consolation, a Prestwich Memorial centre was designed and erected adjacent to the coffee shop. Similarly, in 2005, in Chicago in the United States (USA), families made submissions to the Supreme Court of Illinois to challenge in vain, the relocation of nearly 15,000 graves that date from as early as 1849. Here, the graves had to make way for the construction of a new runway at O'Hare Airport; see E. A. Torriero and Virginia Groark (2005) "Cemetery at center of O'Hare battlefield: Fight goes on to keep 1,300 graves at site" (http://articles.chicagotribune.com/2005-11-03/news/0511030208_1_active-cemetery-moving-graves).

Resources (DMR) makes the final decisions about mining projects without thoroughly establishing the heritage impacts and the politics thereof effected by the mining developments; whereas, SAHRA – established in terms of the NHRA – is simply, a commenting body on issues relating to graves.

In the MPRDA's requirements and procedure related to acquiring exploration or mining rights the mine should: show adequate financial resources and technical ability to conduct the proposed mining operations optimally; demonstrate that mining will not result in unacceptable pollution, ecological degradation, or damage to the environment; provide proof that the applicant has provided financially or otherwise for a prescribed social and labour plan; and, profess the ability to comply with the relevant provisions of the Mine Health and Safety Act.[319] Notably, the problem lies with the fact that the DMR merely assesses mining and prospecting applications for the purpose of legal routine,[320] but does not put in place effective mechanisms to ensure compliance.

Further problems lie with the excessive power vested in the Minister to execute decisions relating to mining permits.[321] In an effort to minimize the Minister's powers, section 57 of the Act proposes the establishment of a Ministerial Advisory Council. The latter comprises of: The Director-General (the chairperson); the Chief Inspector; three persons representing relevant state departments; a Regional Manager; three persons representing organized business; and. three persons representing organized labour – all of whom are appointed by the Minister. The role of the Ministerial Advisory Council is, according to section 58, to advise the Minister on: the sustainable development of the nation's mineral resources; and, the growth and transformation of the minerals and mining industry. Additionally, the Minister has the power to remove any member of the Council from office. Essentially, such a structure means that the Council can influence the Minister's decisions; the ultimate decision-making power, however, lies with the Minister.

The Act also proposes that the Minister can initiate, promote, or encourage with the advisory contribution of the board, the beneficiation of minerals and petroleum resources in the Republic. The Minister also reserves a right to periodically invite applications by notice in the *Government*

[319] Mineral and Petroleum Resources Development Act, 2002.

[320] Heritage consultancy companies have mastered the processes. and therefore maneuver the mining and heritage legislation on behalf of mining houses (as further discussed in the following chapter).

[321] The implications of this are discussed in detail in the following chapter.

Gazette. According to the Act, this invitation process will ensure coordinated quality approvals by the Department that meaningfully contribute towards the fulfillment of the objects of the Act. In addition, it is suggested that the invitation strategy will bring about certainty and transparency, and further enhance optimal development of the nation's mineral and petroleum resources. It can be argued, however, that the calls for invitations for application for mining permits creates potential for the abuse of ministerial powers and corruption. For, what all this means is that the Minister can award the mineral rights to whomever they desire and there is always a possibility that periodical application invitations by notice in the *Gazette* are a mere formality, when the decision about who will mine has already been finalized behind closed doors. This is not something which can easily be proved – but the possibility that such things happen is a real one. For instance, the National Union of Mineworkers (NUM) accused Eskom of unfairly awarding the politically-connected Gupta family a coal supply contract to one of its power stations.[322] This followed the power utility's decision not to renew a 40-year contract with Exxaro Resources, which expired at the end of 2015. While Eskom claims the company failed to meet targets, the union believes the contract was terminated to enable a company being bought by the Guptas could be appointed.[323]

One of the cases that demonstrate the inefficacy of the minister-advisory board system of issuing permits, as provided in the Act, is the Plat-Reef Resources (Plat-Reef)[324] mine application of 2013 and 2014. The case shows how the unclear administrative positions laid out in the Act are open to abuse – and how the advisory bodies invest power in mining companies. Plat-Reef was granted a mining permit to extract platinum in the Mokopane belt, north of Limpopo Province, regardless of a public outcry by the community and its civic representative, the Mokopane Interested and Affected Communities Committee (MIACC). This interest group advocated on behalf of the residents of different villages in the area and solicited advice and letters of objection from academics and lawyers on behalf of the community.[325] Some of the concerns raised by

[322] Roy Cokayne, Numsa Media Monitor in *Business Report*, 21 November 2016.

[323] ENCA News (2016) "Guptas given unfair advantage: NUM,"1 February 2016,www.enca.com/south-africa/we-are-not-influenced-gupta-connections-eskom

[324] A subsidiary of Ivan Hoe based in Canada.

[325] This raises critical questions about the inadequacies of the Act's conceptualisation of consultation provided for under Chapter 4, Section 10.

MIACC[326] in relation to the final Heritage Impact Assessment were that: the assessors demonstrated very little understanding of the landscape that they traversed; they failed to provide any context for the archaeology that they report on; they did not present or recognise hydrological features of the landscape; that Digby Well's demonstrated very little understanding of the history of the Mokopane, they did not recognise the communities' valued history of graves which the mine had proposed to relocate; lastly, and importantly, the HIA/EIA did not suggest an area of least impact – it assumed a predefined impact zone; the only options appear to be the location of the tailings.

Plat-Reef responded to the letter intended for MIACC and the Department of Minerals Resources on 13 May 2014. The mine's judgement read as follows:

> certain of the (criteria) on which MIACC bases its objection are so vague and devoid of substance that a legally valid objection cannot be found…. For these reasons, we trust that the Department of Mineral Resources and the Limpopo Department of Economic Development, Environment and Tourism will not succumb to the unfounded and opportunistic demands for written undertakings requested by MIACC.

A few points were singled out by the mine but two of these are most relevant here. The mine recorded that two of MIACC's main grounds of objection may be summarised as follows: the persons conducting the HIA ("the specialists") have a "superficial" understanding of the issues they were assessing and failed to take into account the proper (historical) context of the archaeological and other resources they assessed; and, the specialists "failed" to recognise that the presence of graves "represent the presence of groups and give clues to the timing of movements of people" which are "intimately tied up in the history and the politics of the chiefdoms as well as the politics of the apartheid government."

The mine's response with regards to the first point was that:

[326] The letters were consolidated into one document of objection drafted by the Lawyers for Human Rights (LHR) on behalf of the Mokopane Interested and Affected Communities Committee (MIACC), 5 May 2014.

> the above grounds are, with respect, extremely vague. Firstly, it is no good to complain about the specialists' alleged "superficial" treatment of the physical and historical landscape without then identifying in practical terms which historical and physical landscape issues were dealt with insufficiently,[327] including the nature of the insufficiency and an indication as to what would be sufficient. In this manner, MIACC seeks to measure the specialists against an indefinite, unknowable and ever-shifting standard."

The response from the mine regarding graves was that:

> the fact that graves may… represent the presence of groups and give clues to the timing of movements of people… which are intimately tied up in the history and the politics of the chiefdoms as well as the politics of the apartheid government, is meaningless without specific examples of instances where the specialists have incorrectly dismissed a specific grave as having a negligible heritage value.[328] In some sense, every single grave in South Africa represents the presence of groups, gives clues to the timing of movements of people, and is intimately tied up with its history and politics. That does not render every grave in South Africa a part of the national estate.[329]

[327] This reply did not seem to take into consideration that the Lawyers for Human Rights as representatives of MIACC (as interested and affected persons) only have 30 days to submit their comments after the notice of an application according to the MPRDA, Chapter 4, Section 10. Moreover, it is the obligation of the mine to identify in practical terms which historical and physical landscape issues will be affected by their mining activities.

[328] It is worth noting that Plat-Reef had indicated that graves will be relocated, but they had not indicated when, or the number of these, or to where they will be relocated. Neither did they indicate how old these graves are, nor whether they will require a local, provincial, or national permit for relocations. Such considerations are, however, part of the requirement for a mining permit to be granted.

[329] The very fact that not every grave in South Africa is treated a national heritage resource is one of the principal problems with the South Africa legislation protecting graves. This statement from Plat-Reef Resources, is a clear case of a potential loophole which leaves room for exploitation. It means that those graves that are not of national significance can be violated. In essence, they are rendered insignificant.

In its closing remarks, the letter states that:

> …the vague nature of these criticisms levelled against the specialists, is exceptionally difficult to comment on meaningfully. However, as we shall demonstrate below, it is clear from the text of the HIA that the specialists have, in fact, considered these issues to the extent possible in making the findings and recommendations that they did.[330]

A month later, Plat-Reef Resources received a mining permit from the Department of Minerals Resources. The prompt bestowing of the mining permit irrespective of the concerns that the mine's Scoping Report, Environmental Impact Assessment (EIA), and the Heritage Impact Assessment (HIA) were not well outlined, would give the impression that the decision to grant the mining permit to Plat-Reef Resources mine was taken well ahead of time and that the mine's submission of the required documentation was arguably a formality.[331] The permit was granted a few days after Ngoako Ramathlodi was appointed as the Minister of Minerals and Resources, leading to questions about how much time the new Minister had to deliberate on his decision. This case illustrates how loopholes in the legislation can easily be exploited by mining houses. It also demonstrates how interested and affected parties are not supported financially to raise their concerns regarding the mine's reports. Neither is the time allocated for public comments adequate to assemble a compelling case against any mine. If anything, the mine is in a better position to defend its mining proposal and this is aided by the gaps in South Africa's mineral law. In relation to graves, one of the major weaknesses of the Act is that the process of acquiring a prospecting or

[330] This is an undertone that demonstrates problems as to how consultation is defined in the mineral legislation. The mine seems to be of the view that community commentary is enough to demonstrate that affected and interested parties were consulted. Whether this consultation is substantive or not bears no significance.

[331] Ngoako Ramathlodi was sworn-in as the Minister of Mineral Resources on 26 May 2014, and a 30-years long mining permit was granted a few days after. See: Leandi Kolver (2014) "DMR grants Ivanhoe Platreef mining rights,"www.miningweekly.com/article/ dmr-grants-ivanhoe-platreef-mining-right-2014-06-02. The permit was issued despite contestations from residents who were not satisfied by the mines divide-and-rule tactics, their proposed BEE and royalty deal, and proposed social-labour plan; as well as the mining of platinum in an area that has not been paleontologically or archaeologically researched.

mining permit requires the involvement of various government departments.[332] Applicants have to comply, for instance, with the relevant provisions of the National Water Act, 1998,[333] Chapter 5 of the National Environmental Management Act (NEMA), 1998,[334] as well as the Health and Safety Act, 1996, and the NHRA. The role of the various departments complicates the processes. For example, the Minister of Mineral Resources is recognised as the competent authority to implement mine environmental management in terms of the NEMA, whereas the Minister of Environmental Affairs and Tourism is the competent authority to develop, review, and amend legislation, regulations, and policies relating to mine environmental management. Processes were ostensibly underway to facilitate intergovernmental cooperation between departments and to ensure that there is further refinement of both pieces of legislation to prevent the duplication of mandates. This, however, has not actually happened, and thus mining corporations are easily able to exploit the lack of communication between departments.

The fundamental issue here is that the MPRDA was drafted independently of the Heritage Act and makes no mention of it. The MPRDA has structures that could respond to cultural claims – but they are seriously flawed. Therefore, when a claim is made about a grave site on mining land

[332] This is discussed in greater detail in the next chapter.

[333] This Act regulates the use of water, also for mining, and the protection of the resource. In addition, it supports the "Polluter Pays Principle;" mines producing, allowing, or causing pollution – including acid mine draining (AMD) – should be held liable for the cost of cleaning-up and legal enforcement. Victor Munnik, (2010) records, however, in his case study of *The Social and Environmental Consequences of Coal Mining in South Africa*, Mvula Trust, that in practice it has not been easy to enforce this legislation, partly due to capacity constraints at the Department of Water Affairs and in the DME – which has only 79 inspectors for the whole country to deal with prospecting and mining applications, as well as infringements.

[334] This Act is enforced by the Department of Environmental Affairs and Tourism (DEAT) and requires Environmental Impact Assessments (EIAs) and Environmental Management Programmes (EMPs) for activities that affect the environment. In line with the NWA, this Act also requires prevention or rectification of pollution, and if the person responsible fails to do this, DEAT can recover the costs for clean-up from the polluter. Once more Victor Munnik, (2010) records, however, in his case study of The Social and Environmental Consequences of Coal Mining in South Africa, Mvula Trust, suggests that enforcement and implementation suffer from the large degree of intergovernmental cooperation required for EIA and EMP approval, and the lack of capacity.

there is no self-evident priority between the two laws. Instead there is a conflict of principles: one entrenching private ownership and the other collective heritage – and a conflict of processes (who gets to decide what is done) arises. This is the framework within which *actual* contestation takes place, and *actual* challenges are realized. It is within this frame that the case-study at the centre of this thesis plays itself out. This understanding of the existing legal framework and their inadequacies is the necessary beginning for a deeper analysis of the political and sociological issues at stake.

Conclusion

In presenting a historical overview of the mineral legislation in South Africa two key problems with the Mineral and Petroleum Resources Development Act, 2003, have been advanced. The first problem is that the Act is vague with regards to the question about ownership of minerals in the country. The second problem is that there are inadequacies found in the Act's provisions and those related to graves. Moreover, it has been argued that post-1994 the ANC adopted a mineral policy with a framework conceptualised as state ownership; when in reality, there was a paradigm shift towards the state being a subcontractor. As the custodian of minerals, the state is able to determine who can mine and benefit from South Africa's minerals. The critical question here is what is the significance of a state-granted prospecting or mining permit? A close reading of the legislation illustrates that a permit holder is able to determine the land use of an area,[335] and this is one of the reasons why there are contestations over grave relocations. The permit holder who acquires ownership rights to what is underneath the soil and therefore, what happens top soil, is regression to the Roman Dutch law principle of absolute ownership; only that in the present-day the state authorises absolute ownership for the period of the agreed lease.

What this chapter does is to provide another, alternative, more critical, framework for explaining why graves are subject to national contestation. And what is at stake here will become more evident in the chapters that follow. The most critical issue that emanates from the South African mineral legislation is that the law privatises minerals (tied to land) to multinational

[335] This is regardless of the fact that Section 5 (1) of the MPRDA classifies prospecting rights, mining rights, exploration rights, and production rights as limited real rights in respect to the minerals, petroleum, and land to which such rights relate.

corporations. This is problematic essentially because questions around ownership and the multi-usage of land in South Africa have not yet been resolved – as noted by Cawood and Minnitt South African mineral laws "constantly fail to recognise the rights of indigenous people who occupied the land long before Europeans arrived in South Africa."[336] Adding to this limitation, and perhaps one of the reasons as to why land reform has failed in South Africa, is the recognition given to, and protection of, the old order mineral rights by the post-1994 mineral laws as well as the Constitution.[337] During the colonial, segregationist, and apartheid eras, land was generally categorized into four main types: Private; State; Alienated State; and, Trust land.[338] Laws passed during the nineteenth and the twentieth century gave each category of land a unique procedure by which minerals and surface rights are acquired. The ANC-led government inherited this highly complex system.

Prior to the country's transition, the Minerals Act 50 of 1991, was passed with the intent of safeguarding the interest of those conservative groups who wanted to continue to benefit from apartheid structures. Therefore, the Act was framed to enable steps towards a system of exclusive private mineral rights ownership. The latter would be pursued through the Codesa negotiations which came to recognise these rights in the new democratic dispensation. This historical pact presents challenges and contradictions: it vows to redress past injustices yet protects old property rights – which are endorsed by the Constitution. Specifically, pertaining to the context of this thesis, it made it possible for mines to motivate for the relocation of graves belonging to local communities – and *this* is the fundamental reason as to why contestations arise. The dynamics involved here become clearer once dissected in relation to the case study presented in the next chapter.

[336] Cawood and Minnitt (1998) *op cit*., p. 374.

[337] This is not to exclude the import of other issues that pose a challenge to land restitution in South Africa: such as incompetency, lack of resources, corruption. and policy challenges.

[338] Cawood and Minnitt (1998) *op cit*., p. 372.

CHAPTER 4

"THE BARRICADED ANCESTORS"

> "…. go through today but ask the mine for permission to enter the next time you visit."[339]

Some 25km drive from Witbank, less than 10km from the N12 national road, is Glencore's Tweefontein Colliery Complex. From Johannesburg to the N12, the landscape changes between Delmas and Kendal towns, exposing a thick layer of smog that continues over large parts of the Highveld.[340] Thousands of hectares of previously fertile land and functioning ecosystems lie destroyed by coal mining; some "rehabilitated" land lies unused because it can never again support productive crop-growing.[341] Just after the N12 exit to the left of Road 555 is an off-road driveway leading to Glencore's offices, where a large boom-gate is controlled by security guards who regulate and inspect every vehicle that wishes to enter the company's premises. A high wired fence surrounds these premises and barricades the graves that are located where the proposed open-cast mine will operate. The mine's guards drive around, on patrol, in *bakkies* on the lookout for unauthorised activities and suspicious characters. The security guards are tasked to demand entrance permits from visitors, to issue warnings to the uninvited, and if necessary, to escort people off the fenced property. In effect, the ancestors have found themselves barricaded. And it is this

[339] On 13 May 2015, Mqcina, the liaison between Professional Heritage and Grave Solutions' and the community, proposed an informal visit to the Tweefontein grave site to assess the area. From the entrance, we [Mr Mqcina, Vusi Kumalo and I] were escorted by a mine patrol vehicle. After being observed for some time, we were eventually stopped and instructed to produce an entrance permit from the mine. When we could not produce the required permit, we were instructed to bring it on our next visit. It was evident during Mqcina's negotiation with the mine guards that had it not been for his diplomacy and elderly status, we could have been escorted away from the mining premises.

[340] See, for example, Figure 11 in the appendix.

[341] For details on the impact of coal mining see: "In pictures: What coal is doing to the Mpumalanga Highveld," http://cer.org.za/news/in-pictures-what-coal-is-doing-to-the-mpumalanga-highveld

state of affairs, of "The Barricaded Ancestors," that stands as an exemplar of what this thesis terms "lawful exclusion".[342]

To understand this notion of "lawful exclusion" it is necessary, in what follows, to reveal the full implications of Glencore and the Professional Grave Solutions' exploitation and disregard of the provisions in both the NHRA and the MPRDA concerning the process of grave relocation. In particular, focus falls on: how the administrative functions within bureaucratic systems – such as applications and consultations – become a formality; and how the lack of clarity around consultation and participation in the two sets of legislation are exploited by the mine. For it is here that new forms of exclusion have been created within the confines of the law in the post-apartheid era.

To produce a fair and comprehensive evaluation, I endeavoured to seek and draw on the experience of the mine's employees involved in the grave relocations project. In mid-2013, Glenore manager of the Tweefontein relocations project, Jan Combrink and director of Professional Grave Solutions (PGS), Henk Steyn agreed to be interviewed and that I interview the relocations finance personnel, as well as to access the mine's own archives. At that point, Glencore undertook to provide related documents such as maps, reports, title-deeds, and agreements that may be useful for this research project. The manager of the relocations projects also agreed to participate to facilitate a working relationship with their heritage consultants – PGS. The expectation was to get Glencore's firsthand account of their experience with the mineral and heritage laws, as well as their explanation as to why there are contestations over grave relocations. However, part of the agreement with Glencore was for the research interviews with the grave owners to be suspended until such a time as the mine had completed their consultation with all the families; the concern being that any other interviews with the affected families might create apprehensiveness and negatively impact on the negotiations. Thus, the understanding was that there should be a holding period prior to the agreement taking effect. A year-and-a-half passed without forward movement on the part of the mine, and despite many follow-ups the agreement, in effect, fell away. Consequently, the following discussion is centered on the various public documents obtained from the South African Heritage Resources Agency's digital archive. First,

[342] Discussed in Chapter 1

though, it is necessary to draw out the nature, operations, and scope of Glencore as a powerful Anglo-Swiss multi-national mining company in South Africa.

Glencore-Xstrata: A Merger of Two Coal Producing Giants

In February 2012, Glencore International PLC, [343] agreed to buy Xstrata PLC for US$62 billion in shares.[344] Both companies completed a long-awaited merger on 2 May 2013.[345] According to a mining analyst John Meyer, the merger of these two companies would position them as the fourth-largest commodities trader in the world.[346] This was anticipated to be one of the biggest mining takeovers, the fifth-largest in the history of the natural resources sector; ranking alongside the early oil industry mega-mergers.[347] A Glencore-Xstrata representative mentioned during an interview with the *Business Day Live* that the acquisition of Xstrata provides a "step towards change in marketing scale and profitability," [348] and that the combination of Glencore and Xstrata would enable them to "capture the value at every stage of the supply chain from sourcing raw materials

[343] Glencore is an acronym of Global Energy Commodity Resources.

[344] Firat Kayakiran and Jesse Riseborough, "Glencore Agrees to Buy Xstrata for $62B in Shares," *Bloomberg Business*, 7 February 2012.

[345] Glencore International Plc and Xstrata Plc became Glencore-Xstrata, and then on 20 May 2014 changed name back to Glencore plc. At the time of the merger, both Glencore and Xstrata based their financial activities in Switzerland for tax purposes; Xstrata's corporate offices are in London and Glencore's in Jersey with at least fifty offices in forty countries.

[346] Phillip Inman, "Five reasons Glencore/Xstrata mega-merger is important," *Guardian*, 10 September 2012, www.theguardian.com/commentisfree/2012/sep/10/glencore-xstrata-mega-merger Inman predicted that the merged company would be the No. 1 producer of coal and zinc and the biggest independent producer of copper within four years. This was a cause of concern for the European Union; the company could become so powerful that its trading policies could unduly influence the price of basic metals. Xstrata had a huge investment policy, with plans to open new mines around the world (from Peru to Namibia) and to increase production by 50 per cent. However, this was not the case.

[347] Javier Blas, "Glencore finishes takeover of Xstrata," www.ft.com/cms/s/0/9d355d82-b31a-11e2-95b3-00144feabdc0.html#axzz3zteLA1wo ; "Xstrata gives cautious blessing to $33 billion Glencore bid," Reuters; "Commodities trader Glencore sweetens offer for proposed $80 billion merger with Xstrata," *Star Tribune*, 7 September 2012.

[348] Dated, 9 March 2014.

deep underground to delivering products to an international customer base."[349] Phillip Inman explains in his newspaper article on "Why Glencore-Xstrata Merged," that this "financial model is employed by both companies because they get to enjoy the best of both worlds favored by hedge funds and a growing number of global businesses."[350]

Prior to this merger, Glencore is reported to have served as a marketing partner for Xstrata, with some of Glencore's executive officers serving on the board of Xstrata.[351] In 2014, after the merger, Glencore was ranked tenth in the *Fortune Global 500* list of the world's largest companies; being the world's third-largest family business.[352] Even before this, Glencore was one of the world's leading integrated producers and marketers of commodities; for many years being the largest company in Switzerland. Marc Rich & Company AG found Glencore; Rich, a notorious trader, who was later charged with tax evasion and illegal business dealings with Iran in the United States sold Glencore to Glencore International in 1993.[353] Glencore's partner Xstrata had a longer history, being founded in the early 1920s and widely-known as one of the world's major producers and exporters of thermal coal. At the time of merger, Xstrata had operations in 19 countries across Africa, Asia, Australia, and Europe.[354] In 2011, Xstrata was listed as the 16th-largest company on the London Stock Exchange.[355] Under Glencore plc, Xstrata's operations became classified into six categories, one being coal. Glencore's coal operations include 30 mines in four countries (Australia, South Africa, Colombia, and Canada), being headquartered in Sydney, Australia.[356]

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[349] Inman, *op cit.*

[350] *Ibid*.

[351] Peter Koenig, "Secretive Swiss trader links City to Iraq oil scam," *Sunday Times* (London), 25 September 2005; Alex Schärer, "Die Erben des Marc Rich," *WochenZeitung*, 13 December 2001.

[352] Michael Snyder, "Is Glencore The Next Lehman? The World's Largest Commodities Trading Company Is Toast," http://theeconomiccollapseblog.com/archives/is-glencore-the-next-lehman-the-worlds-largest-commodities-trading-company-is-toast

[353] Glencore was founded in 1974.

[354] Glencore-Xstrata, 8 February 2013, "Merger & Acquisition Project: Glencore and Xtrata Creating Strong Relationships" https://www.slideshare.net/kapishkaushal/glencore-xstrata

[355] "FTSE All-Share Index Ranking," stockchallenge.co.uk

[356] *Ibid*.

With respect to coal operations, Jana Marais recorded that "Glencore remains bullish on the outlook for coal, despite its forecasts that the market will remain oversupplied in the near term;" the company's rational being that "coal remains the prime choice to fuel economic growth in Asia… and that it remains the lowest cost fuel source for industrialising economies."[357] As a result, two of Glencore's seven major growth projects have been coal projects in South Africa.[358] One of which is the Tweefontein complex which was to be injected with a $1.1bn expansion of existing operations to bring about a projected production of seven million tons of coal a year.[359] It was recognised that to meet this target, the coal deposits on the Tweefontein farm would require an open cast mining method;[360] the Tweefontein Optimisation Project (TOP), a predominantly opencast operation, was proposed to mine the rich pillar reserves that were left behind from discontinued underground workings. By 2014 the first two of a projected total of seven open pit

[357] Jana Marais, "Glencore Xstrata mining merger produces $2.4bn in synergies," *Business Day Live*, 9 March 2014, www.bdlive.co.za/business/mining/2014/03/09/glencore-xstrata-mining-merger-produces-2.4bn-in-synergies

[358] *Ibid*.

[359] *Ibid*.

[360] Opencast, open-pit or open-cut mining is a surface mining technique of extracting rock or minerals from the earth by their removal from an open pit or borrow. This form of mining differs from extractive methods that require tunnelling into the earth. Although there is no consensus about when this mining method was first used in South Africa, it is commonly accepted that it began in the 1970s. Opencast is employed when the deposits of commercially useful minerals or rock are found near the surface; that is, where the overburden (surface material covering the valuable deposit) is relatively thin or the material of interest is structurally unsuitable for tunnelling (as would be the case for sand, cinder, and gravel). For minerals that occur deep below the surface – where the overburden is thick, or the mineral occurs as veins in hard rock – underground mining methods extract the valued material. Opencast mines are typically enlarged until either the mineral resource is exhausted, or an increasing ratio of overburden to ore makes further mining uneconomic. When this occurs, exhausted mines are sometimes converted to landfills for disposal of solid wastes. However, some form of water control is usually required to keep the mine pit from becoming a lake if the mine is situated in a climate of considerable precipitation or if any layers of the pit forming the mine border productive aquifers. See: Mine Engineer Community, 2000, *Open Pit Surface Mine*, accessed 19 December 2011, http://www.mine-engineer.com/mining/open_pit.htm

operations were already producing enough coal to make the site Glencore's second-largest coal operation.[361]

Mining, which began at Tweefontein at the turn of the nineteenth century, was planned to continue for over two decades over an area of 113 km^2.[362] It is, however, worth noting from the 2016 reports that in 2015, "Glencore placed its optimum coal unit in business rescue proceedings, a form of bankruptcy;"[363] this is "after Eskom fined it under the terms of a contract to supply the Hendrina power plant and refused to negotiate over a price of R150 per metric ton specified in a contract that runs until 2018."[364] As a result, the coal unit was sold to Tegeta Exploration & Resources (Tegeta) for R2.15bn.[365] Tegeta is company which was controlled by the politically connected Gupta family through Oakbay Investments and a son of former President Jacob Zuma, Duduzane Zuma. The Gupta family was for some time accused of wielding enormous political influence in South Africa, with critics (the media and opposition parties) alleging that it is trying to "capture the state" to advance its business interests.[366] The allegations were confirmed in the November 2016, "State Capture Report," documented by the former public prosecutor, Thuli Mandonsela. The report documented the former president's authorisation of the use of state entities and resources for personal enrichment.[367] For this reason a judicial commission of inquiry to

[361] Martin Creamer, "Glencore's new low-cost Tweefontein coal mine coming in below budget," www.miningweekly.com/article/glencores-new-low-cost-tweefontein-coal-mine-coming-in-below-budget-2014-11-28

[362] *Ibid*. This would remain to be seen given the proposed talks about a *just transition* from coal mining and burning to renewable energy by the government. The transition is proposed to take place in line with the global trend which has abandoned fossil-based economy for green or low carbon industries. See for more details, The groundwork Report. (2017). The Destruction of the Highveld: Part 2: Burning Coal, Pietermaritzburg: Arrow Print

[363] Franz Wild, Antony Sguazzin, and Paul Burkhardt, "Glencore held 'gun to our head' over coal mine – Eskom CEO," Bloomberg, http://today.moneyweb.co.za/article?id=564019#.Vuwvdfl97IU

[364] *Ibid*.

[365] *Ibid*.

[366] Details can be read in P, Jacques. (2017). The President's Keepers, Cape Town: Uitgewers publishers

[367] Public Protector South Africa. 2016. State of Capture. [Online] Available: http://cdn.24.co.za/files/Cms/General/d/4666/3f63a8b78d2b495d88f10ed060997f76.pdf.

investigate allegations of state capture, corruption and fraud in the public sector, including organs of state begun in September 2018. One of the implicated persons in the report is the former Minster of Mineral Resources, Mosebenzi Zwane. [368]

Current revelations show that Mosebenzi Zwane "traveled to Switzerland to meet Glencore's Chief Executive Officer, Ivan Glasenberg to help advance the coal deal- in what he said was an attempt to save jobs."[369] This, once more, reveals inadequacies concerning the mineral legislation in that it grants absolute decision-making powers to the minister. As the sole decision-maker, the current revelations in the report support that the minister succumbed to bribery and corruption. Moreover, there are legitimate questions to be posed related to the qualifications needed and process followed to become a minister. In South Africa, executive authority vests with the President as the head of state to appoint, as well as dismiss, ministers and deputy ministers, and to assign their powers and functions. The then Minister of Mineral Resources, Zwane- was a relatively unknown figure; his name featured in daily reports as an associate of the rich and politically influential Gupta family, as well as President Jacob Zuma.[370] Zwane succeeded Ngoako Ramathlodi's abbreviated term, when he was sworn as the new minister as of Mineral Resources

[368] Minister Zwane was born in Vrede in the Eastern Free State and became involved in politics in the early 1980s as a member of the Thembelihle Youth Congress. Zwane obtained his Secondary Teacher's Diploma from the South African Teachers College in Pretoria, as well as a certificate in Executive Leadership Municipal Development from the University of Pretoria. He taught at a farm school and rose through the ranks of the ANCs Frankfort region to service on its executive in the early 1990s. Zwane eventually served as a councillor on the Phumelela Local Municipality and became executive mayor of the Thabo Mofutsanyana District Municipality in 2006. See: *The Rand Daily Mail*, "New mining minister Mosebenzi Zwane – profile of a mystery man," 23 September 2015; the official South African Government Leaders, www.gov.za/leaders/mosebenzi-joseph-zwane-mr

[369] Wild *et al*., *op cit*.

[370] Franz Wild, "Guptas have business link to Minister of Mineral Resources Mosebenzi Zwane," *Times Live*, 19 February 2016, www.timeslive.co.za/politics/2016/02/19/Guptas-have-business-link-to-Minister-of-Mineral-Resources-Mosebenzi-Zwane

in 23 September 2015. Many reports suggest that Zuma replaced Ramathlodi because of his shareholder status in the platinum industry, yielding then to a conflict of interest.[371]

Minister Zwane's appointment also came at a very critical period as South Africa faced challenges in relation to electricity shortages that resulted in power cuts over 2014 and 2015. The Electricity Supply Commission (Eskom) as the major producer and distributor of electricity provides over 95 per cent of the country's energy usage.[372] The 1980s reports revealed that Eskom delayed constructing three coal-fired power stations, as there was an excess of generation capacity at the time.[373] Following the demise of apartheid in the 1990s, the government attempted to deregulate the electricity supply industry through inviting the private sector to build new power stations, so to meet rapidly growing demand for electricity. And consequently, Eskom was, at this time, prevented from building new power stations or from strengthening the transmission network.[374] In the main, the transmission network delivers power from Mpumalanga (as this is where the majority of power stations are located) to other parts of the country. With no bidders coming forward to construct new power stations, there was effectively no investment into new generation plants during the early 1990s; eventually, this resulted in the on-going power shortages since the 2000s. Prior to this, in 1998, the Department of Minerals and Energy had released a detailed energy review in which it explicitly warned that unless "timely steps were taken to ensure that demand does not exceed available supply capacity, generating capacity would reach its limit by 2007."[375]

Any such timely steps where hindered by the debate over whether Eskom should remain a parastatal or be privatised,[376] but something had to be done and it was resolved that Eskom had to

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[371] Craig Mckune and Stefaans Brümmer, "Mining minister's platinum shares: A R20m 'conflict of interest,'" *Mail and Guardian*, 27 June 2014, http://mg.co.za/article/2014-06-26-mining-ministers-platinum-shares-a-r20m-conflict-of-interest

[372] Eskom webpage, www.eskom.co.za/Pages/Landing.aspx

[373] *Mail & Guardian*, "Zille: Govt chose guns over power stations," 25 January 2008, mg.co.za/article/2008-01-25-zille-govt-chose-guns-over-power-stations

[374] *Ibid*.

[375] *Ibid*.

[376] *Africa Business Review*, "Four reasons not to privatise ESKOM," 17 May 2015, www.africanbusinessreview.co.za/leadership/1940/Four-reasons-not-to-privatise-ESKOM

embark on building new coal-fired power stations. In fact, Eskom's reliance on coal-fired power stations is huge: they produce approximately 90 per cent of its electricity,[377] using over 90 million tons of coal per annum.[378] So, the construction of new power stations increases yet further the demand for coal (even though coal consumption is poised to be hit by the global battle against pollution and for renewable energy sources). Increased coal demand from Eskom heightens supply competition within mining houses and places the Minister of Mineral Resources with key decision-making power concerning who can mine and fulfil consumption demands. In this context, the question of ancestral graves seems of relatively minor import.

Your Graves, Our Land: Business as Usual

The presence of graves on the Tweefontein, Klipplaats, and Boschmansfontein farms has not halted the mine's normal execution of operations. Those graves whose owners the mine is still in negotiations with, [379] were during the site-visit already enclosed with a fence and in some areas drilling machines had started to dig in search of coal seams.[380] Seeing that the graves were fenced prior to completing the consultation process, I asked Henk Steyn[381] director of Professional Grave Solutions and a mediator between the mine and the community, whether PGS requests for permission to relocate or simply instructs the families during the consultation process. In response, Steyn said:

> We don't force anyone to relocate a grave. If the family refuses – you can't force them. Mines can mine around the grave. It costs them a lot of money. It is not the best outcome. You've been around a coal mine; it is not conducive to have people walking around, especially in that area. So, people are sometimes relieved when you tell them that we will relocate your grave because it is difficult for them to get in

[377] www.eskom.co.za/AboutElectricity/ElectricityTechnologies/Pages/Understanding_Electricity.aspx

[378] *Ibid*.

[379] See Appendix 1.4 concerning Glencore-Xstrata claims to ownership of the Tweefontein farm.

[380] See Figure 1.5 in the Appendix.

[381] This is a pseudonym.

> there. There is no taxi that's going to the mine. It's dangerous and they must arrange beforehand with the mine to access their graves.[382]

The families are thus caught between a rock and a hard place, either they move the grave or they risk having the grave disturbed and damaged. This means that families are ultimately compelled to agree to relocate upon realisation that the mine can work around and close to the tombs.[383] In other words, even if permission is sought during the consultation process, the mine is still going to operate regardless.

Professional Grave Solutions has been involved in grave relocation projects since 2003. Steyn and other members of the company hold Honours Degrees in Archaeology from the country's leading universities. In a brief introduction about his background, Steyn recollected: "I never saw myself working at a university or museum. So, since 1998, after I completed my Honours, I've been doing *business* in Archaeology."[384] This was an ideal time to take opportunity of the newly legislated demands that Archaeological and Heritage Assessment be carried out as part of the EIA. At this time, a number of Cultural Resources Management (CRM) companies started up, but only a few were able to negotiate the business terrain. PGS remains one of the most successful.

The Association of Southern African Professional Archaeologists (ASAPA) set out the criteria for ethical standards of practice and SAHRA provided further guidelines. In an effort to create some checks and balances, the Professional Association set out standards of practice for CRM practitioners and still grants accreditation to those who are specialists in a field or who have some years of experience. In other words, not all archaeologists are accredited to carry out grave relocation, and SAHRA would be reluctant to grant a permission to an unaccredited archaeologist to excavate a grave. Hence, PGS took the initiative to be the first company in South Africa to provide Archaeological services. Steyn added that:

> You must understand that our business is two-fold. We do archaeological work, like heritage impact assessments and so on. That's 100 per cent archaeological work.

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[382] Professional Grave Solutions director and employee interviewed by Dineo Skosana, Waverley (Pretoria), 30 September 2014.

[383] Mining around the grave can sink the tomb into the soil – ultimately, damaging it.

[384] *Ibid*. (Emphasis added.)

> And then, we do the grave relocations as well. So, there is competition; especially in the past few years – there are a whole lot of small archaeological companies that sprung up. If it comes to grave relocations, I'd certainly say that we are the biggest company in the country doing that. There are other archaeologists doing grave relocations, but they do not administer the whole project – they only excavate graves older than 60 years. We specialize in doing the entire project. We do the social consultation; appoint an undertaker because the legislation requires that you appoint one. Between us and the undertaker, we will do the excavations. He will do the reburial.[385]

From this explanation, it is evident that PGS has a team of fully-accredited archaeologists and after years of experience is well placed to win grave relocation tenders. Not only are CRM companies profiting from the business of grave relocations but also funeral parlours' undertakers.[386] To secure business, heritage consultants submit their tendering applications for the mining project and are subsequently and invariably captured in the mine's vendor list should the mining company want to use their expertise once again. While PGS is aware of the cultural significance of the graves, it is that significance that creates their market and at the end of the day, like in any business, is profit-driven. To make themselves competitive they know how to tailor the process to suit the client. This raises a concern that have been flagged over the world about the independence of Impact Assessors and their ability to take decisions that may halt or stop development.

For Glencore, Professional Grave Solutions oversees the relocation of around 1,000 graves that are located in nine separate informal cemeteries spread across the aforementioned farms.[387] These

[385] Professional Grave Solutions director and employee interviewed by Dineo Skosana, Waverley (Pretoria), 30 September 2014.

[386] See Figure 7 in the Appendix which illustrates the booming of the tombstone business. The stones were paid for by the mine.

[387] According to the heritage law, graves which are older than 60 years and which are situated outside a formal cemetery are administered by a local authority whereas, graves which are less than 60 years old are managed by the Tissue Act (Act No. 65 of 1983), and those under 60 years old outside a formal cemetery must be dug in the presence of an archaeologist. SAHRA permits (as previously outlined) are only required for: the exhumation of graves older than 100 years; those of victims of conflict; royal or

graves belong to local people, former migrant labourers, and labour tenants.[388] Two Tweefontein Complex exhumation applications are central to the argument presented in this chapter. First is the application for the relocation of TOP 3, 18, 19, 21, and 24[389]graves, as well as the application for the relocation of TOP 5B, 22, 23, and 32graves.

According to PGS', *Application for Permit: Burial Grounds and Graves – application form 305,* TOP 3, 18, 19, 21 and 24 have graves older than 60 years old and are located outside formal cemeteries. All five of the cemeteries under discussion, are located on the Tweefontein 13IS farm. Their individual descriptions from the application form are as follows: TOP 3 is located directly south of one of the mine's haul roads and comprises a rectangular area that is enclosed with palisade fencing. A total of 74 graves are located here, some with formal inscribed headstones but most comprising oval stone dressings without headstones. TOP 18 is located amongst black wattle trees and comprises two rows. A total of nine graves are located here, of which two have formal granite headstones and seven comprise of stone dressings without any formal headstones. One grave appears to have been opened and only has a depression where the grave would be. TOP 19 is on an agricultural field. It comprises a loose arrangement of 29 graves, some with cement headstones and others with stone dressings. The condition of the cemetery is poor, with a number of graves which have subsided into the soil. Evidence for burrowing animal damage was also found. TOP 21 comprises a rectangular area which had been enclosed with a low stone wall and palisade fencing. The cemetery is located a short distance north of the mine haul road. A total of six graves are located here, all of which have inscribed formal headstones. TOP 24 is located near the eastern boundary of the farm and comprises two graves. Both graves have dressings of pitched cement slabs. One of the graves still bears a cement headstone, whereas the smaller grave's cement headstone appears to have fallen.

In the Application for Permit: Burial Grounds and Graves – application form 305 reads, in the TOP 3 of the identified graves, 25 are younger than 60 years old, whereas the families of 12

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traditional leaders; historical graves or burial grounds; and, any grave or burial ground older than 60 years which is situated outside a formal cemetery administered by a local authority.

[388] The graves will be profiled in greater detail in the next chapter.

[389] This is the mine's own grave site numbering system for the purpose of site and grave identification.

graves were not certain how old their graves are. The remaining three graves were all indicated to be older than 60 years. Of the remaining 34 graves, only one date is known and that is from an inscribed headstone which indicates that the person died in 1943. In summary, of the 74 graves from the cemetery 25 are younger than 60 years and the remaining 49 are either older than 60 years or by default presumed to be so. In TOP 18, two of the graves from this cemetery have formal headstones containing dates of death of 22 September 1928 and 9 May 1929. The other graves do not have dates on them. The TOP 19 of the identified graves has one grave that is younger than 60 years whereas, the families of four graves were not certain how old their graves are. Three of the identified graves are older than 60 years. Of the remaining 21 graves, only two more dates are known. The grave of Sanderson Nyilenda has an inscribed headstone containing the date of death as 30 January 1945, whereas the grave of Smuts Paulos has the date of death as February 1952. The other graves do not have dates on them. In summary, of the 29 graves from the cemetery, one is younger than 60 years and the remaining 28 are either older than 60 years or by default presumed to be so. The TOP 21 graves have dressings from the cemetery which contain dates that indicate that five of the six graves from this cemetery are older than 60 years, whereas the grave younger than 60 years was buried on 26 April 1958. In TOP 24, both graves from this cemetery were identified, but the family representative did not know the dates of death. As such, both graves from this cemetery are presumed to be older than 60 years."

Both applications point to the operation of "lawful exclusion" – made possible through: the inadequacies in the conceptualisation of consultation and participation in the National Heritage Resources Act (1999) and the Mineral and Petroleum Resources Development Act (2002); a regression to the historical Roman-Dutch principle of absolute ownership; and, as drawn out below, PGS's application process which follows more of a formal administrative logic than granting due process to a submission request. What eventuates is that some of the grave sites become barricaded *even before* the consultation process with the owners is duly completed - barring African communities from the normative cultural practice of grave-site visits. Glencore upholds this practice by virtue of being in possession of a land ownership title and a mining

permit,[390] and being aware that the MPRDA overrides the protection of heritage resources such as graves.

Bureaucratic Applications: A Formality

In line with section 36 of the NHRA, PGS' applications state that they have conducted an intensive process of social consultation to identify the buried individuals and to obtain permission for exhumation and re-interment from the affected families, communities, and other *bona fide* interested and affected parties. This consultation process began in 2011 with the erection of site notices at all the cemeteries.[391] According to the forms, the physical social consultation process commenced in 2012, and the methodology followed in terms of this process were as follows.

First is the identification of persons who may have resided in the study area by speaking to elderly people who have lived within the surroundings of the study area all their lives. During conversations with these individuals leads may be forthcoming of families or individuals who used to reside within the study area. It is also noted in the applications that the social consultation team followed-up on each of these leads, attempting to ascertain whether any identified individuals were tied to the graves buried within the study area. In some cases, preliminary meetings could immediately take place, while in others a preliminary meeting date was scheduled. Once the families with graves within the study area had been identified, a preliminary meeting took place to introduce PGS as well as the proposed relocation project to the families. This first meeting also aimed to establish where the graves of the particular family are located.

Once the family representatives with whom the preliminary meeting had been held had discussed the proposed relocation with the remainder of their families, a date was scheduled on which the physical identification of the graves could be undertaken – and if the family so wished the proposed permission forms could be signed. On the identification date the respective family representatives were physically taken to the cemeteries where the graves were located. The representatives then identified the graves and respective (unique) grave numbers were recorded by the social consultation team. PGS claims that this was then followed by a meeting at the mine

[390] *Ibid*.

[391] See Figure 8 in the Appendix

where the proposed relocation was explained to the family again, and that those families willing to sign the permission were then given the opportunity to do so.

From the PGS outline of the relocation process, application 1 and 2,[392] it is recorded that there were 78 unidentified graves and at least 25 graves which have been identified by the next of kin but of which the date of death was at that time unknown.[393] Here, common practice is to continue with the relocation of all the graves, including those that remain unidentified.[394] The same practice can be observed with the fencing of the graves, whose owners the mine were still negotiating with. Essentially the process revealed that consultation was important during the relocation process, but not significant enough to halt relocations. According to section 36(3) of the National Heritage Resources Act (1999):

> no person may, without a permit issued by the relevant heritage resources authority: destroy, damage, alter, exhume or remove from its original position or otherwise disturb the grave of a victim of conflict, or any burial ground or part thereof which contains such graves; destroy, damage, alter, exhume or remove from its original position or otherwise disturb any grave or burial ground older than 60 years which is situated outside a formal cemetery administered by a local authority; or bring onto or use at a burial ground or grave referred to in paragraph (a) or (b) any excavation equipment, or any equipment which assists in the detection or recovery of metals.

And for the issuing of the permission to exhume, the affected persons must be consulted. However, Glencore's fencing of the grave site *is* an alteration to the burial ground and some families were not aware of the changes to the Tweefontein grave site, until the day of the removal of ancestral remains. The important point then is that: to remove graves that have not been identified and to restrict movement of some of the families that are yet to agree for their ancestral remains to be

[392] Professional Grave Solutions, *Application for Permit: Burial Grounds and Graves – application form 305*.

[393] As previously noted, date recording on graves is essential as it determines which authority (local, provincial, or national) has to be involved in the process, as well as the kinds of intervention that ought to be applied during relocation (e.g., the use of an undertaker for graves that are less than 60 years old and outside a formal cemetery).

[394] See figure 10 in the appendix

relocated is to treat the legal obligations as a mere formality rather than to give submission requests due regard. Such bureaucratic deficiencies are in need of further discussion, but first it is necessary to consider and draw out the relevance of social scientific conceptualisations of governmental bureaucracy.

Although the term "bureaucracy" was coined in the eighteenth century, it was Max Weber, who in his writings between 1909 and 1920, greatly contributed to our understanding of the term.[395] In particular, Weber's study, *The Bureaucratic Machine* (1909-1920), stands as an outstanding contribution to the discipline of Sociology. Describing the conditions for bureaucracy, Weber submits that it is "fully developed in political and ecclesiastical communities only in the modern state, and, in the private economy, only in the most advanced institutions of capitalism."[396] He states that "the regular activities required for the purposes of the bureaucratically governed structure are distributed in a fixed way as official duties,"[397] adding that "the management of the office follows general rules, which are more or less stable, more or less exhaustive, and which can be learned."[398] Weber then concludes that "the reduction of office management to rules is deeply embedded in its very nature."[399] Weber views office holding as being based on merit, "vocation," and that therefore provides "faithful management" that is not susceptible to personal favours or corruption.[400]

It is the "goodness" of this perspective that has to be brought into question. For, it has to be recognised that because bureaucracy standardises rules, duties, and activities, they can become reduced to routine ceremonial responsibilities. In other words, bureaucracy limits the possibility of subjecting each application to proper substantive review on a case-by-case basis; instead it can open up room for illegality or the very kind of patrimonialism that bureaucracy seeks and claims

[395] Charles Lemert (ed.) (1999) *The Protestant Ethic and the Spirit of Capitalism*, Oxford: Westview Press

[396] Karl Mannheim (1947) *Max Weber, From Max Weber: Essays in Sociology* [trans. H. Gerth and C. Wright Mills], Broadway House, London, p. 197.

[397] *Ibid*, p. 196.

[398] *Ibid*, p. 198.

[399] *Ibid*.

[400] *Ibid*.

to eliminate through it rational, technically efficient, workings.[401] Hence, it can be argued that if we understand "bureaucracy" in terms of the principle of repetitive administrative technique and organization, it can sociologically be grasped how it is in the nature of bureaucracy to formalise every aspect of administration to its own detriment.

Bureaucracy – be it the organisational composition of persons in government departments or the actual rules and processes that govern these departments and organize society – is an apparatus through which law is enforced. In the sense argued here, bureaucracy means excessive administrative procedures that enforce laws that if applied in an impersonal, officious, and repetitive manner can, in cases such as being considered above, devalue due process. Exemplifying this is PGS's grave relocation applications (paperwork) to various relevant departments – which follow the same format as if there is an original application template that is routinely, as a matter of fact, adapted for each case. Also, the departments to which applications are sent, do not seem to pay attention to such matters as to whether or not some graves have been identified by the mine's consultants. Rather, what seems to matter is whether PGS has attached all necessary documentation, filled in the necessary sections of the application, and adhered to meeting the closing date.

Glencore has seemingly adopted this "mere formality" method of operation in that they have fenced off the graves of families with whom they are still in negotiations – effectively rendering consultation a hollow process. With regard to Heritage Resource Management,[402] it is a

[401] Ronald N. Johnson and Gary D. Libecap (1994) *The Federal Civil Service System and the Problem of Bureaucracy*, University of Chicago Press, Chicago, p. 5; also consider, Ludwig von Mises (1944) *Bureaucracy*, United States of America: Yale University Press, p. 122. Von Mises argues that bureaucratic formality is necessary and that no reform can remove such features of government rule: "It is of no use to criticize the bureaucrat's pedantic observance of rigid rules and regulations. Such rules are indispensable if public administration is not to slip out of the hands of the top executives and degenerate into the supremacy of subordinate clerks. These rules are, moreover, the only means of making the law supreme in the conduct of public affairs and of protecting the citizen against despotic arbitrariness."

[402] Section 38 of the National Heritage Resources Act states that "the responsible heritage resources authority must specify the information to be provided in a report required in terms of subsection (2)(a): Additionally, the following must be included: the results of consultation with communities affected by the

requirement for heritage impact assessments to be submitted to SAHRA, which is not a decision-making body and, in any event, the NHRA fails to provide proper guidelines as to what adequate consultation would look like, leaving much room for the applicants' discretion. The Mineral and Petroleum Resources Development Act (2002) is no better in this regard;[403] it fails to define what constitutes adequate consultation with departments during the application process for a mining permit. Moreover, the MPRDA suggests that during consultations with interested and affected parties they may submit comments regarding applications, but in practice – as previously discussed in the case of MIACC in the previous chapter – such comments are treated in a perfunctionary manner. The reality of hollowed-out consultation is a matter of deep concern.

Hollowed-Out Consultation

Public consultation "is one of the key regulatory requirements employed to improve transparency, efficiency, and effectiveness of regulations;"[404] it is also a regulatory process by which public input

proposed development and other interested parties regarding the impact of the development on heritage resources.

[403] Under consultation with state departments, the MPRDA stipulates that, when considering an environmental management plan or environmental management programme in terms of section 39, the Minister must "consult with any State department which administers any law relating to matters affecting the environment and that the Minister must request the head of a department being consulted, in writing, to submit the comments of that department within 60 days from the date of the request". Whereas, under consultation with interested and affected parties, it is provided that "within 14 days after accepting an application lodged in terms of section 16, 22, or 27, the Regional Manager must in the prescribed manner— make known that an application for a prospecting right, mining right, or mining permit has been received in respect of the land in question; and call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice and that if a person objects to the granting of a prospecting right, mining right, or mining permit, the Regional Manager must refer the objection to the Regional Mining Development and Environmental Committee to consider the objections and to advise the Minister thereon".

[404] Delia Rodrigo and Pedro Andrés Amo (undated) "Background Document on Public Consultation," Regulatory Policy Division, Public Governance and Territorial Development Directorate, www.oecd.org/mena/governance/36785341.pdf

on matters affecting society is sought. Rodrigo and Amo identify three related forms of interaction with interested members of the public which, in practice, they suggest are often mingled with public consultation programmes, complementing and overlapping each other: namely, notification, consultation, and participation.[405] Moreover, in democratic theory, public consultation is key to the process of deepening and extending democratisation. In South Africa, consultations became more popular with the rise of local participatory democracy post-1994. The 1996 Constitution prescribed a participatory democracy, although it did not specify its forms.

But, as suggested by some commentators, public consultations can merely serve to provide a "democratic façade."[406] This has been, it is argued in this thesis, the case with regard to how both the heritage and the mineral legislations use the rhetoric of consultation without giving effective consideration to whether the participatory processes yield substantive outcomes that accord with the participant's vision. Benjamin Saccaggi's study of grave relocations relating to the Sekuruwe community in Limpopo Province also suggests that the manner in which the communities' graves were relocated disrespected cultural norms and infringed constitutional rights.[407] Saccaggi reveals that in his case study Anglo Platinum argued that they followed all the "proper channels" to inform the affected families about the relocations – whereas that the community actually argued that there was no form of consultation.[408] In the case of Tweefontein the applications illustrate that although there is some level of consultation, the process lacked any substantive content because – as will be seen in the following chapter – most families were notified that their graves were to be relocated with no real option to refuse. Very few families found themselves able to contest these relocations; one family, the Mabhena, were only able to seriously contest relocation as they had occupied the area prior to the enactment of the 1913 Land Act and resolved to launch a land claim. In fact, for the Mabhena and other families, the graves constitute material evidence in support of their land claims. Significantly, those families who did contest the removal of their ancestral graves during

[405] Ibid

[406] See, for example, Phillippe Gervais-Lambony, "Public Meetings in Vosloorus: New Political Landscape in Ekurhuleni, South Africa," Seminar Paper, University of the Witwatersrand, Johannesburg, 31 January – 2 February 2008

[407] Benjamin Saccaggi (2011) "Disenfranchised Heritage, Ancestral Graves, and their Legal Protection in South Africa," unpublished MA thesis, University of the Witwatersrand, Johannesburg.

[408] *Ibid*.

the consultation process have now begun to lobby in formal and informal ways against Glencore – arguing that the farms do not belong to the mine. This pressing question of land restitution remains unresolved.

Whose land is it?

Although, as previously discussed, in most instances mining corporations attain land use rights through mining permits, Glencore is documented as the owner of the Tweefontein, Klipplaats, and Boschmansfontein farms.[409] Glencore's land ownership status, coupled with the mining permit, affords the company absolute legal authority to determine the use of the area.[410] This question of land ownership does not, however, go uncontested in the dispute over graves; a few families have become increasingly mobilised to support those chiefly families whom according to the Constitution, the Labour Tenants Act (1996), and the Restitution of Land Rights Amendment Act (2014) are eligible to claim land. [411]

Generally, however, the land reform project in South Africa has been sluggish and unstable, with new legal and institutional initiatives being introduced every few years.[412] Land reform was

[409] See figure 9 on the appendix

[410] Interim Protection of Informal Land Rights Act 31 of 1996, (IPILRA) meant to protect the informal rights of communities however, the Act was often overruled by the MPRDA, until very recent when the Constitutional Court judgment on the Lesethleng Community elevated the informal land rights act over the mineral law.

[411] As discussed in previous chapters of this thesis.

[412] Land Reform in South Africa focused on three areas: restitution, land tenure reform and land redistribution. Under land restitution, the idea was that the ANC-led government can monetarily compensate claimants who had been forcefully removed, whereas, the land tenure reform was meant to recognise people's right to own land and therefore control it. The most important component of land reform in South Africa, land redistribution- premised on the purchase by the state of land from willing sellers and the redistribution of the land to claimants. The principles of land redistribution rest in the interim Constitution of 1993, which read that, 'every person or community dispossessed of the rights in land before the commencements of this Constitution, as a result of racially discriminatory laws, shall be entitled to claim restitution of these rights.'

encapsulated in, and central to, the ANC's 1955 Freedom Charter; it being claimed that "all the land would be re-divided amongst those who work it to banish famine and land hunger."[413] And land restitution was advanced in order to garner the political support of the rural poor after the democratic election of 1994. Since that time the ANC has promised to undertake broad and sweeping action to reverse the deprivations institutionalized under apartheid. These promises were outlined in the Reconstruction and Development Programme (RDP), a policy framework developed through extensive consultation between the ANC and its tripartite alliance partners, the Congress of South African Trade Unions and the South African Communist Party.[414] The RDP contained government policy guidelines for agricultural and land reform and comprised three broad goals. First, was the strengthening of tenure rights for the rural poor. Second, land restitution was to be made to those who could prove that their or their family's land had been stolen under apartheid. And third, was a commitment to redistribute thirty percent of agricultural land to the rural poor. All three goals were to be achieved before the year 2000. Today, though, there is a firm scholarly consensus that land reform's failure outweighs its success.[415] And the country finds itself mired in conversations about the possibility of expropriating land without compensation to remedy past injustice. In an official statement released by the president of South Africa, Cyril Ramaphosa, announced that the ruling African National Congress (ANC) will amend the Constitution and allow for land expropriation without compensation.[416] The intention to expropriate land without compensation has been meet with criticism from farmers, human rights groups, political parties, as well as international communities; most arguing that it is unjust.

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[413] African National Congress, *The Freedom Charter*, 26 June 1955; www.anc.org.za/ancdocs/history/charter.html

[414] *Ibid*.

[415] Cheryl Walker, Anna Bohlin, Ruth Hall, and Thembela Kepe (eds.) (2010) *Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa*, United States: Ohio University Press

[416] Luke Daniel, "It's official: ANC to amend Constitution allowing for land expropriation without compensation" accessed on 9 September 2018, https://www.thesouthafrican.com/anc-to-amend-constitution-land-expropriation/

The failure of the South African land reform project requires broad contextualisation. There is no doubt that the ANC's adoption of neo-liberal economic policies post-1994 may have undermined the project before it began. But there is more to it than this. As was shown in the discussion of the hurried enactment of the Minerals Act in 1991, the State clearly engaged in a specific manner and direction with the reform challenges and contradictions of the new South Africa. The key point being that the protection of the old mineral rights order through the Constitution indirectly secured land rights for those who held the then mining rights. A state of affairs made possible by the fact that in South Africa mineral rights indirectly enable surface rights, in line with the Roman-Dutch law of property rights. This is a situation that poses serious challenges to any attempt at reform.[417]

When all is said and done, it is the holding of absolute property rights that explains why Glencore is in such an advantageous position to push for the relocation of communities' ancestral graves, as well as to why cold bureaucratic procedures are tolerated. The barricades surrounding the graves are an assertion of absolute ownership that allows a form of legal exclusion that cannot but represent the alienation of *Man* from fellow *Man*. It is to the resulting subjective politics of contestation that we must now turn.

[417] Gavin Capps (2012): Victim of its own success? The platinum mining industry and the apartheid mineral property system in South Africa's political transition, Review of African Political Economy, 39:131, 63-84, p. 70

CHAPTER 5

GRAVE MATTERS

Whilst the contestations over grave relocations can be located within the inherent contradictions between South Africa's Minerals and Petroleum Resources Development Act (2002) and the heritage law, this chapter endeavours to explain why grave relocations matter from the perspective of the owners of the graves. Oral history interviews are presented to argue that ancestral remains represent mediators of life and death for the living. Moreover, and importantly, the graves are material evidence of a history that is entangled with narratives of land dispossession and restoration in the current political dispensation. Graves – as a form of evidence – matter as they validate citizenship for African communities that were previously denied such status; and rights that remain marginalised by the post-apartheid legal order. To draw out what is at stake, it is necessary to present a thorough description of the grave owners and the grave relocation process, and to then explore in light of the history of land dispossession the matter of graves as evidence.

The Grave Owners

Graves feature both as part of arguments and memories about land dispossession and land claims and, in a more general sense, of the creation and mobilisation of ideas about citizenship and belonging.[418] To explain why graves are subject to contestation it is important to let the families' experiences of removal and reburial of their ancestral remains speak for themselves. Through oral history interviews conducted between 2015 and 2016 with fourteen families whose graves were relocated by Glencore, I probed amongst other ideas and issues relating to consultation, access to information, and awareness of legal cultural rights.

Like many African families, those who were interviewed belong to different Christian denominations and yet maintain a strong connection with ancestors. How the families maintain this connection is not homogenous neither is it rigid. The context shapes whether families identify

[418] Belonging is according to the Sociologist, Jason Cons, "an analytic for understanding how history is remembered and articulated as a claim to territory, rights, and membership in unstable places", (2012) "Histories of Belonging(s): Narrating Territory, Possession, and Dispossession at the India-Bangladesh Border", *Modern Asian Studies* 46, p.527

themselves as Christians or a part of an 'African religion' at a given time. Straddling between ancestral devotion and being Christian is common and takes place with ease, except in those families who belong to Pentecostal churches.[419] Even so, those that attend charismatic churches still argued for the respect of their graves and demanded compensation.

An underlying aim was also to draw out the inconsistencies and irregularities in the application of legal provisions in the NHRA and MPRDA. The first step, though, was to understand why the deceased were buried on the Tweefontein farm; and here the use of oral history among surviving family members allowed me to gather information about the historical background of the graves and to establish connections to the deceased.

Access to the signed relocation agreements with heritage consultants, Professional Grave Solutions (PGS), enabled the identification of the families. All the families so identified readily agreed to share their experiences, motivated by a general sentiment that the mine was violating their rights. I continually had to remind mostly illiterate family representatives that I was not a legal practitioner or a journalist, and that I was not working for the government. Nonetheless, the families addressed the interviews as an opportunity to raise concerns which they felt they could not bring up with the mine. Basic details of the fourteen families interviewed and their graves are presented in Table 1 (below).

Through the interviews it transpired that many graves initially located on the Tweefontein farm were of former labour tenants and migrant labourers whose families now live around Witbank and Ogies. Whilst some graves date back to the 1920s and 1930s, most of them dated to the 1950s and 1960s. The graves are of women, men, and children who died from various causes such as short or long illnesses, and accidents. Whilst the owners of some graves could not be identified, the graves were relocated nonetheless.[420]

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[419] Anderson, (1993) writes, ''the term 'African Pentecostalism' is used very broadly to include in the first place 'Pentecostal mission churches', churches started by white Pentecostal missionaries in the early twentieth century and still generally under white influence or domination, the largest being the Apostolic Faith Mission and the Assemblies of God. Secondly, the term includes 'independent Pentecostal churches', independent black churches founded by Blacks within the last twenty years, an example being the Grace Bible Church in Soweto. Thirdly, 'African Pentecostalism' should also include 'indigenous Pentecostal-type churches', numerically the most significant, referring to those African indigenous churches who have historical, theological and liturgical links with the Pentecostal movement (Anderson 1992a:28-31), and who, like the Pentecostals, emphasise the power and manifestations of the Holy Spirit in the church''. Anderson adds that many Pentecostals identify ancestors as demonic.

[420] See figure 10 in the appendix

Table 1: The Families Interviewed and their Graves

Interviewed Families	Number of graves	Date of death
1. Mgidi	1	Unknown
2. Mtshwene	3	1950s, 1960s
3. Mokalapa	3	1970s
4. Skosana	7	1950s, 1960s
5. Nyathi	1	1980
6. Ndlela	3	1906, 1978, 1979
7. Mguni 1	1	Unknown
8. Mnguni 2	2	1950s, 1960s
9. Mabhena	35	1920s – unknown
10. Maseko	1	Unknown
11. Motaung	2	Unknown
12. Mavimbela	3	1951, 1954, 72
13. Mathibela	11	1930s – unknown
14. Vilakazi	4	unknown, 1956, 1959

The Relocation Process: 2012

All the interviewed families recalled being approached by the mine's consultant, *baba* Mqcina, a local old man employed to facilitate the negotiations. When asked how he was appointed as a consultant, *baba* Mgcina recounted:

> Mr Leeds, I was his driver, said to me, 'Shorty, you'll be retiring in the next few months… me and the mining committee are thinking of giving you a job. The coal seam underground is running out. Workers under Glencore mine will soon be out of jobs. We are now going to mine using the open cast method. So, we would like you as a local person born here to be the person of contact for the relocations of graves project because you know almost everybody.'[421]

To give a description of his responsibility in the project, *baba* Mqcina said that: "the important role that I play is to identify people. I look for the owners of the graves. They take me to their

[421] Mqcina, interview by Dineo Skosana, Phola Park, Ogies, 13 May 2015.

graves. People say 'Yes, we know these graves.' I work through referrals."[422] The Tweefontein grave relocations were publicized through local newspapers, as well as on the radio. The meetings between the mine and the affected families began in 2011 and were intensified in 2013.

At first, the mine conducted group consultations with affected families, but after realizing the effects of group dynamics,[423] the PGS consultants decided to conduct private family consultations.[424] Explaining his first encounter with the mine's consultant, Peter Mokalapa, a family representative recounted that: "there was a radio announcement that if you have graves on these cemeteries be informed that they will be relocated. They then came to the houses of the people who responded."[425] The house visits accelerated the negotiations as most families were compelled to believe that they could not challenge the mine's decision to relocate their graves.

Peter Mokalapa further explained the mine's strategy when he mentioned that: "they would tell you that you refusing the relocations slows down the process as some families have already agreed. In fact, they used dividing tactics on us. We should have been united on this issue."[426] The Mathibela family representative, Jimmy Mavimbela, mentioned an additional critical reason for not refusing to relocate:

> The things is, when the mine tells you that they want to relocate your graves, you already know that they have money and can afford good lawyers. You agree to everything because hiring a lawyer is very costly. So, you just go along with the mine's instructions.[427]

Mokalapa shared the same sentiment when he said:

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[422] *Ibid*.

[423] Families conversed about their legal rights and brainstormed about adequate compensation for the relocation of their graves.

[424] What the participants refer to as "a divide and rule strategy."

[425] Peter Molapa, group interview by Dineo Skosana, Vorsman, Witbank, 28 April 2016.

[426] *Ibid*.

[427] Jimmy Mavimbela and Mrs Mtshweni, interview by Dineo Skosana, Kwaguqa, Witbank, 20 May 2016.

> The problem is that we found some graves already dug up. You could not see your graves clearly. The landscape had changed. So, if you refuse, it's almost like you are the only one. So, if it were just up to me, I would have refused to have our graves relocated. I would ask for enough compensation before I agree to the relocations, but they were already digging our graves – maybe because we are illiterate.[428]

All affected families echoed the sentiment that the PGS consultants did not facilitate a dialogue about the relocations during their visits. Instead, the meetings were called to convey Glencore's decision to relocate the families' ancestral graves. The consensus among the families that I interviewed is that they were simply informed about the grave relocations and that it was not a negotiated process. This is contrary to PGS' consultant, Henk Steyn's account of the consultation process:

> So, we go out in the field. We've got field workers. We would find the next of kin and then we will explain the project to them and have them sign the request for exhumation form. Like the legislation says, you can't get permission you have to request permission. So, we ask them, if they are happy – they will sign the forms. We then take them to the police station for an affidavit, which states that they are the closest family members.[429]

Not only did the families recount a different experience from PGS', they also emphasized the problems related to the coordination of the actual relocations process. For example, the mine issued its scheduled dates for relocations after each visit. The proposed date was often on a weekday which meant that some family representatives could not attend because they had to be at work. This played in Glencore's favour because it complemented their rule that not more than two people per family will be allowed to attend the relocation and reburial process.

Come the day, most of the families stated that the graveyard was already fenced-in when they went to exhume their loved ones. Recounting his experience on the day, Abel Mtshweni said: "As visitors, we had to get permission from the gate. You are kitted in safety boots, glasses, helmet and

[428] Peter Molapa, group interview by Dineo Skosana, Vorsman, Witbank, 28 April 2016.

[429] Steyn Henk, interview by Dineo Skosana, Waverley, Pretoria, 30 September 2014.

a vest, just like someone who is going into an underground mine, not graves."[430] Glencore granted permission for family representatives to bring a priest from their church denomination. However, on each family's scheduled day of the relocation the mine provided inadequate transportation for family members to travel to the new gravesite. This meant that only one member per family could oversee the process. Families who wished to be accompanied by their relatives had to organize their own transport – and this was always a financial challenge.

The mine's failure to provide sufficient transportation was a major concern for the families, because in most instances it meant that the family representatives – who were sometimes younger or lacked knowledge related to customs which are performed during relocations - were not part of the process. Concerned about the mine's travel arrangements, Peter Mokalapa disclosed that:

> At the gate, few people are permitted. I understand that because when you are many you might not be able to control the people, but there should at least have been transport for people to get to the reburial cemetery, because we don't know every ritual that ought to be performed and there are elders who know all these. Now that we left them, it means things did not go accordingly. The mine did not follow our protocol. They did not even allow us to bring a priest. They brought their own priest.[431]

Another family representative, Elizabeth Mnguni, added: "they did not tell us that they have their own priest, we were surprised on the day."[432] Although the presence of a priest hired by the mine worried some families, not everyone was concerned about this. For instance, the Mathibela family representative offered a different perspective:

> No, it's no longer *intoyabafundisi* [*a priest related matter*], it is a cultural thing because we slaughter. The family must be there to see where the remains are relocated. A *snuff* [*crushed tobacco*] is needed when communicating with your

[430] Abel Mtsweni, interview by Dineo Skosana, Phola Park, Ogies, 11 June 2016.

[431] Peter Mokalapa, *op cit*.

[432] Elizabeth Mnguni, interview by Dineo Skosana, Phola Park, Ogies, 11 June 2016.

> ancestors. When you get home, you slaughter and drink traditional beer. Relocations are more of a cultural thing – different from normal burials.[433]

All the families commonly mentioned that the dead must be spoken to during the relocation process. They are informed prior to being moved about the disturbance of their place of rest and assured that they will be rested at another site. This is done to ensure that the spirit of the deceased does not linger and torment the living. For instance, John Mguni explained:

> You have to call upon the spirit of that person, praise their surname and totems, and say to them we are about to move you. You see. I am Mnguni, so I'll say [he recites his praise names] Mnguni *babili bakwa Mhlamunye, bakwa Magalela… baba ungaphazami. Namhla siyakuthatha ninomma siyonibeka endaweni e so…* [*Do not be alarmed. Today, we move you and mother to a new place.*]

The Mathibela and Mabhena are the only families who challenged the mine when agreements related to the relocations could not be reached. These families have the most graves on the affected cemetery – eleven and 35 respectively – and used these numbers as leverage during the negotiations with the mine. The representatives from both families are relatively well-educated and to some extent aware of their legal rights. The Mathibela representative owns various local stores in Kwa-Mhlanga, whilst Dan Mabhena is the son of Chief Mabhena whose chieftaincy is based at the former Kwa-Ndebele homeland. Both families are well renowned in their communities and have strong business connections. Recalling the negotiations Mathibela recounted:

> They sent this Boer man to conduct the negotiations. If you ask my wife, she will tell you that I sent Henk off. He was here, seated, and I told him to leave because this is my house. I said: 'You are not here to tell me what you are going to do with my graves.' I told him that: If I want, I can delay this process for 3 to 5 years. I am not stranded for money. If you come to my house, you negotiate with me otherwise,

[433] The relevance of this contraction in which the mine brought its priest to rebury all the families' remains (a Christian gesture), whilst some families see this process fundamentally as a cultural process, is discussed below.

> get out!' He never came back. They sent Mqcina instead. They had to negotiate. [434]

On another hand, Dan Mabhena explained that the mine wanted to directly negotiate with his father in the hope that he would sign the agreement for the relocations. Dan Mabhena shared his negotiation experience when he said:

> I told the mine that they can relocate the graves provided they will take care of the families, because we are the beneficiaries of that place. The mine had to consider opening job opportunities. We gave them an endless list with our demands. When they realized that these demands were hefty, they began giving people money – bribing those with similar surnames to sign on our behalf. As we speak, we do not know what happened to our graves and who signed for the relocations. It's something I still need to take up. [435]

To further give clarity to why there were contestations Mathibela gave a similar rationale to Mabhena when he said: "Our culture says that you cannot be a Skosana and want to appease ancestors from Mathibela. That's what the mine intended to do. They wanted to slaughter a cow and call all the affected families to feast on it. That is unacceptable!"[436] Although the Mathibela were eventually able to reach an agreement with the mine, the Mabhena – whose ancestral graves belonged to former labour tenants who lived on the farm for over 50 years – could not come to an amicable understanding. This is because the mine could not agree to their terms related to compensation for the Tweefontein farm for which they have launched a land claim. Mathibela mentioned that their family's land claim was launched by his uncle in the first phase of call for claims in 1998 – and that they do not have the claim number because of the then land claim system in operation.

The Mathibela contend, as do all of the families interviewed, that the standard wake fee (offered by the mine) of R1,500 is inadequate compensation for the number of years their families have

[434] Mathibela, interview by Dineo Skosana, eKangala, 11 June 2016.

[435] Dan Mabhena, interview by Dineo Skosana, Witbank, 20 August 2016.

[436] Mathibela, *ibid*.

lived on the farms on which the mines are now situated and for the relocations of their homes that took place when mining houses began to expand over the 1970s and 1980s. The families asserted that the R1,500 wake fee was determined by Glencore; there was no consultation with regards to what might constitute fair compensation. All the families except the Mathibela and the Mabhena felt compelled to accept this compensation fee. Thus, the Mathibela were the only family that was able to secure higher compensation, of R9,000 per grave. Explaining how their family representative could negotiate R99,000 for their eleven graves Mathibela recounted:

> I had already erected tombstones for my father and some of the elders. I said to them that I will not agree to have my graves relocated in the manner that you usually do. So, I went to Home Affairs in Witbank. I asked them to disclose how much I should be compensated per grave? They said there is no specific fee. The agreement is essentially between me and the mine. So, I said to them: 'How much will the mine make from the piece of land that my eleven ancestral graves occupy?' The Home Affairs Department then said the matter is not within their jurisdiction. So, I delayed the process. Three weeks after, the mine came to me with an offer of R9,000 per grave plus transport and other services. They said they will erect the tombstone for the graves which already had tombs and my choice of headstones. We had an agreement.[437]

Glencore honoured their agreement with the Mathibela, but this was not the case for all of the families. For instance, families were concerned that their graves with headstones (which they used to identify where their loved ones were buried) were not replaced. These headstones were mostly old stone concrete-like and inscribed with the date of birth and death of the deceased.[438] Only a few were modern marble headstones. The mine failed to honour its verbal and written agreements even though some families had clearly indicated on the relocation forms that they would like headstones to be erected on their graves. The failure to provide documentation of agreements is one of the major problems in this process.

[437] Mathibela, *ibid.*

[438] See Figure 4, appendix.

Families whose graves are younger than 60 years old did not have copies of their relocation agreements and were not aware that these can be accessed online or from the local municipality. Moreover, there are no legal verification systems to verify completed documents. Thus, any person can sign an agreement purporting to be the rightful representative. Mqcina revealed the repercussions of this when he mentioned that on a few occasions people falsely claimed, for financial gain, that certain graves held the remains of their family members.[439] Mqcina also disclosed instances where there have been generational tensions, with younger representatives perceiving the elderly as being too susceptible to manipulation. The families tied their demands for higher compensation to ideas about ownership. Some of the families who have graves claimed ownership to the sites of the graves- in the sense that they either historically owned the land; were removed without compensation for the commencement of mining activities or that the deceased family members worked the land as labour tenants. This was mostly the sentiment echoed by those whose graves date from the 1920s to the late 1980s. Most families reveal that the lodged claims in the 1990s and 2000s call for land claims.

Both young and old family representatives expressed concern over the actual relocation process. There was no standard legal process to adhere to during the relocations except for provisions relating to the removal of graves younger than 60 years old and older than a 100-years-old.[440] Thus, the mine improvised throughout the process with each family. For example, while some family representatives reported arriving at graves that had already been opened with the remains exposed, some families could witness the exhumations. Those families who owned old graves recalled finding fossilized remains that were hard to identify. This was a result of various factors related to environmental preservation. For example, if the soil is too acidic it is most likely that the remains would decay over time and become largely indistinguishable from the soil. As Abel Mtshweni recalled: "We didn't find bones. We only found the soil. The remains had turned into darker soil – much darker than the soil surrounding these. So, the undertakers placed that soil in black plastic bags."[441]

[439] Mqcina, *op cit.*

[440] As discussed in detail in chapter 2

[441] Abel Mtsweni, interview by Dineo Skosana, Phola, 11 June 2016.

None of the families were pleased with the provision of black plastic bags for the removal of the remains. The Mathibela family was particularly vocal about this to the mine; their representative recounted lashing out that:

> This is not acceptable! A black plastic bag is for rubbish. It is the same even when I go to a shop and you use a black plastic bag, for me I don't accept it. I did not accept the bags. These people are too important to me to be placed in a *dust-bin* bag. Something you throw away? Never! These people must be respected.[442]

Moreover, all the families were against the provision of small coffins for the reburials. When I asked whether they were given a choice regarding the coffins, Mtsweni said: "We were never asked about our choice."[443] Mokalapa described the process when he recalled that: "Everything was done as if they are reburying a child even the grave was small. They would put all the remains together and put everything in a plastic. And everything would be put in a box."[444] The families saw this as disrespect to their ancestors and as disregard for their cultural beliefs. The Maseko representative concluded that their "remains were treated like the relocation of dogs."[445]

The Mathibela family demanded nine adult coffins and two child coffins, whilst other families felt compelled to accept just the small coffins. The families revealed that they were not consulted about the coffins' sizes, the desired type, or the quality. Jimmy Mavimbela explained that: "We would have chosen our own coffins because we buried our people initially in the coffins we liked and picked for them as a family."[446] Families also complained that the remains from different families were transported together to reduce costs. This is considered disrespectful to cultural beliefs as the spirits of the deceased should not be combined; the coalescing of the spirits is believed to confuse ancestors and may portend a bad omen.

After the reburials, the families received the abovementioned R1,500 wake fee. This fee was one of the thorniest issues regarding the whole relocation process – with the families tying

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[442] Mathibela, *op cit*.

[443] Jimmy Mavimbela and Mtshweni, interview by Dineo Skosana, Kwaguqa, Witbank, 20 May 2016.

[444] Abel Mtsweni, interview by Dineo Skosana, Phola, 11 June 2016.

[445] Maseko, interview by Dineo Skosana, Hlalanikahle, 20 May 2016.

[446] Jimmy Mavimbela and Mtshweni, interview by Dineo Skosana, Kwaguqa, Witbank, 20 May 2016.

demands for higher compensation to ideas of ownership and belonging. Some of the families claimed ownership to the sites of the graves in the sense that they either: historically owned the land (in some instance, as a chieftaincy – the Mabhena); were removed without compensation for the commencement of mining activities; or, that the deceased family members worked the land as labour tenants. Such sentiments were echoed by those whose graves date from the 1920s to the late 1980s, as opposed to those whose graves were newer. As a result, some families had lodged claims in the 1990s and 2000s call for land restitution. Another concern about the compensation arose from that the fee is insufficient for the purchase of necessary items for traditional rituals – such as a cow, and groceries – required before or after the relocations. The Mtswheni representative said: "Our main concern was the compensation because R1,500 is little. In fact, there was nothing we could do because we were not being asked – we were told that the mine will be relocating graves on this date."[447] The Motaung representative shared the same view: "The money was not enough considering that they are violating our ancestors."[448] Elizabeth Mnguni added that "there should be a hefty compensation for grave relocation. Maybe if we were white, this amount would not have been agreed upon."[449] Most families were, as a result, unable to conduct the essential rituals tied to relocation. Troubled by the issue of compensation, Mnguni mentioned that:

> We slaughter, but if you don't have the money what can you do? Everything is costly. If you vow to have a traditional ceremony how would you pay for it? There is nothing more important than ancestors. There is nothing! As you drive in that car [*pointing at me*], here is your grandfather. All of them including those who gave birth to your father. They are always watching over you. If they are not there, you never get anywhere.[450]

The failure to perform ceremonies is seen to create spiritual instability. Consequently, the families had to incur at their own cost the items and traditional ceremonies necessary for themselves and

[447] Abel Mtsweni, interview by Dineo Skosana, Phola, 11 June 2016.

[448] Motaung, interview by Dineo Skosana, Empumelelweni, Hlalanikahle, 20 August 2016.

[449] Elizabeth Mnguni, interview by Dineo Skosana, Phola Park, Ogies, 11 June 2016.

[450] John Mnguni, interview by Dineo Skosana, Phola Park, 28 April 2016.

their ancestors' wellbeing. Not only was it evident that there were serious problems related to spiritual security, it was also clear that some representatives and their families needed professional counselling.

Although grave relocations are gradually becoming a common phenomenon in South Africa (and globally), all the interviewed families expressed their experience as being a shocking and emotionally draining process. Evelyn Nyathi, for instance, recounted:

> I found clothes on my remains. Sibongile, my daughter, was wearing a little dress and a little jersey with flowers. God did well because there were contestations over that grave. Anna had been saying it's their grave. Her sibling's grave. So, when we got there, we found Sibongile's clothes which she wore when she drowned.[451]

Another elderly woman Mtshweni, whom I interviewed with her son, said:

> I saw my mother when I was asleep, and she said she needs traditional mats. You know a dream is strange. I knew that my mother had died. But I spoke to her as we are speaking. My husband had not yet mentioned that the graves will be relocated in April. So, when the date came, I took the mat my mother mentioned on a dream and placed it on the box.[452]

Many families also recalled the traumatic experience of seeing remains for the first time. Although some family members had not met the deceased, they were told stories about them by older family members. This gave life and meaning to the deceased to the point where the living developed a physical and spiritual connection.

The general sentiment that emerged from amongst the families was that Glencore treated their remains like objects that stand in the way of production and profit-making. The interviews evoked memories and emotions of sadness, as well as anger. The plight of the families speaks to the continued salience of structural violence and injustice in post-apartheid South Africa. The older

[451] Evelyn Nyathi, group interview by Dineo Skosana, Vorsman, Witbank, 28 April 2016.

[452] Jimmy Mavimbela and Mrs Mtshweni, interviewed by Dineo Skosana, Kwaguqa, Witbank, 20 May 2016.

family representatives - notably John Mnguni, the Vilakazi husband and wife, and Mtshweni (all above age 65) – spoke in a manner that insinuated a lack of transformation as far as the quality of life of African people is concerned, and they conveyed an impression of hopelessness. For these older South Africans, the insensitive nature of the relocations symbolized how the dignity and respect accorded African people remains less than human in the current political dispensation. The younger family representatives echoed sentiments of anger and were concerned to challenge the *status quo*.

The Land Matters

Not only were colonialism, segregationism, and apartheid legitimized through discriminatory policies premised on constructions of racial difference,[453] they were built on and sustained through systemic land appropriation laws. As Abie Dithlake has written, "as a result of systemic land dispossession, Africans were forced into changing and fluctuating productive relationships with the land. They moved through land ownership, sharecropping, and labour tenancy to total landlessness."[454] Under colonialism, the latter was stimulated by labour supply shortages on white farms and plantations. The discovery of diamonds in Kimberley in 1867 and gold on the Witwatersrand in 1886 escalated the shortage of labour supply.[455] To remedy this situation, the Prime Minister of the Cape Colony, Cecil Rhodes, implemented laws to satisfy the need for a plentiful and inexhaustible supply of cheap labour that would benefit mines and white farms.[456]

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[453] Harold Wolpe (1972) "Capitalism and Cheap Labour Power: From Segregation to Apartheid," Economy and Society 1, no. 4, 425-456 suggests for example that "racial ideology in South Africa must be seen as an ideology which sustains and reproduces capitalist relations of production. This ideology and the political practice in which it is reflected is in a complex, reciprocal (although asymmetrical) relationship with changing social and economic conditions," p 454.

[454] Abie Dithlake (1997) "Labour Tenancy and the Politics of Land Reform in South Africa," in Levin, Richard and Weiner, Daniel. eds, No More Tears: Struggles for land in Mpumalanga, South Africa, Trenton: Africa World Press, Inc p. 220.

[455] R. Mendelsohn (1991) *Sammy Mark: The Uncrowned King of the Transvaal*, Cape Town: David Philip.

[456] Mbeki, G. (1992). The Struggle for Liberation in South Africa, Claremont: David Philip, Publishers

The Glen Grey Act of 1894, passed in the Cape Colony, was one of the first pieces of legislation to lay the foundation of segregationist law.[457] In particular, the system of communal land ownership was replaced by one of individual land ownership. The responsibility of land allocation was transferred from chiefs to the magistrate.[458] Newly imposed taxes compelled African men to seek paid work on the mines.

After the formation of the Union of South Africa in 1910, land dispossession heightened with the passing of the devastating Native Land Act of 1913. Solomon Plaatje relives the reality of many African people at the time when he remarked that: "Awakening on Friday morning, June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth."[459] South African historians have shown that this piece of legislation was driven by an intense goal to inhibit the growth of the African peasantry.[460] Later discriminatory laws to underpin

[457] The Glen Grey Act stated that African migrants from "reserve" areas would provide labour, thus setting the foundation for separate development and apartheid policies that had a key objective of generating a steady flow of cheap labour to white-owned farms and mines. The significance of the Glen Grey Act and its relationship to mine labour is often cited in the literature but is much exaggerated. The individual tenure elements of this legislation were only implemented in a limited number of districts in the old Cape Colony, about half of those that became the former Ciskei and seven out of 26 that became the Transkei. It was not fully implemented in all of these, and by the 1920s they had largely given up on this. See this for example, in Beinart, W & Delius, P (2014) The Historical Context and Legacy of the Natives Land Act of 1913, Journal of Southern African Studies, 40:4, 667-688

In any case the majority of migrant workers on the diamond mines were from Lesotho, Mozambique and especially in the earlier years, from Sekhukhuneland. Similarly, on the Gold Mines – although here the Cape workers from the Transkei (and largely from districts where individual tenure was not implemented) increased sharply from about 1910 especially. The responsibility of land allocation was transferred from chiefs to the magistrate

[458] Mbeki, *op cit*.

[459] S. T. Plaatje (1916) *Native Life in South Africa*, Johannesburg: Ravan Press, p. 13.

[460] Colin Bundy (1979) *The Rise and Fall of the South African Peasantry*, London: Heinemann; S. J. Terreblanche (2005) *A History of Inequality in South Africa, 1652–2002*, Pietermaritzburg: University of of KwaZulu-Natal Press

Natal Press; Paul Maylam (1986) *A History of the African People of South Africa: From the Early Iron Age to the 1970s*, Cape Town: David Philip.

land dispossession, were the Native Urban Areas Act of 1923, the Native Administration Act of 1936, and the Group Areas Act of 1950. Such laws, intensified under apartheid, provided "the new basis for cheap labour."[461]

It is against this historical background of the dispossession of land – and integral to the colonial, segregationist, and apartheid orders – that African people were divested of full citizenship.[462] Land dispossession represented and resulted in the withdrawal of the status of belonging, rights, and responsibilities attached to being a citizen of the country. It is in this context that graves must be seen to constitute a form of material evidence that validates citizenship in the post-apartheid era. Although citizenship is highly contested, contemporary views of the concept are found in the views of the Sociologist, Thomas Marshall (1950). He defined citizenship as basic human equality that automatically grants political membership, as well as an array of rights. In his view, citizenship could be classified into three differentiated rights- namely, the civil, political and social. For Marshall, the civil aspect comprises of the rights necessary for individual liberty such as freedom of speech, thought and faith, the right to own property and the right to justice. Whereas, the political aspect of citizenship refers to the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. Lastly, the social facet of citizenship referred to the right to economic welfare and security, as well as social heritage and the right to live according to the standards prevailing in the society.

In South Africa citizenship has been inextricably tied to the land. In her work on citizenship and land, Deborah James (2013) points that the relationship between the two developed over time,

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[461] Wolpe, *op cit*., p. 444.

[462] Consider, for example, Deborah James (2013) "Citizenship and land in South Africa: From rights to responsibilities," *Critique of Anthropology*, 33(1), pp. 26–46; Sipho Nkambule (2012) "Citizenship a tool of social inclusion and exclusion in post-apartheid South Africa," *Journal of Community Positive Practices*, issue: 2 / 2012, pages: 170-185. Also see, Peter Geschiere and Francis B. Nyamnjoh (2000) "Capitalism and autochthony: The seesaw of mobility and belonging," *Public Culture*, 12(2), pp. 423–452; A. Claassens (1991) "For whites only – Land ownership in South Africa," in M. de Klerk (ed.), *Issues and Options for Land Reform*, Cape Town: IDASA, pp. 43–61; and, M. Mamdani (1996) *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton: Princeton University Press.

and in ways that continually changed. The connection between the two is rooted in the country's history of land dispossession. In other words, dispossession was a mechanism through which exclusive citizenship rights could be aligned with the colonial and apartheid projects. This denied African communities amongst other rights- the right to own property and to belong to the country.

What is pertinent to the matter at hand is (mentioned above) the fluctuating ties to the land that were introduced through labour tenancy and the migrant labour system. Labour tenancy regulations were applied in various forms from the nineteenth century onwards – the limited rights being more clearly defined in the 1913 and 1936 Land Acts. All the same, some African families could establish themselves permanently on white-owned farms, especially on farms with absentee landowners.[463] Thus, although referring to a much later period, when asked why they buried the dead in Tweefontein, Mtshweni recalled that: "My uncle used to stay there. This was also before the mine was operating. It was farms then. They were labourers."[464] In effect, this family had been able to establish a long-term presence on this farm. Motaung who lost her child in 1987, also indicated that her father - buried in Tweefontein – was a labour tenant.[465]

When the mine begun its operation in the 1970s,[466] some families were removed to make way for the mine, while others were removed during the height of the apartheid period in 1950s without prior arrangement for resettlement. Other descendants of the deceased whose graves were on

[463] Dithlake, *op cit*., explains that "to labour tenants, it was not cash which ensured their service, but the security of their tenure on land, the crops they reaped, and the stock they grazed… This was the fundamental reason why labour tenants clung so tenaciously onto their land under these precarious conditions," p. 221.

[464] Jimmy Mavimbela and Mrs Mtshweni, interview by Dineo Skosana, Kwaguqa, Witbank, 20 May 2016.

[465] Mrs Motaung, interview by Dineo Skosana, Empumelelweni/Hlalanikahle, 20 August 2016.

[466] Correspondence Files, MNW, Vol. 435, Ref MM2495/18 and NTS, Vol. 2279, Ref 741/280 (132), National Archives of South Africa, reveal that the Tweefontein No.13 IS farm was mined as early as 1918, by Tweefontein United Collieries Ltd. There were also other colliery mines such as the Oogiesfontein Colliery Syndicate and the London and Rhodesian Mining and Land Company Limited (LONRHO) that mined parts of the farm. Ownership of these mines changed over time through mergers, liquidation, or newly formed colliery companies.

Tweefontein and neighboring farms were moved in the early 1990s to the then informal settlement of *Hlalanikahle* (Witbank). Other families, like the Mathibela, were relocated to Ogies. The criteria laid-down for the provision of resettlement houses is not clear. It seems the mine provided alternative housing in the newly developed Phola Park (Ogies) for those who worked for the mine but did not provide housing for those who were not employed in the mine.[467] John Mnguni, (76 years old man) for example, recalled: "We grew up on that farm. My parents stayed there. Then I moved to Phola, when they removed us. My parents were no longer alive…. they were farm labourers on the mielie-meal plantation."[468]

The interviews indicated that some family members who had graves on these farms returned to their homes outside the country;[469] suggesting that the idea of "home" could be fluid. Some of the people interviewed connected home with their place of birth, where the umbilical cord falls,[470] and many such homes were reconstituted during the period of land dispossession.[471] Often, people's social relationships were disrupted, and sometimes completely broken during movement or

[467] The same Correspondence Files as cited above reveal that mining companies, such as LONRHO and Duiker Exploration Ltd., submitted multiple applications to the Department of Environmental Planning and Energy to build houses for black and white mining personnel in the late 1970s and early 1980s. Eventually, the Department of Mining issued letters to the Director of Local Government/Administration on 20 April and 28 September 1978 which recommended that "houses be erected at Ogies given that services are already available and can cope with an additional 200 houses."

[468] John Mnguni, interview by Dineo Skosana, Phola Park, 28 April 2016.

[469] Mqcina, interview by Dineo Skosana, Phola Park, Ogies, 13 May 2015.

[470] Peter, Geschiere. (2009). The Perils of Belonging: Autochthony, Citizenship, and Exclusion in Africa and Europe. Chicago and London: The University of Chicago Press

[471] This conforms to Peter Alexander's observation that apart from being responsible for the recruitment of labour mainly from Mozambique, the Witwatersrand Native Labour Association (Wenela) was also responsible for ensuring that migrants permanently settled together with their families next to the mines so as to encourage a stable workforce, see Peter Alexander (2001) "Oscillating migrants, 'detribalised families' and militancy: Mozambicans on Witbank Collieries, 1918–1927," Journal of Southern African Studies, 27(3)

resettlement. Some labour tenants were buried on the farms, while many opted to be buried in their place of birth.[472] As Rebekah Lee and Megan Vaughan have put this:

> How would the dead be ensured safe passage into the afterlife, if not buried at 'home' under the watchful eyes of the living? And how would the community attain ritual and spiritual closure without the assurances brought on by the ceremonial treatment of the body of the deceased? ...Throughout southern Africa, the migrant labour system imposed a necessary mathematics of distance upon the delicate calibrations of social and kinship relations.[473]

Peter Geschiere , observes the same practice in Cameroon when he notes that " …it is seen as a social disgrace if someone has to be buried in city, for it means that he has no family anymore; apparently there is no one waiting in the village to bury his body there".[474] In the space of disconnectedness, African families were motivated to create burial societies, as well as mortuaries, to ensure that their deceased reached home timeously to receive traditional burials.[475] Lee and Vaughan argue that: "The fear of death was expressed not so much in any anxiety associated with the premature ending of one's life, but rather in the possibility that death could happen 'far away' or 'far from home."[476] Hence, modes of dealing with death away from home were invented to ensure that the distance and disconnect are bridged in death, and that belonging is reestablished. Here, the coercive nature of apartheid was also important. In other words, families that voluntary moved for various reasons found ways of managing a connection with graves, but the coercive elements of the apartheid era played a role in sensitizing and politicizing the connection with graves.

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[472] As more generally noted by: Rebekah Lee and Megan Vaughan (2008) "Death and dying in the history of Africa since 1800," *The Journal of Africa History*, 49, pp. 341–359.

[473] *Ibid*., p. 356.

[474] Peter, Geschiere. (2009). The Perils of Belonging: Autochthony, Citizenship, and Exclusion in Africa and Europe. Chicago and London: The University of Chicago Press.

[475] Rebekah Lee (2011) "Death on the move: Funeral entrepreneurs and rural–urban nexus in South Africa," *The Journal of the International African Institute*, 81, pp. 226–247.

[476] Lee and Vaughan, *op cit*., p. 228.

Graves as Evidence [477]

The colonial ghost which embodies amongst other things, a moment of disruption, appropriation, and assimilation, compels "post-colonial" societies to revisit the past in order to "validate present attitudes."[478] According to David Lowenthal, "the past validates the present in two distinct ways: by preserving and by restoration."[479] How then, does a ruptured society – such as South Africa – regain what was lost, if "colonial modes of evidence" are tainted,[480] and the dispossessed "oral transmission accumulates actual alterations unconsciously, continually readjusting the past to fit the present"?[481] Put simply, how does the state validate land dispossession in the current land restitution programme, when documentation of removal was never issued? This is a thorny issue in South Africa's current political landscape. The findings of this thesis do not provide solutions, but they do offer insight into another form of evidence that pertains to the current land restitution programme.

The conceptual framework of Zoe Crossland, an anthropologist who explores evidential practices on human remains, is important for drawing out what matters here. Crossland's scholarship examines the remains of a popular and notorious nineteenth century convicted Australian bushranger and gang leader - Edward Ned Kelly; whose remains were found some 130 years after they went missing following his execution at the old Melbourne Gaol, Pentridge Prison.[482] Crossland argues that an interpretation of Kelly's remains as evidence requires a complex fusion of disciplines: criminology, anthropology, medicine, and heritage studies. In this

[477] Although the graves in this study belong to former labour tenants and migrant labourers – some of whom were not from South Africa (and whose owners could not be allocated as a result) – analysis of graves as a form of evidence is only applied to those migrant labourers and labour tenants who were originally born in South Africa and are, by law, in the post-apartheid era, permitted to claim land.

[478] David Lowenthal (1985) The Past is a Foreign Country, Cambridge, UK: Cambridge University Press, p. 40.

[479] *Ibid*.

[480] See this idea in Premash Lalu (2009) *The Deaths of Hinsta: Post-Apartheid South Africa and the Shape of Recurring Pasts*, Cape Town: HSRC Press.

[481] Lowenthal, *op cit*., p. 41.

[482] Zoe Crossland (2009) "Of clues and signs: The dead body and its evidential traces," *American Anthropologist*, 111(1), pp. 69–80.

endeavour, Crossland draws from the nineteenth-century evidential paradigm in anthropology which was informed by the work of Sigmund Freud and seeks to establish four different evidentiary conceptions of the dead body:

> the reading of bodily symptoms to diagnose interior states and faculties; the body as evidence of individual identity that is, as identical with the person who is understood to inhabit it; the body as evidence of the past, including as symbol of nation, ethnicity or other larger group, identity, or position; and lastly, the body as evidence of crime.[483]

These different ways of interpreting the dead body were developed by different disciplines. By, for example, physicians who explored diseases during dissections in the eighteenth-century concluded that the dead body is a site for understanding the living; and from that body of work developed by anthropologists in which the body was theorized as evidence of identity (an approach which was popular in the nineteenth-century for documenting colonial subjects and for the regulation of criminal bodies).[484]

Crossland's idea of the body as evidence of the past is an important one.[485] For Crossland, the corpse "refers not only to a body but also to a collection of facts or objects, as in a corpus of material, evidence, or knowledge."[486] What this means is that dead bodies are not just forensic evidence – as understood in post-mortems or exhumations for further examination.[487] Dead bodies and graves have meaning in other ways; of being a repository of memory, being a connection with

[483] *Ibid*., p. 71.

[484] *Ibid*.

[485] For Crossland, "Forensic anthropology is broadly empiricist in orientation, grounding its truth claims in the impartial collection of fact, and the practical knowledge and expertise of the researcher. The expert witness must inspire confidence that his or her testimony is independent and based on a clear knowledge of the facts and that he or she possesses an ability to read the signs of the body correctly and without outside influence." p. 75.

[486] Crossland, op *cit*., p. 74.

[487] *Ibid*.

ancestors that have potential to act.[488] It is from this perspective that we can reassess Evelyn's account of her dead daughter. Evelyn said that:

> I found clothes on my remains. Sibongile my daughter was wearing a little dress and a little jersey with flowers. God did well because there were contestations over that grave. Anna had been saying it's their grave. Their sibling's grave. So, when we got there, we found Sibongile's clothes which she wore when she drowned.[489]

Re-reading this in line with Crossland's theory, Evelyn's daughter's remains, unmediated, resolved a contestation over ownership, by speaking beyond the grave – challenging those who claimed the deceased was theirs. Evelyn's remains, then, become an active agent within a network of complex relations that involves more than one claimant over ownership.

In this deeper understanding of the scheme of things, the interviewed families articulated the view that graves are evidence of their past. Some of the families launched claims to land in 1998 – in the first round of calls by the Department of Rural Development and Land Reform. For example, Mabhena, who belongs to a chieftain lineage, was adamant that the Tweefontein farm that is currently mined is their land. The family asserts the presence of graves on the farm as proof. The Mabhena representative recounted:

> We wanted a meeting. We were five representatives, including the Ntuli. We said to them [*the mine*] that they can relocate the graves provided they will take care of our families because we are the beneficiaries of that place. For that, the mine must consider us. For that, the mine must consider opening job opportunities. We gave them an endless list with our demands. When they realized that these demands were hefty, they decided to bribe people and some of the people who were relocated in the area have nowhere to go. So, we have not met with Glencore-Xstrata.[490]

[488] *Ibid*.

[489] Evelyn Nyathi, group interview by Dineo Skosana, Vorsman, Witbank, 28 April 2016.

[490] Dan Mabhena, interview by Dineo Skosana, Witbank, 20 August 2016.

When asked what the Mabhena's relationship was with the Ntuli, he explained: "We lived alongside the Ntuli, and the Skosana.[491] That's why there are at least 550 graves there."[492] If graves are, however, a form of evidence, what forms of evidence are actually admissible in the land claims courts in the current land restitution programme? And what are the limitations of such forms of evidence? First, it must be acknowledged that land is "a key source in mobilizing political power, including through electoral politics."[493] Therefore, land reform is a critical site of electorate struggle when class, race, and ethnic power structures are unevenly pitched in relation to unequal land distribution.[494] Inevitably, land reform formed a large part of the African National Congress' election campaign platform prior to 1994.[495] At this time, there were high hopes that land restitution would not only redress the injustices experienced by black South Africans who had been dispossessed of land rights, but also contribute to the objectives of tenure security, land distribution, and rural development that underpinned the new democracy's wider land reform ambitions.[496] After its election to power in 1994, the ANC passed several pieces of legislation to begin to compensate those who were dispossessed during colonial, segregationist, and apartheid South Africa.[497]

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[491] I am not related to the Skosana being referred to here.

[492] Dan Mabhena, interview by Dineo Skosana, Witbank, 20 August 2016.

[493] Sam Moyo, Dzodzi Tsikata, and Yakham Diop (eds.) (2015) *Land in the Struggles for Citizenship in Africa*, Senegal: CODESRIA, p. 16.

[494] *Ibid*.

[495] The African National Congress's (1994) *Reconstruction and Development Programme: A Policy Framework* noted that: "A national land reform programme is the central and driving force of a programme of rural development… This programme must be demand-driven and must aim to supply residential and productive land to the poorest section of the rural population and aspirant farmers. As part of a comprehensive rural policy, it must raise rural incomes and productivity, and must encourage the use of land for agricultural, other productive or residential purposes."

[496] Cheryl Walker, Anna Bohlin, Ruth Hal, and Kepe Thembela (eds.) (2010) *Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa*, South Africa: KwaZulu-Natal Press KwaZulu-Natal Press.

[497] Namely: The Restitution of the Land Rights Act passed in 1994; then the Land Reform (Labour Tenants Act) of 1996; the Extension of Security of Tenure Act of 1997; the Prevention of Illegal Evictions from and Unlawful Occupations of Land of 1998; the Restitution of the Land Rights

By 2005, the acting Director General of the Department of Land Affairs reported to Parliament that 79,969 investigations into the claims made by 1998 were launched.[498] Although some claims were settled, there is a general sentiment amongst scholars that South Africa's land redistribution has been sluggish, and therefore, a failure.[499]Accounts of this failure are attributed to a wide range of problems such as: the market driven land reform system;[500] the lack of post-settlement support;[501] the politicization of Community Property Associations recognised under community tenure;[502] the absence of support for small-scale black farmers; the incompetency of officials dealing with land claims; and, tensions between communities and chiefs who launch claims on their behalf.[503] What stands out, for its silence, in these accounts is the exclusion of the mineral law and its contribution to the failure of post-apartheid land reform. As has been argued in Chapter 3, the key point is that the old order mining rights were secured before South Africa's transition through the Minerals Act 50 of 1991) which marked a move towards private mineral rights ownership. This Act effectively safeguarded the interests of those who had most to lose. The legal agreements entered into then, remain binding to date. Parts of the mineral rich land in South Africa cannot be distributed because it was legally leased for exploration or mining by the previous

Amendment Act of 2003; the Communal Land Rights Act of 2004; and, the Restitution of Land Rights Amendment Act of 2014.

[498] Walker *et al*., *op cit*., p. 2.

[499] For a comprehensive review of scholarly views see: John Leyshon (2009) "Review: Land reform, restitution and entitlement in post-apartheid South Africa," *Journal of Southern African Studies*, 35(3), pp. 755–768.

[500] Ruth Hall (2009) "Land Reform How and for Whom? Land Demand, Targeting and Acquisition," in Ruth Hall (ed.), *Another Countryside: Policy Options for Land and Agrarian Reform in South Africa*, University of Western Cape: The Institute for Poverty, Land and Agrarian Studies pp.62-93

[501] Edward Lahiff (2009) "With What Land Rights? Tenure Arrangements and Support," in Hall (ed.), *op, cit*., pp.93-117

[502] Ben Cousins (n.d.) "Land reform in South Africa is sinking: Can it be saved?" University of the Western Cape: Nelson Mandela Foundation Report.

[503] *Ibid*.

regime. It is this complex relationship between the mineral law and land reform is overlooked in scholarly accounts.[504]

There is also an unexplored challenge which has seen many claims not resolved in the current land claim's programme: the problem of evidence. In this regard, Lowenthal observes, for example, that "the past is what you remember, imagine you remember, convince yourself you remember, or pretend you remember."[505] Here, Lowenthal well-captures the complexity in recollecting the past; pointing out that memory can occasionally distort events – consciously or mistakenly – and that remembering is crucial to our identity because "the sureness of 'I was' is a necessary component of the sureness of 'I am."[506] The meaning commonly attached to memory (which is at times obscure), is what challenges the validation of claims in any restorative project in post-colonial societies. At this point, the historian and communities seeking to make sense of past events turn to archival sources.

In recent years, however, scholars have turned to problematize the forms of evidence which are generated by existing archives.[507] The emerging consensus being that existing archives must be engaged cautiously because like the political climate in which they were constructed, they embody the colonial and apartheid power relations and biases that sought to further narratives of, and a discourse of, dominance.[508] It nevertheless, is the case that archives do sometimes contain evidence of which families were established as tenants on particular farms. This can arise in a number of contexts including court cases and legal disputes. Historically, African communities were not issued with land tenure deeds. As a result, many communities rely on graves in order to attain farm numbers in the current political dispensation. And yet, farm numbers have increasingly become a challenge to attain in the context of mining and grave relocations – and where private farm owners

[504] In addition, there is a lack of research that explores forced removals on the basis on mine construction.

[505] Lowenthal, *op cit*., p. 193.

[506] *Ibid*., p. 41.

[507] See, for instance, Carolyn Hamilton (2002) "Refiguring the Archive," New York: Springer; Lalu, *op cit*., p. 62. Lalu suggests that colonial archives should not be approached as sources of truth. The truth, Lalu suggests, lies in the silence and marginality of these archives.

[508] Thus, for example, Lalu, *op cit*., concludes in his work that "the modes of evidence in of the colonial archive do not necessarily provide an understanding of the events leading up to the killing of Hintsa, but rather help define the limits of what can be said about the killing," p. 32.

deny owners of graves access.[509] Here, then, it becomes crucial to recognise the import of Crossland's work that sees the dead body and its place of rest as evidence of the past for the living. Stated simply, the grave matters as it reveals "an identity and a history of violence enacted on it;"[510] read in numbers, graves display ancestral history and reconstruction.

Conclusion

At least three points of contestations have been drawn-out from the family interviews. First, the families were not satisfied with the actual relocation process. Reasons included: inadequate transport provision; the presence of a mine-hired priest for some families; the process of gathering, removal, and reburial of remains; the use of black plastic bags for the remains; the provision of standard small coffins for young and adult remains; and, the unfulfilled promise of providing tombstones. The families saw all of this to reflect an urgency to relocate material things that stand in Glencore's way of generating profit, as well as a complete disregard of the families' cultural beliefs.

The second concern was that graves played a significant role in providing spiritual security. For this reason, the provision of the R1,500 compensation fee (wake fee) was inadequate. The families complained that this amount was insufficient for the disturbance of their ancestral remains. The fundamental concern was that the amount could not purchase items necessary for the performance of rituals which ensure harmony between the dead and the living.[511] All families suggested that

[509] This was articulated by communities in seven Provinces when I monitored the Restitution of the Land Rights Bill, in 2013 and 2014. See: Dineo Skosana (2013) "Community views on the Restitution of Land Right Amendment Bill," Report 1 & 2 compiled with the Centre for Law and Society: Cape Town, for The Land and Accountability Research Centre, Cape Town. Also see: James, *op cit*., who observes the denial of access of former labour tenants for grave visits on private owned farms.

[510] Crossland, *op cit*., p. 76.

the success and misfortune in the lives of the living are attributed to ancestors and that there is always an ongoing conversation between them and the dead.[512] This demonstrates that.

Third, and tied to the second concern, was that the families recognise that graves are a form of evidence that can validate their claim of ownership, their history, and identity. As such, some families are making land claims under the Restitution Act whereas, others make claims in a general sense that they have a connection with the area their home. Although the dead body as evidence in the original body of work served to validate identity in criminology, as well as in anthropology and allow pathological research in forensics, the dead in this study validate citizenship. In a context where oral evidence can be altered; colonial archives are now turned to with skepticism for telling the story of dispossession from the appropriator's view. Where the law continues to marginalise African families, graves become an indication of belonging. Graves map a history of family ties in as much as they reflect involuntary movement and estranged social networks.

[512] Depending on the nature of the issue in question, the family might perform rituals at their home or visit a grave. Some families, for example, mentioned grave site visits for such matters as pre-lobola negotiations, illness, recurring deaths in the family, misfortune, failure to conceive, or to secure employment.

CHAPTER 6

CONTESTING CONSECRATION

How can the bureaucratised handling of remains and the contestation thereof best be social scientifically explained? Adopting a multi-disciplinary lens, a number of important insights can be advanced from Max Weber's writings on secularism and the critique thereof in terms of the sway of political theology. In particular, as this chapter seeks to argue, it needs to be understood how in the South African context the state is not only blended with religion but is significantly tied to Christian theology to such an extent that it raises problems for how the legal system engages matters relating to the traditional spiritual heritage of African people. In other words, traditional African beliefs do not confront objective treatment by the state and its law-making functions, as Christian values are intrinsically bound to the state's very foundations.

To take the argument further forward, insight that the sacred in modern, market-oriented, African societies has become overly commercialised is of import in assessing the centrality of the commercially-related arguments around grave removals that we have earlier discussed. Although the intricate symbolic meaning behind traditional beliefs, customs, and rituals run deeper than such commercial matters, social scientific understanding is enriched through examining the meaning of the sacred in these terms.[513] It is, though, only when the meaning of the sacred is contextualized in a broader, more fluid, sociological context that grave contestations and the compensation, which the owners of graves demand, are best seen to be about the preservation of their consecrated status.

The Secular State

The bureaucratised relocation of ancestral remains unearths contested and long-standing debates about the relationship between the sacred and politics. Preoccupied with the connection between religion and politics in ancient civilisations, and in the modern world, the fathers of modern

[513] Cultural beliefs and practices, as well as the process of their transmission are framed as sacred as, from an anthropological perspective, the religious view of the sacred is a cultural collection of thoughts and practices that function as a basis for the community's social structure; see, M. Eliade (1957) *The Sacred and the Profane: The Nature of Religion* [trans. Willard R. Trask], New York: Harcourt, Brace, & World.

Western political philosophy effectively, and at times vainly, made concerted efforts to investigate the relationship between the two.

The key idea that church and the state should operate as separate entities was shaped, most famously, by the English political philosopher Thomas Hobbes – whose 1651 treatise, *Leviathan* laid the foundational concepts for what would later come to be called "secularism." [514] As Paul Dumouchel has remarked: *Leviathan* "marks an important turning point in Hobbes' thinking about religion… for the first time, he becomes fully aware of what may be called the political problem of religion."[515] Over time, Hobbes's ideas came to inform liberal political thought; notably in the work of John Locke. In *A Letter Concerning Toleration* (1689), Locke writes with the primary goal to "distinguish the business of civil government from that of religion."[516] For Locke, "the only business of the church is the salvation of souls, and it no way concerns the commonwealth, or any member of it, that this or the other ceremony be there made use of."[517] Locke suggests that civil unrest is caused by the states' religious intolerance and concludes by proposing the separation of powers in which the government promotes liberty and the general welfare of the public, while the church exists to promote its internal interests such as salvation.[518]

Later, Max Weber extended and, in some ways, broke away from Locke's position. Weber wrote about secularization – the process by which the state becomes detached from religion.[519] Michael Hughey has summarized Weber's position as "whenever the general idea behind the word secularization, was under investigation, Weber usually turned to more specific concepts, such as 'disenchantment,' 'rationalization,' and 'intellectualisation."[520] And it is from the ideas of Weber

[514] The separation of church and the state is also discussed in Chapter 2

[515] Paul Dumouchel (1995). *Hobbes & Secularization: Christianity and the Political Problem of Religion*, Université du Québec a Montréal, Canada.

[516] John Locke (1689). *A Letter Concerning Toleration*, [trans. from Latin by William Popple], Create Space Independent Publishing Platform, p. 6.

[517] *Ibid*, p. 23.

[518] *Ibid*, pp. 23–42.

[519] Michael Hughey (1979) "The idea of secularization in the works of Max Weber: A theoretical outline," *Qualitative Sociology*, 2(1), pp. 85–111.

[520] *Ibid*, p. 86.

that one can better engage how political theology impacts on an understanding of the contestation surrounding grave relocations.

Weber's German upbringing as the son of a jurist father and Protestant mother, his educational background in law, economics, and philosophy at Heidelberg University, and later, his years in the Strasburg army, had a profound impact on his social outlook;[521] as did his extensive travelling to academic institutions in Italy, Switzerland, Belgium – and most importantly, in 1904, America. Reflecting on the letters Weber wrote to his mother, Karl Mannheim writes that: "During his travels in America, Weber seems to have been most interested in labour problems, the immigrant question, and problems of political management – especially of municipal government – all expressions of the capitalist spirit."[522] Mannheim therefore concludes that, "perhaps the United States was for Weber what England had been for previous generations of German liberals: the model of a new society,"[523] and certainly it is where Weber's fascination with the role of bureaucracy began. In sum, Weber's work is concerned about the effect of religious ideas on economic activities, as well as the distinct character of Western civilization.[524] It is Weber's writings on secularization that are of key import to what is being argued in this chapter – in particular, his notion of a secular state. So, what, then, are Weber's ideas about secularization?

Weber maintains that religion stems from a philosophical desire to make sense of the universe.[525] Concerned with the question of the relationship between religion and the economic development of the West, Weber advanced that Calvinist and more widely, Protestant religious ideas, had a major impact on social innovation and the development of the Western economic

[521] Max Weber (1947) *From Max Weber: Essays in Sociology*, [trans. H. Gerth and C. Wright Mills], London: Broadway House, pp. 3–31.

[522] *Ibid*, p. 16.

[523] *Ibid*, p. 17.

[524] See, for example, Max Weber (1930) "The Protestant Ethic and the Spirit of Capitalism," New York: Allen and Unwin

[525] Weber's idea differs from Emile Durkheim who saw religion as a socially constructed source of solidarity and identification for individuals within a society, rather than a supernatural establishment; consider, Robert Jones (1986) *Emile Durkheim: An Introduction to Four Major Works*, Beverly Hills, California: Sage, pp. 115–155.

system.[526] In *The Protestant Ethic and the Spirit of Capitalism*, Weber argued that the connection between work and devotion in Protestantism was established through the social nervousness about salvation, which led to rational labour practices and ultimately the accumulation of capital.[527] Weber's thinking on secularism was further developed in "The Bureaucratic Machine" and "The Types of Legitimate Domination."[528] In his essays, Weber goes on to develop corresponding idea of the rationalism of scientific pursuit and the systematisation of government administration and economic enterprise; suggesting that rationality weakens supernatural reasoning and beliefs – a process Weber refers to as "the disenchantment of the world."[529]

Disenchantment, Richard Jenkins explains, "has two distinct aspects, each utterly implicated in the other. On the one hand, there is secularisation and the decline of magic; on the other hand, there is the increasing scale, scope, and power of the formal means–ends rationalities of science, bureaucracy, the law, and policy-making."[530] Disenchantment as a concept and a practice, therefore, feeds into the development of modern states and institutions with religion losing its authority in all aspects of social life and governance; notably the law comes to be interpreted rationally on the basis of strictly formal conceptions and not on "the kind of adjudication that is primarily bound to sacred traditions."[531] Hence, the law is seen to become detached from the spiritual, supernatural, superstitious, and paranormal ideas on which religion relies for its legitimacy.

In this context, it can be asserted that in South Africa, as in Western Europe and America, there has arisen an ostensible commitment to secular ideas of the state and law; without, however, managing to fully evade the continuing sway of Christian theology and influence, as indeed we are arguing plays out – uniquely in South Africa – in the matter of proper respect for the traditional

[526] Mannheim, *op cit*, p. 261.

[527] Charles Lemert (ed.) (1999) *The Protestant Ethic and the Spirit of Capitalism*, Westview: Westview Press, p. 100.

[528] These were written roughly at the same time: 1909-1920 and 1917-1920

[529] Mannheim, *op cit*., pp. 3–31.

[530] Richard Jenkins (2000) "Disenchantment, Enchantment, and Re-Enchantment: Max Weber at the Millennium," *Max Weber Studies*, 1(1), p. 12.

[531] Mannheim, *op cit*., p. 216.

beliefs of African people. To better grasp what is at stake here it is necessary to theoretically draw out the limitations of Weber's secularization thesis when set against the pull of political theology.

Political Theology

Political theology re-emerged in the twentieth-century public discourse; much steered by the influence of the German political theorist, Carl Schmitt. As Clayton Crockett puts it: "political theology is essentially a counter-Enlightenment project, and it coincides with the critiques of the modern Enlightenment by postmodern theorists."[532] One of the key ideas that is criticized by political theology is secularism;[533] it questions the likelihood that one can ever completely separate religious ideas and politics.[534] Carl Schmitt, in *Political Theology, Four Chapters on the Concept of Sovereignty*,[535] puts it thus:

> All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries.[536]

[532] Clayton Crockett (2011) *Radical Political Theology: Religion and Politics after Liberalism*, New York: Columbia University Press.

[533] Crockett himself is concerned to engage political theology as a response to "the crisis of liberalism."

[534] Dimitris Vardoulakis (2009) "Stasis: Beyond Political Theology," *Cultural Critique*, No. 73, p. 125.

[535] Carl Schmitt's ideas were heavily influenced by his Catholic background, later, his role as a jurist, as well as a state councillor during his time in the Nazi Party; see Joseph W. Bendersky (1983) *Carl Schmitt: Theorist for the Reich*, New Jersey: Princeton University Press.

[536] Carl Schmitt (2005) *Political Theology, Four Chapters on the Concept of Sovereignty*, [trans. George Schwab], Chicago: University of Chicago Press, p. 36.

Schmitt's principal idea is that theology is the basis for understanding the modern state. Schmitt advances that there is a transfer from the theological framework such that in modern states, "political theory addresses the state in much the same manner as theology does God;"[537] and develops this through a comprehensive interrogation of sovereignty. The sovereign, Schmitt submits "is he who decides on the state of exception"[538] – "the exception" being the situation that occurs outside the norm, analogous to Biblical miracles. It is, however, this very conception of an extraordinary situation that Enlightenment rationalism rejects.[539] For Schmitt, the exception "is an appropriate moment for stepping outside the rule of law in the interest of the public,"[540] and the sovereign is the authoritative figure that decides when and what measures must be taken to regularize an exceptional moment. Schmitt concludes that society cannot function without the political leadership and the intervention of the sovereign, particularly during states of emergencies.

Schmitt's ideas were consolidated during the Weimar Republic and earned him the label of being the "father of authoritarian theories."[541] And as John Cobbs, who considers the broader implications of Schmitt's ideas, puts it: "Theologians were disturbed by the suggestion that Christian teaching about God must bear responsibility for the particular forms taken by social and political authority."[542] What, though, is valuable about Schmitt's provocative writings is the insight

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[537] *Ibid*, p. 36.

[538] *Ibid*, p. 5.

[539] *Ibid*, p. 37. The rationalist perspective submits that there is a scientific and systematic explanation to events and dismisses the idea of miracles.

[540] Schmitt, *op cit*., p. 9.

[541] Nomi Stolzenberg (2014) "Political Theology with a Difference," 4 *U.C. Irvine Law. Rev.407*, p. 407. Stolzenberg adds (p. 407) that political theology's "association with the archconservative political theorist Carl Schmitt and his dubious association with Hitler are enough for many people to condemn the subject and take it off the table of intellectual conversation forever. Even people who have only a nodding acquaintance with this episode in the annals of political thought know enough to dismiss Schmitt as a German political theorist who venerated authoritarianism, exalted political violence, derided liberalism, and explicitly lent the imprimatur of his theory of political theology to Hitler's Nazi ideology and rise to dictatorial power."

[542] John B. Cobb (1980) *Process Theology as Political Theology*, Manchester, UK: Manchester University Press; and Philadelphia: Westminster Press, p. 2.

that "all concepts of modern political thought are secularised theological concepts." What has to be acknowledged, however, is that Schmitt's conception of theology, like many of his antecedents is analogous to the Christian doctrine [543]; it is rooted in *Christian* theological ideas and their transferal to the construction of modern states. In universalizing the Western Christian tradition alternative theological traditions are extricated; what of the likelihood that other religious traditions may shape ideas about modern states? Moreover, from this perspective, Schmitt's view that "the state needs law and law needs the state; but law, as a deeper principle, holds the state in check in the final analysis,"[544] is in two key respects too reductively cast. First, is that because "the law is the law of a state," it becomes almost impossible to imagine a system of rules and regulations that are completely clear from Christian concepts. Second, if the law upholds neutral secular principles to thoroughly keep the state and its citizens in check, then the sovereign who decides during the emergency, or the act of presiding over the law, is itself symbolic of God's judgement – at least in Schmitt's analogical terms; in other words, a state whose ideas are based on the Christian theology will reflect legal systems, as well as regulations, that are closely linked to that religious tradition.[545]

The inherent problem of the universalisation of Western Christian theological principles have been articulated and highlighted by the rise, since the 1950s, of liberation theology – especially in Latin America, but also in Africa.[546] As Denis Carroll puts it, liberation theology was a reaction to the fact that "regrettably, the church allowed itself to be enlisted in colonial policy. The cross was made to accompany the sword and seemingly to legitimise colonial depredation."[547] Carroll adds that liberation theology is practiced: " whenever people bring the resources of their faith to

[543] This idea is also partly explored in Talal Asad (1993) *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam*, Baltimore: Johns Hopkins University Press. Asad considers how religion as a historical concept emerged in the West and came to be applied as a universal concept.

[544] Schmitt, *op cit.*, p. 36.

[545] This poses a challenge for a country like South Africa whose citizens uphold different religious views.

[546] See, for instance, Emmanuel Martey (1992) *African Theology: Inculturation and Liberation*, New York: Wipf and Stock. Martey points out that the African liberation movement against colonisation in Africa had a significant impact on the development of African Christian theology.

[547] Denis Carroll (1986) *What is Liberation Theology?* England: Litho Press, p. 9.

examine oppressive situations whether the oppression is economic, political, social or sexual."[548] It remains problematic, however, that liberation theology has resulted in a shift from "colonial Christendom to new Christendom."[549] For, a shift from understanding the Christian tradition as a tool for oppression to an instrument for the attainment of freedom, suggests that there is nothing philosophically wrong in itself with the dominance of Christian ideas; the problem is seen to lie with the interpretation and practice of a specific form of Christianity that aided and abetted the conquering of colonies. The shift also suggests that liberation theology would not exist outside of Christianity.

These shortcomings with respect to liberation theology have been partly addressed in the scholarly work that calls for the decolonisation of theology.[550] Like liberation theology, the idea of a decolonized theology emerges from the need to challenge orthodox Western theology, which according to Noel Leo Erskine, normalizes injustice by preaching about freedom in the afterlife.[551] A close reading of liberation and decolonised theology reveals a synergy of ideas from which the articulation and the exercise of liberation theology is an act of decolonising religion. The difference, however, is that decolonizing theology as a school of thought takes cognisance of the existence of diverse religious traditions and beliefs. For example, writing about decolonising religion in the Caribbean, Erskine refers to black religion or black theology, maintaining that "Black Theology differs from traditional theology by the simple reason that it may not be [*as*] concerned to describe traditional themes [*such*] as the eternal nature of God's existence as it is to explore the impermanent, paradoxical, problematic nature of human existence."[552] This sort of

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[548] *Ibid*, p. 8.

[549] *Ibid*, p. 9.

[550] Consider: Andrea Smith (2010), "Decolonization in Unexpected Places: Native Evangelicalism and the Rearticulation of Mission," American Quarterly, Volume 62, Number 3 and. T. S. Maluleke (2006) "The Africanisation of theological education: Does theological education equip you to help your sister?" in E. P. Antonio (ed.), *Inculturation and Postcolonial Discourse in African Theology*, New York: Peter Laing, pp. 46–55.

[551] Leo Erskine (1998) *Decolonizing Theology: A Caribbean Perspective*, New York: Africa World Press.

[552] *Ibid*. p. 4. One of the churches to shape the discourse on a decolonized theology in South Africa is the church of amaNazaretha founded by Isaiah Shembe in 1911, in Natal. Shembe molded elements of indigenous Zulu religious beliefs with Christian theology to produce a movement in which the collective

theology, Erskine concludes, enables us to see that "practicing African religion was part of what enabled… the Caribbean Blacks to resist dehumanisation and to reject the slave Master's God."[553] Noteworthy here, with regard to Schmitt's political theology, is the recognition that indigenous theology or other forms of theology do shape modern states.

It is by understanding that political theology should not be addressed in reductive terms, but as encompassing religious traditions and beliefs, that one can offer a better social scientific explanation of the contestation over grave relocations. The South African state is a hybrid version of a secular state, founded on Christian thought and principles, that seeks to apply the law to a large number of people who subscribe to traditional religions.[554] The crux of the contestation rests here.

As was highlighted in preceding chapters the problem with the South African heritage law is that it is a borrowed product of international discourse and practices, as well as a continuation of earlier Roman-Dutch law. This law favours the protection of tangible heritage of national significance such as architectural structures, art, and monuments; spiritual heritage is protected but there is a disregard of what does not conform with Christian monotheism – thus what it means to protect the dead in terms of African religious tradition remains misconstrued. It is such a state that enables economic actors such as Glencore, to exploit African communities.

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participation in the ritualized performances of prayer, sacred song and dance served to provide an alternative religious and social order for Zulu-speakers; see L. Gunner (2002) *The Man of Heaven and the Beautiful Ones of God,* Leiden: Brill.

[553] Erskine, *op cit*., p xiii. This idea is also articulated in David Lan's 1985 book, *Guns and Rain: Guerrillas and Spirit Mediums in Zimbabwe*, London, James Currey. Lan examines the collaboration and the resistance of guerrilla movements and local spirit mediums during Zimbabwe's fights for independence.

[554] W. Bennet (2011) *Traditional African Religions in South African,* Law Cape Town: University of Cape Town Press, asserts that compared with the three main monotheisms – Christianity, Islam, and Judaism – traditional African religions make no attempt to separate religion from everyday life, make no claim to universal validity, or seek to resolve the contest between sin and virtue. Believers contemplate no final judgment and no redemption with the possibility of eternal salvation.

Commercialising the Sacred

The social anthropological literature relating to ethnicity, culture, and death provides a source of valuable insight into matters of our concern – none more so than the Comaroff's 2009 book *Ethnicity, Inc*.[555] A key insight of this work is how ethnicity is gradually transformed by the commodification of what is supposed to be most distinctively authentic – "culture;"[556] resulting in the reconfiguration of ethnic groups into fledgling business corporations. The Comaroff's present the scattered emergence of ethnic products, heritage industries, and national marketing as part of a world-historical transformation that radicalises and transforms earlier kinds of ethnic commodification into something else: emergent forms of "Ethnicity, Incorporated."[557] Krisan Surak, in reviewing *Ethnicity, Inc*. notes that:

> This is a transformation that thrives on the psychic dislocations wrought as capitalism engenders both the apparent loss of and simultaneous longing for authentic experiences. In these conditions, consumer desire mediates the recognition of ethnic identities, as moderns find themselves through consumption of authentic otherness or self-fashioning via the consumption of ethnic goods.[558]

Although the Comaroff's draw from Marxist theory, from Marx's emphasis on the alienation of the commodity from its producer,[559] they suggest that the retailers of ethnic authenticity are not an

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[555] John L. Comaroff and Jean Comaroff (2009) *Ethnicity, Inc,* Chicago: University of. Chicago Press. Also consider the Comaroff's earlier 1999 article: "Occult economies and the violence of abstraction: Notes from the South African post-colony," *American Ethnologist,* 26(2), pp. 279–303.

[556] Culture is commodified, and in turn, the commodity becomes culture. Samuel Weeks's (2011) review of Ethnicity Inc. in *Cadernos de Estudos Africanos* 22, 179-181, makes the point that "in turn, these saleable representations of ethnicity frame people's conceptions of cultural identity and belonging, such that many impoverished black Africans fear annihilation if they cannot successfully market something 'unique.'

[557] Kristin Surak (2009) "The Business of Belonging," Review. *The New Left* (63). pp. 151-159

[558] *Ibid*, P.153

[559] Karl Marx (1959) *Economic & Philosophic Manuscripts of 1844*, [trans. Martin Milligan], Moscow: Progress Publishers. Marx identified the alienation of the worker from their product as one of the four

"alienated proletariat," for their ethnicity in part constitutes the mode of production.[560] The Comaroff's also observe that ethnicity retailers more often than not, are poor and marginalised minorities who desperately seek dignity and capital in a state that has entrusted its traditional duties to market forces.[561] As such, individuals find themselves compelled to become innovative and business minded, and as a result, ethnic groups can be resuscitated by the power of capital.[562]

This commercialisation thesis provides a powerful insight into the intersection of sacred politics and the political economy of African communities today.[563] In part, it provides a social scientific explanation as to why – in the case being investigated in my thesis – the grave owners' prime concern centered on confronting the inadequate monetary compensation from Glencore for the movement of ancestral remains. The demand for substantial compensation for grave removals clearly resonates with the Comaroff's argument about modernity and the space it opens for the commodification of the sacred. This argument, however, is not flawless. The argument must be applied with caution as must not lose sight of the non-monetary value that is attached to the consecrated by the living and therefore, misinterpret the politics thereof. At root, the politics of grave relocation stems from an understanding about the moral value of ancestral remains and the idea that if disturbed thorough compensation must be provided. This is not reducible to the reasoning that if modernity provides an opportunity for financial gain, then trade the sacred.[564] In

types of alienation that takes place during production within a capitalist system. Marx established that the Capitalist class appropriates the worker's manual labour as well as the product or intellectual property which the worker never owns.

[560] See this idea in Comaroff, John and Comaroff, Jean. (2009). Ethnicity, Inc. Chicago and London: The University of Chicago Press. p. 22-59

[561] Comaroff and Comaroff (2009), *op cit*.

[562] *Ibid*.

[563] As Weeks, *op cit*., comments: "the Comaroff's succeed in their wider objective of proposing a model of critical scholarship to examine the ethnic economy in all its dimensions. The widespread ability of commodified ethnicity to (re)shape identity, (re)vitalise group consciousness, and form new patterns of sociality explains its ubiquity and attests to its influence in contemporary society" p.181

[564] As previously mentioned there are a few cases in which families who share a similar surname to the deceased claimed graves which did not belong to them for monetary gain; the general finding, however,

fact, contrary to the drift of the Comaroff's view, the sacred status of ancestral remains was not downplayed or manipulated during discussions with the owners of the graves.

Moreover, it has to be said that there is also something problematic in the condemnatory and detached style of the Comaroff's writing; [565] so much so that it compels a resuscitation of the controversial debate within cultural anthropology concerning scholar positionality.[566] The problem with a lack of reflection on one's positionality is that it can lead to serious misrepresentation[567] of

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was that families did not see an opportunity to make money of their ancestral remains, but rather considered their graves sanctified and therefore worth a reasonable compensation for any disturbance.

[565] Weeks, op cit., p. 181, remarks: "The tone of *Ethnicity, Inc.*, mocking at times, conveys an implicit value judgment. Unexplored in any detail is the fact that participating in the cultural economy has brought some Southern Africans real material benefits, in addition to providing a sense of pride in ethnic self-identification."

[566] See, for instance, Maja Nazaruk (2011) "Reflexivity in anthropological discourse analysis," *Anthropological Notebooks*, 17(1), pp. 73–83. The term "reflexivity," denotes the notion that the researcher must situate his or herself in relation to the subject of the study; it dictates that no true objective reality can be observed because each person can only interpret events through a veil of their own subjective understanding.

[567] Misinterpretation in Anthropology can be traced back to the development of the discipline in tandem with colonial expansion; see Edward Tylor (eds.) (1871) *Primitive Cultures; Researches into the Development of Mythology, Philosophy, Religion, Language, Art and Custom*, Boston: Estes & Lauriat; and, Nehemia Nyaudi (2003) *Introduction to the Study of Religion*, Kenya: Zapf Chancery Publishers. These scholars note that early Anthropology carried with it all the European biases and preconceptions of the 19th century. In this respect, Charles Darwin's evolutionary theory shaped early anthropological views. T. W. Bennett, in his (2011) edited volume, *Traditional African Religions in South African Law*, Law Cape Town: University of Cape Town Press, expands this idea when he writes that "belief systems were classified according to a progression from animism, to ancestor worship, to polytheism, and finally, to the supposed pinnacle development of monotheism. African religions were situated at the lower end of the scale, and in consequence, were deemed primitive." p. 53 A. D. Spiegel and H. Becker's (2015) South Africa: Anthropology or Anthropologies? *American Anthropologist*, 117(4): 754-760, reveals that in South Africa, "socio-political historical circumstances were momentous factors in the development of the discipline from its beginnings in the early 1920s, and they continue to influence contemporary debates and practices."

the subject of one's interest.[568] For example, if positionality is not taken into account, it would perhaps lead scholars to misinterpret Mathibela's negotiated settlement of R99,000 with the mine as a sheer transactional pursuit;[569] when in fact Mathibela advanced that this compensation fee was necessary for his eleven graves, and that it was still inadequate for the value of ancestors.[570]

More in line with the argument of this chapter is Hylton White's 2013 article, "In Defence of a Critical Anthropology of Religious Life," which takes a critically engaged position on the commercialisation thesis. White explores the relationship between the ancestral spirits and the economy through the case of Vusi, who comes from an impoverished African family of migrant labourers and labour tenants in rural KwaZulu-Natal and concludes that:

> The link between economic life and the lives people have with spirits is a link to be discovered not in what spirits actually say, but rather in the space of what is missing, awkward, or difficult in the course of people's transactions with them. Sometimes the most important thing to say about a particular kind of cultural form is not what it is or even what it does, but rather its dependence on what it is not, and the critical implications of that dependence.[571]

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[568] See: Francis B. Nyamnjoh (2012) "Blinded by Sight: Divining the Future of Anthropology in Africa", *Africa Spectrum* Vol. 47, No. 2/3 (2012), pp. 63-92 Nyamnjoh observes that non-African Anthropology scholars tend to defend their positionality by deeming it more capable of producing ground-breaking research because of "outsider's objectivity."

[569] Mathibela, interview with Dineo Skosana, eKangala, 11 June 2016.

[570] Very few published works reflect on the positionality of anthropological interpretation. Studies which do so often seem progressive for pointing to problems of bias to Western conceptual standards, but they rarely admit the challenge of studying heterogeneous African communities from an outside position. Constant reflection of a scholar's positionality and how it shapes one's contribution to knowledge would eliminate the continuous reproduction of misleading misinterpretation about African experiences. Also consider, Nyamjoh, *op cit*., p. 65.

[571] Hylton White (2013) "Spirit and society: In defence of a critical anthropology of religious life," *Anthropology Southern Africa*, 36(3&4), pp. 139–140.

White advocates an "anthropology that is critical and up to the task of comprehending social ties, including ties with spirits."[572] White is aware of the monetary factor in modern economic societies: he writes, for example, that "all our relations are framed in one or another way by the circulation of capital through human interactions, in a form of money,"[573] and that "money is a prerequisite for the motion of all kinds of value;"[574] but stresses that one must recognise that no monetary value can be attached to ancestors.[575]

Contextualising the Sacred

The work of anthropologists and historians such as Rebekah Lee and Megan Vaughan provides another lens by which to explain grave relocations. [576] Although Lee and Vaughan primarily explore the history of death practices (and not the matter of grave relocations), they do pursue their investigation in the context of: the colonial and postcolonial state; the migrant labour system in Africa; and, demographic change and urbanization. Lee and Vaughan show how new technologies of death – such as urban mortuaries, refrigerated transport of the deceased, burial schemes, and embalming and exhumations – are not *simply* about the commodification of death and sacredness,

[572] *Ibid*, p. 139.

[573] *Ibid*.

[574] Ibid, p. 144

[575] Hylton White (2013) "Spirit and society: In defence of a critical anthropology of religious life," refers to the case of Vusi which he presents to reveal Vusi experiences of a series of misfortune in his life because he has not been able to conduct the necessary rituals with his ancestors to bring luck and well-being into his life – not because of a lack of money.

[576] Rebekah Lee and Megan Vaughan (2008) "Death and dying in the history of Africa since 1800," The Journal of Africa History, 49, pp. 341–359 and Rebekah Lee (2011) "Death on the move: Funeral entrepreneurs and rural–urban nexus in South Africa," The Journal of the International African Institute, 81, pp. 226–247. Also consider: S. Van der Geest (2006) "Between death and funeral: Mortuaries and the exploitation of liminality in Kwahu," *Africa*, 76(4), pp. 485–501; B. Page (2007) "Slow going: The mortuary, modernity and the hometown association in Bali-Nyonya, Cameroon," *Africa*, 77(3), pp. 419–441; and, Garrey Denny (2009) "The Standard of Dying: Race, Indigence, and the Disposal of the Dead Body in Johannesburg, 1886–1960," *African Studies*, 68(3),. pp. 310-330.

but are ways of dealing with "death on the move" in the context of the workings of the mining industry and migrant labour system.

Through contextualising death practices one can grasp how external forces have contributed to the reinvention of practices and beliefs surrounding death which are both self-evidently "modern" and yet also rooted in a much longer history. Contextualisation helps one understand that the contestation about the sacred is not just about the clash of the fluid "modern" and the "traditional" in a capital-oriented society, but also about the way of preserving notions of the sacred in a continuously shifting market-driven context. In other words, it is not always that the meaning of the sacred changes to generate capital gains as the Comaroff's maintain, rather communities engage in contestation in order to preserve what is sacred – and which can be profaned by the market.[577] This is in accord with what Lee and Vaughan submit in their work, *Death and Dying in the History of Africa since 1800*, when they write that:

> Although it would be tempting to argue that commoditization has emptied the spiritual content of death rituals and marked a "great transformation" in African death cultures, there is reason to suggest this is an oversimplification…. As Jane Guyer and others have stressed, monetary transactions in Africa cannot be understood in isolation from locally derived systems of belief, sociality, and exchange. Commodities, therefore, need to be seen as potentially malleable mediators of local cultural values, and not simply as markers of Western capitalist consumption.[578]

Lee and Vaughan suggest that one adopts an analytical framework that perceives the management of death as fundamental to understanding the social fabric and belief systems of

[577] Rebekah Lee (2011) "Death on the Move: Funeral Entrepreneurs and Rural–Urban Nexus in South Africa," *The Journal of the International African Institute*, 81, pp. 226 – 247; Marleen, De Witte (2001) *Long Live the Dead! Changing Funeral Celebrations in Asante*, Ghana, Amsterdam: Aksant Academic Publishers, p. 105; and, Jane Guyer (2004) *Marginal Gains: Monetary Transactions in Atlantic Africa*, Chicago: University of Chicago Press.

[578] Rebekah Lee and Megan Vaughan (2008) "Death and Dying in the History of Africa since 1800," *The Journal of Africa History*, 49, p. 358.

"traditional" societies. In this way, one can better understand how it is that in African societies death brings physical, spiritual, and social rupture.[579] To heal this rupture:

> two transitions must take place, the first is that the deceased must move from a state of impurity or contagion to a state of ritual purity and harmony with the spirit world. This transition can be guided by the living, through close attention to the ritual preparation and interment of the body.[580]

From this perspective then one can better deduce that contestation over graves is not – in the case studied in this thesis – simply tied to the R1,500 per grave *wake fee* provided by the mine; it is more about the formal relocation practices which heal the spiritual and social disturbance caused by death and the exhumations. It is also about graves standing as a symbolic recollection of belonging: as drawn out in the previous chapter, for the affected families graves represent a specific kind evidence of a connection to the land in the context of South Africa's on-going land restitution project. The point is that an all too ready and un-contextualised application of the commercialisation thesis to sacred politics can too easily obscure these deeper meanings pertaining to the contestation over consecration.

[579] Discussed in Chapter 1

[580] *Ibid*, p. 344.

CONCLUSION

CONTESTATION OVER GRAVESITE REMOVALS

The central focus of this thesis has been to critically interrogate the nature of political contestation around gravesite removals on the Tweefontein farm (Ogies). Primarily, legal analysis and social history methods were employed to probe why and how graves have been subject to political contestation. And in particular the formal legal framework – the National Heritage Resources Act of 1999 and the Mineral and Petroleum Resources Development Act of 2002 – within which removals take place was examined. Part of investigating the contestations entailed identifying gaps in the legislation which enable mining houses – such as Glencore – to exploit resources and communities. At its heart the thesis also outlined and analysed the experience of those African families whose graves were relocated.

The thesis has highlighted how inadequacies in the law create conditions for a market-friendly mineral law to override the protection of heritage in such as manner as to result in new forms of exclusion for African people; a state of affairs that compels those affected to seek alternative ways to validate their sense of belonging. In the case of Tweefontein, the families to whom the graves belong argue that graves matter as a form of evidence that speaks to the current political dispensation which requires evidence of historical injustice for political and economic redress.

To build this argument, the thesis pointed to the contradictory nature of the NHRA and the MPRDA. The fundamental contradiction being that section 36 of the heritage law aims to protect graves, whereas the market-driven MPRDA – that operates through state-led privatisation of minerals – overrides the NHRA by making it possible for mining companies to lease mineral resources which are attached to land. Both laws were shown to intersect in ways that are not only contradictory but also fail to attain self-proclaimed objectives to protect previously marginalised communities. At root, the problem is shown to lie in the fact that both the heritage and mineral law) – in common with many other laws in South Africa – are founded on earlier precedents of colonial law. Both Acts draw from European legal traditions; from the weight of Roman and Roman-Dutch legal systems. However much inherited legal traditions might have been revised in post-apartheid South Africa, but the law continues to conflict with demands for social justice. And result in new forms of exploitation and marginalisation for African communities – what in this thesis have been termed "lawful exclusion."

"Lawful exclusion" is therefore posited as being the means by which African communities, such as that examined in this thesis, can be marginalised through reformed laws of the current democratic dispensation. The precise workings of lawful exclusion have, in this thesis, been explicated in detail in the analysis presented around "the barricaded ancestors;" wherein, notably, a clear disregard of the provisions in both the NHRA and the MPRDA concerning the process of grave relocation is shown to deny the owners of the graves their right of access.

There is, in all this, contested meaning attached to the ancestral remains by Glencore on the one hand, and the owners of the graves on the other. For the mine, the graves and their contents - the remains – matter as being movable objects standing in their way of profit-making from the coal-seams. For the owners of the graves, the remains matter because they are considered sacred and are an embodiment of their identity and social history, as well as a form of evidence in the political context of land claims and social redress. This was amplified by how Glencore actually carried out the relocations; the mine used black plastic refuse bags and small cardboard boxes for the reburial. To the African families this process was considered, to say the least, "undignified;" – the way in which the removals and the reburials were conducted represented the continuing dehumanisation of African people. The outstanding fact here is that in post-apartheid South Africa the African body continues to be violated and marginalised *even when dead.*

This thesis, though, not only sought to add to the scarce literature on the politics of exhumations and the grave relocations of commoners, but to also to contribute to a deeper understanding of the experiences of coal-mine-affected communities. This is important because coal-mine affected communities have, to date, only been studied as far as environmental, health, and economic impacts are concerned;[581]where often the main focus is on the social impact of mining on workers

[581] See, for instance: J. Carruthers (2002) "Environmental history in southern Africa: An overview," in S. Dovers, R. Edgecombe, and B. Guest, B (eds) *South Africa's Environmental History: Cases and Comparison*, Cape Town: David Philip. pp 98-112; K. G. Aiken (1994) "Not long ago a smoking chimney was a sign of prosperity: Corporate and community response to pollution at the Bunker Hill Smelter in Kellogg, Idaho," *Environmental History* Review, 18(2), p. 67; M. Singer (2010) *Changing conceptions of South African coal-based population, with special reference to the Witbank coalfield, 1906–1978*, unpublished MA thesis, University of the Witwatersrand, Johannesburg.

and on the nature of the working conditions of the early twentieth-century migrant populations.[582] The tragic death of 42 mineworkers in Marikana in 2012 reignited interest in the socio-economic status of mine workers and trade unionism in South Africa.[583] Few studies, however, interrogate the impact of coal mining on heritage and sacred sites, as well as the politics thereof. In this regard, this thesis contributes to knowledge by showing how the profit imperative of a market-driven economy can override specific needs to redress past injustices. In this regard, the study points to legal and policy problems in the post-apartheid South Africa but does not propose the forms of intervention towards policy reform.

This study heralds a number of important insights for further researchers. First, it has shown that for a thorough comprehension of contemporary social problems, the traditional boundaries of academic disciplines must be transcended. For example, Legal Studies can best explain the contestation over grave relocations as far as the MPRDA and the NHRA are concerned; whereas, Anthropology best relates to contestation with regard to cultural practices and the contradictory meanings attached to human remains by the owners of the graves and the mine. And Political Science best accounts for the role of the state and governmental policy in fuelling contestation, as well as the socio-political behaviour of those who contest relocations. Social History has to be utilized to provide the broader temporal context of contestation over grave removals. Each of these disciplines, in their own ways, helps provide a partial lens on what is at stake in the contestation

[582] See, for instance, migrant workers' studies such as: Alexander (2001) "Oscillating Migrants, 'Detribalised Families' and Militancy: Mozambicans on Witbank Collieries, 1918–1927," *Journal of Southern African Studies*, 27(3), pp 505-525; D. Moodie (1994) *Going for Gold: Men, Mines and Migration*, Berkeley, CA: University of California Press; R. Turrell (1982) "Kimberley: Labour and Compounds, 1871–1888," in S. Marks and B. Rathbone (eds.) *Industrialisation and Social Change*, London: Longman, p. 57.

[583] P. Stewart (2012) "Intensified Exploitation: Rock Drill Operators' Post-Strike Productivity Deal in a South African Platinum Mine," *Labour, Capital and Society / Travail, capital et société*, 45(2), pp. 32–57; D. Pillay (2012) "Workers' Control, Marxist-Leninism and the Revitalisation of Working-Class Politics in South Africa," *Labour, Capital and Society / Travail, capital et société*, 45(2), pp. 4–31.

over gravesite removals, but only through the kind of creative synthesis offered in this thesis can a full, more convincing, social scientific picture be presented. [584]

Second, this thesis points towards a greater need for social science disciplines to interrogate the discourse relating to the political and economic gains and losses in South Africa's "new democracy." The drafting of the Constitution of the Republic of South Africa (enacted in 1996), as well as the string of laws that were passed post-1990 that sought to address the land question, poverty, and inequality, are enough to persuade both academics practitioners and society-in-general that 1994 marked the advent of a just transition.[585] But to what extent – when viewed against new forms of "lawful exclusion" – does 1994 really mark a "turning point?"

Third, grave relocations studies matter not only because of the sacredness attached to the dead, but also because of the country's particular history of oppression, displacement, memorialization and belonging;[586] all of which are potent in the "collective consciousness of a nation still preoccupied with transition, reconciliation, and transformation."[587] It is important to note, however, that graves are not only subject to contestation in countries with a history of oppression. Broadly speaking, human remains are considered sacred and worthy of protection because of their connection to human heritage in different parts of the world.[588] Sloane, for instance, shows how in

[584] M. McKeon (1994) "The Origins of Interdisciplinary Studies," *Eighteenth-Century Studies*, 28(1), pp. 17–28; P. Sinnema. (2007). "Interdisciplinary Studies and the Myth of Disciplinary Capaciousness," *Victorian Review*, 33(1), pp. 59–61.

[585] Shaw. S (2001) South Africa's transition to democracy: an African success story: a resource book on the positive changes of the nineties, The United States of America: Sandy Shaw

[586] Also see: J. Duggan (2010) "Prestwich Place Memorial: Human remains, development and truth," www.archivalplatform.org/blog/entry/prestwich_place/; J. Jonkers (2005) "The Silence of the Dead: Ethical and Juridical Significances of the Exhumations at Prestwich Place, Cape Town, 2003–2005," unpublished MPhil thesis, University of Cape Town.

[587] Jonkers, *op cit*., p. 4.

[588] See, for instance: D. Sloane (1991) *The Last Great Necessity: Cemeteries in American History*, Baltimore and London: The Johns Hopkins University Press; M. Chisholm (1985) "War Graves in

the United States, given the sacredness of the remains, attitudes toward cemeteries have gone through many changes as reflected in the names given to places where dead bodies are buried.[589] The term "graves" symbolised a gloomy finality; whereas, the softening of the term to "graveyards and cemeteries" in the nineteenth century led to the increasing beautification of the grounds. In a review of Sloane's work, Horton writes that: "with the new term [*cemeteries*] came the attitude that deceased people were only asleep or at rest. Marker symbols of an optimistic and comforting nature were used."[590] Hence, what requires further investigation are the varying meanings and ways in which different societies connect to the dead – and the extent to which the various ways of relating to the deceased can explain contestation over gravesite removals elsewhere.

Over and above all this there is an outstanding matter for the South African government: can a just social transformation take place in the context of a market-driven MPRDA which leases land for mining and removes graves and communities off the land?[591] By what justification can modern development projects – such as mining – take precedence over the matter of socio-economic redress; especially if it can be shown, as in this thesis, that such developments actually work to perpetuate marginalisation in new guise?

Malawi," *The Society of Malawi Journal*, 38(2), pp. 13–16; M. Rowe (2003) "Grave Changes: Scattering Ashes in Contemporary Japan," *Japanese Journal of Religious Studies*, 30(½), pp. 85–118.

[589] Sloane, *op cit*.

[590] L. Horton (1992) "The Last Great Necessity: Cemeteries in American History," *The Annals of Iowa*, 51, pp. 423–424.

[591] On 24 October 2018 the Constitutional Court of South Africa made a ruling to protect the land rights use of the Lesethleng Community in North-West Province; the community had been evicted from their farm (Wilgespruit) for platinum mining by Itireleng Bakgatla-Bakgafela and Pilanesburg Platinum mine; see, Lawyers for Human Rights (2018) "Court Rules in favour of Lesetlheng Community," www.lhr.org.za/news/2015/court-rules-favour-lesetlheng-community It remains to be seen what the implications of this ruling is for mine-affected communities.

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APPENDIX



Figure 3: graves with concrete headstones located on the Tweefontein farm before the relocations



Figure 4: the date of birth and death markings on old concrete headstones



Figure 5: graves with rod-like markings for identification purposes



Figure 6: graves marked with personal items of the deceased



Figure 7: look-alike tombstones- built by Zenzele funeral parlour. At the bottom-right of the headstone, is the company's name, *Zenzele*, engraved for marketing purposes



Figure 8: grave-site removal notification on the Tweefontein farm

TWEEFONTEIN COMPLEX

A
GLENCORE
OPERATION

19 February 2014

SOUTH AFRICAN HERITAGE RESOURCES AGENCY
PO BOX 4637,
CAPE TOWN,
8000
TEL: 021 462 4502, FAX: 021 462 4509

Sir /Madam

LETTER OF EXHUMATION PERMMISSION AND RELOCATON OF GRAVES AT THE TWEEFONTEIN OPERATION

Tweefointein mining Operation is owned by Glencore South Africa (Pty)Ltd and operating under mining right number MP30/5/1/2/2/289MR.

The following properties are all within the Tweefontein Mining Operation:

1. Tweefontein 13 LS RE;
2. Klipplaat 14 LS portions 2 and 7; and
3. Boschmansfontein 12 LS.

On behalf of Glencore in their capacity as owners of the relevant properties, permission is herewith provided to Professional Grave Solution (Pty)Ltd to exhume and relocate the identified graves in the above mentioned properties.

The due diligence has been followed with the respective families and the remains will be reburied in graveyards chosen by the families.

Your faithfully

Manuel Longueira
Assistant General Manager

pp
Ronaldt Mafoko
General Manager
Tweefontein Complex

Figure 9: Glencore's evidence of ownership of the Tweefontein farm



Figure 10: unidentified relocated graves. These were moved to the Phola cemetery.



Figure 11: layer of smog surrounding the Tweefontein area and the Highveld, Mpumalanga