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Mining Community Development in South Africa: A Critical Consideration of How the Law
and Development Approaches the Concept “Community”

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1. Introduction

The legislative system¹ that provides for the socio-economic development of mining communities in South Africa has been under significant scrutiny in recent times. Various instances of conflict between mining communities and mining companies, of which the Marikana Massacre of 2012 is certainly the most noteworthy,² show that mining communities expect mining companies to contribute more to the improvement of their living conditions.

The relationship between mining communities and mining companies are exposed to the various socio-economic challenges that other sectors of the South African economy currently face.³ However, a conceptual approach to the legislative system in the mining industry specifically may show to the unique challenges the industry faces when it comes to mine community development. A conceptual approach requires asking whether the way in which the legislative system is framed and the rhetoric it promotes do not create expectations with mining communities that cannot be met by mining companies.

The legislative system promotes the empowerment of mining communities or “mine community development” by means of a complex interaction between various pieces of legislation and policy guidelines. At the centre of this interaction, are the definitions of “community” and “mine community” provided for in the Mineral and Petroleum Resources Development Act (“MPRDA”)⁴ and the Mining Charter.⁵ These definitions have been amended quite a few times since the enactment of the legislative system,⁶ attesting to the

¹ Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”), the social and labour plan created in terms of the regulations to the MPRDA, the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry created in terms of s 100 of the MPRDA (“Mining Charter”) and the Integrated Development Plan created by the local municipality in terms of the Local Government Municipal Systems Act 32 of 2000 (hereinafter “legislative system”).

² During 2012, the South African platinum mining industry saw several strikes. Labour unrest during the week of 9-16 August 2012 at Lonmin’s mine at Marikana resulted in violence and killings that sent shock waves globally. Thomas Piketty a French economics scholar, in *Capital in the 21st century* introduced the chapter on income and output by referring to the Marikana shootings to illustrate the continuous debate surrounding the percentage of output to be allocated to wages. Piketty T, *Capital in the twenty-first century* (Cambridge Massachusetts, The Bellknap Press of Harvard University Press 2014) 39.

³ The South African economy’s struggle to attain significant economic growth in recent years, has been ascribed to weak leadership and unequal wealth distribution. Walker A, ‘South Africa: the economic challenge’ *BBC News* (16 February 2018)

⁴ Mineral and Petroleum Resources Development Act 53 of 2003,

⁵ Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838 GG 33573 of 20 September 2010),

⁶ Amendments to both the MPRDA and the Mining Charter are currently being finalised. The definition of “community” as provided for in the MPRDA has been amended before and will in terms of the latest

difficulty for the law to capture “community” and causing uncertainty as to who should benefit from mine community development.

This paper proposes that there is a conceptual problem when catering for communities, and not individuals, in a development paradigm. This problem creates challenges for accurately defining “community”. It is not argued that community development should not be promoted, but a possible reason for why mine community development is not successful is proposed.

To illustrate the problem, the first issue to be considered is the kind of commonality that is being recognised when development is orientated towards a specific community. The South African mining legislative system will be considered in parallel with certain international legal instruments. The legislative system provides for a “community” referring to a group of persons sharing custom, tradition and ethnicity (“traditional communities”), but the provisions pertaining to socio-economic development in the South African mining context specifically focus on groups of persons sharing the effects of the mining company’s activities. In this regard, a “mining community”, is also recognised, and is synonymous with poverty, marginality and exclusion from the formal economy. What is the effect of acknowledging the different kinds of commonalities? Does it perpetuate exclusion or require unattainable inclusion?

The second issue raised in this paper is the possible conflict between the aspirations of development projects to embrace the idea of community and the neoliberal foundations of the notion of “development”. A theoretical analysis of the idea of “community” is first performed to show the inherent inconsistency within the idea of “community development”. Second, the idea of community is considered in a neoliberal context. Development, as envisaged in South African policies created during the 1990’s, is often associated with neoliberalism. Neoliberalism centres on the individual and its rights to property and contract in a free market system.⁷ The question is whether the South African legislative system operates from this individualistic perspective. If this perspective prevails, it is possible that it is to blame for the

amendments, be amended again. Once the 2018 Mining Charter has been accepted, it will be the third Mining Charter for the industry since 2004 (the fifth if the 2016 and 2017 draft Mining Charters are also taken into account). Each of these iterations define “community” and “mine” community in a different manner. For further discussion on this matter see Heyns A and Mostert H, 'Three Mining Charters and a Draft: How the Politics and Rhetoric of Development in the South African Mining Sector are Keeping Communities in Poverty' 2018 *Law and Development Review*

⁷ Williams P and Taylor I, 'Neoliberalism and the Political Economy of the "New" South Africa' 2000 (5) *New Political Economy* 21

misconfiguration of “community” and “mine community”. The continued misconfiguration and misrepresentation of mining communities in development legislation causes difficulty for mining companies to determine who should benefit from development projects. The latter mentioned situation perpetuates the perception of mining communities that mining companies are not significantly contributing to the development of mining communities in South Africa.

In the following section, a brief description is provided of the origins of certain development policies in South Africa that are relevant for the development of mining communities. Broad-Based Black Economic Empowerment⁸ and mine community development in terms of the legislative system regulating the mining industry and the notion of integrated development plans are considered to the extent applicable to mine community development.

2. Development, Empowerment and Neoliberalism in the South African Mining Industry⁹

The “new” South Africa came into being in a context that was preoccupied by globalisation and neo-liberalism.¹⁰ Commentators have noted that during the transition negotiations in the early 1990’s, the African National Congress¹¹ maintained a nationalist approach, firmly behind the ideals of the Freedom Charter, which followed a somewhat leftist approach.¹² Post-1994, however, there was a shift to a more neoliberal or free market capitalist policymaking, showing to an attempt to retain investor and business confidence in a changing economic and political landscape.¹³

⁸ Broad-Based Black Economic Empowerment is currently enforced in South Africa in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003, but as is explained in the next section, the Mining Charter serves as to instrument that promotes Broad-Based Black Economic Empowerment in the mining industry specifically.

⁹ This section 2 is based on an article that deals with the issue of BBBEE and development in much more detail. See in general Heyns A and Mostert H, 'Three Mining Charters and a Draft: How the Politics and Rhetoric of Development in the South African Mining Sector are Keeping Communities in Poverty' 2018 *Law and Development Review* .

¹⁰ Terreblanche S, *A history of inequality in South Africa 1652-2002* (Scottsville, University of Kwazulu-Natal Press 2002) 56; Bond (2000) 13&14.

¹¹ The ANC, or the African National Congress is currently the ruling party in South Africa.

¹² The Freedom Charter of the African National Congress was adopted on 26 June 1955 at the Congress of the People in Kliptown. The charter sets out certain core principles or “freedom demands” agreed upon by the African National Congress and its allies. Available at <http://www.anc.org.za/content/freedom-charter> accessed on 30 July 2017.

¹³ Terreblanche (2002) 106.

Policies, aimed at the transformation of the South African economy and the development of its people, which were created during South Africa’s transition period, are often critiqued for following guidelines of institutions such as the World Bank (which is synonymous with the “idea of development”).¹⁴ The Reconstruction and Development Programme (“RDP”),¹⁵ the Growth Employment and Redistribution (“GEAR”) and even black economic empowerment (“BEE”), are regarded as promoting a neo-liberalist agenda.¹⁶ BEE plays a significant role in mine community development, as is explained below.

As the “blueprint for transformation”¹⁷ in South Africa, the RDP was in many instances critical of the global neoliberal path set for the South African economy.¹⁸ These sentiments did however not find their way into the policies created in the 1990’s.¹⁹ and the government was often criticised for “talking left” but “acting right”.²⁰ As a means to address the shortcomings of the RDP, the GEAR strategy was adopted in 1996. The strategy promoted social objectives similar to those promoted by the RDP, but it was regarded as a local implementation of Washington consensus.²¹ In spite of being more investor-friendly than the RDP,²² the GEAR strategy was not successful in achieving its goals.²³

¹⁴ Programmes such as RDP and GEAR were based on models provided by the Development Bank of Southern Africa and the World Bank. Many commentators, however, argued that neoliberalist policies might not have been the most appropriate policies to address the problems South Africa faced at that stage. See in general Bond P, *Elite Transition: From Apartheid to Neoliberalism in South Africa* (London, Pluto Press 2000) & Terreblanche (2002) chapter 11.

¹⁵ See *The Reconstruction and Development Programme: A Policy Framework* available at <http://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf> (hereinafter “the ANC RDP Policy framework”) accessed on 19 October 2017. The RDP has its origins in the Freedom Charter (*supra* note 111). The RDP is the result of various conferences initiated by the ANC and maps the road to national democratic transformation. It formed part of the ANC’s election campaign before the first democratic elections. The RDP promotes meeting basic needs, developing human resources, building the economy and democratising the state and society.

¹⁶ Bond (2000) & Terreblanche (2002) chapter 11 argue that neoliberalist policies were not appropriate policies to address the problems South Africa faced at that stage.

¹⁷ Commission BEE, *Black Economic Empowerment Commission Report* (Johannesburg, Skotaville Press 2001) p. 1.

¹⁸ Sections 1.4.17 and 6.5.16 of the ANC RDP Policy Framework (1994) *supra* note 14.

¹⁹ Bond (2001) *supra* note 13, vi, 87.

²⁰ Bond (2001) *supra* note 13, vii.

²¹ Bond (2001) *supra* note 13, xi, 69,82. The World Bank was also involved in policy creation regarding aspects such as housing and infrastructure and land reform.

²² Tangri R and Southall R, 'The politics of black economic empowerment in South Africa' 2008 (34) *Journal of Southern African Studies* 702.

²³ Bond (2001) *supra* note 13, 41. *Growth, Employment and Redistribution: A Macroeconomic Strategy* available at <<http://www.treasury.gov.za/publications/other/gear/chapters.pdf>> accessed on 18 October 2017. GEAR for instance caused job losses instead of creating jobs.

The RDP, together with the Freedom Charter, provided for the founding objectives and values of Black Economic Empowerment (“BEE”) or broad-based black economic transformation (“BBBEE”).²⁴ Initially, BEE was introduced in South Africa to deracialise business ownership,²⁵ but eventually transformed into an approach aimed at benefitting previously disadvantaged black persons at different levels of the economy.²⁶

“Disempowerment” (the ill to be cured by BEE/BBBEE) is framed in the language of development by the BEE commission (“BEEcom”)²⁷ by presenting BEE as a means to achieve sustainable development and to break “the cycle of underdevelopment”, specifically regarding rural areas.²⁸ The problem identified is low economic growth and poverty to be addressed by means of increased investment and growth.²⁹ It can therefore be argued that BEE promotes a neoliberalist development agenda.³⁰

A neoliberalist development agenda affects how the problem of development is framed and how the beneficiaries of development are identified.³¹ In addressing the need for the development of rural areas, which includes mining communities, the BEEcom places significant emphasis on the poverty by which these areas or communities are afflicted.

²⁴ BEECom report (2001) *supra* note 16, 1, referring to 4.4.6.3 of the ANC RDP Policy Framework (1994) *supra* note 14. BEE initially only focused on encouraging black ownership of business, but it soon became apparent that only an elite few benefited from this approach to the transformation of the economy. The scope of BEE was then broadened to focus not only on the ownership of businesses, but also on the management structures and employee composition. It became important for a business to contribute to the skills development of black persons and to promote black owned businesses by procuring goods and services from such businesses. Importantly for the issue addressed in this paper, it now also became important for a business to share the benefits of its activities with the community affected by its activities. BEE became known as Broad-based Black Economic Empowerment (“BBBEE”).

²⁵ BEECom Report (2001) *supra* note 16, 1.

²⁶ In addition to the ownership of businesses, BBBEE also focuses on human resource development, the preferential procurement of goods and services, representation of black persons on management levels of businesses and investment in black owned enterprises. See the definition of “broad-based black economic empowerment” in section 1 of Broad-Based Black Economic Empowerment Act 53 of 2003,

²⁷ The BEE commission was established under the Black Business Council, an umbrella body representing major black business organisations, in May 1998 and chaired by Cyril Ramaphosa, current day president of South Africa.

²⁸ BEECom Report (2001) *supra* note 16, 3&9.

²⁹ BEECom Report (2001) *supra* note 16, 9

³⁰ Heyns A and Mostert H, 'Three Mining Charters and a Draft: How the Politics and Rhetoric of Development in the South African Mining Sector are Keeping Communities in Poverty' 2018 *Law and Development Review*

³¹ See in general Gordon RE and Sylvester JH, 'Deconstructing Development' 2004 (22) *Wisconsin International Law Journal*

Poverty measurements such as the “poverty line” are used to classify people as poor.³² The report, however, does acknowledge that poverty is not only a lack of income but also a lack of opportunities and therefore requires not only an economic approach but also a social approach.³³ The recommendations made included land reform, promoting economic opportunities and ownership by communities and investment in rural infrastructure.³⁴

Given the South African mining industry’s complicity in apartheid,³⁵ the mining industry, has been one of the cardinal targets of the larger drive for transformation in post-apartheid South Africa.³⁶ The Mineral and Petroleum Resources Development Act (“MPRDA”)³⁷ places significant emphasis on the BEE in the mining industry. Section 100(2) of the MPRDA provides for the creation of a broad-based socio-economic empowerment charter (“Mining Charter”) to provide for the historically disadvantaged South Africans to participate in and benefit from the mining industry. Primarily, broad-based economic empowerment as provided for in the MPRDA focuses on addressing past and present discrimination against historically disadvantaged persons and the transformation of the minerals and petroleum industry.³⁸ Transformation includes the socio-economic development of mining communities and labour sending areas from the benefits arising from the mining activities.³⁹

³² BEECom Report (2001) *supra* note 16, 48. The commission referred to the Poverty and Inequality Report prepared for the Executive Deputy President (1998). Making Democracy Work: A Framework for Macroeconomic Policy in South Africa (1993).

³³ BEECom Report (2001) *supra* note 16, 48. The report refers to the Global Poverty Report, July 2000, which was submitted to the G8 Okinawa Summit by the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Monetary Fund and the World Bank.

³⁴ BEECom Report (2001) *supra* note 16, 48.

³⁵ The Truth and Reconciliation Commission (“TRC”) described mining in South Africa as “the blueprint or ‘grand apartheid’” because of the exploitation of cheap black labour. See Howard J, 'Half-hearted regulation: Corporate social responsibility in the mining industry' 2014 (131) *The South African Law Journal* 11 referring to the findings of the TRC TRC, *Truth and Reconciliation Commission of South Africa Report* (2003) <http://www.justice.gov.za/trc/report/> accessed on 6 March 2016. The Truth and Reconciliation Commission (“TRC”) was created in 1995 by the Government of National Unity of South Africa to assist South Africans in dealing with the atrocities that occurred under apartheid. See <http://www.justice.gov.za/trc/> accessed on 30 July 2017.

³⁶ Southall R & Tangri R “The politics of Black Economic Empowerment” (2008) 34 *Journal of Southern African Studies* 703.

³⁷ 28 of 2002 (“MPRDA”). The MPRDA is the main piece of legislation that regulates the mining industry in South Africa.

³⁸ MPRDA s 1.

³⁹ MPRDA s 2(e) & 2(i).

The Mining Charter⁴⁰ describes mine community development as the meaningful contribution to community development, enabling the holder of a mining right to retain its “social licence to operate”.⁴¹ The holder of a mining right must conform to “international best practice” by partaking in “ethnographic community consultative and collaborative processes”.⁴² A mining company must perform assessments to determine the mine community’s developmental needs and the promotion of projects should be aligned with the integrated development plan⁴³ for the relevant municipality.⁴⁴ A mining company will comply with its duties in terms of mine community development if the approved development projects are implemented.⁴⁵

In addition to the Mining Charter, the MPRDA provides for the social and labour plan (“SLP”) that also focuses on mining communities. The objectives of the SLP, as provided for in the regulations to the MPRDA,⁴⁶ are quite ambitious. The SLP is a means of compelling the holder of a mining right to contribute towards the social and economic development of the mining area and will thus affect the mining community. In addition to contributing to the transformation of the mining industry, the SLP also aims to provide employment opportunities and improve the social and economic welfare of all South Africans. For the purposes of this paper, the focus will remain on the SLP’s role in the social and economic development of the mining area.

The SLP of a mining company must also be aligned with the integrated development plan (“IDP”) of the local governmental authority, the municipality, governing the relevant mining area. The Local Government Municipal Systems Act⁴⁷ provides for every municipality to promote integrated development planning. The IDP is essentially a planning tool, but municipal planning must be slanted towards achieving development.⁴⁸ The IDP serves as point of coordination for plans and development proposals for a specific municipality.⁴⁹ A

⁴⁰ Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838 GG 33573 of 20 September 2010), (hereinafter “2010 Mining Charter”).

⁴¹ 2010 Mining Charter 6.

⁴² 2010 Mining Charter 6. “International best practice” is not defined.

⁴³ To be created in terms of the Local Government Municipal Systems Act, 2000 32 of 2000 . See discussion below.

⁴⁴ 2010 Mining Charter 6.

⁴⁵ 2010 Mining Charter scorecard.

⁴⁶ Regulation 40-46 of Regulations in terms of section 107(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (GNR 527 GG 26275 of 23 April 2004).

⁴⁷ 32 of 2000. Chapter 5 of the act specifically deals with integrated development plans.

⁴⁸ Section 23, Act 32 of 2000.

⁴⁹ Section 25(1), Act 32 of 2000.

mining community residing and a mining company operating in the area governed by a municipality, must be included in the process of creating and implementing the IDP.⁵⁰ The drafting of the IDP should take place only once the actual level of development of the municipal area has been determined and communities have been identified that lack access to municipal services.

The idea of integrated development planning was introduced in South Africa, based on ideas of the World Bank.⁵¹ The inclusion of the IDP in South African legislation is the result of influences of international development agencies on the first democratic government of South Africa⁵² and further signifies the failure of state socialism initially promoted by the ANC government.⁵³

The provisions of the Mining Charter that deals with the development of mining communities and its interactions with the SLP and the IDP have been analysed in the context of the politics of development,⁵⁴ elsewhere.⁵⁵ The purpose of this paper is to focus specifically on how the Mining Charter, and other relevant law that deals with the development of communities, both international and South African, conceptualises “community”. In the following section, these conceptualisations are set out to determine the commonalities acknowledged by the law.

3. “Community” in Terms of the Law

The approach to “community”, in the context of development, by international law and legal policy is first considered. Second, the conceptualisation of “community” in terms of South African mining and development law is considered. The objective is to determine which commonalities between members of communities the law recognises.

⁵⁰ Section 26(b), Act 32 of 2000.

⁵¹ Binns T and Nel E, 'Devolving Development: Integrated Development Planning and Developmental Local Government in Post-apartheid South Africa' 2002 (36) *Regional Studies* Binns & Nel (2002) 293; [World Bank sources].

⁵² [Harrison “Integrated development plans and Third Way politics” in Pillay et al *Democracy and delivery-Urban policy in South Africa* 187 & 192.]

⁵³ [Harrison 194.]

⁵⁴ The politics of development refers to the idea that development is situated in a specific worldview and that it represents a specific construction of what it means to be underdeveloped or poor. The politics of development affect the manner in which development problems are framed and how the beneficiaries are represented, which inevitably affects how solutions are constructed. See in general Gordon RE and Sylvester JH, 'Deconstructing Development' 2004 (22) *Wisconsin International Law Journal* .

⁵⁵ Heyns A & Mostert H “Three Mining Charters and a Draft: How the Politics and Rhetoric of Development in the South African Mining Sector are Keeping Communities in Poverty” *Law and Development Review* 2018 (forthcoming) available at <https://doi.org/10.1515/ldr-2018-0038>

The consideration shows that the law broadly acknowledges four types of commonalities when “community” is conceptualised. In the context of mining, shared custom and communal land rights on the one hand, and shared effects of mining, on the other hand, are regarded as commonalities around which “community” is created. A broader view shows that mining legislation and other law dealing with communities also regard poverty as a commonality on which community is centred. The law furthermore acknowledges that persons living in the same geographic area can constitute community.

3.1. “Community” in Terms of International Law and policy

Development policies in South Africa did not originate in isolation of the global development context. The South African law dealing with the development of mining communities must therefore be interpreted with the global position in view.

International law recognises the rights of “indigenous communities” or “peoples” specifically in the context of the right to self-determination and the right to development.⁵⁶ “Indigenous peoples/community” has no universal definition, but by examining the relevant legal instruments⁵⁷ that provide for indigenous peoples, the general characteristics, for the purposes of international law, of these peoples can be identified.⁵⁸ When reference is made to “indigenous peoples” in an international context, a specific group of people is acknowledged with regard to their unique cultural identity and close relationship with the land that they are occupying.⁵⁹ Indigenous peoples often also constitute a minority group in a specific area, but this may not always be the case.⁶⁰ The definition for “indigenous communities, peoples and nations” used by the Working Group on Indigenous Populations⁶¹ describes the communities in accordance with the continuity they have with societies that existed before colonial

⁵⁶ Warden-Fernandez J, 'Indigenous Communities' Rights and Mineral Development' 2005 (23) *Journal of Energy & Natural Resources Law* 398; Permanent Sovereignty over Natural Resources 1962 UN General Assembly Resolution 1803, UN Declaration on the Right to Development A/RES/41/128 (1987).

⁵⁷ Warden-Fernandez J, 'Indigenous Communities' Rights and Mineral Development' 2005 (23) *Journal of Energy & Natural Resources Law* 398-400. [legal instruments]

⁵⁸ Warden-Fernandez J, 'Indigenous Communities' Rights and Mineral Development' 2005 (23) *Journal of Energy & Natural Resources Law* 398-400

⁵⁹ Warden-Fernandez J, 'Indigenous Communities' Rights and Mineral Development' 2005 (23) *Journal of Energy & Natural Resources Law* 398-400

⁶⁰ Warden-Fernandez J, 'Indigenous Communities' Rights and Mineral Development' 2005 (23) *Journal of Energy & Natural Resources Law* 398-400

⁶¹ Warden-Fernandez J, 'Indigenous Communities' Rights and Mineral Development' 2005 (23) *Journal of Energy & Natural Resources Law* 398-400

occupation.⁶² These communities view themselves as separate from other parts of current day society and do not hold significant political power.⁶³ The members of these groups occupy specific land, share a common ancestry with the original, pre-colonial, occupants of the land, and share a specific culture and language.⁶⁴

“Community” in an international policy context, however, is not limited to indigenous peoples. The World Bank, for instance, has created a global policy focusing on “community-driven development”⁶⁵ to promote notions such as transparency, participation, local empowerment, demand responsiveness, downward accountability, enhanced local capacity, access to information, financial support, self-organisation and people-centeredness.⁶⁶ “Community-driven development” is specifically focused on poverty, creating the impression that the commonality shared by “community” or indigenous peoples, in this instance, will always be poverty.⁶⁷

As is argued in section 2, the origins of empowerment policies in South Africa are seated in global development theory and context. Which understanding of community underlies development policies aimed at communities, and specifically mining communities? Mining often takes place on land to which traditional communities, which can be regarded as indigenous communities as portrayed in terms of international law. However, if the way in which mining communities are generally depicted is considered, it is clear that the effects of mining are often translated into poverty for mining communities. The following section considers the relevant definitions of “community” and “mine community” in South African law.

⁶² Warden-Fernandez J, 'Indigenous Communities' Rights and Mineral Development' 2005 (23) *Journal of Energy & Natural Resources Law* 398-400

⁶³ Warden-Fernandez J, 'Indigenous Communities' Rights and Mineral Development' 2005 (23) *Journal of Energy & Natural Resources Law* 398-400

⁶⁴ Warden-Fernandez J, 'Indigenous Communities' Rights and Mineral Development' 2005 (23) *Journal of Energy & Natural Resources Law* 398-400

⁶⁵ Available at http://siteresources.worldbank.org/INTPRS1/Resources/383606-1205334112622/5805_chap9.pdf accessed on 30 May 2018.

⁶⁶ Available at http://siteresources.worldbank.org/INTPRS1/Resources/383606-1205334112622/5805_chap9.pdf accessed on 30 May 2018.

⁶⁷ Available at http://siteresources.worldbank.org/INTPRS1/Resources/383606-1205334112622/5805_chap9.pdf accessed on 30 May 2018.

3.2. “Community” in Terms of South African Mining and Land Legislation

The Constitution of the Republic of South Africa⁶⁸ in Section 152(1), determines that municipalities⁶⁹ must promote the socio-economic development of the areas they govern. No mention is made of “communities” in the context of development. The Local Government: Municipal Systems Act⁷⁰ gives effect to the mentioned constitutional obligation and is of specific relevance in the context of mine community development, as is discussed below.

Socio-economic development is also mentioned in section 24 (b)(iii) of the Constitution, which deals with the right to a healthy environment for present generations and protection of the environment for future generations. To give effect to the right to a healthy environment, legislation must be enforced to ensure that socio-economic development takes place in a sustainable manner. Once again, no mention is made of “communities”. Section 31 of the Constitution, however, explicitly provides for the rights of persons to form cultural, religious or linguistic “communities” and to take part in the activities associated with these communities. “Community” in this sense centres on shared culture, religion or language, but does not necessarily relate to development.

In the instance of mining specifically, the MPRDA together with the Mining Charter and the SLP effectively acknowledge two types of communities: “community” and “mine community”. The MPRDA and the Consultation Guidelines⁷¹ define “community” in relation to land and custom, which can be regarded as a traditional community in terms of the Traditional Leadership and Governance Framework Act⁷² in certain instances, as discussed below. “Community” in this instance will also be interpreted as a “cultural, religious or linguistic community” for the purposes of section 31 of the Constitution. In addition to shared culture, religion or language, common interest in land also constitutes a commonality acknowledged by the law in this instance.

⁶⁸ Constitution of the Republic of South Africa, 1996 (“Constitution”). The Constitution is the supreme law of South Africa.

⁶⁹ Municipalities represent the local branch of government. In South Africa, government functions at national, provincial and local level.

⁷⁰ 32 of 2000.

⁷¹ “Guideline for consultation with communities and interested and affected parties” issued by the Department of Mineral Resources as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA,

⁷² Traditional Leadership and Governance Framework Act, 2003 41 of 2003 .

“Community” is mentioned in the MPRDA only in a few instances – mainly to provide for the protection of the community’s land rights if mining permits or rights are awarded in respect of the relevant land.⁷³ Together with the Consultation Guidelines, the MPRDA provides for consultation with or notification of a community during the mining right application process. The latter entitlement to notification is, however, only applicable to a community in so far as the community is an interested and affected party, a landowner, or a lawful occupier of the land to which the prospecting or mining right relates.⁷⁴ These provisions do not make specific reference to “community” as is defined in the MPRDA.

The definition of community has been amended a number of times and will be amended once more when the 2013 Mineral and Petroleum Resources Development Amendment Bill⁷⁵ comes into effect. According to the 2013 Amendment Bill, a community is still seen as a group of people holding rights regarding land in terms of agreement or custom.⁷⁶ However, the Bill links “community” to the relevant metropolitan or a district municipality, as provided for in the Local Government Municipal Structures Act.⁷⁷ The aforementioned amendment possibly signifies an attempt by the legislator to align the MPRDA’s regulation of communities with the provisions providing for the local economic development of mining areas.

The Mining Charter also defines community by relating it to land and custom, but includes a separate definition for “mine community” which “refers to the communities where mining takes place and labour-sending areas”.⁷⁸ “Labour sending areas” is defined in the Mining

⁷³ The Minister can stipulate conditions protecting the rights of a community if prospecting rights (section 16(4)(b) or mining rights (section 22(4)(b) are granted for land occupied by that community. Section 104 also stipulates that the Minister must give preference to communities applying for prospecting or mining rights in respect of any land registered or to be registered in the name of such a community.

⁷⁴ The MPRDA does not define “interested and affected parties” but the Consultation Guidelines defines “interested and affected parties” as including “host communities”.

⁷⁵ Mineral and Petroleum Resources Development Amendment Bill, 2013 B15D_2013 . The 2013 Amendment Bill is currently being considered by the National Council of Provinces where after the President of the Republic must sign it into law. The bill was already introduced to the National Assembly in 2013.

⁷⁶ Definitions section 1.

⁷⁷ Act 117 of 1998.

⁷⁸ Definition section of the Mining Charter. “Labour sending area” refers to the “areas from which a majority of mineworkers, both historical and current are or have been sourced”. The preamble to the MPRDA states that mining and production should contribute towards the socio economic development of areas where mines are operating and does not refer to community. “Local economic development” for the purposes of the socio-labour plan in terms of regulations 40-46 is aimed at the “area in which the mine operates” and the “local and sending communities”.

Charter as the areas from where the majority of mineworkers have been sourced in the past as well as presently.⁷⁹ Only in section 2 of the MPRDA is reference made to “mine communities” or “labour-sending areas”.⁸⁰ The Mining Charter serves as the MPRDA’s empowerment tool by compelling mining companies to contribute to, amongst other things, “mine community development”.⁸¹ The development focus is therefore specifically on “mine communities”, which is much broader than “community”, as envisaged in the MPRDA and the Mining Charter.

The social and labour plan (“SLP”) created in terms of the MPRDA, provides for “socio-economic development”⁸² and the “local economic development”⁸³ of the area in which the mining company operates.⁸⁴ In this context, “local” can be regarded as the “area in which the mine operates”⁸⁵ and the “local and sending communities”.⁸⁶ The regulations do not define “community”, “mining area” or “local and sending communities”, but the definitions of the MPRDA are applicable to instruments created in terms of the MPRDA.⁸⁷ In the instance of a mining right or permit issued in terms of the MPRDA, the “mining area” will be the area on which extraction has been authorised.⁸⁸ When “mining area” pertains to any environmental, health or social and labour issues, it includes land and surface adjacent to the area where extraction has been authorised.⁸⁹ Since the SLP specifically focuses on labour issues, it can

⁷⁹ 2010 Mining Charter definition of “labour sending area”.

⁸⁰ Section 2 of the MPRDA declares it, amongst others, an objective of the MPRDA to expand opportunities for historically disadvantaged persons, women and communities as well as to ensure that mining and production should contribute towards the socio-economic development of areas where mines are operating. The Mineral and Petroleum Resources Development Amendment Bill 2013 does however propose the inclusion of the definition “labour sending areas”. An amendment to Section 2(2)(i) is proposed to make provision for the socio-economic development of labour sending areas, presumably to be in line with the Mining Charter’s definition of “mine community” for the purposes of mine community development.

⁸¹ S 100 of the MPRDA; [insert provision of Mining Charter]

⁸² Regulation 41 (c)

⁸³ Regulation 46 (c)

⁸⁴ Regulation 46 (c) (ii) specifically mention that the local economic development programme should set out the impact of the mining activities on “local and sending communities”.

⁸⁵ Regulations 41 (c) and 46 (c)

⁸⁶ Regulation 46 (c) (ii) specifically mention that the local economic development programme should set out the impact of the mining activities on “local and sending communities”.

⁸⁷ Definition of “this Act” in the MPRDA, include the regulations, in which the SLP is provided for, and terms and conditions connected with any right, permit issued in terms of the MPRDA.

⁸⁸ See definition of “mining area” in the MPRDA. Mining area also include the land or surface where roads, railway lines, power lines, pipelines and cableways that are under the control of the mining right holder, are situated. Buildings , structures, machinery, stockpiles and other objects situated on the mining area, also form part of the mining area.

⁸⁹ Regulation 46 describes the content of the SLP. The plan should consist of a human resource development programme, a local economic development programme and processes for the management of downscaling

be deduced that “local and sending communities” include not only the community of the area in which the mine operates but also the areas from which labourers are sourced.⁹⁰ The definitions for “community” in the MPRDA will also be relevant here.

The SLP and the Mining Charter are not the only instruments providing for the development of mining areas or communities. The development of mining communities in terms of mining legislation must take place in accordance with the Integrated Development Plan (“IDP”) applicable to the municipal area in which the mining communities are situated.⁹¹ The Local Government: Municipal Systems Act⁹² in terms whereof the IDP is created defines “local community” to include the persons residing in the municipality, the ratepayers of the municipality, organisations involved in the local affairs of the municipality, and visitors of the municipality that make use of the municipal services provided.⁹³ It is quite evident that “community” in this instance differs significantly from a cultural, religious or linguistic community envisaged in the Constitution, or “community” as provided for in the MPRDA and Mining Charter, which communities are often regarded as traditional communities.

Traditional communities are recognised in terms of the Traditional Leadership and Governance Framework Act⁹⁴ if specific requirements, as set out in section 2 of the act are met. Neither the MPRDA nor the Mining Charter makes specific reference to the Traditional Leadership and Governance Framework Act, but it is accepted that a “community” for the purpose of the MPRDA can also be a “traditional community” in terms of the Traditional Leadership and Governance Framework Act. Section 2 of the Act determines that a traditional community will be recognised as such if it is subjected to traditional leadership, as determined by that community’s customs, and if the community observes customary law. “Customary law” is not defined in the Act.

The different perceptions of “community” provided for in different legal instruments and frequent changes to the definition provided in the MPRDA are linked with the “the chaotic

and retrenchment. The SLP should furthermore provide for sufficient finances for the implementation of the SLP and it should include an undertaking by the mining right holder that it will implement the SLP.

⁹⁰ 2010 Mining Charter.

⁹¹ Regulations providing for the SLP.

⁹² 32 of 2000.

⁹³ Definition of “local communities” in Act 32 of 2000.

⁹⁴ Traditional Leadership and Governance Framework Act, 2003 41 of 2003

state of communal land tenure in South African Law”.⁹⁵ The Restitution of Land Rights Act⁹⁶ is one of the primary pieces of legislation that provides for land restitution as a means of land reform in South Africa.⁹⁷ As mentioned above, the MPRDA acknowledges the concept of “community” to protect the interests of these groups of people in their land in the process during which mining permits and rights are awarded. Many of these communities have or are currently engaged in processes to restore their rights to the land that they occupy.⁹⁸ “Community” as provided in the Restitution of Land Rights Act may overlap with “community” as provided for in the MPRDA. For the purposes of restitution, “community” means, “any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group”.⁹⁹

The various legislated definitions of “community” are considered here to determine why mining law provides for “community” or “mine community”. Four kinds of commonalities are acknowledged by the legislation and each commonality relates to a specific aspect of the history of the South African mining industry. In the first instance, shared custom and belief and communal rights to land, are acknowledged. As aforementioned, this commonality is directly linked to land reform, which is a measure to address the dispossession of land under apartheid South Africa. The acknowledgement of community in this sense also links with the effects of mining, as part of colonialism and globalism on indigenous communities, since “community” represents almost static communal structures “untouched” by external influences.¹⁰⁰ Contrary hereto, recognising “mine community”, in the second instance, is a means of acknowledging the effects of mining and the legacy of mining practices under apartheid on people to address these effects. The commonalities acknowledged by the legislation in the second instance are the effects of mining shared by those constituting the “mine community”.

⁹⁵ See in general Humby T, 'The community-preferent right to prospect or mine: navigating the fault-lines of community, land, benefit and development in Bengwenyama II' 2016 *SALJ*

⁹⁶ The Restitution of Land Rights Act, 1994 22 of 1994

⁹⁷ S 25 of the Constitution provides for three different types of land reform: land restitution, land redistribution, and securing tenure of land.

⁹⁸ See the Bengwenyama Minerals cases: *Bengwenyama Minerals (Pty) Ltd v Genorah Resources* (unreported TPD decision 39808/2007); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources* 2010 3 All SA 577 (SCA); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC); *Bengwenyama-ya-Maswazi Community v Genorah Resources (Pty) Ltd* 2014 All SA 673 (SCA).

⁹⁹ Definitions of Restitution of Land Rights Act.

¹⁰⁰ Note that the assessment here is based solely on the definitions provided and not on any empirical work done with communities, since the study undertaken here is conceptual in nature.

The legislation acknowledges a third kind of community that is constituted by a group of persons that live in a specific area - either the mining area or a municipality. Upon consideration of the definitions in this instance, it seems that community exists only superficially as far as people live together in the same space. The community of shared space, however, will often overlap with the other types of community acknowledged by the legislative system.

The MPRDA, the Mining Charter, the SLP and the IDP acknowledge that mining and other rural communities live under poor socio-economic conditions. The broader international development paradigm also ties community development to poverty, as has been described above. It can be argued that underlying all three kinds of communities acknowledged by international and domestic law, there is the idea of community as shared poverty.

4. “Community” and Neoliberalism

In the context of mine community development, the different conceptualisations of community, as described above, can complement each other to ensure that the broadest possible group of persons benefits from development initiatives. These commonalities can overlap in the sense that a group of persons sharing tradition and custom may experience the effects of mining, also experienced by other persons living near a mine, but not forming part of the traditional community.

However, the different perceptions of community can also cause arbitrary exclusion from development initiatives, causing conflict in mining areas and difficulties in managing the relationship between mining communities and mining companies. As set out in section 2, mining companies are mandated in terms of legislation to mitigate the effects of mining on the communities in which mining operations take place. The effects of mining are usually associated with poor socio-economic conditions faced by mining communities as well as the impact of mining activities on the environment. The question for both the mining company and the surrounding community is who should be regarded as the community for the purposes of the legislative system. Irrespective of the definitions provided and objectives stated in the legislation, as set out in part 2, it remains challenging to determine who exactly qualifies as a “mine community” for the purposes of mine community development projects.

In this section, a conceptual consideration of “community” is undertaken to determine the implications of acknowledging “community” in legislation providing for development. Following on the theoretical discussion, the question as to “community’s” position in a neoliberal development context.

4.1. Theoretical Perspectives on “Community”

“Community” is often regarded as the purest, authentic form of co-existence, and contrasted with modern society that represents the evils of technological advancement and industrialisation.¹⁰¹ In the latter context, the concept “community” is also used to analyse the effects of modernisation or development. Some argue that development causes the disintegration of community in a traditional or authentic sense,¹⁰² showing an inherent tension or even conflict in the notion of “community development”.

The definition of “community” in the MPRDA and the Mining Charter refers to the type of community that is often regarded as a “traditional” community. “Traditional” in this instance refers to the sharing of traditional customs or beliefs and interests in land that are held communally. The idea of the traditional community is often associated with the essential or ideal community.¹⁰³ The purpose of this chapter is to illustrate the conceptual problem when catering for communities, and not individuals, in a development paradigm, posing challenges for accurately defining “community”. In this section, the work of Tönnies¹⁰⁴ is considered to illustrate the dichotomy between on *Gemeinschaft* or the ideal Community and *Gesellschaft* or Society. It is shown how the dichotomy reflects the impact of development on Community.

The ideas of Tönnies¹⁰⁵ on the concept “community” are personified in his distinction between *Gemeinschaft* (hereinafter “Community”) and *Gesellschaft* (hereinafter “Society”). Members of a Community have in common “blood”, “place” and “spirit”.¹⁰⁶ “Community by blood” refers to familial ties between community members.¹⁰⁷ The community members as

¹⁰¹ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001)

¹⁰² Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) Bessant K, 'Authenticity, Community and Modernity' 2010 (41) *Journal for the Theory of Social Behaviour* 2, 20; [Weber, Simmel, Nisbet]

¹⁰³ [COMPLETE]

¹⁰⁴ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001)

¹⁰⁵ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001)

¹⁰⁶ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 27.

¹⁰⁷ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 27.

family members also form a “community of place” in terms whereof community members physically share a space such as a specific piece of land.¹⁰⁸ Shared family ties and physical space are furthermore confirmed by a shared religion or custom, or a “community of spirit”.¹⁰⁹ Together, these three levels of being-together constitute Community. For Tönnies, community represents the harmonious co-existence of the will of the people, but this unity of wills¹¹⁰ should not be equated to a social contract.¹¹¹ The unity of persons living together as a Community is pre-determined;¹¹² Community comes before the individual, and the individual is constituted by its being a member of the community. As the “original or natural state”, the Community is viewed as organic.¹¹³ It is centred on the patriarchal household¹¹⁴ and is economically self-sufficient, thereby affirming its independence from the outside world.¹¹⁵ The existence of the community is based on the maintenance and constant reaffirmation of tradition and culture, leaving no space for contestation of the values so affirmed.¹¹⁶

In contradistinction to the Community, Society is not premised on a predetermined order or unity.¹¹⁷ Tönnies uses the comparison between Community and Society to illustrate the effects of industrialisation, modernisation and urbanisation on small rural communities – with the effect of Community turning into Society.¹¹⁸ While the concept Society describes an alternative way in which individuals group together, the concept also represents the actual process of transformation.¹¹⁹ Society thus represents the effects of development, in a broad sense, on Community.

The individual community member derives its identity from its relationship with others that is represented in the concept Community, but that is not the case in the instance of Society. Society is a collection of individuals, each acting for its own interests, but ordered in terms of

¹⁰⁸ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 27.

¹⁰⁹ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) p ____

¹¹⁰ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) In Book Two, Tönnies sets out his understand of human will and contrasts natural will, to be found in *Gemeinschaft*, with rational will, to be found in *Gesellschaft*.

¹¹¹ Social contract in this instance means ...

¹¹² Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 38.

¹¹³ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 22 and 38.

¹¹⁴ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 39 – 41. [explain patriarchal household]

¹¹⁵ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 49.

¹¹⁶ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 49.

¹¹⁷ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 52.

¹¹⁸ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) [reference to foreword and other commentary on Tönnies.]

¹¹⁹ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) [page no]

a social contract.¹²⁰ In contrast with the focus on the interrelatedness of the members of Community, Society emphasises the tension between the interests of the respective individuals.¹²¹ To accommodate the tension between the interests of the individual, Society is divided into different spheres, presumably¹²² the public and private sphere.¹²³ Goods are owned and used by individuals to the exclusion of others, except if a transaction is entered into where such a good is offered in return for value.¹²⁴ For Tönnies, Society represents the effects of the pursuit of profit generation and capitalism for Community¹²⁵ and serves the sole purpose of providing a platform for capitalist ventures.¹²⁶

Accordingly, Society operates on the assumption that all individual members are equal and free to act with one another (in contradistinction with Community where a certain hierarchy may be present, predetermined by custom).¹²⁷ Another consequence of Society is that land is treated as a kind of wealth and used as finance capital.¹²⁸ This is in strong contradiction with Community, where land signifies the community of place. Under the construct of Community, property is regarded as possession, which is an extension of the self. Under the construct of Society, property is regarded as wealth and a means of obtaining more things external to the self.¹²⁹

Tönnies furthermore explains the difference between Community and Society by relating Community with “natural will” that is decision making influenced by a higher power and Society with “arbitrary/rational will” that is decision making not influenced by a higher power and taking into account self-interest.¹³⁰ The distinction between “natural will” and “arbitrary will” is explained by comparing an organ of a body with a manufactured part of a machine.¹³¹ An organ is self-generating and finds its identity in its relationship with the body.

¹²⁰ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 63.[explanation of “social contract”]

¹²¹ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 52.

¹²² Tönnies does not refer to the public and private sphere by name, but it would fit in with the social contract construction that he is utilising.

¹²³ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 52.

¹²⁴ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 54.

¹²⁵ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 68.

¹²⁶ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 71.

¹²⁷ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 72.

¹²⁸ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 74.

¹²⁹ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 188.

¹³⁰ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) xlii. [comments on translation – rational and arbitrary usually regarded as being opposed to one another]

¹³¹ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 132.

A manufactured part is made by humans and it is given a specific structure or form – its identity therefore lies in its form and not in its relationship with the larger machine.¹³² Community is based on a pre-determined unity of “natural wills”, meaning that the creation of Community is an end in itself.¹³³ Society is based on a unity of “arbitrary/rational wills” because of a social contract, meaning that the creation of Society is done as a means to an end.¹³⁴

Tönnies is regarded as one of the founders of European sociology.¹³⁵ His views on Community and Society should be seen as an attempt to restore the idea of community, which has been lost and replaced with the welfare state in the late 1800’s and early 1900’s because of the modernisation of Western communities.¹³⁶ It can be questioned whether Tönnies’ approach to the concept of “community” can be applied to a South African mining community.

However, whereas it is accepted that Tönnies’ theory on Community cannot encapsulate the subtleties of a traditional community in the South African context, there are similarities between his concept of Community and “community” as provided for in the MPRDA and other legislation is considered above. Community (*Gemeinschaft*) is based on community of family, land and religion. “Community”, as provided for in the MPRDA, is constituted by a group of people with rights to land in terms of custom, which in many instances operate on familial level and consists of a spiritual or religious element. A “community” or traditional community therefore operates in terms of a pre-determined order (determined by custom) and is similar to Community/*Gemeinschaft*.¹³⁷ Together with legislation such as the Restitution of Land Rights Act and the Traditional Leadership and Governance Framework Act, the MPRDA preserves the idea of traditional communities, by acknowledging and defining “community”. A South African context dictates that the preservation of “community”

¹³² Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 132.

¹³³ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 136.

¹³⁴ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 135.

¹³⁵ Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) x. Tönnies, Durkheim and Weber are regarded as the founders of European sociology.

¹³⁶ Tilman R, 'Ferdinand Tönnies, Thorstein Veblen and Karl Marx: From community to society and back?' 2004 (11) *The European Journal of the History of Economic Thought* 579. Since community structures have broken down and can no longer be relied on for support, support must be provided at state level. Tönnies F and Harris J, *Gemeinschaft und Gesellschaft* Cambridge University Press 2001) 222-241.

¹³⁷ It is noted that the definition of “community” in the MPRDA makes mention of a group of people exercising rights regarding land in terms of custom or agreement

facilitates the preservation of traditional communities’ right to land, and specifically, in the case of the MPRDA, land on which mining takes place.

By using the construct provided by Tönnies’ Community/*Gemeinschaft* to analyse “community” in the MPRDA, deductions could be made about the way the individual views itself and how it relates to others. The latter mentioned aspect informs how the law is created and viewed in the community, which is relevant for understanding how the law relates to community. However, for the purposes of questioning the theoretical paradigm within which mine community development operates, Tönnies’ notion of Society (*Gesellschaft*) is possibly even more useful than the notion of Community. As mentioned above, Society differs from Community in the manner in which the individual is viewed and order (or law) in the Society is created. In the latter mentioned instance, Society is viewed in substance as that which replaces Community, but Society also represents the process of modernisation, and it is argued here, development. Development, in essence, requires the entity that is being developed to transform into something else. Thus, as is evident from Tönnies’ description of Society, the development of a community actually requires that “community” be replaced with something else, signifying an inherent tension in the concept “community development” and in the context of this paper then, “mine community development”.

4.2. “Community” and Neoliberalism

The purpose of this paper is to determine whether there is an inherent, theoretical contradiction within the idea of mine community development. The motivation for this investigation is the apparent difficulty for the South African legislature to define “community” or “mine community” for the purposes of empowering or developing communities or areas affected by mining. The uncertainty that is caused creates conflict between the mining communities and mining companies.¹³⁸

¹³⁸ A good example of an instance where such difficulties and conflict arose is that of Richards Bay Minerals (“RBM”). RBM is a subsidiary of Rio Tinto. The operations of RBM are located in the jurisdiction of the Mbonambi. The latter traditional authority was therefore earmarked to benefit in terms of RBM’s development endeavours. The Mbonambi, however, occupies only a small part of the Imfolozi sub-district, which comprises of 16 other traditional authorities. The endeavours implemented by RBM to uplift the community yielded generous benefits for the Mbonambi. These benefits included the provision of infrastructure for education and health care and other community development schemes, as well as employment opportunities. RBM also created vehicles, which provided for equity ownership held by the community. In spite of these positive outcomes, the benefits received by Mbonambi created tension between Mbonambi and the other traditional authorities who maintained that they were also entitled to receive

In the previous section, the theoretical dichotomy between Community and Society, as conceptualised by Tönnies, indicates that Society, as the antithesis of Community, not only replaces Community, but also represents the process that causes the disintegration of Community in its authentic sense. The argument here is that this process can be regarded as development and that Community and development are therefore mutually exclusive concepts.

Furthermore, it can be deduced from Tönnies’ conception of Society, that Society is constituted by an amalgamation of individual identities that should be allowed to retain these identities. The link with liberalism¹³⁹ can therefore be made.

It is often held that the idea of development that we are pursuing today, originated after the Second World War.¹⁴⁰ During this first neo-classical “moment”, the law was regarded as an instrument to achieve economic growth and development and was therefore used to regulate effective state intervention in the economy.¹⁴¹ Neoclassicism is related to liberalism and therefore centres on the individual. The second moment in law and development that arose in the 1980’s, is often described as a turn to neoliberalism.¹⁴² In this context, neoliberalism manifests in law and policies aimed at the protection of property and contracts and ensuring minimal state interference in the economy.¹⁴³ As a descendent of classical liberalism,

benefits.(Kapelus (2002) *JBE* 289 and 290). To add complication to the matter, the Mbonambi traditional authority was not regarded as being representative of the community at large. The members of the mine community were therefore sceptical about the direct relationship between RBM and the traditional authority (Mbatha and Wynberg (2014) 84). The transfer of benefits directly to the traditional authority was also questioned because of the perception that only persons affiliated with the traditional authority would benefit.(Mbatha and Wynberg (2014) 86). See Mbatha & Wynberg (2014) & Kapelus (2002) *JBE*.

¹³⁹ Liberalism is regarded as a political ideology that is based on acknowledging the individual and providing it with rights to certain freedoms that protects it against government interference.Blackburn S, *The Oxford dictionary of philosophy* second ed (2005) Oxford, Oxford University Press, 209.

¹⁴⁰ Trubek D and Santos A, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of New Critical Practice' in Trubek D and Santos A (eds), *The New Law and Economic Development: A Critical Appraisal* (New York, Cambridge University Press 2006)

¹⁴¹ Trubek D and Santos A, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of New Critical Practice' in Trubek D and Santos A (eds), *The New Law and Economic Development: A Critical Appraisal* (New York, Cambridge University Press 2006) Trubek and Santos (2006) 2; Thomas (2011) 970.

¹⁴² Trubek D and Santos A, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of New Critical Practice' in Trubek D and Santos A (eds), *The New Law and Economic Development: A Critical Appraisal* (New York, Cambridge University Press 2006) 5.

¹⁴³ Trubek D and Santos A, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of New Critical Practice' in Trubek D and Santos A (eds), *The New Law and Economic Development: A Critical Appraisal* (New York, Cambridge University Press 2006) 5.

neoliberalism also places significant emphasis on the freedoms and security of the individual.¹⁴⁴

No consensus exists as to whether law and development, more than 30 years after the heyday of neoliberalism, are still locked in the neoliberalist paradigm.¹⁴⁵ The link between South African development policies and neoliberalism has been set out in part 2 above, but the status of neoliberalism in South Africa is also a highly contested matter.¹⁴⁶ Since development originated in liberalist thinking, it can however be argued that development problems are still framed and beneficiaries are represented from an individualist perspective. This is not to say that the development project does not acknowledge communities. Section 2 hereof indicated how development policies are specifically aimed at communities. Broad-based Black Economic Empowerment in the South African mining industry, as promoted South African Mining Charter, makes specific provision for the development of mining communities. The question is rather whether a construct that has its origins in an individualist worldview can truly embrace all that “community” can represent, without arbitrarily excluding development beneficiaries that are reduced to being poor.

The mining legislative system does not only provide for “community” in the sense that Tönnies refers to it. As was indicated in section 2 above, the Mining Charter, which provides for mine community development, differentiates between “community” and “mine community”. “Mine community” represents all the communities affected by mining and the areas from where labourers are sourced. The concept “mine community” thus reflects the effects of industry (and modernisation/development) while retaining the idea of community. It could be argued that mine community is situated somewhere between Community and Society. The question is whether the focus on mine community is more suitable in a development context.

¹⁴⁴ Williams P and Taylor I, 'Neoliberalism and the Political Economy of the "New" South Africa' 2000 (5) *New Political Economy* 21

¹⁴⁵ This is referred to as the third moment of law and development that consists of the responses to critiques of the first two moments. Trubek D and Santos A, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of New Critical Practice' in Trubek D and Santos A (eds), *The New Law and Economic Development: A Critical Appraisal* (New York, Cambridge University Press 2006)

¹⁴⁶ Williams P and Taylor I, 'Neoliberalism and the Political Economy of the "New" South Africa' 2000 (5) *New Political Economy* 21

5. Conclusion

The South African legislative system regulating the mining industry possibly operates from an individualistic perspective. If this perspective prevails, it is possible that it is to blame for the misconfiguration of community in the context of mine community development. The continued misconfiguration and misrepresentation of mining communities in development legislation causes difficulty for mining companies to determine who should benefit from development projects. The latter mentioned situation perpetuates the perception of mining communities that mining companies are not significantly contributing to the development of mining communities in South Africa.

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