Legal Truth and Discourses of Violence in Post-apartheid Commissions of Inquiry: The TRC and Marikana Commission

by

Claire-Anne Louise Lester

Department of Sociology and Anthropology

Stellenbosch University

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Supervisor: Dr Bernard Dubbeld

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DECLARATION

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ABSTRACT

This thesis offers an analysis of the official discourse of two post-apartheid commissions of inquiry investigating state violence – the South African Truth and Reconciliation Commission (TRC) and Marikana Commission of Inquiry. I trace both continuities and shifts within the apartheid and post-apartheid period in the way questions of 'truth' and 'justice' have been approached in relation to past (political) violence. Moreover, I point to Marikana as exemplifying a continued problem in the post-apartheid dispensation, which has been to keep the major facets of economic organisation largely intact, reproducing structural violence and social inequity by workers in the South African mining sector.

Following Adam Ashforth, my method involves an analysis of the official discourse produced in and by a commission of inquiry; however, I develop this approach to focus on the official discourse on violence in both the TRC and Marikana Commission of Inquiry. I assess various scholarly analyses and characterisations to discern their functions in terms of the following analytical schema: fact-finding, truth seeking, their discursive or narrative role and ideological function. Through an in depth analysis of what Adam Sitze calls 'tumult commissions', official commissions established throughout British colonialism to investigate excesses in violence by state security in quelling a major uprising in the mining sector, I trace how this institutional form has continued through the South African transition in the TRC, and into the democratic era. I argue that on a basic level these commissions of inquiry are concerned with the law; that they are instruments used in the attempt to bring society more in line with the law when other institutions like the courts or police have been stretched to capacity or when their legitimacy has been severely undermined. I proceed to focus on the TRC and Marikana Commission's concern with the law and how the legal conceptualisations of 'violence' and 'violation' constrain the findings published in the final Report, and subsequently the possibility for

restitution or justice for victims of state violence. This attests to the difficulties of both truth-telling and enacting justice in a society that remains characterised by past and continued structural violence. I find that post-apartheid commissions of inquiry have used increasingly legal approaches to address direct forms of violence, violation and injury but that they bump up against limits internal to international law itself when violence is structural and domination takes a more abstract form. As such, the production of past and present material inequalities could be glimpsed but not fully digested by the TRC and Marikana Commission's legal orientation.

Nonetheless, an analysis of these Commissions' mandated deliberative and inclusive process facilitates challenges to official discourse on violence from civil society groups to include focus on structural violations. I show how claims to truth and justice by the public have allowed post-apartheid commissions of inquiry to be moved in various directions of their own volition, which has allowed for structures of power and the discourses that sustain them to be challenged in meaningful ways. It still stands, however, that the legal approach sets limits on a commissions' findings, and while these commissions may describe violence; legal discourse lacks the sufficient theoretical and explanatory capacity to elucidate the root causes of repeated abuses in the mining sector, those that result as an inevitable consequence of the class relations that define capitalist production.

OPSOMMING

Hierdie tesis bied ’n analise van die van die amptelike diskoers van twee post-apartheid ondersoekkommissies wat staatsgeweld ondersoek – die Suid-Afrikaanse Waarheids-en-Versoeningskommissie (WVK) en Marikana-kommissie van ondersoek. Ek spoor beide kontinuïteite en verskuiwings binne die apartheid- en post-apartheidtydperk na in die manier waarop vrae oor 'waarheid' en 'geregtigheid' benader is in verband met voorafgaande (politieke) geweld. Bowendien wys ek op Marikana as 'n voorbeeld van 'n voortdurende probleem in die bestel ná apartheid, wat daarop gefokus was om die belangrikste fasette van die ekonomiese organisasie grotendeels ongeskonde te hou, soos weergegee deur die strukturele geweld en sosiale ongelykheid onder werkers in die Suid-Afrikaanse mynbousektor.

Vervolgens Adam Ashforth behels my metode 'n ontleding van die amptelike diskoers wat in en deur 'n kommissie van ondersoek voortgebring is; ek verfyn egter hierdie benadering om te fokus op die amptelike diskoers oor geweld in die WVK en die Marikana-kommissie van ondersoek. Ek evalueer verskillende wetenskaplike ontledings en karakteriserings om hul funksies in terme van die volgende analitiese skema te onderskei: feitelike ondersoek, die soeke na waarheid, diskursiewe of narratiewe rol en ideologiese funksie. Deur middel van 'n diepgaande analise van waarna Adam Sitze verwys as 'onstuimige kommissies' – amptelike kommissies wat dwarsdeur die Britse kolonialisme ingestel is om buitensporige geweld deur staatsekuriteit te ondersoek om 'n groot opstand in die mynbousektor te onderdruk - spoor ek na hoe hierdie institusionele vorm voortbestaan het deur die Suid-Afrikaanse oorgang in die WVK, tot in die demokratiese era.

Ek voer aan dat hierdie kommissies van ondersoek hul op 'n basiese vlak met die wet besig; dat dit instrumente is wat gebruik word in die poging om die samelewing meer in ooreenstemming te bring met die wet wanneer ander instansies soos die howe of polisie tot

kapasiteit gestrek is of as hul legitimiteit ernstig ondermyn word. Ek fokus verder op die WVK en die Marikana-kommissie se omgang met die wet en hoe die regskonseptualisering van 'geweld' en 'oortreding' die bevindinge beperk wat in die finale verslag gepubliseer is, en daarbenewens ook die moontlikheid vir restitusie of geregtigheid vir slagoffers van staatsgeweld. Dit getuig van die beswaarlikheid van waarheidsvertelling en die instelling van geregtigheid in 'n samelewing wat steeds gekenmerk word deur eertydse en voortgesette strukturele geweld. Ek vind dat post-apartheid kommissies van ondersoek toenemend wettige benaderings gebruik het om direkte vorms van geweld, oortreding en besering aan te spreek, maar dat hulle bots teen die perke wat inherent is tot die internasionale reg, wanneer geweld struktureel is en oorheersing 'n meer abstrakte vorm aanneem. As sodanig kan die produksie van wesenlike ongelykhede in die verlede en hede skrams gesien word, maar nie volledig aangespreek word deur die WVK en die Marikana-kommissie se regsgerigtheid nie.

Desnieteenstaande bevorder 'n ontleding van hierdie kommissies se mandaat beraadslagende en inklusiewe prosesse uitdagings tot die amptelike diskoers oor geweld deur burgerlike samelewingsgroepe om die fokus op strukturele oortredings in te sluit. Ek toon aan hoe aansprake op waarheid en geregtigheid deur die publiek toegelaat het dat post-apartheid kommissies van ondersoek na eie gelang in verskillende rigtings beweeg, wat dit moontlik gemaak het om magstrukture en die diskoerse wat dit onderhou op sinvolle maniere uit te daag. Dit bly egter steeds van krag dat die wetlike benadering perke stel aan die bevindings van 'n kommissie, en hoewel hierdie kommissies geweld kan beskryf; regsdiskoers nie genoeg teoretiese en verklarende vermoë het om die oorsake van herhaalde misbruike in die mynbousektor toe te lig nie, dié wat die resultaat is van 'n onvermydelike voortvloeisel van die klasseverhoudinge wat kapitalistiese produksie definieer.

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Last but certainly not least, thank you to my family and dearest friends who are also my greatest teachers. And of course, to Michael, my partner in every sense of the word.

LIST OF ABBREVIATIONS

(SA) TRC: (South African) Truth and Reconciliation Commission

AHI: Afrikaner Handelsinstituut

AMCU: Association of Mineworkers and Construction Union

ANC: African National Congress

BEE: Black Economic Empowerment

BMF: Black Management Forum

COM: Chamber of Mines

COSATU: Congress of South African Trade Unions

EFF: Economic Freedom Fighters

GHRV: Gross Human Rights Violation

NAFCOC: National Federated Chamber of Commerce

NP: National Party

NUM: National Union of Mine Workers

PAC: Pan Africanist Congress

PNUR: Promotion of National Unity and Reconciliation

RDO: Rock Drill Operator

RDP: Reconstruction and Development Programme

SAB: South African Breweries

SACOB: South African Chamber of Business

SACP: South African Communist Party

SAPS: South African Police Service

SLP: Social Labour Plan

SSC: State Security Council

UN: United Nations

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1. Introduction: Commissioning Violence in Post-Apartheid South Africa

1.1 Identification of the Problem

On the 16th of August, 2012, the South African Police Service (SAPS) fired live ammunition at a large group of mine workers. They were rock drill operators employed at Lonmin Platinum mine and were engaged in an 'unprotected' strike for a substantial wage increase to R12,500 per month. The SAPS shot and killed 34 people on that day, and wounded over 70 others.[1] It came after ten other people were killed in the preceding days as a result of increased tension on the mine: six mine workers, two Lonmin private security guards and two members of the SAPS. Incidentally, the event occurred on the 25th anniversary of another historic mine workers' strike, occurring in 1987, in which 300 000 mine workers participated, led by the National Union of Mine Workers (NUM) with Cyril Ramaphosa at the helm.[2] From the perspective of 1987, one might have been stretched to imagine that the same Ramaphosa would, 25 years later, be a shareholder and director at the mine where striking mineworkers were killed, or that as a leader of the ruling African National Congress (ANC) he would have used his political influence as Deputy President to direct the police action against the striking mine workers.[3]

[1] One figure used widely is 78, as per page 395 of the report; however, one can never know exactly how many were injured as it is likely that those who sustained minor injuries or at least injuries which did not require hospitalisation would not have reported them.

[2] John D Battersby, "Miners' Strike in South Africa Raises the Spirit of Resistance," *The New York Times*, August 16, 1987, https://www.nytimes.com/1987/08/16/weekinreview/miners-strike-in-south-africa-raises-the-spirit-of-resistance.html?pagewanted=all&src=pm; Jade Davenport, "The 1987 Mine Strike," *Mining Weekly*, September 27, 2013, https://www.miningweekly.com/article/the-1987-mineworkers-strike-2013-09-27.

[3] During his testimony at the Marikana Commission, North West Commissioner Lieutenant General Zukiswa Mbombo stated that Cyril Ramaphosa had spoken to him on the telephone and pressured her into acting swiftly to "kill this thing" (the strike). Mokwena, Day 292, 38200; Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province", 163-164

The Marikana commission of inquiry was established to investigate the notorious event, and is a recent example of the South African state establishing a 'truth-seeking' commission to investigate the violent suppression of protest action by the police. Images of the police gunning down the group of protesting mine workers through clouds of dust were broadcast to news outlets and television screens the world over, the violence casting a stain on South Africa's transitional justice instrument, the Truth and Reconciliation Commission's (TRC's), narrative that state violence of such proportions was a thing of a bygone apartheid and colonial past. Within this past, South Africa has had its share of police killings; however, Marikana was the first 'democratic' massacre – one that was authorised and executed by the liberation movement ANC government that had promised a better life for all.[4] It is also the instance of the highest number of deaths by police guns in a single event since 1994.[5] As Kylie Thomas asserts, "the Marikana massacre can be understood as marking the end of the first period of the South African transition and the ideal of the new democratic 'rainbow nation'",[6] the transition which became institutionalised in part by the TRC. It is for this reason that the Marikana massacre, and the use of an official commission to investigate this violence, along with the TRC are the main foci of this thesis. I investigate both commissions and argue that they offer partial or reduced versions of the truth in their inability to address questions of socio-economic justice.[7]

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[4] Andrew Nash, "Marikana's Path," *Social Dynamics* 41, no. 2 (2015): 387–91.

[5] Haru Mutasa, "South Africa Remembers Marikana Miners Killed by Police," *Aljazeera*, 2017, Two others which took place during the throes of the transition are the Boipatong massacre (June 17th 1992) and the Bisho Massacre (7 September 1992). See James GR Simpson, O Routledge Taylor, and Francis Croi, "Boipatong: The Politics of a Massacre and the South African Transition," *Source: Journal of Southern African Studies* 38, no. 3 (2012): 623–47

[6] Kylie Thomas, "'Remember Marikana': Violence and Visual Activism in Post-Apartheid South Africa," *ASAP/Journal* 3, no. 2 (2018): 401–22., 402

[7] For example, Joseph Mathunjwa, the head of the Association of Mineworkers and Construction Union (AMCU) referred to the Marikana Commission, as "the Commission of Omission", in an interview that dealt with the absence of compensation for the families of those injured or killed in the 2012 massacre.; Mahmood Mamdani, "A Diminished Truth," *Siyaya* 3 (1998); Mahmood Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)," *Diacritics* (The Johns Hopkins University Press, 2002); Mahmood Mamdani, "The Truth According to the TRC," in *The Politics of Memory: Truth, Healing and Social Justice*, ed. Ifi Amadiume and Abdullah An-Na'Im (London; New York: Zed Books, 2000).

A day after the massacre, South African President Jacob Zuma announced that the state would establish an official commission of inquiry into what had transpired,[8] and it was appointed on 23 August, in terms of section 84(2)(f) of the Constitution of South Africa. It was titled *The Commission of Inquiry into the Tragic Incidents at or near the Area Commonly Known as the Marikana Mine in Rustenburg, North West Province, South Africa*, or as it became colloquially known, the 'Marikana' or 'Farlam Commission'.[9]

Commissions of inquiry - as a mode of ascertaining the 'truth' concerning problems of governance, particularly following instances of security force's violence in response to protest - have been a standard move across various administrations in South Africa, which suggests a level of continuity in institutional responses to state-sanctioned violence. However, there is a protracted and ambiguous history regarding their use to investigate unauthorised excesses of force and unlawful killings of civilians by state agents. They were features of British colonial rule and were established in various British colonies following the violent suppression of uprisings against imperial subjugation.[10] As stated in the Myburgh Commission Report of 1996, a commission established to investigate the emergence of violence on East Driefontein, Leeudoorn and Northam mines, "Commissions of Inquiry have been established almost as a matter of course to investigate the causes of violence and to make recommendations on ways to prevent violence".[11] A question that emerges is why these institutions are chosen over other

[8] "Ian Farlam to Head Marikana Inquiry - Jacob Zuma," *Politicsweb*, August 23, 2012, https://www.politicsweb.co.za/documents/ian-farlam-to-head-marikana-inquiry--jacob-zuma.

[9] The label 'Marikana commission' and 'Farlam commission' will be used interchangeably. "Terms of Reference of the Commission of Inquiry into the Tragic Incidents at or Near the Area Commonly Known as the Marikana Mine in Rustenberg, North West Province, South Africa," Staatkoerant, 12 September No.35680, 2012, http://www.politicsweb.co.za/party/marikana-terms-of-reference-for-the-farlam-inquiry. No. 35680 Government Gazette, 12 September 2012. The commission was chaired by retired judge of the Supreme Court of Appeal, Ian Farlam

[10] Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (Ann Arbor: The University of Michigan Press, 2013).

[11] The report referenced several inquiries – some official commissions, and some unofficial investigatory committees, set up for this function. It cites a 1975 report by the Inter-Departmental Government Committee of Enquiry into "Riots on Mines in the Republic of South Africa," which found that migrant labour was responsible for the outbreak of violence yet maintained that there was no visible alternative to the system of

types of official 'fact-finding' and 'truth-seeking' instruments; or why are the courts are not used, particularly when investigating violence by state functionaries on private property?

A central feature of the South African transition from apartheid was unearthing questions of 'truth' about past political violence, or contested truths surrounding "conflicts of the past".[12] This was fused with the aim to lay a foundation for a constitutional democracy based on the rule of law and a society in which respect for human rights took centre stage. The events surrounding the Marikana massacre present an opportunity to ponder the ways in which this has been actualised in a postcolonial, post-apartheid context. It urges one to investigate the mechanisms through which the post-apartheid state is grappling with violence and violations of the rights of people when abuses are apparent, one of which is the commission of inquiry model.

According to its terms of reference, the Marikana Commission was set up:

> to investigate matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West Province from Saturday 9 August to Thursday 18 August 2012 which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction to property.[13]

Initially mandated to be completed within four months, the commission continued for over two years. Hearings were completed on 14 November 2014, and the report was delivered to

migrant labour. It also references the 1991 commission that investigated violence at the President Steyn Gold Mine that led to the death of 86 people with 403 being injured. This commission found that violence was not the result of the hostel system per se, but that the conditions created by the system created a fertile environment for inter-group violence as it facilitated the formation of groups of workers into hostel factions. J.F Myburgh, "Report of the Commissions of Inquiry into Recent Violence and Occurences at the East Driefontein, Leeudoorn and Northam Mines" (Cape Town, 1996)., 4

[12] 'National Unity and Reconciliation', "Interim Constitution of South Africa" (1993), http://www.servat.unibe.ch/icl/sf10000_.html. Postamble. Chapter 16

[13] "Terms of Reference of the Commission of Inquiry into the Tragic Incidents at or Near the Area Commonly Known as the Marikana Mine in Rustenberg, North West Province, South Africa."

President Zuma on 31 March, 2015. The report was finally made public in June of that year, following persistent pressure by opposition parties and civil society.[14]

The Marikana Commission became the most recent in a long line of commissions established to investigate violence in South Africa in general, and in the mining sector in particular. From the moment the killings occurred, as depicted in the commission's terms of reference, official discourse framed the violent event as a 'tragedy', or an unfortunate necessity, a contested framing which continues to this day.[15] Many compared the shooting to the Sharpeville massacre of 1960,[16] an event which was also investigated by a commission of inquiry (the Wessels Commission); or to the Soweto uprising, the facts of which were inquired into by the Cillié Commission.[17] In the context of the anti-apartheid armed struggle and increased state repression, these commissions were largely criticised as official instruments that whitewashed police violence.

However, a more precise comparison would be to compare Marikana to other uprisings that have occurred in the mining sector and the state's response in those contexts. An overview of the causes of and responses to these uprisings in the mining sector provides some illumination of the social and economic processes which gave rise to them.

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[14] Greg Nicolson, "Marikana Report: Despite the Realease Promise, Pressure on Zuma Persists," *Daily Maverick*, May 27, 2015, https://www.dailymaverick.co.za/article/2015-05-27-marikana-report-despite-the-release-promise-pressure-on-zuma-persists/.

[15] Following the massacre, President Jacob Zuma stated, "The events of the past few days have *unfortunately* been visited upon a nation that is hard at work, addressing the persistent challenges of poverty, unemployment and inequality". "Statement from President Jacob Zuma on the Marikana Lonmin Mine Workers Tragedy, Rustenburg," n.d., http://www.thepresidency.gov.za/speeches/statement-president-jacob-zuma-marikana-lonmin-mine-workers-tragedy%2C-rustenburg. In August 2019, seven years after the Marikana massacre, President Cyril Ramaphosa tweeted, "The Marikana *tragedy* stands out as the darkest moment in the life of our young democracy. Today we remember our 44 compatriots who lost their lives in Marikana seven years ago this week. Never again can we allow such a tragedy to befall our nation," Msimang, "Marikana Wasn't a Tragedy; it Was a Massacre."

[16] Linda Smith and Peter Alexander, "Marikana Massacre: Explosive Anger," *Critical and Radical Social Work* 1, no. 1 (2012): 131–33.

[17] See Helena Pohlandt-mcCormick, "'I Saw a Nightmare...': Violence and the Construction of Memory (Soweto, June 16, 1976)," *History and Theory* 39, no. 4 (2000): 23–44.

Shortly following the formation of the Union of South Africa in 1910, an uprising of mine workers broke out at Kleinfontein Mine on the Witwatersrand. Mine workers were dissatisfied with the high living costs and white mine workers demanded a minimum subsistence wage as well as job security from cheaper African labour.[18] The strike reached its peak on 4 and 5 July, 1913 when a group of strikers set *The Star* – the media of the Chamber of Mines – ablaze. The unrest was suppressed by military force and 25 people were killed.[19] The Witwatersrand Disturbances Commission (1913) was established to, "find out the truth," concerning the, "proximate causes which gave rise to various acts of public disorder…and the use of forcible measures to suppress the disturbances".[20] The strike resulted in a compromise by mining companies and the state with white labourers, which resulted in the legalisation of trade unions for white workers. In 1922, there was also a three month strike (the "Rand Rebellion") carried out by white mineworkers. Poor Afrikaner workers petitioned for special treatment and, like the poor whites in the Americas, petitioned for special 'white' status – the slogan of a mine workers strike of 1922 was 'Workers of the World Unite for a White South Africa'. Beginning as a dispute over wages, the workers then armed themselves and the conflict evolved into an open rebellion against the state.[21] The conflict ended when Jan Smuts, Prime Minister of South Africa, ordered the newly established Air Force to bomb the working-class suburbs of Benoni and Germiston from above, pounding the strikers into defeat. The Inquiry reported that 153 people were killed and another 687 injured. A main consequence of this was a class alliance

[18] Wessels Pretorius Visser, "Governments, Parliaments and Parties, Labour, Labour Movements and Strikes (Union of South Africa)," International Encyclopedia of the First World War, 2016, https://encyclopedia.1914-1918-online.net/article/governments_parliaments_and_parties_labour_labour_movements_and_strikes_union_of_south_africa.

[19] Wessels Pretorius Visser, "The South African Labour Movement's Response to Declarations of Martial Law, 1913-122," *Scientia Militaria* 31, no. 2 (2003): 144–45.

[20] Herbet John Viscount Gladstone, "Witwatersrand Disturbances Commission Report," 1913., 44-45

[21] Baruch Hirson, "The General Strike of 1922," Marxists.org, accessed August 20, 2020, https://www.marxists.org/history/etol/revhist/supplem/hirson/1922.html.

between the emergent Afrikaner nationalists and 'white labour', an alliance which extended into the apartheid government's white protectionist labour arrangement.[22]

Later, in 1946, there was the African mineworkers' strike, arranged by the African Mineworkers Union concerning wage disparity between white and black workers. The preceding years had seen a monumental increase in the urbanised black African labour force, with this demographic nearly doubling between 1933 and 1939, indicating a substantial growth in an African proletariat, or the class of Africans forced to sell their labour to meet their subsistence needs.[23] At the time, the state's labour policies distinguished between skilled and unskilled labour based on racial grounds, which closed off opportunities for upward mobility to the small-trading black African petty bourgeoisie. According to O'Meara, this exploitation of African workers was the direct catalyst of their political oppression.[24] The turn to the policy of Apartheid saw an entrenchment into law of the segregationist policies of the British; but it was also was the final nail in the coffin of the precapitalist mode of production that characterised black African communities in the 'Reserves'.[25] The Land Acts of 1913 and 1936 had spatially divided South Africa during the segregation period of 1910-1939 allocating a mere 13% of land to the majority black African population and forming 'native reserves' creating a 'bifurcated' state with white South Africa controlled by citizenship rights and black South Africa under 'communal' tenure under chiefs, devoid of formal rights.[26] The surge in Africans being incorporated into capitalist relations of production in the mining sector (as well

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[22] Edward Webster, *Essays in Southern African Labour History* (Johannesburg: Ravan, 1978)., 14

[23] Dan O'Meara states that there was an increase of approximately 400,000. Dan O'Meara, "The 1946 African Mine Workers' Strike in the Political Economy of South Africa" (Johannesburg, June 1975)

[24] O'Meara., 9

[25] Ivan Evans, *Bureaucracy and Race* (Berkeley, Los Angeles, London: University of California Press, 1998); Harold Wolpe, "Capitalism and Cheap Labour Power: From Segregation to Apartheid," in *Segregation and Apartheid in Twentieth-Century South Africa*, ed. William Beinart and Saul Dubow, 1st ed. (London: Routledge, 1995), 60–90.

[26] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996); Evans, *Bureaucracy and Race*.

as in agriculture and other forms of industry) was twinned with policies that capped wages for black Africans, leading to a situation of rural impoverishment and severe urban poverty. This generated a structurally induced conflict that manifested as one over wages, but which can be understood as emanating from all the wretched features of rural and urban life. It comes as no surprise that the preceding years (1930-45) saw the emergence of African trade unions, as well as a corresponding rise in state militancy against worker uprisings.[27] But wage dissatisfaction by workers in the mining sector was not reserved for a particular race, as shown by white mine workers' strikes in the early 1910s. These conflicts culminated in the 1946 mine workers strike, which saw over 60 000 workers downing their tools. The strike led to what became known as 'Bloody Tuesday', where an alleged nine mineworkers were killed by the police.[28]

Another example of the state using its security apparatus to lethally suppress worker uprisings in the mining sector was the 1973 labour unrest on Western Deep Mine in Carletonville, where mineworkers were shot with live ammunition, killing eleven and injuring a further 27.[29] An inquest was held, which exonerated the police, but the report was not made public.[30] Finally, there was the 1986-7 African mineworkers' strike, where 20 000 workers were dismissed from General Mining Union Corporation (Glencore's) Impala platinum mine in Bophuthatswana. Glencore was South Africa's largest mining company, and the government responded by declaring a nation-wide state of emergency on June 12, 1986. These examples of Union and National Party governments' responses to industrial action seem to have been forgotten in debates surrounding Marikana. However, this historical view of strikes and their suppression in the mining sector shows how the state's security apparatus – the police, the army, and the

[27] O'Meara, "The 1946 African Mine Workers' Strike in the Political Economy of South Africa.", 10

[28] See Nico Buitendag, "History as a System of Wrongs - Examining South Africa's Marikana Tragedy in Temporal Legal Context," *Strategic Review for Southern Africa* 37, no. 2 (2015)., 98

[29] Some sources state that twelve people were killed.

[30] "Press Release: Committee Informed Police Exonerated in Carletonville Mine Shootings in South Africa, Special Committee on Apartheid. 27 November" (United Nations Office of Public Information, 1973).

legal institutions such as courts, and penal system – has been used to coerce workers into submitting to the will of their employers, and to enforce laws which either overtly or covertly assist in perpetuating capitalist production.[31]

No reference to these particular commissions is made in the Marikana Commission's final report, but as the commission was in session, Judge Farlam stated, "if there ever was a commission in the history of this country on which the eye of history is focused, this is it. It's vitally important that we do our utmost to get to the truth".[32] This suggests his awareness of past commissions and his determination that this particular post-apartheid commission not to be associated with those implemented during the undemocratic, segregrationist (1910-1948) and apartheid (1948-1994) periods.

The Marikana commission had two main mandates: first, it needed to uncover accurate information regarding why public order policing failed to prevent an event of this kind from occurring (in a country where protest action is a daily occurrence, the way the state responds to protest is of utmost concern); second, it had to ensure some measure of justice for victims of the police killings.[33] However, as the Marikana Commission unfolded, it became clear that former police chief Riyah Piyega, and other police officials, lied at the commission, which led critics to accuse it of 'whitewashing' the massacre to produce a sanitised version of events that favoured the police and that protected politicians like Cyril Ramaphosa and mining capital.[34]

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[31] For Wolpe, these laws include the Industrial Conciliation Act (1924), the Masters and Servants Act, the Native Labour (Settlement of Disputes) Act (1953) and Native Labour Regulation Act (1911). Laws like the Native Land Act (1913) fall in the group of the laws which covertly supported Apartheid racial capitalism. Wolpe, "Capitalism and Cheap Labour Power: From Segregation to Apartheid.", 65

[32] Chairperson, Marikana Commission Transcript. Day 63., 6648

[33] Fanie du Toit, "Marikana Victims Deserve Justice," *Cape Times*, November 27, 2013.

[34] Jeanette Chabalala, "Officers in Court for Marikana Tragedy," *News24*, March 15, 2018, https://www.news24.com/SouthAfrica/News/officers-in-court-for-marikana-tragedy-20180315. As a result, Marikana has been likened in scale to the Sharpeville Massacre of 1960, when 69 protesters were killed by the apartheid regime's police force. As Peter Alexander stated, "In popular imagination it is something that has its own recogniseable label – there was the Sharpeville Massacre (1960), the Soweto Uprising (1976), and now the Marikana Massacre (2012). See Peter Alexander, "Marikana, Turning Point in South African History," *Review of African Political Economy* 40, no. 138 (December 2013): 605–19, 614

From this perspective, the TRC and Farlam Commissions appear to have operated much in the same way as colonial and apartheid-era commissions did.

However, as a post-apartheid commission the Marikana Commission stood out. Despite the public scepticism, its official motto was, 'Truth, Restoration, Justice'. These aims echo those of the TRC – the model of transitional justice set up to ease the transition from apartheid to a democratic state founded upon the rule of law and respect for human rights. Both the TRC and Marikana Commissions were established around turning points in South Africa's history; events where a popular upsurge of resistance by civil society prompted an official response to state-sponsored violence and the social crisis that it represented.[35] Both commissions were also established to address issues of public concern to domestic and international law, and were both tasked with investigating violence in instances where the state or institutions of the state were potentially culpable.[36]

Hence, both the TRC and the Marikana Commission are centred on a subject that strikes at the heart of state power on the one hand, and on the limits of democratic participation on the other: events that call into question the legitimacy of the state's use of violence.[37] These commissions also raise the question of how violence is conceptualised in official discourse in post-apartheid South Africa, how we may understand various forms of violence, and indeed, leads us to question whether existing legal definitions are adequate in ensuring human rights are protected in all spheres of social life. The topic of violence inevitably raises questions of justification and legitimacy, and the schematics employed through law, discourse, ideology and custom to legitimate or make acceptable some forms of violence over others.

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[35] Alexander, "Marikana, Turning Point in South African History."

[36] Stuart Wilson, "After Marikana Commission - What Now?," Daily Maverick, 2014, https://www.dailymaverick.co.za/article/2014-11-26-op-ed-after-marikana-commission-what-now/.

[37] M Keller, "Commissioning Legitimacy: The Global Logics of National Violence Commissions in the Twentieth Century," *Politics and Society* 37, no. 3 (2009): 352–96., 358

My dissertation demonstrates how both post-apartheid commissions produced partial or reduced versions of the truth, but also that versions of 'official truth' were openly contested in the public commission space. I argue that while various theories concerning the role of official commissions abound, as shall be indicated below and in Chapter 2 which follows, commissions of inquiry are essentially legal institutions concerned with the law and legal conceptualisations of violence. Hence, a substantial part of my analysis is rooted in the TRC and Marikana Commission's legal approaches, which I argue curtailed their respective abilities to apprehend issues of socio-economic justice and structural violence.[38]

1.2 Theoretical Approaches: Official Inquiries, Violence and the Law

A review of scholarly approaches, as well as historical accounts of commissions and their functions, is provided at length in Chapter Two. However, it is worth a cursory overview here to highlight the goal of my study.

The role of commissions of inquiry in British state and policy formation has been covered in depth by numerous authors.[39] Some have approached their analysis from a Liberal perspective, assessing the extent to which such commissions objectively and reasonably carried out their mandate.[40] Others have been more critical, citing the role of commissions in legitimating

[38] For example, Joseph Mathunjwa, the head of the Association of Mineworkers and Construction Union (AMCU) referred to the Marikana Commission, as "the Commission of Omission" in an interview that dealt with the absence of compensation for the families of those injured or killed in the 2012 massacre.; Mamdani, "A Diminished Truth"; Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)"; Mamdani, "The Truth According to the TRC."

[39] See for example the works of Richard A Chapman, *The Role of Commissions in Policy-Making* (London: Allen and Unwin, 1973).; Ronald Edward Wraith and G. B. Lamb, *Public Inquiries as an Instrument of Government* (Allen and Unwin, 1971).; For more on the history of Commissions see Hugh Mcdowall Clokie and Joseph William Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (London: Oxford University Press, 1937).

[40] See for example Jeffrey Stanyer, "The Redcliff-Maud Royal Commission on Local Government," in *The Role of Commissions in Policy-Making*, ed. Richard A Chapman (Plymouth: George Allen & Unwin, 1973), 105–42; Chapman, *Role Comm. Policy-Making*; Charles Hanser, *Guide to Decision: The Royal Commission* (Totowa N.J.: Bedminster Press., 1965).

capitalism and the state.[41] Postcolonial scholars have drawn on Foucault's notion of plural truths to argue that, as techniques of surveillance, evaluation and adjudication, "colonial commissions" – as named by Mongia – produce modern "regimes of truth" that reproduce power.[42] For example, Mongia's assessment of commissions of inquiry's function in enabling the state-directed system of indentured Indian migration in the 19th century maintains that commissions' regimes of truth are rooted in claims to objectivity and rationalist approaches to truth, to which "specific effects of power" become attached.[43] This approach understands the relationship between truth and power as "complex and complicit" and attempts to ascertain the various ways certain discourses are construed as "being in the true".[44] As Foucault wrote:

> Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the status of those who are charged with what counts as true.[45]

The notion of truth presented here as a 'regime' connotes a system of rules by which claims to truth are adjudicated and in which certain approaches to designating truth from falsity make sense. In social formations underpinned by a liberal political rationality, the idea of 'truth as objectivity' becomes the pre-eminent form of truth in official commissions.[46] The relevant point to understanding commissions from this postcolonial or deconstructionist position is that they become modern theatres of 'truth' in which the will of power is ritually performed, and the mechanism by which this power is exercised is through discourse.

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[41] Frank Burton and Pat Carlen, *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State* (London: Routledge & Kegan Paul, 1979).

[42] Radhika V Mongia, "Impartial Regimes of Truth: Indentured Indian Labour and the Status of the Inquiry," *Cultural Studies* 18, no. 5 (2004): 749–68.; Michel Foucault, "Truth and Power," in *Michel Foucault, Power/Knowledge,* ed. C Gordon (New York: Pantheon, 1980).

[43] Mongia, "Impartial Regimes of Truth: Indentured Indian Labour and the Status of the Inquiry.", 749

[44] Mongia., 750

[45] Foucault, "Truth and Power.", 131

[46] Liberalism as a political rationality and mode of governance connected to colonialism is discussed in David Scott, *Refashioning Futures: Criticism Ater Postcoloniality* (Princeton: Princeton University Press, 1999)., Chapters 1 and 3.

The role of commissions of inquiry has often been associated with their discursive and narrative functions as projects of authoritative 'sensemaking'.[47] Burton and Carlen, writing in 1979, highlighted the discursive potency associated with official government publications, linking these directly to their impact on the formation of knowledge and how this translated into power.[48] By 'official discourse', Burton and Carlen refer to, "the systemisation of modes of argument that proclaim the state's legal and administrative rationality. The discourse is a necessary requirement for political and ideological hegemony".[49] Writing in the context of the Cold War, Burton and Carlen argued that the legal and administrative discourse used in official documentation was a technique used to legitimate the content of the text, decision or policies that ensued from the official investigation. The notion of legitimacy is significant in understanding the state and power, particularly when the state is implicated in violence.[50]

The connection between official commissions of inquiry and state legitimacy is explored in Ashforth's exemplary study of 20th century 'Native Question' commissions (later understood as commissions into 'race relations') which he characterised as "reckoning schemes of legitimation".[51] He was concerned with the relationship between official commissions and the

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[47] Burton and Carlen, *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State*.; Moon draws on the narrative theory of Hayden White in Claire Moon, "Narrating Political Reconciliation: Truth and Reconciliation in South Africa," *Social & Legal Studies* 15, no. 2 (2006): 257–75; Andrew D. Brown, "Authoritative Sensemaking in a Public Inquiry Report," *Organization Studies* 25, no. 1 (January 2004): 95–112

[48] Burton and Carlen, *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State*.; Adam Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa*, *Oxford Studies in African Affairs* (Oxford: Clarendon press, 1990); Adam Ashforth, "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms," *Journal of Historical Sociology* 3, no. 1 (March 1, 1990): 1–22; Adam Ashforth, "Lineaments of the Political Geography of State Formation in Twentieth-Century South Africa," *Journal of Historical Sociology* 10, no. 2 (1997): 101–26

[49] Burton and Carlen, *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State*., 48

[50] The relationship between official discourse and state legitimation has been analysed in relation to commissions around the world since the 20th century. For example, Gilligan – writing about Royal Commissions into organised crime in Australia – asserts that the commissions act as, "tried and tested sealant of legitimacy gaps," that perform an important legitimation role for official discourse. George Gilligan, "Royal Commissions of Inquiry," *Australian Academic Press* (2002), 293; See also Keller, "Commissioning Legitimacy: The Global Logics of National Violence Commissions in the Twentieth Century."

[51] Ashforth, "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms," March 1, 1990.

state. Drawing his concepts both from Burton and Carlen, and from Foucault, he maintained that official 'State' commissions are "theatres of power" that produce and legitimate the "Truth of State".[52] For Ashforth, 20th century state formation in South Africa is marked by the establishment of institutions designed to aid the subordination and administration of Africans.[53] Official commissions were part of the administrative and legal structure that informed the particular development of the South African state and racialised capitalism under colonialism and apartheid. He states further that commissions of inquiry's 'truth-seeking' procedures and their relative independence means that one can interpret their reports as, "representing the state speaking 'truth' about itself; a 'truth' which frequently reveals the limits of the possible within a particular structure of state".[54]

While scholars like Gilligan argue that the heterogeneity of commissions' effects does not allow for a uniform explanatory model, whether in terms of "crisis management" or "legitimation deficit",[55] the most convincing accounts explain their primary function with some reference to their authorising of an official discourse on an identified problem.[56] I am interested in how the TRC and Marikana Commission facilitate the production of official discourses on violence, how these discourses reflect a particularly ideology and how certain discourses on violence may in some cases obscure forms of violence endemic to the capitalist mode of production, or indeed to the experience of workers under capitalism.

I found that existing theoretical approaches to commissions could not adequately account for why their use has persisted over time as the official responses to social and political problems

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[52] Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa*.

[53] Ashforth., 4

[54] Ashforth., 6

[55] Gilligan, "Royal Commissions of Inquiry.", 289

[56] Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa*.; For Gilligan, "(royal) commission of inquiry are too diverse in their effects to be tied down to a uniform explanatory model, whether based on notions of crisis motivation or legitimation deficit" in Gilligan, "Royal Commissions of Inquiry.", 289

in postcolonial and post-apartheid South Africa, despite the existence of other appropriate investigatory bodies like the Public Protector, the use of arbitration proceedings via the courts, criminal trials, investigative journalists or researchers employed in the government bureaucracy. Moreover, the argument that commissions established during apartheid functioned to legitimate a particular 'truth of state' also does not fully explain how, especially in the post-apartheid period, some commissions produce findings that are destabilising, embarrassing or incriminating of the government that authorised them.[57] Although comprehensive in many respects, Ashforth's study does not contain information on how the commissions he investigates are constructed and conducted, and how this influences the 'official discourse' contained in the report. As Dubow notes, how can we understand the internal history of a commission's operations and the way this impacts the relationship between evidence presented at or submitted to a commission and the conclusions published in the final report to explain how the discourses relate to state power, or to particular interests?[58] To address this, my analysis focuses on the implications and effects of commissions' increasingly legal focus, particularly since the end of apartheid. I trace how the concepts of 'human rights' and 'human rights violation' emerge in a global political context, shaping the discourse on how violence and its perpetrators are conceived.

Moreover, as the Marikana killings occurred at Lonmin Platinum mine, whose culpability was also investigated by the Farlam commission, the relationship between company and state became pertinent. As a company, Lonmin's history is tied to the history of British colonialism

[57] An example is where the TRC made findings of moral and political responsibility against those who had committed gross human rights violations during the period of their inquiry, which included members of the ruling party ANC – the state that authorised the TRC. Specifically, the TRC found that, "the ANC was morally and politically accountable for creating a climate in which such supporters believed their actions to be legitimated and when carried out within the broad parameters of a 'people's war' as enunciated and actively promoted by the ANC" "Volume One. Truth and Reconciliation Commission of South Africa Report" (Cape Town: CPT Book Printers, 1998). Vol. 2, Ch. 4, Sec. 229

[58] Saul Dubow, "Book Review of The Politics of Official Discourse in Twentieth-Century South Africa by Adam Ashforth," *African Affairs* 90, no. 358 (1991): 132–33.

and the extraction of raw materials from (South) Africa. Apart from narratives depicting the massacre as a 'tragedy' on the one hand, or an example of ANC-led 'black-on-black' state violence, there is also the story of Lonmin's relationship to the post-colonial, post-apartheid state. As one commentator articulated, Lonmin's actions are, "those of a company that has been able to maintain the financial relations of colonialism while outsourcing the violence of this exploitation to a supposedly post-colonial state".[59] In this context, we also see the outsourcing of violence to Lonmin's private security, which works in tandem with the SAPS in guarding the company's precious assets. Hence, Marikana presents an image of the South African state protecting the interests of the mine owners, and capitalist class in general, over the livelihood of the mine workers. As critics like Hattingh asserted at the time of the massacre, "The outright violence of the state in the platinum sector and at Marikana, therefore, lays bare the true nature of the state; and the role it plays in protecting the ruling class".[60] Marikana has therefore become a moment from which to assess the extent to which the promises of social justice made at the transition have been actualised. Despite the TRC and Marikana Commission, little has changed in the lives of mine workers and, as shall be discussed in the chapters that follow, while there may have been minor improvements in the conditions of hostel accommodation, evidence presented at both commissions evince that people residing in mining communities continue to live in substandard housing and lack access to basic service delivery.

Considering the many failures of both the TRC and Marikana Commission, it is tempting to want to explain commissions as merely a feature of the legal superstructure, whose functions are in line with the ruling, capitalist class's interests; or as tools that tell the 'truth of State'. However, my political sociological reading shows moments in which the commissions reveal

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[59] Johannes Seoka, "Can Lonmin Wash Its Hands of Marikana's Blood?," *New Internationalist*, January 25, 2017, https://newint.org/blog/2017/01/25/can-lonmin-wash-its-hands-of-marikana-blood.

[60] Shawn Hattingh, "What the Marikana Massacre Highlights," *Libcom.Org*, September 23, 2012, https://libcom.org/news/what-marikana-massacre-highlights-23092012.

core elements of the violence they investigate and where the 'official discourse' is challenged in meaningful ways. However, their essentially legal articulations of violence mean that these commissions have been unable to deal with the forms of socio-economic harms and structural violence their public and deliberative processes expose. In a sense, analysing post-apartheid commissions of inquiry investigating state violence shows how we are dealing with a state that promises truth and justice, but attempts to operationalise this within a legal framework that by its nature cannot contend with it.

1.3 Research Questions

The questions guiding the research were:

How was violence conceptualised in two post-apartheid commissions of inquiry: the Truth and Reconciliation Commission and Marikana Commission of Inquiry?

Clarifying this reveals some of the contradictions in official truth-seeking regarding violence in the South African mining sector and the potential for certain forms of violations to be overlooked. Therefore, the second research question guiding the thesis is:

Why do the TRC and Marikana Commissions frame violence in the way they do and what are the implications of this framing of 'truth' and justice?

1.4 Chapter Outline

Chapter Two, which follows, provides a historical overview of the function of commissions of inquiry used in the process of British and colonial state formation. It cites examples of commissions used in Trinidad and the South African extractive industry to demonstrate the mercurial relationship between the development of the colonial state and economy. In this way, it both reviews and challenges literature on commissions' functions that presents them as 'tools of the state' or as state legitimation only. At the same time, the chapter introduces the concepts and analytical framework that distinguish between various institutional approaches to 'truth-

seeking' following state violence. The framework distinguishes between 'fact-finding', 'truth-seeking', and the discursive and ideological function of official commissions. These concepts will be used in subsequent chapters to analyse the TRC and Marikana Commission as examples of post-apartheid or post-colonial commissions investigating state violence.

Chapter Three analyses the TRC's approach to violence in the mining sector by drawing on its institutional hearings on business and the mining sector. I assess salient critiques of the TRC's 'truth-seeking' that accuse it of whitewashing the structural violence of the past by referring to the Promotion of National Unity and Reconciliation Act, which did in fact oblige the TRC to investigation human rights abuses of a structural nature. I find that the TRC's institutional hearings did provide a public arena in which debates about the relationship between the state and business emerged, as well as the nature of Apartheid's violence. During these hearings, the violence engendered by apartheid's racial capitalism emerged. However, in the final report, the TRC did not view the structural violence effected by the mining sector as generative of gross human rights violations in and of itself. Instead, my analysis of dominant and competing discourses on violence within the business and mining sector hearings reveals that the TRC produced ambiguous findings in relation to business's culpability for apartheid's violence and the overarching discourse on structural violence of apartheid. Implied in the report was that the core issue was that the systemic violence of Apartheid was racialised, rather than that the generic structural violence of capitalism generated continued violations of human dignity. The chapter concludes by highlighting that discourses on violence are inherently legitimist and ideologically informed in their ability.

Chapter Four provides further critical analysis of the TRC's ambiguous findings on violations in the mining sector to explain why the TRC approached violence in the way it did. I argue that the TRC adopted a legal approach to its findings, which is rooted in the international transitional justice movement and increasing salience of international law, of which the TRC

viewed itself as an instrument. Through an analysis of the period of transition to democracy in relation to the global emergence of neo-liberalism, the fall of Socialism and rise of the transitional justice movement in the 'third wave' of democratisation, I explain that there was a concomitant increase in the legitimation of human rights discourse and practice. I argue that the TRC must be understood as a product of political and military compromise, but also that arguments presenting the transition as an elite-led whitewash fail to grasp the adoption of a legal culture on the sides of both the outgoing NP government and the liberation movements. The chapter proceeds to focus on the TRC's, and international law's, inability to fully comprehend and theorise the concept of exploitation in the context of capitalism. Using Marx's analysis of capitalism, the TRC's silence on the systemic logics of capitalism that depend on and reproduce exploitation is characterised as an ideologically informed silence that presented exploitation under apartheid as immoral, but exploitation under liberal democracy as acceptable.

In Chapter Five, I introduce the context of the Marikana massacre and the Farlam Commission that promised 'Truth, Restoration, [and] Justice' for victims and families of victims of the massacre. I analyse the emergence of public discourses on violence as the situation at Marikana unfolded, drawing on radio discussion and presentation of events at Marikana by newspapers, to articulate that legitimist discourses on violence were apparent in the days preceding the killings on August 16th, 2012. Moreover, I conduct a discursive analysis in the framing of the Marikana Commission's founding documents - the terms of reference and regulations - to assess how violence is framed in relation to the various 'parties' under investigation.

Chapter Six expands on the discursive and ideological effects of the commission's legal fact-finding regarding the violence. The first part of this chapter draws out the official discourse on the strikers, who are presented as a criminal 'crowd', where I examine the implications of this framing. The second part of the chapter addresses the issue of structural violence and Phase 2

of the Marikana Commission, which sought to investigate long-term structural causes of the tragedy.

Chapter Seven reveals that, although the Commission's legalised focus constrained the range of both fact-findings and truth-seeking, the legal approach also created grounds to find the state and Lonmin liable for the killings. Hence, I argue that the Commission provided space for unofficial and contestatory discourses to emerge which challenged the prevailing 'official discourse' of the 'criminal crowd' of striking mine workers. In addition, I make a contribution towards a critical understanding ideology in the context of commissions of inquiry that is linked to a critique of domination.

Chapter 8 offers my final analysis and conclusions regarding some of the recent developments in South Africa and contemporary engagements with and by the TRC and Marikana Commission. I point to some of the pitfalls of the over-legalisation of commissions of inquiry and restate the observed contradictions of official truth-seeking into violence, when constrained established legal approaches to 'violence' are adopted.

2. Official Truth and (Post)-Colonial Political Violence: Analytical Framework

2.1 Introduction

Traditionally, commissions have been used to consider legislative policy, inquire into the work of administrative departments or investigate social conditions.[1] There are also examples of them investigating allegations of corruption,[2] or being used to interrogate state collusion in fuelling political violence, such as those established during the South African transition from Apartheid to democracy.[3] This research was spurred by the Marikana Commission, as the most recent example of a commission to address the state's use of violence against protesting members of the population in the mining sector. This chapter provides an historical overview of the use and functions of commissions, particularly following state violence, to develop an analytical framework for the analysis of the South African Truth and Reconciliation Commission (TRC) and Marikana Commission. This shall lay the foundation for the chapters which follow that analyse discourses on violence in the TRC and Marikana commission, and the way certain legal framings have obscured systemic or structural forms of violence.

Commissions of inquiry share many features; however, to aid analytical clarity, one may identify certain (sub)-types and genres of official 'truth-seeking'. Different types may also be

[1] Clokie and Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics*., 2

[2] Examples from the USA include the multiple inquiries into the New York Police department between 1894 and 1994, of which the Mollen Commission of 1994 was the most prominent, as it provided insights into how institutional corruption was bred and sustained. In South Africa, there is the Hoexter Commission (1950) that looked into bribery in awarding liquor licenses in Johannesburg; and more recently, the Zondo Commission (2018-present) investigating allegations of corruption and 'State Capture' in the executive and private sector. At the time of writing, the Zondo Commission was still in session.

[3] Two commission are prominent here: The Harms Commission and Goldstone Commission. The former, conducted in 1990, was an inquiry into allegations of official death squads within the police; however, it has largely been denounced as a whitewash as it failed to identify names of individuals or police units as party to the operations. The latter, set up by then-president FW de Klerk, examined the security sector's contribution to political violence.

distinguished by their modes of official truth-seeking, such as 'fact-finding', or the search for forensic, legal and/or narrative truths. By identifying various modes of official truth-seeking, I lay out some of the key functions of and approaches to understanding commissions of inquiries' work.

Mainstream scholarship on commissions of inquiry published in the 1930s, 60s and 70s, like that of Chapman, Clokie and Robinson, Hanser, and Raith and Lamb, accepted the mandates of objective fact-finding at face value.[4] This thesis takes a more critical approach. It highlights commissions' discursive, ideological, and political functions in legitimating certain forms of violence endemic to the development of the modern industrial capitalist and colonial state. It does this by providing an overview of official commissions that inquire into political violence in the history of British colonial and post-colonial state formation. I distinguish between representations of ordinary violence, political violence and structural violence in official discourse. Following du Toit and Thompson, the distinction between ordinary and political violence is grounded in the notion that whether violence is characterised as political or not is ideological and has practical implications in facilitating or undermining relations of domination and/or exploitation.[5]

Section 2.2 locates commissions of inquiry historically as British state apparatuses, as royal commissions, and how the institutional form was utilised as part of Britain's colonial and imperial project. The historical context illuminates the various institutional formats official 'truth-seeking' commissions have taken, with a focus on those established to inquire into state violence, or moments of conflict. Section 2.3 provides an overview of literature that focuses

[4] Chapman, *Role Comm. Policy-Making*; Clokie and Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics*; Wraith and Lamb, *Public Inquiries as an Instrument of Government*.

[5] André du Toit and N Chabanyi Manganyi, *Political Violence and the Struggle in South Africa*, ed. André du Toit and N Chabanyi Manganyi (Hampshire and London: Macmillan Academic and Professional Ltd, 1990). 87-130; J.B Thompson, *Studies in the Theory of Ideology* (Cambridge: Polity, 1984); J.B Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Cambridge: Polity, 1992).

on the discursive and narrative function of official commissions and interrogates their use as tools of state legitimation. This lays the foundation for the ensuing discussion on how the official discourse and narrative genres relate to state responses to violence in the South African mining sector. This paves the way for Sections 2.4 and 2.5 which analyse the relationship between discourse and ideological analysis, towards a critical approach to ideological discourse analysis. The section justifies the chosen method of ideological discourse analysis, which I maintain is useful to understand commissions as 'theatres of power' in material terms.

The chapter will also clarify the distinction between four conceptual schemes that are applied to analyse the TRC's approach to mining sector violence in the context of South Africa's transition to democracy, and the analysis of the Marikana Commission as the first post-apartheid 'tumult-commission' occurring 18 years into South Africa's democratic dispensation, founded on the Bill of Rights and the Constitution.

1) Fact-finding, as a general aim of official commissions of inquiry established following events of state-sponsored violence;
2) Truth-seeking, as related to specific aims of certain sub-types of commissions, such as truth commissions or tumult commissions;
3) The narrative and discursive function of commissions, which addresses their function in producing official discourses on a contentious subject, for example: truth discourse, reconciliation discourse, tragic discourse; legal discourse etc.; and
4) The ideological function of discourse in the TRC and Marikana Commission, relating to the doctrines, beliefs and social myths which are reified to sustain relations of domination.

2.2 Historical and Analytical Approaches to Commissions in British and (post-) Colonial Governance

This section provides an historical overview of commissions' use in (re)producing state authority across various epochs. The use of royal commissions as a distinctive apparatus of modern, bureaucratic state formation in Britain is shown, where the 'fact-finding' function via objective inquiry led to their proliferation. This use is traced through British imperial projects

in establishing laws to govern subject populations. Finally, drawing on examples from Trinidad and South Africa – former British colonies - the use of commissions in mediating tensions in industrial disputes places pressure on their characterisation in literature as tools merely of 'state legitimation'. Here, I explore the concept of the state from various theoretical traditions, particularly in its relationship to wielding legitimate violence. In the section which follows, I trace how commissions of inquiry were integral to the process of British state formation and the development of capitalism, showing how the rise of the modern state emerged codependently with the rise of global capitalism.[6]

2.2.1 Fact-Finding Commissions and British State Formation

Much of the earlier literature on commissions of inquiry refers to the Commonwealth Commission model, originally called tribunals of inquiry or royal commissions.[7] Royal commissions present one of the oldest forms of government institutions in Britain. Under feudalism, they were used to channel issues deemed pertinent to the monarchy, where Burton and Carlen assert that they originated as an extension of monarchical power. The premodern state knew little about its subjects and the space understood as the nation,[8] and commissions were used to gather information about both of these. They were authorised by the Crown, or relevant executive authority, where commissioners would be mandated to investigate routine problems arising in the extension and establishment of monarchical or executive power.[9]

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[6] See Philip Richard D Corrigan and Derek Sayer, *The Great Arch: English State Formation as Cultural Revolution* (London: Blackwell, 1985).

[7] Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa*.

[8] James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven; London: Yale University Press, 1998)., 2

[9] Burton and Carlen, *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State*., 2; The first recorded commission was established by Norman Conqueror William I between 1080 and 1086 to "ascertain the ownership of each estate of land and its value for taxation." Clokie and Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics*. Moreover, during the Elizabethan period (1591) commissions were used, for example, to "track down Catholic priests and their abettors". See Corrigan and Sayer, *The Great Arch: English State Formation as Cultural Revolution*., Chapter 3., 59

Royal commissions were instrumental in contributing to policy formation in Britain: for the development of laws. For Clokie and Robinson, writing in 1937, there was a need for supplementary agencies in democratic countries because the "process of parliamentary procedure – and in particular its operation – restricts and restrains the inquisitive and inquiring members and enforced a conformity of conduct which is totally destructive".[10] For this reason, royal commissions occupied a "distinctive position in the administration of the British State".[11] One reason for their distinctiveness is the sheer number of commissions instituted in the 19th and 20th centuries.[12] Authors like Ashforth assert that official commissions are tools of the state (he calls them State Commissions),[13] but Harrison notes that while these inquiries operated within parameters established by the government, "they were not departments of the state."[14] Significantly, the status of royal commissions was addressed by a treasury memorandum in 1877, which stated the commissions were, "not a matter of law but only of Treasury practice."[15] For the most part, during this time commissions were administered by the treasury and it was the treasury that would devise and inspect the terms of reference for any financial implications of findings and recommendations. However, in tracing the actual subject-matter of commissions, it is evident that they were used increasingly for legal purposes: to seek facts to form the basis upon which new laws would be made, or to ascertain why, in a particular instance, the law had not been properly carried out.

Investigative commissions have some defining characteristics: they involve experts, they are conducted in public and they are advisory and *ad hoc* (as opposed to permanent commissions).

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[10] Clokie and Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics*., 4

[11] Elaine Harrison, *Officials of Royal Commissions of Inquiry 1870-1939* (London: University of London, 1995)., xii

[12] There were over 130 Royal Commissions established between 1870 and 1900; 61 between 1900 and 1914 and another 59 set up between 1914-1940. Harrison., xiii

[13] Adam Ashforth, "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms," *Journal of Historical Sociology* 3, no. 1 (1990): 1–22

[14] Harrison, *Officials of Royal Commissions of Inquiry 1870-1939*., xiii

[15] See fn 6 in Harrison., xiii

These characteristics have historically allowed commissions to claim impartiality in their analysis of evidence. As Hanser wrote, "No country has produced anything comparable in effectiveness to the royal commission of Great Britain as an agency to which appeal can be made for a definitive determination of controversial facts and for a trustworthy judgement on a complex public problem."[16] Similarly, Clokie and Robinson asserted that commissions permit the compilation of accurate information to address pressing social problems, which is, "a most important antecedent of sound state action".[17] For Stanyer, commissions, "hold out to citizens the prospect of greater rationality in public decision-making."[18] It was this seemingly rational and objective character, both in procedure and in the nature of the final documents produced, that would act to legitimate a commission's findings as reliable facts that could be used to inform policy.

The types of policy the commissions went on to inform can be seen as indicative of the particular orientation of the state at a particular moment, suggesting dominant social paradigms or 'common sense'. For example, according to Stoler, the commissions devoted to providing social relief can be read as, "specific to a particular European moment of intensified social reform and of righteous state confirmations of commitment to it."[19] One of the earlier examples cited in this regard is *Condition of the Working Class in England*, in which Engels extensively references the findings of the factory commissions in Britain as evidence of the dangerous and exploitative working conditions of British factory workers.[20] A series of parliamentary investigations and a royal commission were consequences of the 'ten-hour movement' of

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[16] Hanser, *Guide to Decision: The Royal Commission*., 22

[17] Clokie and Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics*., 10

[18] Stanyer, "The Redcliff-Maud Royal Commission on Local Government.", 131

[19] Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton: Princeton University Press, 2009)., 142

[20] Friedrich Engels, *Condition of the Working Class in England* (Leipzig: Institute of Marxism-Leninism, 1845), https://www.marxists.org/archive/marx/works/download/pdf/condition-working-class-england.pdf.

factory workers who pushed for reduced working hours. The inquiries confirmed appalling abuse and mistreatment of children in factories. Later, Karl Marx would write in *Capital*, Volume One:

> We should be appalled at the state of things at home, if, as in England, our governments and parliaments appointed periodically commissions of inquiry into economic conditions; if these commissions were armed with the same *plenary powers* to get at the truth; if it was possible to find for this purpose men as competent, as *free from partisanship* and respect of persons as are the English factory-inspectors, her medical reporters on public health, her commissioners of inquiry into the exploitation of women and children, into housing and food (Emphasis mine).[21]

In this context, Marx was impressed with the factory inquiries' apparent impartiality, or unbiasedness, and ability to expose the extent of labour exploitation when labour hours and conditions were unregulated by law. While it is true that the factory commissions did this, it must be noted that they were responding to a decade of factory workers organising themselves into a political force, placing pressure on the government to intervene in regulating working hours.[22]

Nonetheless, the palpable contributions these early commissions made in reforming working conditions led advocates of commissions of inquiry to assert that they presented a, "democratic turn" in modes of governance and assisted in promoting deliberative democracy.[23] Their associative democratic qualities are that hearings are conducted in public, as opposed to *in camera*, and the data they gather is often be made publicly available.[24] In so doing, wider

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[21] Karl Marx, *Capital: A Critique of Political Economy, Volume 1* (Moscow: Progress Publishers, 1867), https://www.marxists.org/archive/marx/works/download/pdf/Capital-Volume-I.pdf., 7

[22] Claire-Anne Louise Lester, "Commissions of Inquiry and the Role of Law: Towards a Materialist Approach," *Social Dynamics*, 2020, 1–20.

[23] Keller, "Commissioning Legitimacy: The Global Logics of National Violence Commissions in the Twentieth Century.", 356

[24] Their public nature has been inscribed in their founding legislation for some time. For example, the British Tribunals of Inquiry (Evidence) Act of 1921 states that the commission "shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry of the nature of the evidence to be given". "Tribunals of Inquiry (Evidence) Act 1921" (UK Government Legislation, 1921), https://www.legislation.gov.uk/ukpga/Geo5/11-12/7/section/1/enacted.

audiences could be included in the debate, opening an arena of democratic space that permitted the inclusion of diverse narratives and, equally, potential for dissent. Marx references these commissions as armed with, "plenary powers to get at the truth." Indeed, royal commissions were endowed with considerable powers to fulfil their investigative mandates, including powers of search and seizure and subpoena powers.

The 1830s were a time of profound legal and political change and this affected how commissions were both used and viewed by the public. For Holdsworth, commissions of inquiry were the point where the technology of the legal-rational bureaucratic state diverged from the medieval order.[25] The Reform Parliament was elected in 1833, fuelled by the enthusiasm of dawning liberalism imbued with Adam Smith's *laissez faire*, the notion of natural rights and Jeremy Bentham's utilitarianism. At the same time, the expansionist capitalist state was developing how it made increasing use of a professionalised civil bureaucracy to perform the investigative role of government. Prior to government departments being staffed with the specialised trained personnel we see today, it was royal commissions that performed the research and information gathering function of the state.[26] Foucault refers to this process as the 'governmentalisation' of the state – where the state became characterised by the modes by which society was managed, rather than solely its military role to protect a nation's borders.[27] As Weber noted, "It is obvious that technically the great modern state is absolutely dependent on a bureaucratic basis. The larger the state and the more it is, or the more it becomes a great power state, the more unconditionally this is the case".[28] These commissions combined the emergent "proto-scientific ethos of the nineteenth century Britain" with a public

[25] Holdsworth, William Searle. A history of English law. Vol. 1. Methuen, 1922

[26] Clokie and Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics*., 10

[27] See C Gordon, "Governmental Rationality: An Introduction," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991), 1–48.

[28] Max Weber, *From Max Weber: Essays in Sociology*, ed. H.H Gerth and C.W Mills (New York, 1958)., 211

fact-finding and reporting structure, which advocates claimed provided an objective and participatory model for policy-making.[29] The state drew authority from its claim to reason (legal-rational authority), and this reason in the public sphere was equated with justice. This is evident in the words of Hanser who stated that the role of royal commissions was to ensure policy was grounded in reason and justice, so that the policy could maintain and improve efficiency and "achieve greater equity".[30]

However, despite claims to 'objectivity', it is also clear at this period that commissions were influenced by political agendas. Reform Ministries were under considerable pressure from various groups and supporters – pressure for social reform. Pressure for reform merged with the trend towards rationalisation of state power legitimated by the claim to sound information and knowledge. In the Victorian reform period, following the Poor Law Commission in 1832, commissions played a significant role in shaping policy reforms, particularly in the area of social welfare. That commissions were used as investigatory bodies to advance certain (political) reforms is, according to Clokie and Robinson, evidence of the "relation between investigation by royal commissions and the political opinions of the Ministry of the day".[31]

For others, like Finer, the political influence in commissions was more insidious than Clokie and Robinson imply. Finer states that commissions and committees of inquiry would make selective appointments of commissioners, would marshal evidence selectively and prime witnesses to produce politically palatable outcomes. An example is the royal commission on the Employment of Children in Factories (1833), which Finer states was politically expedient to delay the passing of the ten-hour bill and reduce the number of hours that children could be

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[29] Keller, "Commissioning Legitimacy: The Global Logics of National Violence Commissions in the Twentieth Century.", 354

[30] See Hanser, *Guide to Decision: The Royal Commission*., 218

[31] Clokie and Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics*., 98

required to work in factories.[32] Both texts suggest a function of commissions that goes beyond a generic 'fact-finding' role. They were used increasingly to mediate political tensions emerging from social, political and economic changes.

Another criticism, related to their procedural aspect, is that they function to diminish public debate on policy.[33] In their comparative study of commissions of inquiry into national security, Farson and Phythian assert they often exist for the purpose of "limiting political damage" and "ensuring political survival".[34] More cynical views include that they serve purely as instruments of political obfuscation and delay, with Herbert stating that the existence of a commission is prima facie indication of a failure to govern.[35] Despite these critiques, the influence of commissions in British state formation is astounding. Between 1840 and 1843, four further commissions were set up in Britain to investigate the employment of children in mines, collieries and the sectors of industry not included in the legislation that regulated child labour in mills and factories.[36]

Yet, what does it mean when we say, 'state formation' and that commissions of inquiry were integral to this process? 'The state' is a contested subject and approaches to studying and understanding it vary.[37] The view commonly attributed to Marxists is that the state is an instrument of class domination, where it serves the material interests of those who control its

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[32] Finer 1969 cited in Burton and Carlen, 6

[33] For example, Blom-Cooper asserts that the Tribunals of Inquiry Act was passed with the aim of avoiding elements of debate and potential opposition to the issue under inquiry, as it meant that the issue would circumvent the Select Committee in parliament – the forum in which policy issues had customarily been dealt with. L Blom-Cooper, "Public Inquiries," *Current Legal Problems* 46, no. Part 2 (January 1, 1993): 204–20, https://doi.org/10.1093/clp/46.Part_2.204., 206

[34] Anthony Stuart Farson and Mark Phythian, *Commissions of Inquiry and National Security: Comparative Approaches* (Santa Barbara Calif. ;;Denver Colo. ;;Oxford: Praeger, 2011)., 9

[35] A Herbert, *Anything but Action? A Study of the Uses and Abuses of Committees of Inquiry* ([London]: Published for the Institute of Economic Affairs by Barrie and Rockliff, 1961).

[36] "List of Commissions and Officials: 1940-1949 (Nos. 29-52)," British History Online, accessed May 12, 2019, https://www.british-history.ac.uk/office-holders/vol9/pp28-41.

[37] See Clyde W Barrow, *Critical Theories of the State: Marxist, Neo-Marxist, Post-Marxist* (Madison, Wis. : University of Wisconsin Press, 1993)

institutions (such as the executive, bureaucracy and the police).[38] This varies according to different versions of Marxism. For example, Structuralist Neo-Marxists argue that the state is an arena of class struggle and that the state has relative autonomy from social groups but functions as a "factor of cohesion" to regulate competing classes in society.[39] For Weber, the 'state' can only be defined sociologically in relation to its means (*Mittel*) to wield physical violence. He argues that the "state is that human community which (successfully) lays claim to the *monopoly of legitimate physical violence* within a certain territory", where that territory is an additional defining feature of a state.[40] Regarding the state as a human community, Durkheim added that it is a "group of officials" as well as an "organ of social thought" and moral discipline.[41] This is relevant to understanding the development of the state as a force of moral regulation, and hence the development of the capitalist state as a cultural revolution.[42] For Corrigan and Sayer, state forms are always "animated and legitimated by a particular moral ethos".[43] For my purposes, I view the state as a set of social relations and practices. Hence, to say that commissions of inquiry contributed to state formation in Britain (and elsewhere, as is discussed below) means simply that they have been used as instruments though which the idea and practices of 'the state' became animated and exercised through discursive and non-discursive practices of governance within a particular society – the nation.

However, the state is also understood as an historical formation, which cannot be understood outside the development of global capitalism. For example, the English government played a critical role in establishing the large chartering companies (such as the East India Company,

[38] This is the instrumentalist view.

[39] Barrow, *Critical Theories of the State: Marxist, Neo-Marxist, Post-Marxist*., 8-9

[40] Max Weber, "The Profession and Vocation of Politics," in *Weber: Political Writings*, ed. Peter Lassman and Ronald Spiers (Cambridge University Press, 1919)., 310-11

[41] E Durkheim, *Professional Ethics and Civic Morals* (RKP, 1957, 1904)., 49-50

[42] Corrigan and Sayer, *The Great Arch: English State Formation as Cultural Revolution*.

[43] Corrigan and Sayer., 4

formed by a royal charter in 1600) where state regulation influenced the concentration of trade rights to few monopolies.[44] Hence the state, and the place of commissions of inquiry within what we call the state, cannot be understood only in moral, or ideational terms. As the factory commissions exemplify, the state regulates and authorises laws that have material – economic, political and social – effects.

2.2.2 Discovering the Laws to Govern Colonies

The imperial project involved extending the British state to foreign territories, and the question of how to stabilise colonial rule was a central concern to the establishment of the colonial state. Commissions punctuated the initiation and consolidation of British colonial rule and the practice of utilising them for the investigation of new laws continued through South Africa's several transitions: with the union of South Africa in 1910, the commencement of the apartheid regime in 1948 and, indeed, the transition to democracy in the early 1990s with the establishment of the TRC. In colonies, commissions were used to establish laws that could govern territories and as part of the global project of universalising international law, a consequence of the imperial expansionist project.

The 1823-35 Commission into the Condition and Treatment of Natives in Southern Africa aimed to provide a blueprint for the establishment of colonial rule and management of Africans in the colonially defined territory. Within the context of a political and imperial project of territorial and administrative expansion, commissions were used to develop the appropriate content for new laws to aid imperial objectives and undermine indigenous laws and custom.[45] One of the first examples is the 1883 Cape Colonial Commission upon Native Laws and Customs. This commission investigated all aspects related to the regulation of indigenous people's movement. It inquired into forms of social hierarchy, questions of polygamy, 'native

[44] Corrigan and Sayer., 66

[45] See Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*., 62-63

law' and custom. In this context, purportedly "objective" and "scientific" knowledge of the African "other" was, according to Mamdani, derived by an approach to evidence that confirmed prejudices about African culture and life.[46]

Moreover, the recommendations of the 1883 Cape Colonial Commission upon Native Laws and Customs informed key aspects of the Native Territories Penal Code (Act 24 of 1886). The code was used to import English law to South African law and exerted considerable influence on criminal law after the formation of the union in 1910, an influence that continues today.[47] Laws established to govern not only movement and entitlements, but encoding crime and formalising punishment, were central to the development of the modern state in Europe and extended via colonial posts to places like South Africa. It is argued that the prison system in colonial Africa served a colonial objective, and as Bernault states, following independence, "regimes carefully reworked the prison system to meet modern, if sometimes unfortunate, political purposes".[48] Hence, over and above its reform objective, penal law in the colonial context post-1834 must be understood from an economic perspective. With the abolition of slavery, the practice of using convicts as cheap labour to build the colony's economic infrastructure – roads, railways and ships – was a well-established practice, legitimated by discourses that emphasised reforming the Cape criminal.[49]

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[46] Mamdani., 44

[47] D.S Koyana, *Influence of the Transkei Penal Code on South African Criminal Law* (Alice: Lovedale Press, 1992)., ii

[48] Florence Bernault, "The Politics of Enclosure in Colonial and Post-Colonial Africa," in *A History of Prison and Confinement in Africa*, ed. Florence Bernault (Portsmouth: Heinemann, 2003)., 2

[49] With the discovery of diamonds and gold, there was high demand for cheap labour. De Beers Mining Company was the first private company to employ convict labour in 1885. Prisoners worked on lime quarries on Robben Island, and during the Great Depression the agricultural sector also made use of prison labour, such as Glenroy sugar cane farm located on the South Coast of Natal (now Kwazulu Natal). See S Oppler, "A Brief History of Prison in South Africa," 1998, http://www.issafrica.org/PUBS/MONOGRAPHS/No29/History.html#. On the discursive strategies used to legitimate this practice see Claire-Anne Lester, "Codified Criminality: A Socio-Historical Analysis of Confinement at the Cape of Good Hope," *Historical Approaches* 9 (2011).

Establishing the rule of law in conquered territory was necessary to set the terrain of governance of the subject population and the boundaries of state authority. This was a matter pertinent to both domestic and international law. In terms of domestic law, commissions of inquiry like the South African Native Affairs Commission (SANAC, 1903-1905) were used to seek information regarding what could be considered appropriate laws to govern the African population.[50] SANAC, established shortly after the South African War of 1899-1902, was used to address the shortage of available labour to service the gold mines of the Witwatersrand and establish the requisite administrative apparatuses to this end.[51] Ashforth references SANAC's "scheme of labour control," in the context of the "imperatives of state makers in Southern Africa," in terms of how best to induce Africans into wage labour and inhibit their independence.[52]

Examples such as this reveal that these commissions' findings would be used to determine the legal parameters of who would qualify as citizens, ruled by civic law as bearers of rights, or subjects, ruled by custom. Effectively, they became used increasingly as instruments through which to administer the population. As Sitze states:

> It maps out in advance the sorts of things, goods, and populations whose preservation and equilibriums the sovereign will need to manage, administer, and oversee; it seeks to foresee the problems government might encounter as it undertakes a given program of administration; it examines, in retrospect, the failings and scandals that marked similar attempts to establish government in the past; it poses the questions government will need to answer if it is to achieve its optimal thresholds of credibility and efficiency.[53]

These functions are wholly apparent in the context of the emergent South African state. For Scott, the operations of modern states are to realise the state's "fiscal and administrative goals",

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[50] Ashforth, 22

[51] Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa*., 23

[52] He explains these 'schemes', which involved speaking from a 'secular authority' and techniques to justify tribalism as a basis for 'Native' administration, denying franchise rights to the 'Native' population and hence differentiating between citizens (with rights) and subjects of rule. Ashforth., 43, 25

[53] Sitze, 159

which is to "measure, codify, and simplify land tenure".[54] It is not merely coincidence that the ascendancy of Positivism as the primary jurisprudential technique in international law coincided with colonial expansion. Positivism replaced naturalism as the main jurisprudential form of international law in the late 19th century, followed by the universalisation of international law as a consequence of imperial expansion occurring in the latter part of the "long nineteenth century".[55] The fundamental idea behind Positivist jurisprudence is the idea of the state's primacy in international law. As noted by Anghie, "the fundamental positivist position, that states are the principal actors of international law and that they are bound only by that to which they have consented, continues to operate as the basic premise of the international legal system".[56]

Within their administrative roles, commissions have been used as instruments of state legibility utilised to legitimate the laws that their findings informed. As Stoler asserts, "if statistics help 'determine the character of social facts'…it is commissions that provide their interpretive, historical, and epistemic frames".[57] Commissions, used to investigate laws in colonial territories, relied on legal interpretive and epistemic frames. As I have argued elsewhere, commissions were (and continue to be) used when the regular legal institutions of the state (the courts, the police and regulatory laws in general) are under pressure or have lost legitimacy.[58] Where states are implicated in violence, commissions also occupy a curious space in the criminal justice system, lacking the power to punish, yet possessing the power to apportion responsibility or culpability for what is publicly perceived as criminal behaviour. The question

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[54] Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*., xi, 36

[55] According to Eric Hobsbawm the end of the 19th century is 1914 with the start of the Great War. Eric Hobsbawm, *The Age of Empire 1875-1914* (New York: Vintage Books, 1989)., 6

[56] Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law," *Harvard International Law Journal* 40, no. 1–80 (1999): 1-., 2

[57] Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense*., 169

[58] Lester, "Commissions of Inquiry and the Role of Law: Towards a Materialist Approach."

now, in a post-apartheid South Africa which has a functioning bureaucracy and established legal system, is what is the specific legal function they fulfil?

2.2.3 Violence and 'Truth-Seeking' in the Colony

Sitze argues that similar to the 'Grand Tradition' of 'Native Question' commissions,[59] there is another type of truth-seeking commission common to British colonial governance, which he calls 'tumult commissions'.[60] The Jamaica Royal Commission of 1865 is presented as the archetypal tumult commission and Sitze cites some 24 tumult commissions in South Africa, beginning with the 1836 commission investigating the murder of King Hintsa by the Governor Banjamin D'urban, including Bulhoek (1921), Bondelswarts (1923), Witieshoek (1951), Sharpeville (1960) and Soweto (1976).[61]

According to Sitze, tumult commissions investigated questions of colonial importance such as 'conquest', and land division, appropriation, citizenship and ownership.[62] Whilst mandates would indicate broad objectives of 'fact-finding' into the causes or specifics surrounding a period of unrest, most would end up inquiring into the necessity of the use of police and military force when suppressing a riot or rebellion. Tumult commissions did not have the unrestricted freedom of independent inquiries, nor did they have the coercive power of a legal court. Sitze states:

> Even though commissions could, in principle, give rise to prosecutions, they were more often substitutes for prosecutions… Under apartheid South Africa, the more that Commissions of Inquiry would be created to investigate state massacres, the less they would produce public debate and discussion…Here, the Commission of Inquiry was not a fact-finding device; it was a whitewashing machine.[63]

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[59] Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa*.

[60] Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*.

[61] Timothy Keegan, *Colonial South Africa and the Origins of the Racial Order* (Charlottesville: University Press of Virginia, 1996); Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*., 160

[62] Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*., 161

[63] Sitze., 152

From this perspective, tumult commissions created a semblance of an authoritative investigation into the use of state security force in suppressing insurgency, and in this sense, would seek to determine the 'truth'.[64] Sitze's most valuable point is that, when coupled with indemnity laws, tumult commissions legitimated impunity for extrajudicial state killing.

While Sitze's tumult commission concept is useful in identifying a pattern of commissions that would 'whitewash' state violence in colonial contexts (often in contexts where there was a suspension of the law, or martial law), it has little explanatory value in terms of understanding *how* the commissions' function in the way they do. How does this 'legitimation' operate? He interprets the use of commissions – both in proposing laws to manage the population, and in response to state violence – by drawing on Foucault's concept of governmentality and biopolitics. Sitze asserts that in the British colonial context, commissions were 'biopolitical' devices, because whether the laws they inquired into were aimed at avoiding racial conflict (as was the case with 'Native Question' commissions), or to prevent the reoccurrence of some form of conflict (as were tumult commissions), commissions were used to inquire into the health and welfare of the population. For Foucault, biopower marked a shift from power being directed at the individual body (disciplinary power) at the end of the 17th and in the course of the 18th century, to a "new technology of power" emerging in the second half of the 18th century directed at the population as a whole.[65] These techniques of power, according to Foucault, are more subtle and relate to exercising power over death and attempting to regulate life.[66] In simple terms, biopower can be any form of knowledge-driven authority directed at governing life and death. According to this Foucauldian approach, the relationship between official commissions,

[64] Often, these would occur in the context of martial law, or under states of emergency. As Sitze points out, martial law would effectively indemnify state violence ex ante, where commissions would be used as post facto legitimations of that violence. Sitze., 152

[65] Michel Foucault, *"Society Must Be Defended": Lectures at the College de France 1975-1976*, ed. Mauro Bertani and Alessandro Fontana (New York: Picador, 2003).

[66] Foucault., 240-263

their fact-finding techniques and the law is biopower, potentially with some reference to (colonial) governmentality.[67]

To explain how biopower operates, Sitze presents it as manifesting through discourse – the discourse of tragedy. For Sitze, tragic discourse in the context of state massacre is, "the narrative strategy through which colonial governmentality posed the question of its own juridical impasse – its own inability to extend the civilizing element of the rule of law without also itself violating, suspending and neutralizing that same rule of law".[68] Sitze's Foucauldian approach is abstract and not particularly useful in clarifying the actual politics that contribute to the formation of tumult commissions, what informs their operation (who runs it, who testifies and so forth), and the material implications of presenting the violence in the way they do. He attempts to do this in his analysis of the Wessels and Cillié commissions (after Sharpeville and the Soweto Uprisings), where he argues that the narrative of "concomitant cause" was an attempt to, "persuade foreign investors that occasional state massacres were no reason not to continue with 'neocolonial business as usual'".[69] Therefore, Sitze attributes the ambivalent findings relating to responsibility for violence in the Wessels Commission to the requirements of 'governmentality' in appeasing the international community:

> governmentality… [which] demanded calculation, equilibrium, and a program of persuasion with a scope that was no longer imperial (grounded with reference to the civilizing influence of the rule of law) but now global (grounded with reference to the United States and Europe, the political institutions of the United Nations, and the totalizing alliances of the Cold War).[70]

First, the concept of governmentality in this context tells us little of how power operates. Second, the approach to commissions is highly functionalist as it presents the demands of

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[67] As Sitze asserts, "Biopolitical in content, the Tumult Commission was biopolitical in form". It was biopolitical because it aimed to 'keep the peace' and manage conflict. Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*. 170-171

[68] Sitze., 172

[69] Sitze., 178

[70] Sitze., 180

governmentality as uniform, clear cut and executable. Sitze describes the strategy of the apartheid state as using the tumult commissions to sustain the foreign investment required for its domestic and regional policies, as if there was one clear state strategy. However, as Posel's research clearly shows, the apartheid state was divided and plagued by internal power struggles over policy.[71] Moreover, as Evans' research shows, the apartheid ideological project of building a grand state was rather weak and in practice there was a strengthening of the power of local bureaucracies in the Department of Affairs, ultimately devolving state authority and hollowing out the state's legitimacy.[72] For this reason, I maintain that there are limits to Foucauldian approaches to the function of tumult commissions – which explain them as theatres of power or biopower, or as tools of governmentality.

Understanding the Marikana commission requires a look at other tumult commissions used in response to uprisings in extractive industries, as this draws attention to the historical relationship between the (colonial) state, multinational corporations and the labour force. As Johnson argues, most of the British West Indian colonies were characterised by recurrent labour unrest and disturbances, which were an expression of prolonged economic stress for workers catalysed by post-World War 1 economic decline. For example, in 1937 a series of strikes were held at the oil fields of the Forest Reserve field of Trinidad Leaseholds Ltd.[73] Peaceful strikes were the response to unsuccessful requests for a wage increase and what were perceived by workers as unfair labour practices.[74]

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[71] Deborah Posel, *The Making of Apartheid, 1948-1961: Conflict and Compromise* (Oxford: Clarendon Press, 1991); Deborah Posel, "The Meaning of Apartheid before 1948: Conflicting Interests and Forces within the Afrikaner Nationalist Alliance," in *Segregation and Apartheid in Twentieth-Century South Africa*, ed. W Beinart and S Dubow (Psychology Press, 1995), 206–30.

[72] Evans, *Bureaucracy and Race*.

[73] Trinidad Leaseholds Ltd. was the product of a joint venture formed by the Central Mining and Investment Corporation and Consolidated Gold Fields of South Africa in 1913 with the aim of exploring and extracting oil in Trinidad.

[74] For example, while wage increases were denied, it is also stated that if a worker left a job at an oil company, the Trinidad Petroleum Association – with which all the main oil companies were associated – did not permit them to join another company. The strikes gained much attention in the British press. One Member of

Johnson details the political uses of the commissions established in response to the disturbances on the Trinidad oil fields: the Forster and the Moyne Commissions.[75] His research presents how a particular individual, William Ormsby-Gore (Secretary of State for colonies), pushed for a commission to facilitate the introduction of reforms for 'responsible' trade unions and the administration of labour so as to settle labour relations in the oilfields. The oil fields were of strategic significance for the British war effort and the war economy in its entirety, as Trinidad's oil was crucial to fuel the British imperial defence, but also the civilian economy – an essential bedrock of any country at war. With Britain wholly dependent on imported oil, Trinidad was of key strategic importance as this particular oil field provided 62.8 per cent of the British Empire's crude oil.[76] These examples of commissions used to address violence in an extractive industry in a colonial context reveals the way the Commission's role extends beyond fact-finding or truth-seeking. It shows how the commission is used to mediate tensions and balance the grievances of workers,[77] trade unions (none existed for Trinidadian workers but the issue of trade unions was discussed at length during the commissions), the company (Trinidad Leaseholds Ltd.) and the interests of the government.[78]

Parliament (MP) interested in issues related to labour in African colonies requested to the Secretary of State for colonies – William Ormsby-Gore – that there be an "independent and searching enquiry" into the causes of these disturbances. House.Of.Commons, Debates, 5th Series, Vol. 325, 1634 (n.d.).

[75] Johnson's research draws on extensive material from parliamentary debates and personal letters exchanged between William Ormsby-Gore and the Governor of Trinidad, Sir Murchison Fletcher, Howard Johnson, "The Political Uses of Commissions of Enquiry (1): The Imperial — Colonial West Indies Content The Forster and Moyne Commissions," *Social and Economic Studies* 27, no. 3 (1978): 256–83, 258

[76] In one letter, written 10 July, 1937, which was written to Sir Walter Citrine, the General Secretary of the Trades Union Congress, "it…behoves Government in the interests of the State, even more than those of property, to take all such steps as are humanly possible to prevent the cause – and especially any legitimate causes – of trouble arising". Johnson., 258

[77] There were no formal mechanisms through which workers could air grievances and represent themselves via labour administration to resolve any disputes. Workers had expressed concern for the increase in living costs. No trade unions existed for workers. Workers also lamented racial discrimination on the oil fields. A high proportion of management on Trinidad Leaseholds Ltd., were 'white' South Africans who exerted racial prejudice onto workers.

[78] "Ormsby-Gore recognised the desirability of establishing formal mechanisms to smooth labour relations not only from a narrow business point of view but also in the interest of the State." Orsmby-Gore is referenced acknowledging the benefits of conciliation bodies to address industrial disputes in Britain, and the way that these were able to avert more significant conflicts [do you need to add a reference here for this quote?].

The political context in which the commission was established is also relevant to articulating the often contentious or ambiguous relationship between commissions and the state. Johnson asserts that there had been a prior mediation committee to deal with industrial disputes, but that the chairman (Acting Colonial Secretary H.A. Nankivell) had "lost the employers' confidence after [he] had made speeches in the Legislative Council which colonial investors had deemed to be pro-labour".[79] Added to the ambiguity is relationship between a commission and the state. This complicates the notion of state "impartiality" when the government is itself divided on political positions. What we see is that claims to impartiality can in fact serve specific political and economic interests. Here, the commission is rather facilitating a myth of an imperial government operating as a neutral intermediary.

The South African context provides multiple examples of industrial strikes suppressed by violence. As mentioned in the Introduction, these strikes include the white mineworkers' strikes occurring in 1913 and 1922, which primarily concerned job reservation for white mineworkers and higher wages; as well as the 1946 African mineworkers' strike; the wave of strike action in 1973 related to permitting the recognition of African trade unions; and the mass strike action of 1986-7. Below, I provide an analysis of the findings of the Witwatersrand Disturbances Commission to articulate the way it sought to advise on the relationship between the company and government regarding the industrial dispute.

The Marikana Commission's mandate almost echoes that of the 1913 Witwatersrand Disturbances Commission, which sought to establish, "were the circumstances such as to render it necessary for the government to take special precautions to preserve and restore order and to protect life and property" and "whether the acts of violence were such as to justify the police defence, or military forces in using forcible measures". The commission made clear its

[79] Johnson, "The Political Uses of Commissions of Enquiry (1): The Imperial — Colonial West Indies Content The Forster and Moyne Commissions.", 263

position that law and order be upheld. It emphasised that the strike had occurred unlawfully and heard evidence that the strikers had "terrorized" the population to join and support the strike.[80] In its concluding statements, it defended and praised the "unpleasant" work of the police, stating "a mob has no right by our law or by the law of any civilized country to attack the police by hurling stones at them".[81] Nonetheless, the commission also found fault with the way the Kleinfontein Mining Company handled the dispute. It stated that the company had failed to uphold the Industrial Disputes Act when it announced extended work hours without the requisite consultation with workers, which had initially incited the strike. Another key issue that emerged was why Kleinfontein management refused to meet representatives of the workers' unions to resolve the dispute, a decision that the Commission found to have been a main cause of the escalated tension and conflict.[82]

The commission report also offers us a glimpse into the nature of the state and the workings of the mining industry. In providing reasons why officials did not meet with union leaders, the company argued it could not take a decision to engage with trade unions when it was not government policy to do so, and when this would set precedent for the entire mining industry. The Commission stated, "It is quite clear that the companies are bound together in groups, and that in all important matters they consult the mining groups and the Chamber of Mines". The Commission Report also cites communication between the Benoni Chamber of Commerce and the Minister of Mines on 5th June, requesting government intervention, as he "believed the Minister's presence would end dispute". The Minister replied, "Government regrets no solution of dispute yet been found, but cannot participate and must adhere to impartial position".[83]

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[80] Gladstone, "Witwatersrand Disturbances Commission Report."

[81] Gladstone., 61

[82] The Commission stated, "It is quite clear to us that is was almost entirely to the refusal of the mine management to meet the representatives of the men that…this led to the further complications which eventually culminated in the general strike". Gladstone., 51

[83] Gladstone., 52

The Commission stated that it found it difficult to believe that government could be neutral or impartial in the context of a strike "when the law is actually being broken".[84] It continued, "it seems more logical to say that the government must consider the facts, hear the contentions of both parties and then determine which views are the more just and equitable. Having determined this, it would appear to be the function of the government to persuade each party to concede what the Government thinks is proper".[85] On the 10th of June, the minister urged the company to meet the workers' demands to avoid a general strike; however, the Kleinfontein directorate had refused, stating that "any material change of the working arrangements at the Kleinfontein mine would lead to a demand for similar changes at other mines, and that the industry was not prepared to concede less than eight hours work on Saturday".[86] Here, the commission attempted to inform what the government's position *ought* to be with regard to industrial disputes, and the report clearly stated that the state should have powers to mediate industrial tension; however, when the government tried to advise, the company refused to go the route proposed by the minister.

The commission concluded that the police and military forces had the right, according to law, to use "rigorous measures to quell a riot" and that had the military not joined, the carnage may have been much higher.[87] The use of force to quell the riot was framed not only as necessary, but as the duty of those in authority, and to fail to make military aid available would be "an offense".[88] Here, the commission cannot be said to be merely a tool of the state, or

[84] Gladstone., 51-52

[85] Gladstone., 51

[86] Gladstone., 52

[87] Gladstone., 60, 101

[88] The report cites the Featherstone Commission, established to inquire into events surrounding the Featherstone 'Massacre' in 1893 where the issue of military force to quell a worker uprising was addressed: "To call for assistance against rioters from those who can only interpose under such grave conditions ought, of course, to be the last expedient of the civil authorities. But when the call for help is made and a necessity for assistance from the military has arisen to refuse such assistance is in law a misdemeanour." Gladstone., 101. For an analysis of the Featherstone Commission see Robert G Neville, "The Yorkshire Miners and the 1893 Lockout: The Featherstone 'Massacre,'" *International Review of Social History* 21, no. 3 (1976): 337–57.

'governmentality'. It is through the commission that the issues related to the legitimate use of violence by the state vis-à-vis other institutions – the police and the military – were deliberated.

Nonetheless, the commission viewed the events strictly through a legal prism, where those it found responsible for breaking the rules of law and order – the strikers – were described as "hooligans and criminals".[89] In its approach to the cause of the disturbances, the commission stated at the outset that it did not take into consideration the policy of the mining industry or the groups of mine workers: "Whether the line of action adopted by the industry or by the workers was a proper line of action from a political, social, or economic aspect does not concern us as a Commission. We can only deal with the matter from a legal point of view".[90]

It concluded that the causes of the escalated violence were: insufficient policing at the start of the strike to effectively nip it in the bud (failure to apprehend and prosecute those who incited the strike); failure of adherence to the Industrial Disputes Act by both the mine management and the strikers; and the unchecked power of strikers who were permitted to "roam freely from mine to mine to induce men to strike".[91] It also reveals that truth-seeking following violence in the (post)-colony is riddled with contradictions, and that explanations of commissions as tools of the state veil the actual contestations of power that emerge through an analysis of the commission.[92]

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[89] Gladstone, "Witwatersrand Disturbances Commission Report.", 103

[90] Gladstone., 98

[91] Gladstone., 99

[92] Significantly, there were no official commissions established in the wake of mining sector violence in the 1970s and 80s. After the Carletonville shooting in 1973, there was an official inquest led by C.H Badenhorst, the findings of which were not made public. I was unable to track down the report; however, a note was released by the US Department of State on 30 June 2005. The note contains Badenhorst's conclusion that "Company officials and police had to deal with a rampaging mob which refused appeals for restraint and was threatening to overwhelm whites in mine compound". The inquest report allegedly stated that police made an "honorable and correct assessment of situation, that police officers' concern for their men was reasonable and well-founded and that shooting of ringleaders was justified". The US report further noted that challenge to the inquest from inside South Africa was unlikely but that the events on September 11 continued to shock South Africa and would provide motive for "Anglo-American and other white employers" to improve labour conditions. "Inquest into September 11 Carletonville Shootings in Which Eleven Black Mineworkers Were

2.3 Institutional Formulations and Thematic Types

At this stage, it is worth distinguishing between official truth-seeking through commissions and other institutionalised investigatory practices, such as the work of the Public Protector, legal courts, tribunals, investigative journalism, or the work of parliamentary committees, for example. This section also distinguishes between thematic sub-types of institutional fact-finding bodies, including truth commissions, or historical commissions, which share the same basic features of generic inquiries. Outlining the myriad official fact-finding and truth-seeking bodies shows how different types of investigative institutions have diverse aims, methodologies and criteria against which to ascertain 'truth', although they may share the aim of fact-finding.

Public inquiries come in many forms. I have already mentioned royal commissions of inquiry, but there are also statutory inquiries, inquiries by select committees in parliament, ombudsman inquiries or ministerial inquiries. I use the term 'commission of inquiry' as a generic one which covers ad hoc and independent bodies "established by a government or minister to investigate particular issues or past events by gathering evidence in a public manner".[93] In South Africa, the Commission Act (Act 8 of 1947) provides the legal framework and terms of reference for such inquiries.

2.3.1 Truth Commission Model

Another type of official truth-seeking mechanism pertinent to studying the function of the Marikana Commission is the truth commission model. As stated in the introduction, the Marikana Commission's motto was 'truth, restoration, justice' – aims commonly associated with truth commissions. Truth commissions have proven to be complex institutions which have

Killed by Police, Closed October 25 with Judgement Exonerating Police from All Blame." (US State Department, 1973).

[93] Annie Kok and Elrena Van der Spuy, "South African Inquiries into Policing: 1910-2015," *South African Crime Quarterly*, no. 53 (January 15, 2016)., 1

concerns both moral and political due to the ways they tend to invoke and recast history and law.[94] National truth commissions tend to have broader mandates than both legal tribunals and historical commissions, with the South African Truth and Reconciliation Commission (TRC) having one of the more extensive mandates, as far as truth commissions are concerned.[95]

Truth commissions are distinguishable from other commissions for the following reasons. They are established in societies undergoing a transition from a period of civil war, protracted violence or authoritarianism to more democratic societies.[96] As such, they are a form of transitional justice tool. Transitional justice is a theoretical and practical field centred on the theory and praxis of strategies for how an incumbent democratic government ought to 'deal with conflicts of the past' to gain some measure of justice for victims of gross human rights abuses, to apportion either legal and/or moral responsibility or criminal liability for past crimes, and to establish a renewed culture of transparency and respect for the rule of law.[97] In general, this involves judicial and nonjudicial efforts including prosecuting perpetrators for past crimes (as seen in the Nuremberg Trials); establishing truth commissions or other forms of investigatory practices; fostering reconciliation efforts in societies deeply divided; focusing on reparations programmes for people most affected by conflict; facilitating commemoration and acknowledgement of painful history; and reforming state institutions associated with violence and tyranny, such as the security sector, police and military.[98] Truth commissions have been

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[94] Neil J Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington D.C: United States Institute of Peace Press, 1995).

[95] According to the transitional justice canon, truth commissions emerged following the third wave of transitions from dictatorial rule in the Southern Cone of Latin America in the mid-1980s in Argentina (1984) and Chile (1990). More sprung up into the 1990s in Central America. In Bolivia (1982-3), Uruguay (1985) and Paraguay (1992), this official truth-seeking was tasked to parliamentary commissions. Carlo Guarnieri, "The Politics of Memory. Transitional Justice in Democratizing Societies," *Rivista Italiana Di Scienza Politica* 32, no. 3 (2002): 572–74., 4

[96] Typically, this is to democracy, however the experience of transitional countries has revealed that not all have transitioned to democracy. See Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*.

[97] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2011)

[98] Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*.

studied for their capacity to improve human rights[99] and their ability to privilege reconciliation and healing over retributive justice,[100] although the extent to which they do this varies according to scholar and case study. What is common to these processes is what motivates them: the widespread desire that the violence unearthed and accounted for does not happen again. It is for this reason that the name of the Argentinian truth commission report was *Nunca Mas:* "Never Again".

In addition, truth commissions' work – as transitional justice mechanisms and not merely official governmental fact-finding bodies – involves not only establishing factual *knowledge* but determining a suitable way to *acknowledge* past human rights abuses.[101] The point of the distinction is that in particular contexts, such as one of a major political transformation, truth commissions are "historical founding projects" that operate in the context of an emerging democracy.[102]

However, transitional justice literature tends to omit the fact that truth commissions are, first and foremost, a particular form of commission of inquiry.[103] Some of the most widely cited comparative studies on truth commissions, such as that by truth commission expert Priscilla Hayner, do not account for the relationship between royal, or Commonwealth commissions

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[99] T Olsen et al., "When Truth Commissions Improve Human Rights," *The International Journal of Transitional Justice*. 4, no. 3 (2010), https://www.worldcat.org/title/when-truth-commissions-improve-human-rights/oclc/758047965&referer=brief_results.

[100] Priscilla B. Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study," *Human Rights Quarterly* 16 (1994).Robert I Rotberg and Dennis F Thompson, *Truth v. Justice: The Morality of Truth Commissions* (Princeton : Princeton University Press, 2000).; Mark Freeman, *Truth Commissions and Procedural Fairness* (New York NY: Cambridge University Press, 2006).

[101] Thomas Nagel, "State Crimes: Punishment or Pardon" (Aspen, 1989).; André du Toit, "The Moral Foundations of the South African TRC: Truth as Acknowledgement and Justice and Recognition," in *Truth v. Justice*, ed. Robert I Rotberg and Dennis F Thompson (Princeton, Oxford: Princeton University Press, 2000), 122–40.

[102] du Toit, "The Moral Foundations of the South African TRC: Truth as Acknowledgement and Justice and Recognition.", 124

[103] Claire-Anne Lester, "Truth in the Time of Tumult Tracing the Role of Official 'Truth-Seeking' Commissions of Inquiry in South Africa, from Sharpeville to Marikana," accessed April 8, 2018, https://open.uct.ac.za/bitstream/item/28712/thesis_hum_2017_lester_claire_anne.pdf?sequence=1.

and truth commissions.[104] As has been shown by Sitze, there are many similarities between Commonwealth commissions and the TRC.[105] The relationship between truth commissions and the long-established practice of British Commonwealth commissions is more evident when considering Mark Freeman's definition of truth commissions:

> A truth commission is an ad hoc, autonomous, and victim-centred *commission of inquiry* set up in and authorized by a state for the primary purpose of (1) investigating and reporting on the principle causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention. (Emphasis mine)[106]

Thus, Freeman located truth commissions not within the genealogy of transitional justice mechanisms (tribunals, lustration or amnesia), but as a sub-type of commission of inquiry with their legal precedents in the British Parliamentary inquiry tradition which he calls "*Ad hoc* national human rights-related commissions of inquiry".[107] This point will prove pertinent in the analysis of the Marikana Commission, which appears to have appropriated the attractive slogans of transitional justice mechanisms in its official motto of 'truth, restoration, justice'.

A final related point when mentioning truth commissions as relevant truth-seeking and fact-finding bodies following state violence is that truth commissions should stimulate a moment of self-reflection by the state that sponsors them, with the goal of repairing itself in some way.[108] As Elster asserts, when transitional justice processes are employed by a state, "in cases of transitional justice, the society is in a real sense judging itself".[109]

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[104] Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*; Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study."

[105] Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*.

[106] Freeman, *Truth Commissions and Procedural Fairness*., 65. Also cited in Lester, "Truth in the Time of Tumult Tracing the Role of Official 'Truth-Seeking' Commissions of Inquiry in South Africa, from Sharpeville to Marikana."

[107] Freeman, *Truth Commissions and Procedural Fairness*., 53

[108] Freeman., 16

[109] J Elster, "Coming to Terms with the Past. A Framework for the Study of Justice in the Transition to Democracy," *Archives Européennes de Sociologie European Journal of Sociology. Europäisches Archiv Für Soziologie* 39, no. 1 (1998), 14

2.3.2 'Official Truth' and the State: The Public Protector

A key concept in this research project is the concept of 'official truth'. Significantly, it should be noted that there can be both official and unofficial truth commissions. Numerous unofficial truth commissions have been established by entities like NGOs or church groups, including in Brazil (1979-85), Paraguay (1984-90), Uruguay (1986-9) and Bolivia (1990-3), all of which published unofficial truth reports. These bodies have been enumerated by Bickford and fall under the label "unofficial truth projects" (UTPs).[110] These bodies aim to find the 'truth' concerning gross human rights violations or conflicts of the past, often also with the goal of ensuring a measure of justice and accountability for harms committed. Often, they simulate the very modus operandi of official truth commissions, with their hearing of evidence from witnesses in a public forum. In relation to official and unofficial truth processes, Bickford adds that their (un)official status does not add any significant level of superiority to the "truth recovery process".[111] However, he argues that the 'official' discourse of a nationally sanctioned truth commission means that at the very least the commission can make the claim that its findings are 'official history', although whether the findings in the report are indeed true or not can remain contested.[112]

The notion of 'official truth' can be highlighted by referencing another investigative institution: the Public Protector. One could compare the work of an investigative journalist to the work of the public protector and conclude that these two investigatory practices could lead to equally significant and credible findings. However, there is a sense in which the office of the public

[110] Louis Bickford, "Unofficial Truth Projects," *Human Rights Quarterly* 29, no. 4 (2007): 994–1035,

[111] Bickford., 994, 1004

[112] Bickford.; Additional texts related to the contested nature of truth commission findings can be found in Deborah Posel and Graeme Simpson, *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002).

protector adds an additional degree of legitimacy to findings, especially when findings and recommendations are legally binding.

Another key distinction is the public protector's relationship to the state. The public protector is mandated to investigate grievances raised by the public into "any conduct of state affairs" as well as to report on that conduct and "take remedial action"[113] to "strengthen constitutional democracy in the Republic", along with the other permanent commissions established for this purpose.[114] In relation to this mandate to investigate the conduct of state affairs, the Supreme Court of Appeal (SCA) referred to the powers of the public protector in these terms:

> The Act confers upon the Public Protector sweeping powers to discover information from any person at all. He or she may call for explanations, on oath or otherwise, from any person; he or she may require any person to appear for examination; he or she may call for the production of documents by any person; and premises may be searched and material seized upon a warrant issued by a judicial officer… He or she is expected not to sit back and wait for proof where there are allegations of malfeasance, but is enjoined to *actively discover the truth*. (Emphasis mine)[115]

Hence, whilst the office of the public protector is a state institution, it is an independent entity armed with the powers of a court to "actively discover truth". Unlike the work and findings of an investigative journalist, the legal status and power of the office of the public protector, as conferred by the Constitution and the Public Protector Act, also ensures that the 'truth' discovered enjoys the status of *official* truth – truth that is sanctioned by the state. A key difference between the public protector's search for 'truth' is that the investigation does not happen in public, as it does in official commissions of inquiry.

Therefore, the distinctiveness of the commissions of inquiry studied in this thesis is that they seek official truth on an instance or period of state violence, and that they conduct the

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[113] Section 182 of the Constitution of the Republic of South Africa.

[114] Other institutions established for this purpose include The South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission. Section 181(1) of the Constitution of the Republic of South Africa.

[115] Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA) par. 9-11

investigation in public by involving the testimony of witnesses. But the discussion on truth commissions and the public protector also reveals a complex relationship between these institutions and the state. While their findings may enjoy the status of 'official truth' due to them being authorised by the state, they also attain their legitimacy from their impartiality and objectivity, i.e. their independence from the state. As the name of the position implies, the public protector must seek the truth to protect the public, both on behalf of the state and in some instances from the state itself.[116] Hence, this dissertation is concerned with commissions of inquiry that investigate state violence, and I attempt to clarify its complex relationship to the state on the one hand, and civil society on the other, in the post-apartheid context.

2.3.3 Legal Methods of Truth-Seeking

The investigatory process of the public protector differs from that of an international or domestic criminal trial, which relies on legal modes of forensic argumentation to assess evidence and apportion lawful culpability of alleged perpetrators according to rules of due process. Legal due process is based on (but not limited to) the following principles: public hearings that are adversarial; the right to choose legal counsel; determining individual guilt; and the presumption of innocence where the burden of proof lies with the prosecution.[117] These principles inform a legal rationality in thinking about truth, human behaviour and social processes.

For Fish, legal reasoning amounts to a trick whereby it presents itself as autonomous. "The trick", he states, "by which the law rebuilds itself in mid-air without ever touching down".[118] It is by this 'legal trick' that the Witwatersrand Disturbances Commission [see Section 2.2.3]

[116] An example from South Africa is the investigation into 'state capture' by the public protector in 2016

[117] Jon Elster, *Closing The Books: Transitional Justice in Historical Perspective* (Cambridge UK ;;New York: Cambridge University Press, 2004), 88

[118] Stanley Fish, "The Law Wishes to Have Formal Existence," in *Closure or Critique: New Directions in Legal Theory*, ed. A Norrie (Edinburgh: Edinburgh University Press, 1993), 157–74., 171

could confine its analysis of events to a legal point of view, ignoring the social and economic causes of the riot and the violent military response. The relationship between the law, or legal reasoning, and the function of contemporary commissions – especially those established following state violence – is integral to understanding the way they produce knowledge, as well as their relationship to the state and to society.[119] Relevant to clarifying legal, or judicial truth and truth-seeking is that 'truth', according to the realm of the law, refers to only those facts that are legally admissible and relevant to a case. As Van Krieken asserts, in the context of a court of law,

> There are no extra-legal 'truths' exempted from the juridical gaze and cross-examination, no facts which have any autonomous status, all knowledge is mere testimony in favour of one party or another. All science is merely 'opinion', the reliability of any area of knowledge is always open to the court's critical scrutiny.[120]

The reference to cross examination is relevant to the way in which juridical truth is validated as true: via the legal investigative process. It is the *process* of legal investigation that establishes the reliability of 'knowledge' and legitimates the courtroom's findings as 'true facts'. The discourse is legitimated through principles of legal positivism, the intellectual tradition that rests on the principle where only that which can be scientifically or logically proven is recognised as 'true'.

The TRC and Marikana Commission were not legal tribunals. However, the extent to which these commissions apply 'legal rationality' in conceptualising truth is analysed in relation to the discursive and ideological function of legal rationality when investigating instances of

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[119] Bourdieu's 1987 essay "The Force of Law: Towards a Sociology of the Juridical Field" provides a theoretical account of the legal field and highlights the paradoxical relationship between the law and society, articulating that while the legal 'system' is presented as autonomous from other fields, institutions and social practices, it simultaneously regulates interdependence with these fields. Plerre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal*, 1987.

[120] Robert Van Krieken, "Legal Reasoning as a Field of Knowledge Production: Luhmann, Bourdieu and Law's Autonomy," accessed June 21, 2018, https://ses.library.usyd.edu.au/bitstream/2123/967/1/legal reasoning.pdf. cited in Kate Leader, "Bound and Gagged: The Performance of Tradition in the Adversarial Criminal Jury Trial," *Philament* 11 (2007): 20., 10

violence. The analysis of legal rationality extends to the ways in which the commissions adopt legal procedure as a mechanism to legitimate 'truth' and address issues of justice in a post-apartheid context.

2.4 The Discursive and Narrative Role of Official Inquiries

While 'fact-finding' is presented as the main function of official inquiries, the fact-finding role becomes less pronounced when one considers how professionalised state institutions have become. Nowadays, the level of specialised training required of staff is such that the state could employ researchers to investigate any social 'problem' and propose solutions, instead of hosting a public and elaborate commission.[121] The same is often true with truth commissions.[122] Hence, the discursive and narrative function of official inquiries has gained traction among scholars of these institutions, particularly regarding 'official discourse' and the state.[123] This section outlines relevant approaches to discourse, official commissions and the state to clarify my approach.

Traditionally, the study of discourse is the study of language use, the communication of beliefs and ideas, and a way of interacting in certain social situations.[124] I use the term in line with its common usage, as one might refer to a 'medical discourse', 'feminist discourse' or

[121] Weber's account of the development of modern bureaucracies provides detailed description of the rise of professionalism among public officials, who require training in their related fields of employment.

[122] Prior to beginning its work, the TRC called for submissions from the public, where it collected hundreds of statements from people detailing the human rights violation they experienced. See South Africa. Truth and Reconciliation Commission, "Truth and Reconciliation Commission of South Africa Report," New editio (London: Truth and Reconciliation Commission, 1999).; Belinda Bozzoli, "Public Ritual and Private Transition: The Truth Commission in Alexandra Township, South Africa 1996," *African Studies* 57, no. 2 (1998): 167–95

[123] As a general function, Brown contends that commissions of inquiry reports are instruments of authoritative public 'sensemaking'. Brown argues that commissions are "monological storytelling performances that function hegemonically to impose a particular version of reality on their readers". His focus is on how commission reports make 'sense' of complex events and the techniques used to present findings as authoritative. Brown, "Authoritative Sensemaking in a Public Inquiry Report.", 95

[124] Teun van Dijk, "The Study of Discourse," in *Discourse as Structure and Process*, ed. Teun van Dijk (London: Sage, 1997), 1–34., 2

'Modernization discourse', rather than as a form of linguistic communication. To use du Toit's formulation, a discourse is:

> a fairly comprehensive and systematically articulated ensemble of specific ways and modes of talking about particular areas of social life associated with certain general institutions, professions and disciplines or with certain general ideological and political positions.[125]

Regarding modes of speaking about areas of social life, discourse is used in relation to practice. For example, the domain of the law cannot be understood apart from legal discourse and the practice of the legal sphere through contracts, arbitration and the function of the courts. As was shown in the discussion above on legal approaches to truth and fact-finding, distinguishing between various discourses involves identifying discursive rules pertinent to each area of social life. Hence, when identifying the discourses evident in commission reports, my analysis will involve clarifying the associated practice and implications for realising 'truth' and 'justice' that the commissions in question promise.

Furthermore, as this research focuses on official commissions, the study of discourse is also linked to understanding the relationship between official discourse and state apparatuses. Sitze's concept of tumult commissions identified a pattern of discourse – the discourse of tragedy – used when the state is implicated in violence. Similarly, Keller identifies sets of 'logics' in what he terms "National Violence Commissions".[126] The relevant argument in both Sitze and Keller is that official discourses on violence used in commission reports function, overall, to legitimate the state or justify the state's use of force for the purported role of restoring societal law and order. While Sitze and Keller draw links between official narratives of state violence and the function of legitimating the state and rule of law, the relationship is

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[125] Andre Du Toit, "Discourses on Political Violence," in *Political Violence and the Struggle in South Africa*, ed. N.C Manganyi and A Du Toit (MacMillan, 1990)., 95

[126] Keller analyses 28 commission reports from all over the world over the period of the 20th century. Keller, "Commissioning Legitimacy: The Global Logics of National Violence Commissions in the Twentieth Century."

presented as uncomplicated. Sitze and Keller's approaches also accept the law at face value and do not interrogate the ideological function of the law in the capitalist global economic order.

Burton and Carlen's approach, rooted in a Marxist perspective, argues that legitimist discourses on law and order are necessary for "political and ideological hegemony" of a capitalist state that functions "to achieve the political incorporation of the dominant classes [and]… to sustain the confidence and knowledge of the hegemonic fractions".[127] Where used in times of crisis, commissions "represent failure as temporary, or no failure at all… to re-establish the image of administrative coherence and rationality".[128] Writing in the context of the Cold War, Burton and Carlen argue that an official discourse – one that emphasises law, order, reason, rationality etc – operates at the ideological level to legitimate a capitalist class represented in and by the state.

This argument will be evaluated in the chapter that follows, particularly regarding how the commissions frame 'truth' and 'justice' in post-apartheid South Africa. Key to understanding these framings is the way the TRC and Marikana Commission approach the issue of political violence. Political violence is often distinguished from other types of violence by claiming some special moral high ground or public legitimation for the injury done, and for the typically representative character of both the agent enacting the violence and the target of the violence.[129] One could reasonably assert the action of mine workers throwing stones at the police during an uprising for a living wage, and the retaliation of police by beating or shooting those mine workers, is different to the violence exercised by a group of gang members involved in a turf

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[127] Burton and Carlen, *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State.*, 36, 48

[128] Burton and Carlen., 48

[129] It is worth clarifying that I use the term political violence broadly to include violence enacted in the name of the state as well as the violence caused by civil protect and insurrection.

du Toit and Chabanyi Manganyi, *Polit. Violence Struggl. South Africa.*, 6

war. Violence enters the terrain of the 'political' when it is believed that actions are sanctioned or justified by a higher cause, whether that be towards effecting equal citizenship rights or the security force's motivation to maintain law and order in the name of the state. Political violence is not necessarily directed against particular individuals, but rather at representatives of an oppressive order on the one hand, or at a subversive group or revolutionary movement on the other.[130] In situations where political violence is performed, it leads to questions concerning the legitimacy of the political order; questions that tend to linger far longer than the initial injuries sustained. Hence, I argue that a discursive analysis of official commissions in post-apartheid South Africa must involve a critique of ideology.

In addition to the discursive function, in their mandate to construct a collection of 'facts' about past political violence, tumult commissions build a narrative of that violence. For Hayden White, the desire to portray real events using the formal attributes of stories is indicative of the cultural function of narrativizing discourse – "an intimation of the psychological impulse behind the apparently universal need not only to narrate but to give events an aspect of narrativity".[131] The discourse of tragedy is one such example of a narrativizing discourse, which gives a sense of closure to a tumultuous event, to something which must be explained but at the same time defies 'rational' explanation. Commissions of inquiry are stuck between their mandate to provide an objective picture of historical events and the inclination of commissioners to narrate the event. As Peter Gay asserts, "Historical narration without analysis is trivial, historical analysis without narration is incomplete".

[130] du Toit and Chabanyi Manganyi., 6

[131] Hayden V White, "The Value of Narrativity in the Representation of Reality," *Critical Inquiry* 7, no. 1 (1980): 5–27., 8

2.5 Towards a Framework for Ideological Analysis in Commissions

The previous section provided an overview of the discursive and narrative function of commissions. It also established that discourses on violence are ideological. This section elaborates on the way commissions function in relation to ideology by proposing a critical approach to ideological discourse analysis. While there seems to be a general understanding in literature on commissions that the concept of ideology is relevant to their political function, the way commissions can be said to operate ideologically, or that the dominant discourse is ideological, remains vague. In fact, the concept of 'ideology' has often been used in various and sometimes quite cryptic ways with the study of ideology being a complex field. Indeed, there are divergent conceptions of the term ideology.

For example, various works on ideology include Marx and Engels' polemical text, the *German Ideology*.[132] Scholarly works, such as those by Larrain and Eagleton, trace the development of Marxist approaches to ideology.[133] Others, like Therborn, have attempted to develop a theory of ideology, looking at how ideology organises, maintains and transforms power in society.[134] These works led to subsequent debates concerning what ideology is and the range of phenomena that ought to be included in the concept, such as Žižek's *Mapping Ideology*.

'Ideology' has generally been understood in two ways: a neutral conception and what Thompson calls a critical conception.[135] From a neutral perspective, ideology can refer to any coherent set of beliefs that support some form of determined social action.[136] The neutral conception may employ the term ideology as purely descriptive, synonymous with a system of

[132] Karl Marx and Friedrich Engels, "The German Ideology," in *Collected Works, Vol. 5*, Internatio (New York, 1976).

[133] J Larrain, "On the Character of Ideology: The Interpretation of Karl Marx," in *Marxism and Ideology*, 1983, 6–45., T Eagleton, *Ideology: An Interpretation* (London: Verso, 1991).

[134] G Therborn, *The Ideology of Power and the Power of Ideology* (London: New Left Books, 1980).

[135] Thompson, *Studies in the Theory of Ideology*., 168f

[136] See M Seliger, *Ideology and Politics* (London: Allen & Unwin, 1976).

thought, or a 'regime of truth', to invoke Foucault's terminology. From this perspective, there is no distinction between ideologies that serve the interest of particular social groups or those that drive certain types of social action (such as ideologies of resistance and liberation). Such a 'neutral' perspective would view fascism and feminism as alike ideologies. A critical conception, however, conveys a negative or pejorative understanding of the term, where that which is posited as ideological is presented as "illusory or one-sided", containing an inherent condemnation.[137] Hence, a critical approach entails a more restrictive understanding of the notion, connoting something being misleading.

There is also a considerable amount of academic suspicion of the concept of ideology, which has its intellectual roots in poststructuralism and postmodernism. Although distinct approaches, poststructuralism and postmodernism are similar in their distrust of totalising discourses, like the idea of universal truth. Linked to Foucault's idea of 'regimes of truth', a postmodernist position would be suspicious of a critical approach to discourse and ideology, since it is believed to be impossible for one discourse to pass judgement on another discourse, and because "power is everywhere". [138] Hence, Foucault and his followers abandoned the concept of ideology, preferring the more capacious notion of discourse. However, there is a useful distinction to be made between the neutral approach to 'discourse-as-ideology' and a critical approach to ideology. As Eagleton asserts, "the force of the term ideology lies in its capacity to discriminate between those power struggles which are somehow central to a whole form of social life, and those which are not".[139] One may agree with Foucault that power is everywhere,

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[137] Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication*., 53-54

[138] Jorge Larrain, "The Postmodern Critique of Ideology," *The Sociological Review*, 1994, 289–314., 291; Foucault explains his suspicion of the concept based on three reasons. "The first is that, like it or not, it always stands in virtual opposition to something else which is supposed to count as truth… The second drawback is that the concept of ideology refers, I think necessarily, to something of the order of a subject. Thirdly, ideology stands in a secondary position relative to something which functions as its infrastructure, as its material economic determinant, etc. For these three reasons, I think that this is a notion that cannot be used without circumspection". Foucault, "Truth and Power.", 118

[139] Eagleton, *Ideology: An Interpretation*.

while maintaining that in certain contexts particular manifestations of it are more harmful and undesirable than in others.

The circumspection is shared by other mainstream theorists in the social sciences, but for slightly different reasons. On the concept of ideology, Geertz wrote:

> what such an egregiously loaded concept is doing among the analytical tools of social science that, on the basis of a claim to cold-blooded objectivity, advances its theoretical interpretations as 'undistorted' and therefore normative visions of social reality. If the critical power of the social sciences stem from their disinterestedness, is not this power compromised when the analysis of political thought is governed by such a concept…?[140]

Here, Geertz is referring to a problematic aspect of the Marxist tradition's theoretical heritage where the conceptualisation of ideology is influenced by the assumption of a science/ideology polarity.[141] From this perspective, the beliefs presented as ideological tend to be constituted as 'false consciousness' – distinct from objective, scientific truth.[142] While many ideologies are indeed false (e.g. that Jewish people and women are inferior beings etc.), the more effective ones are those that are 'real' enough and "communicate to their subjects a version of social reality which is real and recognizable enough not to be simply rejected out of hand."[143] Paraphrasing Mill, Eagleton states that they may be, "true enough in what they assert but false in what they deny."[144] It is this approach I take to my analysis of official commission reports.

Others, like Fairclough, demonstrate how ideology is essentially related to discourse and power relations. He does this through the notion of common sense, asserting that ideology is at play when texts are constructed in a way that imposes assumptions upon readers and text producers

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[140] Clifford Geertz, *The Interpretation of Culture* (London: Hutchinson, 1973)., 199

[141] A Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (London: Macmillan, 1979).; Lukacs

[142] These notions are supported by the often-cited passage where Marx and Engels liken the way ideology functions to that of a camera obscura, which presents the world as an upside-down image. See also The German Ideology in Robert C. (Robert Charles) Tucker, *The Marx-Engels Reader* (New York ;;London: W. W. Norton & Company, 1978)., 766

[143] Eagleton, *Ideology: An Interpretation*.

[144] Eagleton.

(those who write) of which they are unaware.[145] That the content is taken for granted, or received as something natural, binds ideology to notions of 'common sense'.[146] In addition, ideas related to common sense also link to notions of society as held together by consensus. However, there is not much evidence that supports the idea that modern industrial societies are in fact bound by consensus regarding social norms and values. Instead, we see the opposite. In South Africa today, the ruling party ANC consists of a trade union federation, the South African Communist Party and a broad church of Africanists, Marxists and liberals. Rather, then, the 'stability' of society can be attributed more to the diversity of views a society contains; "a lack of consensus at the very point where oppositional attitudes could be translated into political action".[147]

To avoid some of these issues related to ideology as false cognition, or consensus, I follow Du Toit, Giddens, Thompson and Žižek's approaches to ideology, whose conceptions rely on another polarity seen in the Marxist tradition: the sectional interests/ideology polarity.[148] By focusing on the relationship between ideology and interests, I hope to avoid some of the more vexed questions related to the truth or falsity of ideology, or ideology as false consciousness, as this avenue often leads to contradictions. If discourse and ideology operate through language and if language is a medium for social action, we must accept that ideology at least partially constitutes what is 'real' in society. As Thompson states, "Ideology is not a pale image of the

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[145] Norman Fairclough, *Language and Power* (London, New York: Longman, 1989)., 83

[146] The term 'common sense' was used by Gramsci, and expanded upon by Fairclough in his book *Language and Power*. The connection between 'common sense' and ideology was explored in depth by the Italian Marxist Antonio Gramsci. Gramsci's conception of 'common sense' referred to "a form of practical activity" where "a philosophy is contained as an implicit theoretical 'premiss'" and "a conception of the world that is implicitly manifest in art, in law, in economic activity and in all manifestations of individual and collective life". What binds these scholarly works is that ideology is conceived as a type of implicit philosophy embedded in social activity.

[147] Thompson, *Studies in the Theory of Ideology*., 5

[148] André du Toit, "On Ideology?," *South African Journal of Philosophy* 13, no. 3 (1994): 111–17., 133; Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis*., 186-188; Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication*., 56

social world but is part of that world, a creative and constitutive element of our social lives".[149] Following from this, a discursive or ideological matrix become forms of mediation through which we experience the world. An example relevant to my analysis that follows in the subsequent chapters is liberal legal frameworks informing the direction of commissions on inquiry. One may critique these legal frameworks as ideological in that they mediate the commission's work, thereby obscuring something in social life; however, this is not to say that a legal approach to truth findings will produce false findings.

Taken from the perspective of the relationship between interests and ideology, the lynchpin is the question of domination. Thompson proposes a critical conception of ideology as "the mobilization of meaning… to sustain relations of domination", or as he wrote later, "to establish and sustain relations of domination".[150] With this approach, Thompson is attempting to restore the critical drive in an approach to ideology found in the Marxist tradition. What makes Thompson's approach useful to my study of post-apartheid commissions is his conception of domination in its myriad forms, not necessarily as rooted only in class terms but in any systemically asymmetric power relations.[151]

In defence of the critical approach to ideology, Thompson identifies three ways that ideology was conceptualised in Marx's works: the polemical conception (found in Marx's early work on *The German Ideology*); the epiphenomenal conception (identified in Marx's 'historical materialism' theoretical work); and what he calls the latent conception of ideology, formulated from *The eighteenth Brumaire of Louise Bonaparte*.[152] Thompson uses the 'latent' conception

[149] Thompson, *Studies in the Theory of Ideology*., 5-6

[150] Thompson., 131-132; Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication*.

[151] Thompson, *Studies in the Theory of Ideology*., 130

[152] Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication*., 34ff

of Marx's ideology for his own work, which involves an inclusive understanding of domination. He conceives of ideology as:

> a system of representations which serves to *sustain existing relations of class domination* by orienting individuals toward their past rather than the future, or towards images and ideals which conceal class relations and detract from the collective pursuit of social change. (Emphasis mine) [153]

Following the framework proposed by Thompson, I maintain that ideology is best conceptualised as part of a more general social theory comprising relations between actions, power and domination.[154] This approach intentionally shifts the study of ideology away from the search for imposed shared norms and values, to the identification of mechanisms whereby meaning is mobilised to sustain patterns and relationships of domination.

A system may be described as one of domination when power relations between people are systematically asymmetrical at the institutional level and where certain agents or groups are endowed with power in a way that excludes others. To analyse ideological discourse as part of a general social theory, the thesis will critically analyse in what ways the TRC's business hearings that focused on the mining sector, and the Marikana Commission, mobilised meaning to sustain relations of domination. In what ways is meaning mobilised to legitimate, dissimulate and reify the existing state of affairs, where reifying relations of domination could include

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[153] Thompson., 41

[154] The relationship between these components is illustrated in Althusser's essay on 'Ideological State Apparatuses', which explains the material manifestation of ideology as created and sustained through social practices, rituals and institutions. Althusser's striking example is when he inverts an intuitive understanding of the emergence of institutionalised religion as catalysed by inner belief in the 'divine', a phenomenon of which the church institution was an external expression. Rather, he maintained that it was the church as an institution, with its associated practices and rituals, that was the driving mechanism generating the inner belief. As he stated, "Act as if you believe, pray, kneel down, and you shall believe, faith will arrive by itself". What Althusser is implying is that if one believes that they knelt because of their belief and one engages in the ritual, the performance engenders its own ideological underpinning. Louis Althusser, "Ideology and Ideological State Apparatuses (Notes Towards and Investigation)," in *The Anthropology of the State*, ed. Aradhana Sharma and Akhil Gupta, 2006th ed., 1971, 86–111.

representing a transitory and historically contingent state of affairs as natural, permanent or atemporal?[155]

2.6 Conclusion

This chapter identified the historical functions of commissions of inquiry advanced by various scholars. These were used to develop an analytical framework that may be used to understand the TRC and the Marikana Commission of Inquiry. The framework distinguished between the 'fact-finding' role, the 'truth-seeking' function, as well as the discursive and ideological function of official commissions investigating political violence. This has been particularly relevant to how commissions have operated to legitimate the state's contested authority in colonial and post-colonial contexts.

The relationship between official commissions' fact-finding and the discovery or interpretation of the law was problematised in Section 2.2.2 in relation to establishing laws which at the time seemed reasonable, and empirically informed, yet upheld unequal and unjust social and economic social relations in South Africa.

The overview of their use in British state formation, the development of capitalism and their use to inform law to govern colonial territories presented them as deliberative instruments of governance that have mediated issues relevant to the state and private economic interests. The examples of the Forster and Moyne Commissions in Trinidad and the Witwatersrand Disturbances Commission in South Africa also revealed the ambiguous and sometimes contradictory functions of official discourses on violence. The 'neutral' approach that interprets events through a legal lens is in fact not neutral but obscures certain interests.

[155] Thompson, *Studies in the Theory of Ideology*.

The simple yet significant point taken from Ashforth is that to study discourse in the social world is to study language and, specifically, how language intersects with the myriad manifestations of power to nourish, undermine, or sustain it. The chapter provided an overview of the relationship between discourse and practice, and the way the concept is used analytically in the dissertation. Through the historical overview of commissions being used to investigate law, inform penal codes, and set legal bounds of citizenship, I also sought to demonstrate the operative links between the procedure of 'objective' fact-finding, the ideological function of giving primacy to legal discourse and the socio-economic structural project of colonialism.

3. Contested Truth and Discourses on Violence in the TRC

3.1 Introduction

The Marikana Commission's official motto – 'truth, restoration, justice' – was displayed on an overhead banner as it conducted its work, a clear invocation of the South African Truth and Reconciliation Commission's (TRC's) language as a transitional justice institution. The comparison, however, urges an interrogation of the TRC: the institution, which many expected to, "close the long era of apartheid's race-class oppression and internecine violence".[1] The gunning down of an exclusively black African group of rock drill operators in 2012 confirmed that this era was far from over. During the Marikana Commission, the goals of truth, restoration, healing and justice were espoused as its core aims, with presiding judge and chairperson Ian Farlam stating, "getting to the truth of what, how and why it happened will be part of the healing and restoration process".[2] When addressing the victims of the violence and their families, Farlam provided further indication of the commission's role beyond fact-finding on the opening day:

> As [a] Commission we will do everything in our power to make sure that your attendance and participation in this inquiry will not add to your grief and trauma. It is for this reason that the Commission has deemed fit to subscribe to the values of truth, restoration and justice which are adopted in our official logo.[3]

However, the Marikana commission's terms of reference did not mandate it to be victim-centred, nor that it should seek 'truth', justice or restoration. Instead, it was a generic fact-finding commission whose central purpose was to investigate issues of "public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana …

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[1] Carl-Ulrik Schierup, "Under the Rainbow. Migration, Precarity and People Power," *Critical Sociology* 42, no. 7–8 (2016)., 1052

[2] See for example the closing arguments of evidence leader Advocate Geoff Budlender where he asserts that the Commission's purpose is truth-telling, accountability, healing and looking forward to take "effective steps to make sure that this never happens again". In Marikana Commission of Inquiry. Transcript. Day 294, 38494-5

[3] Chairperson. "The Marikana Commission of Inquiry Transcription," (n.d.). Day 1, 2

which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested (under the apartheid 'common purpose' law) and damage and destruction of property".[4] This implies the need for an analysis of the mine itself, and, due to the interdependent structure of the mining sector, would necessitate an investigation into mining practice in South Africa, and how this may have contributed to the violence seen on 16th August, 2012. In many ways, as stated in the Introduction and Chapter 2, the Marikana Commission was the latest in a long line of official inquiries designed to understand political violence in South Africa in general, and the mining sector in particular. This chapter focuses on another commission that investigated the issue of violence and the mining sector: the business hearings of the TRC.

That the TRC also investigated violence in the mining sector is a point often overlooked in critiques that centre on its neglect of the structural human rights violations of apartheid.[5] Established as South Africa's transitional justice mechanism, the TRC was a truth commission, not an event-specific or tumult commission set up to investigate an occasion of police violence, which were common features in British colonies when there was a brutal suppression of some major uprising.[6] While its similarities with the earlier colonial 'Native Question' and tumult commissions have been demonstrated,[7] the TRC was also quantitatively and qualitatively different to apartheid tumult commissions. Firstly, it was established by separate legislation to the Commissions Act – the Promotion of National Unity and Reconciliation (PNUR) Act No.

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[4] "Terms of Reference of the Commission of Inquiry into the Tragic Incidents at or Near the Area Commonly Known as the Marikana Mine in Rustenberg, North West Province, South Africa."

[5] Mamdani, "A Diminished Truth"; Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)"; Mamdani, "The Truth According to the TRC"; Mahmood Mamdani, "Reconciliation without Justice," in *Religion and Media*, ed. Hent de Vries and Samuel Weber, 2001, 376–87.

[6] Mark Freeman, Truth Commissions and Procedural Fairness (New York NY: Cambridge University Press, 2006), 53-58

[7] Similar elements include its public nature, its powers of search and seizure, subpoena powers and its use of 'experts' to acquire factual truth See Chapter 4 of Lester, "Truth in the Time of Tumult Tracing the Role of Official 'Truth-Seeking' Commissions of Inquiry in South Africa, from Sharpeville to Marikana."; Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*.

34 of 1995, which provided for the TRC's legal mandate. Second, it sought to separate itself from the legal approach of previous tumult commissions (the Witwatersrand Disturbances Commission, Wessels or Cillié Commissions) which cross-examined witnesses in search of forensic truth, as these were associated with the colonial and apartheid past. Rather, it would be victim-centred and was part of the state apparatus designed to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past".[8] As stated by the TRC's principle architect and deputy chairperson, Alex Boraine, the commission's 'secret' lay in there being no "stern-faced officials sitting in a private chamber, but a stage… it was a ritual…the unvarnished truth in all its starkness".[9] Despite the acknowledged differences, the Marikana Commission's reiteration of the TRC's language of truth, restoration and justice prompted me to re-examine the TRC as a foundational commission investigating violence in post-apartheid South Africa and how this commission framed mining sector violence from the standpoint of a constitutional democracy.

The TRC's mandate was highly ambitious for a truth commission whose three committees – the Human Rights Violations Committee, the Amnesty Committee, and Reparations and Rehabilitation Committee – were charged with complex and competing tasks. Its principal mandate was fact-finding with regards to past political violence and it aimed to establish "as complete a picture as possible of the causes, nature and extent of *gross violations of human rights*" committed between the 1st of March, 1960 and the 5th of December, 1993.[10] The PNUR Act defined a gross violation as "the killing, abduction, torture or severe ill-treatment of any person", or the "attempt, conspiracy, incitement, instigation, command or procurement to commit" these violations.[11] Truth-seeking was viewed in consequentialist terms, with truth the

[8] "Promotion of National Unity and Reconciliation Act" (Government Gazette, 1995). Section 3, 1
[9] Alex Boraine, *A Country Unmasked* (Capetown; Oxford: Oxford University Press, 2000)., 99
[10] This date was later extended to include crimes committed until 11 May, 1994.
[11] "Promotion of National Unity and Reconciliation Act." Chapter 1, 2 (a),(b)

conduit to restore "human and civil dignity" of victims "by granting them an opportunity to relate their own accounts of the violations of which they are victims".[12] As its name implied, the Amnesty Committee facilitated the granting of amnesty to perpetrators who provided full disclosure on *politically motivated human rights violation(s)* occurring within the TRC's designated time-frame of investigation.[13] It was planned that amnesty would be individualised rather than blanket amnesty. This amnesty was not to be equated with impunity, however; rather, due to the criteria which one had to meet to be considered, it was what Ron Slye called, "accountable amnesty" that "provide(s) some accountability and more than minimal relief to victims" through exposing the truth.[14] Overall, the TRC's mandate was to compile a report detailing past human rights violations and recommend ways to prevent future violations within a 'reconciled' and democratic society.[15]

Swathes of literature address questions of truth and justice in the TRC; however, these works tend to focus either on its value for victim healing, the catharsis of truth-telling or the constitutionality of the amnesty hearings.[16] Scholarship has also covered issues related to the discursive function of the TRC's 'truth' and 'reconciliation' discourses in relation to human rights violations.[17] However, few assess the TRC's 'Institutional and Special Hearings' in depth and, specifically, the way in which the mining sector's endemic violence was approached. The

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[12] "Promotion of National Unity and Reconciliation Act." Section 3, 1(c)

[13] (Emphasis mine) This "carrot and stick" approach was based on the fact that should someone not come forward voluntarily and they were implicated in committing a human rights violation, they would be liable to face criminal proceedings for their actions. Jeremy Sarkin-Hughes, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Antwerp: Intersentia, 2004).

[14] Ron Slye, "The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law," *Virginia Journal of International Law* 43 (n.d.): 173, 245., 173, 245

[15] "Volume One. Truth and Reconciliation Commission of South Africa Report." 1 / 4, 54

[16] Piers Pigou, "False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission," in *Commissioning the Past : Understanding South Africa's Truth and Reconciliation Commission*, ed. Deborah Posel and Graeme Simpson (Wits University Press, 2002), 37–65.; Lyn S Graybill, *Truth and Reconciliation in South Africa: Miracle or Model?* (Boulder: Lynne Rienner Publishers Inc., 2002).

[17] Annelies Verdoolaege, *Reconciliation Discourse: The Case of the Truth and Reconciliation Commission* (Amsterdam; Philadelphia: John Benjamins Pub, 2008); Claire Moon, "Narrating Political Reconciliation: Truth and Reconciliation in South Africa," *Social & Legal Studies* 15, no. 2 (June 17, 2006): 257–75

myriad forms of violence that Marikana highlights urges a revisit of the TRC as the newly formed South African state's initial attempt to confront past politically-motivated violence.

As stated in the previous chapter, my method involves an analysis of the TRC's ideological discourse on violence in the institutional hearings on the business sector. Following Thompson, I adopt a critical approach to the analysis of ideological discourse, where I attempt to clarify the ways that techniques of meaning-making, or signification, surrounding discursive conceptualisations of violence functioned to dissimulate or mystify relations of domination in the mining sector. Section 3.2 which follows covers some critiques of the TRC relevant to my study. Section 3.3 analyses the TRC's approach to 'official truth' and the extent to which it attempted to engage with issues of apartheid's structural violence. I find that the institutional hearings provided a democratic space from which various civil society groups sought to challenge the narrow notion of violence that had been the focus during other victim's hearings. However, the TRC would struggle to digest the 'truth' reaped through its own investigative mechanism.

3.2 Critiques of the TRC's Approach to Violence

The TRC's approach to apartheid's violence has been the subject of castigation since it began, and more so following the publication of the final report. In 1999, the South African Parliament held a debate on the TRC's report, with former President Nelson Mandela giving the opening address. Mandela stated that while the report's release constituted a "critical milestone" in South Africa's transition to democracy, that the commission suffered from various limitations. "As we anticipated", Mandela asserted, questions were raised concerning "an artificial even-handedness that seemed to place those fighting a just war alongside those who they opposed

and who defended an inhumane system".[18] This sentiment was echoed by Deputy president Thabo Mbeki, who, locating the issue in the history of colonisation and apartheid, argued that the TRC's findings were rooted in an erroneous understanding of gross human rights violations that occurred in the context of an irregular war. Hence, making perpetrator findings against ANC members for violent acts that occurred in exile training camps, or for attacks on white civilians in the context of the armed struggle, served to "delegitimise or criminalise a significant part of the struggle of our people for liberation".[19] Yet, as a fact-finding commission of inquiry it aimed to report frankly and dispassionately on past human rights violations to acknowledge formally the experience of victims and publicly name the perpetrators in an even-handed way. This has been criticised severely.

Mamdani has argued that the TRC produced a compromised image of the nature of South Africa's history of violence. This is because the commission presented the "key injustice of apartheid" as emanating from the "relationship between perpetrators and victims", which victims conceptualised according to a narrow definition of gross human rights violations (GHRV) including murder, torture and severe ill-treatment. This was despite the fact that apartheid's laws targeted communities and groups for racial and ethnic cleansing and policing.[20] By failing to acknowledge the mass of apartheid's victims – victims of forced removals, Bantu education and migrant labour – Mamdani argues that the TRC precluded the

[18] Nelson Mandela, "Opening Address by President Nelson Mandela in the Special Debate on the Report of the Truth and Reconciliation Commission, 25 February 1999" (Cape Town: Parliament, 1999).

[19] Thabo Mbeki, "Statement on the Report of the TRC, Joint Sitting of the Houses of Parliament, 25 February 1999" (Cape Town: Parliament of South Africa, 1999). The TRC found that the bulk of atrocities were committed by the apartheid state and security personnel (Volume 4, Chapter 6, 77). However, it also made a distinction between 'just war' and 'just means', which meant the Commission also made findings against the ANC and the PAC for committing gross human rights violations for which they were morally and politically accountable (Report Volume 2, Chapter 4, 2).

[20] Mamdani, "Reconciliation without Justice.", 377; Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC).", 34

possibility of justice for those victims and "extended impunity to most perpetrators of apartheid".[21]

Implied in the TRC's choice to focus on individual victim experiences of GHRV is that the systemic abuses – such as the pass laws and forced removals – were not deemed violations in and of themselves, but that they were merely the context in which the more 'gross' atrocities occurred. Regarding the identification of perpetrators, Graeme Simpson argues that the decision to grant amnesty for individual crimes committed specifically with political motive also betrays a particular understanding of the apartheid system, where the key conflict is one defined by political cleavages that could be analytically extracted from the wider patterns of structural and systematic violations.[22] As Posel stated, the commission was unable to "grasp adequately the relationship between individual experience, collective action, and the national or structural elements of apartheid's gross human rights violations".[23]

Instead, these arguments suggest that the TRC presented apartheid as what Tina Rosenberg would describe as a "regime of criminals" – a regime consisting of a few bad apples acting outside of the law who could confess to their crimes, like the rogue actions of military juntas in Pinochet's Chile.[24] This is to be distinguished from Rosenberg's concept of a "criminal regime", where one identifies the very laws that underpin society as 'criminal', or at least antithetical to international human rights law and culture.[25] Invoking this schema, the apartheid regime may be seen as a hybrid, underpinned by racist and discriminatory laws, but also

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[21] Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC).", 34

[22] See Graeme Simpson, "'Tell No Lies, Claim No Easy Vistories'A Brief Evaluation of South Africa's Truth and Reconciliation Commission," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, ed. Deborah Posel and Graeme Simpson, 2002., 220

[23] Deborah Posel and Graeme Simpson, "The Power of Truth: South Africa's Truth and Reconciliation Commission in Context," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, ed. Deborah Posel and Graeme Simpson (Johannesburg: Wits University Press, 2002)., 11

[24] Tina Rosenberg, "Overcoming the Legacies of Disctatorship," *Foreign Affairs* 74, no. 3 (1995): 134–52.

[25] Rosenberg.

possessing covert death squads allegedly operating outside the law.[26] This was captured in the TRC's main findings, which affirmed that the bulk of GHRVs were committed by the former state. The report stated further that, during the period from the late 1970s to early 1990s, the South African state, "became involved in activities of a criminal nature when, amongst other things, it knowingly planned, undertook, condoned and covered up the commission of unlawful acts, including the extra-judicial killings of political opponents and others, inside and outside South Africa".[27] It seemed that these were the ones that the TRC sought to compel to apply for amnesty even though the apartheid regime's very foundations of citizenship were generative of human rights abuses. As Rosenberg commented regarding Eastern European Communist regimes: in criminal regimes, abuses may be "morally, but not legally, indictable". Rosenberg writes further:[28]

> Tapping telephones and inducing children to spy on their parents fell within the law. Western legal experts agree that people cannot be tried for acts that were not criminal when committed. Besides, Communist repression required huge bureaucracies, but courts of law try only individuals.

Ivan Evans reminds us that South Africa's racialised state also relied on a vast bureaucracy, where oppression was routinised through the development and implementation of 'Native' policy through the labour bureau system.[29] Acknowledging this, the TRC's focus on state security agents and individualised victims blurred the dynamics of racialised power and structured privilege, and instead, according to Mamdani, "invited beneficiaries [of the apartheid regime] to join victims in a public outrage against perpetrators".[30] He continued that the TRC misdiagnosed the true nature of apartheid's violence. Apartheid was foremost a

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[26] This was a point of contention in the saga surrounding Eugene de Kock.

[27] "Volume Five. Truth and Reconciliation Commission of South Africa Report.", Chapter 6 'Findings and Conclusions', 212

[28] Tina Rosenberg, "Where's the Crime?," *The New York Times*, June 2, 1995, https://www.nytimes.com/1995/06/02/opinion/where-s-the-crime.html.

[29] Evans, *Bureaucracy and Race*., 17

[30] Mamdani, "A Diminished Truth.", 40

programme for colossal material redistribution, and thus it was necessary for post-apartheid justice to be social and systematic.[31] Similar criticism was shared by some of the TRC commissioners themselves. Human rights lawyer and commissioner Yasmin Sooka stated in a 2015 interview:

> In the commission there were some of us who argued that in fact the focus on civil and political rights violations was problematic and that really those were only the manifestations of when people stood up against unjust laws and policies and that what we should really be looking at were the *structural questions around apartheid*… the question of the beneficiary and how one would encourage the beneficiaries to be part of a transformation project and that didn't happen.[32]

Sooka further noted that the TRC made recommendations concerning the police and public order policing, and questioned whether the Marikana massacre would have occurred had the post-apartheid government followed through on those recommendations related to police reform.[33] This points to a range of issues the TRC addressed, which were not incorporated into policy by the ANC government.

However, the recommendations Sooka refers to in the interview were in fact part of the TRC's attempt to deal with the structural issues of apartheid in its Institutional Hearings. Here, contrary to the critiques of Mamdani and Sooka, the issue of apartheid's beneficiaries and bystanders became a central theme. The TRC's Institutional Hearings focused on the role of the apartheid legal system, the prison system, faith communities, the media, the armed forces, the state's role in chemical and biological warfare, and the role of business.[34] These were indeed issues of a structural nature which the commission addressed partially. However, in the section that follows, I show how, in order to fulfil its fact-finding mandate, the TRC still

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[31] Mamdani, "Reconciliation without Justice.", 387

[32] Pippa Green, "Interview with Yasmin Sooka, Former TRC Commissioner. 30 June 2015" (Cape Town, 2015), http://www.capetalk.co.za/features/139/trc/14140/trc-public-policing-proposals-could-have-averted-marikana-says-commissioner.

[33] Green.

[34] "Volume One. Truth and Reconciliation Commission of South Africa Report." 1 / 10, 280

prioritised its gaze on GHRVs over systemic injustices in its investigation of past political violence. This move implies a primacy of dealing with victims and perpetrators rather than beneficiaries, bystanders or collaborators, as well as prioritising individual narrative truth and restorative justice over distributive or social justice.[35] The attempt to steer the focus to 'gross' violations is seen as rooted in a particular moral and political diagnosis of the nature of apartheid, as well as the forms of violence and violations it generated. Nonetheless, the chapter presents how this diagnosis gets disrupted by submissions at the Institutional Hearings on business as various social groups make representations.

3.3 Official 'Truth' and Structural Violence

Approaches to the TRC tend to be framed in the truth versus justice debate: distinguishing the relative importance of each when confronting past human rights violations.[36] In the context of what Samuel Huntington called the 'Third Wave' of democratisation, the question became what was more pressing in transitional states: the need to prosecute perpetrators of crimes or the need to acknowledge the experience of victims of these crimes.[37] In this section, I interrogate the claims made above by analysing the transcript of the TRC's business hearings, submissions made and the final report and recommendations. There are two subsections; the first draws on aspects of the process, and the second analyses the way the business hearings were presented in the final report. However, there is certainly some overlap, as extracts from some submissions found their way verbatim into the final report. While there were several issues raised in the course of the hearings, my analysis draws out topics pertinent to understanding the post-apartheid context which may have influenced the Marikana massacre

[35] See Andre du Toit, "Truth as Acknowledgement and Justice as Recognition," in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I Rotberg and Dennis F Thompson (Princeton University Press, 2000), 122–40., 127

[36] See for example Rotberg and Thompson, *Truth v. Justice: The Morality of Truth Commissions*.

[37] Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

and Farlam commission: conceptualising its mandate and the forms of violence associated with corporate activity; the relationship between corporate interests and the state; and questions related to justice and accountability.

3.3.1 The Process: Ambiguous 'Truth' in the TRC's Approach to Mining Sector Violence

The TRC investigated past violations in the mining sector in the Institutional Hearing on Business and Labour, held from the 11th to the 13th of November, 1997. There was one day allocated to interrogate the relationship between the business sector and apartheid, where representatives of various interest groups participated voluntarily upon invitation.[38] To its credit, the commission was able to appeal to a large portion of society to make representation. As the hearing began, Chairperson Archbishop Desmond Tutu stated that they had received an "avalanche of submissions", some of which were received from abroad.[39] However, the commission did not compel or subpoena participation from the business community, even though it had the legal powers to do so.[40] As a result, and as noted by the chairperson, there were some "glaring absences" of submissions from the white Mineworkers' Union and South African Agricultural Union, and from the multinational oil corporations.[41] As Tutu stated, "Many would say that they were the most obvious supporters of the apartheid dispensation, willingly or unwillingly and it would have helped us considerably to get as complete a picture

[38] There were 88 submissions to the business and labour hearing.

[39] Chairperson Archbishop Desmond Tutu. TRC, "Business Sector Hearings, 11 November 1997" (1997), justice.gov.za/trc/special/business/busin1.htm.

[40] The power of subpoena was regarded a unique feature of the South African TRC, when compared to other truth commission that came before it. However, the Commissions Act endows all commissions with subpoena power.

[41] The Mineworkers' Union and South African Agricultural Union "refused to participate", while the National Council of Trade Unions, (NACTU) did not provide a submission as it had promised to. Other groups merely failed to respond to the invitations sent out. "Volume Four. Truth and Reconciliation Commission of South Africa Report" (Cape Town, 1998)., 18

as possible of the period under review".[42] Implied is that the TRC's 'truth-seeking' was compromised without the participation of those groups.

According to the introduction to the report on the institutional hearings, "what the commission sought to find out was how these institutions saw themselves and how, brought together with those who had opposed them, a part of the enigma of the South African evil could be unravelled".[43] Similarly, the report states that the core objective of the business hearing was to "promote understanding of the role of business under apartheid and explore areas where business failed to press for change – both at a political and at an organisational level."[44] From the offset, one can see that the focus on the 'role of business' is a far more open and general type of investigation than the comparatively focused hearings on victims and perpetrators of GHRVs that characterised the human rights violations and amnesty committee hearings. These hearings relied on individual truth-telling and personal or narrative truth to compile the official historical record of abuses, as well as legal methods of evidence verification when determining whether a 'perpetrator' qualified for amnesty.

The shift in focus to "understanding" is evident in the opening of the business hearings. As the hearing began, Chairperson Archbishop Desmond Tutu (hereafter Tutu) set the tone of the hearings, speaking in a way comparable to how a parent may try to coax a confession from a toddler.

> Now we've come together, not in order to pillory anybody. We have not come in order to ridicule anyone and in a sense we haven't even come to put in the dock. We want to

[42] Chairperson. TRC, "Business Sector Hearings, 11 November 1997."

[43] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 2

[44] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 21 To assist in its "understanding", the commission requested the expert input of several specialists, including Prof. Nic Wiehahn, who had led the Wiehahn inquiry of the late 1970s. This commission had recommended legalising 'black' trade unions. See Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa*. Other experts on labour who participated included Prof. Sampie Terreblanche and Charles Simpkins.

> hear your story. We are not so naive not to be aware that governments are powerful and often room to manoeuvre by business is restricted.[45]

Tutu's avowal that the hearing was not to "pillory" or "ridicule" is clearly anachronistic. The pillory, where the accused would be bound to a wooden frame, fastened by holes for the head and hands, well-positioned for the body to be maimed and publicly abused, was dispensed with as the 'Modern state' developed a "new theory of law and crime, a new moral or political justification of the right to punish".[46] Tutu's statement can be read as signalling to those present that the commission marked a turn to a new state form disassociated from the unbridled barbarism of the *Ancien Regime* Foucault describes in *Discipline and Punish*.[47]

He continued, stating, "we haven't even come to put in the dock".[48] This idiom assured that those giving testimony would not be assigned blame, subjected to scrutiny or treated like a defendant on trial. Tutu's language use in his opening address with the words, "we have come to hear your story," emits the sense that he is speaking to victims of the "powerful" apartheid regime. It also attests to the aim of the business hearings which was, partly, to gather disparate facts and make sense of them through a narrative. Commenting on the hearings, Audrey Chapman, who worked for the commission at the time, said that it was unclear whether they aimed to provide an account of human rights violations within the business sector, or to capture the range of violations, the causes of the abuses, or the degree of complicity of the various institutions.[49] However, as part of a transitional justice project, one may surmise that a core function of the business hearing was to seek the truth about the past as a foundation on which

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[45] TRC, "Business Sector Hearings, 11 November 1997."

[46] Foucault notes that one of the markers of the shift to the 'Modern' state in the 19th century was a shift away from the forms of punishment aimed at the body to make way for institutional reform and the formation of "unified rules of procedure". Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Penguin Books, 1977)., 7

[47] Foucault.

[48] TRC, "Business Sector Hearings, 11 November 1997."

[49] Audrey R Chapman, "Truth Recovery Through the TRC's Institutional Hearings Process," in *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, ed. A Chapman and H Van der Merwe (Philadelphia: University of Pennsylvania Press, 2008), 169–88., 174

to construct a new, 'post'-apartheid society. The business hearing was, therefore, part of the state apparatus to figure out how the business community fit into the 'imagined community' of the new non-racial and reconciled South Africa.[50]

While initially the hearings were framed as a forum to attain the experience of business, as individuals and groups began to testify and 'tell their stories', businesses core to the South African economy became increasingly implicated in having contributed to, or supported, apartheid policy and human rights violations. In his evidence, Prof. Sampie Terreblanche referred to the policies of migrant labour entrenched by the Chamber of Mines, the living standards of the compound system and the extraordinary low wages paid to mine workers. He asked directly how this did not amount to a gross violation of migrant worker rights in the 1960s and the early 1970s.[51] Indeed, Bell and Ntzebenza (Dumisa Ntebenza was another TRC commissioner) write how when the first legal strikes by NUM started in '87 and unrest spread to non-unionised mines, "striking miners were forced underground at gunpoint and at least ten were killed. There were reports that one of the larger mining houses, Gold Fields, had even patented its own rubber bullet".[52] This points to an even greater degree of complicity in direct, physical violence than that of the more abstract and structural nature.

Other statements presented during the hearing drew equivalence between human rights violations committed by business and apartheid policy, policies which had been called crimes against humanity by the United Nations in 1973. Deputy Chairperson Alex Boraine, while questioning South African Chamber of Business (SACOB), referred to business support for the migrant labour system, stating that it was supported by successive governments, with "very

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[50] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2006).

[51] Sampie Terreblanche, "Testimony Before the TRC Made during the Special Hearing on the Role of Business Sector," 1997.

[52] Terry Bell and Dumisa Buhle Ntebenza, *Unfinished Business: South Africa, Apartheid & Truth* (Observatory: Redworks, 2001)., 204

very bad consequences … in terms of family life and social deterioration. Amounting, in my book at least to a gross human rights violations" [sic].[53] The Black Management Forum's (BMF's) submission stated:

> The human rights violations by business are seen as those policies, practices and conventions which denied black people the full utilisation of their potential, resulting in deprivation, poverty and poor quality of life, and which attacked and threatened to injure their self-respect, dignity and well-being. Certain of these violations were open abuses, whilst others were indirect; yet others buttressed those carried out at a socio-political level.[54]

The sense of violence one gets from these statements includes both the physical and metaphorical uses of the concept that may extend to psychological and structural forms of violence. Structural violence, a concept advanced by Johan Galtung, describes a type of violence where a social structure or institution causes harm by preventing one from meeting their basic needs or from advancing their capabilities.[55]

It was here that the Business Hearings faced their first contradiction. Despite the acknowledgment that some businesses – particularly the mining industry – directly caused gross human rights violations, there was no expectation for businesses, or individuals in charge of companies linked to violations, to apply for amnesty. Applying for amnesty would imply that a gross violation had occurred, necessitating the application for immunity from prosecution for that violation.

In an interview I conducted with Alex Boraine, the deputy Chairperson of the TRC and its key architect, he stated that although many businesspeople came before the commission, "it never entered our minds" that those individuals should apply for amnesty, "because, where do you

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[53] Alex Boraine, TRC, "Business Sector Hearings, 11 November 1997."

[54] BMF submission cited in "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 21

[55] Johan Galtung, "Violence, Peace and Peace Research," *Journal of Peace Research* 6, no. 3 (1969): 167–91; Johan Galtung, *A Theory of Development: Overcoming Structural Violence* ([Oslo Norway]: Transcend University Press, 2010); Andrew Dilts, "Revisiting Johan Galtung's Concept of Structural Violence," *New Political Science* 34, no. 2 (2012): 191–95.

stop?" For Boraine, the amnesty process was legally circumscribed by the PNUR Act, which according to him, stipulated that it had to be applied for "on an individual basis and not on a corporate basis, a group basis, or a political party basis". According to Boraine's interpretation of the Act, the definition of amnesty was narrow and "very much linked with human rights violations".[56] When probed about why violations were interpreted narrowly, Boraine stated, "I'm not saying that the Chamber of Mines didn't violate the humanity of people… but it's very different to the spirit of police going and shooting people and burning bodies".[57] The distinction that Boraine attempted to articulate is significant to my study on official truth-seeking into violence, and is related to a distinction between the concepts of physical and structural violence.

In defining his more expanded understanding of violence, Galtung distinguishes between violence which has an actor as physical or direct violence; and violence where there is no actor as structural violence.[58] In both cases, there is a subject that is hurt. Another relevant distinction is between violence and violation. For Degenaar, the concept of violence and violation are closely linked but whereas "violence has a descriptive meaning [X intentionally exerting force on Y] … the concept of violation introduces a normative element expressing the meaning of the original Latin verb *violare*, to violate, outrage, desecrate, infringe".[59] We want the violence wrought by the police, the state, to be a legitimate force used against criminals. Any other form, that which disrupts the social contract, is seen itself as a violation. Boraine's statement reflects that he did not consider the actions wrought by business activity equivalent to police abusing their power and operating outside the law. Doing so would mean taking seriously Galtung's

[56] Claire-Anne Louise Lester, "Personal Interview with Alex Boraine" (Cape Town, 2018).

[57] Lester.

[58] Galtung, "Violence, Peace and Peace Research.", 170

[59] Degenaar, "The Concept of Violence" in du Toit and Chabanyi Manganyi, *Polit. Violence Struggl. South Africa.*, 72

notion of structural violence. This approach, I argue, is rooted in ideology. As du Toit states, "in a contested area like that of political violence it is the hallmark of ideology that certain conceptual distinctions or particular moral idioms come to be accepted as 'obvious' and 'natural' by socially significant groups".[60]

Perhaps sensing that I was unconvinced, Boraine further insisted that the definitions of victim, perpetrator and GHRV had been legally inscribed in the PNUR Act, which informed the TRC's definition of GHRV as "killing, attempted killing, abduction, [and] severe- ill-treatment or torture".[61] To him, the Act prescribed individual applications for amnesty for individually named victims of violations. It is important to note that Alex Boraine was himself instrumental in the drafting of this Act.[62] Secondly, in my review of the Act, it appears that the TRC's narrow conceptualisation of 'victim' was out of keeping with the one provided in its founding legislation. The conception of GHRV in the Act includes victims of "severe ill-treatment", which can be broadly interpreted to include a range of actions and arrangements not covered in the TRC's conception. Moreover, the Act's definition of 'victim' clearly does provide for the inclusion of groups of people. To quote directly from the Act, a victim includes:

> (a) Persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights-
> (i) As a result of a gross violation of human rights; or
> (ii) As a result of an act associated with a political objective for which amnesty has been granted.

[60] Du Toit, "Discourses on Political Violence.", 87

[61] These definitions were the subject of internal debate and discussion. See Lars Buur, "Monumental Historical Memory: Managing Truth in the Everyday Work of the South African Truth and Reconciliation Commission," in *Commissioning the Past : Understanding South Africa's Truth and Reconciliation Commission*, ed. Deborah Posel and Graeme Simpson (Johannesburg: Witwatersrand University Press, 2002), 256.

[62] Charles Villa-Vicencio, "Alex Boraine Refused to Leave Politics to the Politicians," *News24*, December 9, 2018, https://www.news24.com/Columnists/GuestColumn/boraine-refused-to-leave-politics-to-politicians-20181209.

The Act also included as victims "such relatives or dependents of victims as may be prescribed".[63] In the context of the mining industry, this would include families and dependants of migrant workers living and working in abject and life-threatening conditions. It could be interpreted to include groups of people who suffered a "substantial impairment" of human rights, such as racial discrimination or migrant labour. If operationalised by the TRC, adopting this interpretation of victim would have included communities of people who had suffered forced removals, or the generations subjected to the Bantu education policy. Including as victims those who endured "mental injury, emotional suffering, pecuniary loss" could be stretched to include anyone not classified as 'white' under the Population Registrations Act.

Hence, the PNUR Act provided a definition of victim far wider than what the TRC proceeded to adopt in the business hearings. This interpretation emerged from a particular understanding of political violence, where the violence associated with capitalism is construed as a regrettable but inevitable part of the system.

Contrary to Mamdani's charge, investigations into structural or systemic violence were also included in the TRC's mandate. The PNUR Act stipulated that the Commission should "facilitate… inquiries into… gross violations of human rights, including violations which were part of a systematic pattern of abuse".[64] It was to investigate the "nature, causes and extent" of the violations, including their "antecedents, circumstances, factors, context, motives and perspectives which led to such violations", as well as the "identity of all persons, authorities, institutions and organisations involved in such violations".[65] Another significant point is the

[63] "Promotion of National Unity and Reconciliation Act."

[64] "Promotion of National Unity and Reconciliation Act." See Section 4: Functions of Commission (Emphasis mine)

[65] "Promotion of National Unity and Reconciliation Act."Section 4

way the TRC conceptualised crimes against humanity and perpetrators of crimes against humanity:

> A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organisation or group: (a) murder; (b) extermination; (c) torture; (d) enslavement; (e) persecution on political, racial, religious or ethnic grounds; (f) institutionalised discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) arbitrary deportation or forcible transfer of population; (h) forced disappearance of persons; (i) rape, enforced prostitution and other forms of sexual abuse; (j) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.[66]

The commission also endorsed the view that crimes against humanity could be perpetrated by non-state actors.[67] This created some confusion about the primary role of the commission and there was a conception among commissioners themselves that the TRC would primarily investigate GHRVs committed by the apartheid state. As Dr Fazel Randera, a commissioner who arranged the institutional hearing on business, asserted in a recent interview, "Naively, even I at that time thought that I was going to look primarily at the role of the apartheid state in fomenting the conflicts and contributing largely to the conflicts of the past".[68] It seems that this confusion can be linked to an understanding of political violence.

The issue of political violence was a key focus of the TRC. In order to qualify for amnesty, an applicant had to show that their violent act had been committed with political motive. However, as Boraine's statement illustrates, the violence associated with business could not be viewed in the same way as state violence wrought by the police. This line of thinking can be traced to other truth commissions, and the field of transitional justice. Previous truth commissions instituted in Latin America, from which the TRC had drawn much of its concepts and plans,

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[66] This is the definition set out by the International Law Commission in its 1996 Draft Code of crimes against "the Peace and Security of Mankind" adopted by the TRC. "Volume One. Truth and Reconciliation Commission of South Africa Report." Chapter 4., 99

[67] "Volume One. Truth and Reconciliation Commission of South Africa Report." Chapter 5., 100

[68] Pippa Green, "Interview with Dr Fazel Randera, History for the Future Podcasts" (Cape Town: Cape Talk Radio, n.d.), https://lifepodcasts.fm/podcasts/33-history-for-the-future/episode/573-dr-fazel-randera.

had primarily investigated state terror, such as those held in Bolivia in 1982 and Argentina in 1983.[69] The time at which these commissions were brought into being marked a moment when the "decline of socialist movements crossed paths with ascendant efforts to consolidate liberal constitutional rule".[70] As Greg Grandin writes, the 'transitions' to democracy seen in Latin America marked more a shift to a particular form of democracy, where the "state-sanctioned investigations into past episodes of political terror were one part of this transition's agenda to cultivate a notion of liberal citizenship that viewed the state not as an executer of social justice but as an arbiter of legal disputes and protector of individual rights".[71] The implications of the dawn of the human rights discourse is addressed in greater detail in Chapter 4, which follows. However, Grandin's argument concerning commissions established in Latin America becomes illustrative when attempting to understand certain processes of ideological legitimation linked to the dominant discourses surrounding the South African TRC. For Grandin, the Latin American truth commissions sought to extract politics from the version of the past their pages portrayed, presenting the terror,

> not as an extension of a reactive campaign against social-democratic nationalist projects, nor as an essential element in the consolidation of a new liberal order, but as a breakdown of social relations, as but one more instance in a repetitive cycle of 'interruptions in democratic rule' that had taken place since independence in the early nineteenth century.[72]

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[69] During the early days of democracy, Alex Boraine established an NGO called Justice in Transition to host debates between civil society groups and government personnel on topics related to transitional justice and post-conflict justice and restitution. It held two conferences, the first, "Dealing with the Past" held in February of 1994, involved political figures and experts on transitional justice from Latin America and Eastern Europe. Another conference, "Truth and Reconciliation" held in July of 1994, was concerned with localised issues of the South African transition. See Alex Boraine, Janet Levy, and Ronel Scheffer, eds., *Dealing with the Past: Truth and Reconciliation in South Africa* (Institute for a Democratic South Africa, 1997).; Alex Boraine, Janet Levy, and Kader Asmal, eds., *The Healing of a Nation?* (Cape Town: Justice in Transition, 1995).

[70] Greg Grandin, "The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala," *The American Historical Review* 109, no. 3 (June 2004): 46–67, 47

[71] Grandin., 47

[72] Carlos Nino cited in Grandin., 48

However, the discussions that took place during the business hearings challenged the idea that the politically motivated violence of the state could be neatly separated from the structural violations catalysed by corporate behaviour. For example, the Afrikaner Handelsinstituut (AHI), a prominent Afrikaans business group, claimed that their support for the National Party was "part and parcel of the majority of the white community's thinking at the time", a "collective thinking" that they subscribed to. While some may have supported apartheid "in its crudest form", others "supported it for the promise of development, i.e. people could develop to their full potential but as different ethnic groups in their own areas".[73] As support for a particular political and economic social formation, the AHI effectively admitted that their support for apartheid's policy of separate development, and hence the human rights abuses generated, was politically motivated. Another individual, Mike Rosholt, CEO and chairman of Barlow Rand, the second largest mining conglomerate after Anglo American, stated during the hearing that he did not "actually believed in the policy of apartheid"[74], but "believed in stability" and "was against the idea of Russian economism".[75] These statements undermine the notion that the corporate sphere was outside the realm of politics. To argue that the work of business operates outside the realm of politics is an ideological assertion. It is ideological because it obscures the historical development of the state intertwined with the development of capitalism. As articulated by Scott in *Seeing Like A State*, the development of modern capitalism, undergirded by an ideology of modernism, required the state to realise capitalist plans of production, accumulation and expansion.[76] So, while there was one discourse which attempted to distance business from the state, another strong discourse that emerged during the

[73] "Afrikaner Handelsinstituut Submission to TRC Special Hearing on Business" (Truth and Reconciliation Commission, 1997)., 4

[74] Barlow Rand had 325 companies operating and employed 196, 000 people. Mr. Roshold was known to insist that his political stance was apolitical, but expressed himself on issues like being against the apartheid policy of influx control. Joseph Lelyveld, "The Many Faces of Barlow Rand Ltd.," *The New York Times*, 1982, https://www.nytimes.com/1982/04/11/business/the-many-faces-of-barlow-rand-ltd.html.

[75] TRC, "Business Sector Hearings, 11 November 1997.", 57

[76] Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*.

hearing on business and labour was one associated with the Marxist position: that the state is an instrument used for managing the interests of the capitalist class.

This brings me to another central theme which emerged during the hearing: the relationship between the state and capital, in terms of conceptualising legitimate and illegitimate forms of violence. Prof. Sampie Terreblanche's testimony attested to a shift in the structure of white political supremacy in the mid-1970s. He specifically invokes the term "racial capitalism" asserting that there was a "close and rather abnormal collaboration" between PW Botha's securocratic state and private business seeking to maintain white supremacy.[77] Extracts from the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP's) submissions, which were also incorporated into the final report, include COSATU's argument:

> We remain of the view that apartheid, with its form of institutionalised racism, masked its real content and substance – the perpetuation of super-exploitative cheap labour system… the primary victims of this system were the black working class and the primary beneficiaries the white ruling elite.[78]

Similarly, the SACP's submission stated, "In presenting the apartheid political economy as an integrated and coherent system of racial oppression, the struggle against capitalist oppression is twinned with that for democratisation. Resisting the growth of black trade unionism, and calling in the police during strikes, is thus seen as evidence of collaboration with the apartheid system against democratisation."[79] The collaboration between the state, capital and the issue of violence was further advanced in the hearing by Alex Boraine. In his questioning of SACOB, he stated,

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[77] Terreblanche further argued that capital supported Botha's attempt to fulfil Verwoerd's separate development plans, to suppress the liberation movement's 'total onslaught', and asserted that it was business that had informed Botha's apartheid strategy "in an attempt to break out of the stranglehold of stagflation" leading to an artificial integration of the state and capital. TRC institutional hearing on business.

[78] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 22

[79] SACP submission to the TRC cited in "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 22

> certainly some business people…colluded…with the national management security systems; and some actually served on joint management centres in different parts of the country. Now that's a fact. Now, it is alleged, in submissions, that there was at times a link between business and the State Security Council and second, that through the joint management centres, in co-operating against terrorism, which is the way it was phrased, that some business leaders, gave information to joint management centres, flowing from sometimes so-called illegal strikes by giving the names of the leaders of those which led to detention, arrests and inevitably human rights violations.

Significantly, in this intervention, Boraine's use of "human rights violations" is referring to the detention and arrest of people involved in the "so-called illegal strikes" and not the quotidian, structural violence associated with mining and migrant labour, or exploitation. His statement also highlights that much of the discussion centred on the way certain expressions of violence were construed as legitimate, or legitimate in official discourse. Similarly, COSATU's submission read, "even in the final two decades of apartheid rule, in the midst of a deepening economic crisis, a sometimes wavering business community in South Africa generally collaborated heavily and benefited enormously from a close relationship with the minority regime".[80] COSATU's submission spoke specifically of the relationship between the apartheid state and mining capital.

I interpret these interventions, critical of the state and capital, as offering a disruption to the pattern of official commissions seen in South Africa, or other British colonies, in the 20th century. Ashforth's study of the 'Grand Tradition' of commissions into the 'Native Question' finds that they adopted an 'official discourse' – one that relied on rational and legal modes of argument – to tell the 'truth of state', where claims to objective fact, backed by the use of experts, functioned to legitimate the truth the state wished to tell, entrenching discriminatory laws for people of colour, or 'native populations', for the purpose of imperialism. However, in the TRC we see the findings from other post-apartheid commissions used to advance a structural critique of the migrant labour system by newly enfranchised voices. For example, to

[80] COSATU, "COSATU Submission to the SATRC," 1997.

substantiate their contribution as "'act', COSATU's submission refers to the findings of The Leon Commission into Safety and Health in the Mining Industry (1994) and the Commission into violence on Three Goldfields Mines, as well as expert opinion on the matter:

> The connection between the mining industry and the establishment of the migrant labour system is a historically accepted fact. The detrimental consequences of the system on migrant labourers and their families, as well as the rural communities from which they are recruited, are well documented and are an irrefutable historical fact. In this regard we refer specifically to work done by Professor Francis Wilson and Dr Mamphelo Ramphele. We also refer to various commissions of enquiries that have investigated violence and living conditions on mines. The latest of these commissions being the Commission of Inquiry into Safety and Health in the Mining Industry chaired by Judge RN Leon (July 1994) and the Commission of Inquiry into violence on three Goldfields Mines chaired by Justice J Myburgh (20 September 1996). In these inquiries it was totally accepted that the migrant labour system and hostels were undesirable and that they were also factors that have contributed to violence between workers on mines.

Here we see COSATU's submission appropriating an official discourse, using terms like 'irrefutable historical fact' to undermine the findings of commissions held during apartheid, which attributed violence in mines to ethnic clashes to advance a structural and materialist understanding of apartheid's violence, inseparable from the capitalist system.

This brings me to the last theme which emerged during the hearing under discussion: the topic of capitalism itself, and how this mode of production produced social relations. The most illustrative case was when the National African Federated Chamber of Commerce (NAFCOC) testified, arguing that apartheid's chief sin was stifling black business and economic activity. The notion was advanced that "Nafcoc as an organisation … believed in black capitalism as a form of liberation and that's how black people would gain their liberation". During their testimony, representatives advanced a plan of affirmative action akin to the policy of Black Economic Empowerment (BEE) we see today.[81]

[81] The NAFCOC speaker asserted that "all companies listed on the Johannesburg Stock Exchange, must have at least thirty percent of their board members from the black community. At least forty percent of their total shareholdings must be controlled by the black community, at least fifty percent of the value of the outside purchases must come from black owned suppliers and contractors and at least sixty percent of the top managerial and personnel must come from the black community". TRC Hearing on Business and Labour.

The idea was challenged by Commissioner Hlengiwe Mkhize.[82] She asked in what way NAFCOC was, "really significantly different from… what other businesses were standing for, at face value," apart from the fact that some of the members identified themselves as being involved with the liberation struggle. Her second question was,

> Do you think that the new government should actively and conscientiously boost black, organised black business like NAFCOC? If your answer is yes, I would say, is that morally justifiable and a related one is that, wouldn't that create another black bourgeoisie?[83]

Viewed from the perspective of Marikana, where Cyril Ramaphosa was a shareholder in Lonmin mine where the mine workers were killed, this statement is eerily prophetic. A central objective of the ANC's economic policy, the Reconstruction and Development Programme (RDP) was to deracialise the ownership of business through policies of BEE, where a main area was the mining sector.[84] Mkhize continued that the "business of business" is to make profit and she asked NAFCOC whether they had another vision, "another vision of doing business in [the] country that you would make profit but also promote a culture of respect for human rights".[85] This comment would feed into what would develop into a key discourse advanced in the final report on business and labour: the notion of 'conscious capitalism', addressed in Section 3.4. The section that follows draws out the key themes outlined in the TRC report and the way the report presented the relationship between the apartheid state and capital.

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[82] Mkhize is former Minister of Higher Education and Training, appointed by President Jacob Zuma in 2017 and Deputy Minister in the Presidency for Women, Youth and People with Disabilities. She was a TRC Commissioner and the chairperson of the Reparations and Rehabilitation committee from 1995 – 2003.

[83] Mkhize. TRC, "Business Sector Hearings, 11 November 1997."

[84] See Roger Tangri and Roger Southall, "The Politics of Black Economic Empowerment in South Africa," *Journal of South African Studies* 34, no. 3 (2008): 699–716.; Gavin Capps, "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, no. 132 (2012): 315–33; Gavin Capps and Jakob Krameritsch, "Lonmin in Context: The Political Economy of the South African Platinum Industry, An Interview with Gavin Capps," in *Business as Usual After Marikana: Corporate Power and Human Rights*, ed. Maren Grimm, Jakob Krameritsch, and Britta Becker (Sunnyside, Auckland ParK: Fanele, 2018), 84–103.; Andrew Bowman, "Black Economic Empowerment Policy and State-Business Relations in South Africa: The Case of Mining," *Review of African Political Economy* 46, no. 160 (2019): 223–45.

[85] TRC, "Business Sector Hearings, 11 November 1997."

3.3.2 Approaches to Structural Violations in the TRC Report: Presenting an Image of State and Capital

After gathering submissions and hearing evidence, the commission faced the task of collating the evidence into an ordered narrative. The focus of the report is not on human rights violations. Instead, the commission's approach to documenting business involvement with apartheid was outlining "Culpability, Collaboration and Involvement" with the apartheid state.[86] The report is set out like a cost-benefit analysis score card, with one section of the report titled, bizarrely, "Costs and Benefits of Apartheid".[87] For the TRC, understanding the relationship between business and apartheid required assessing the "ways in which apartheid policies aided or hindered business", the way that certain businesses influenced apartheid policy, and reprimanding those businesses that did not sufficiently "promote reform".[88] The report presents multiple snippets of submissions from different groups, inserting lengthy quotes with little analysis. It organised the various submissions into three camps.

The first report sets out the view advanced in the submissions by the ANC, SACP, COSATU, 'expert' academic Sampie Terreblanche and the Black Management Forum (BMF) – an understanding of apartheid as a system of racial capitalism. To sum up these submissions, apartheid had to be understood as a system that benefitted white businesses based on the exploitation of black labour and crushing entrepreneurial potential for Africans.[89] COSATU stated, "The development of an industrial and mining economy required the forced conquest of the indigenous African people… the enforcement of the migrant labour system destroyed the family fabric of millions of black families in South Africa. It was a gross human rights violation that will take us many generations to recover from". This view is common to Left scholarship

[86] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 18
[87] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 30
[88] "Volume Four. Truth and Reconciliation Commission of South Africa Report." 30
[89] "Volume One. Truth and Reconciliation Commission of South Africa Report.", 19

and discourse, which explains the development of apartheid and capitalism as symbiotic processes, where capital accumulation and development of a racially differentiated society depended on the provision of cheap, black labour for the mining and agriculture industry.

The other line of argument presented was that apartheid increased business costs, diminished skills and undermined business growth and productivity, harming business overall. In relation to 'Afrikaner business', the 'English business' sector's submission lamented the relationship between Afrikaner business and the National Party, where Anglo American asserted "NP hostility prejudiced its ability to conduct business".[90] This sentiment was echoed by South African Breweries (SAB), whose submission claimed that, "English-speaking business leaders often felt marginalised under apartheid" as they could not influence policy in the way Afrikaner businesses did. SAB continued, 'in a real sense, such businesses were also victims of the system".[91] The notion that businesses were victims of unnatural state intervention in the economy is a view buttressed by ideas of free market or *laissez-faire* capitalism, attributed to Adam Smith in his 1776 book the *Wealth of Nations*, the idea that an economy devoid of state intervention would lead to increased and more efficient production at lower cost and increase the general aggregate wealth in a society.[92]

Finally, there was the view that businesses in fact contributed to the demise of apartheid. Ann Bernstein, the head of the Centre for Development and Enterprise, a pro-business lobby group, asserted that business generated employment and growth, which led to increased democratic pressures from society.[93] Berstein's position strongly refuted the normative idea advanced

[90] Anglo-American made reference to its bid for Samancor which was "nullified on political grounds". "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 28

[91]"Volume Four. Truth and Reconciliation Commission of South Africa Report.", 30

[92] Adam Smith, *The Wealth of Nations* (New York, 1776).

[93] Bernstein, Submission to TRC (1997)

during the hearings, that businesses should have done more to oppose apartheid.[94] The TRC cites her extract:

> Life is not a morality play. There are very few people who give up everything for their beliefs and ideas. Business accommodated itself to the apartheid system. In so doing it provided jobs for millions of people, created infrastructure, unleashed democratising pressures (unintentionally) and sustained a base of economic activity that now provides a platform of economic growth in a democracy.[95]

The argument advanced here was that by contributing to economic growth, business activity contributed to the demise of apartheid. The underlying discourse is one advanced by modernisation theory proponents: the notion that economic development and democracy inform one another, and that economic development is necessary to sustain a democracy.[96] This argument sought to invert the critical position advanced by COSATU and the SACP, twisting the argument about racial capitalism to the advantage of business.[97]

Hence, the TRC report holds within it competing discourses related to understanding the state and capital, and in so doing, their respective relations to apartheid's violence. In order to make sense of these competing approaches, the TRC report adopted a 'differentiated approach' and presented the ways in which apartheid benefited or hindered businesses. To do so, it distinguished between three levels of involvement with the apartheid state. First-order involvement was when a business actively collaborated with the apartheid state by "helping to

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[94] The Report is replete with a normative tone. In countering the idea that businesses were not aware of the violence the state was waging against people of colour, the report states "once the army rolled into townships in the 1980s, the scales should have fallen from the eyes of all prospective South Africans". "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 37

[95] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 53

[96] Modernisation theory, advanced by Seymour Martin Lipset in the 1960s, was that democracy is influenced by a country's level of economic development. He famously stated, "the more well-to-do a nation, the greater chances it will sustain democracy". Seymour Martin Lipset, "Some Social Requisites for Democracy," *American Political Science Review* 53, no. 1 (1959): 69–105., 75. The relationship between democracy and development has been explored in numerous subsequent studies. See Adam Przeworski, Michael E Alvarez, and Fernando Antonio Cheibub, José Limongi, *Democracy and Development: Political Institutions and Well-Being in the World 1950-1990*, 8th ed. (Cambridge: Cambridge University Press, 2009).

[97] Nicoli Nattrass, "The Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation," *African Affairs* 98 (1999): 373–91., 384

design and implement apartheid policies".[98] The TRC included the mining and agricultural sector here. For the TRC, those businesses who were directly involved in influencing policies were of a different moral order to companies which merely benefitted from those policies. Following on the issue of morality, the commission asserted that the moral basis of wealth acquired in an unjust system had to be questioned.

Regarding the mining industry, the TRC Report acknowledges the multiple ways mining capital influenced the development of cheap labour policies toward self-enrichment. Drawing upon the submissions made by COSATU, the SACP and the ANC, the Report found the mining industry was party to strategies of "influencing legislation that forced black workers into the wage system; state endorsed monopolistic practices; the capping of African wages; the divisive labour practices in managing compounds; the sometimes brutal repression of black workers and trade unions".[99] It reported that the Chamber of Mines (COM) was instrumental in shaping the nature of the migrant labour system, and that this relationship reflected "the clearest example of business working closely with the minority (white) government to create conditions for capital accumulation based on cheap African labour".[100] The commission stated that the mining sector bore "a great deal of *moral responsibility* for the migrant labour system and its associated hardships."[101] It chastised the Chamber of Mines for failing to mention in its submission its role in migrant labour, its suppression of trade unions and its horrendous health and safety record. Agreeing with COSATU's statement that many businesses used "punitive labour legislation against black workers" and were reluctant to recognise black trade unions, the TRC Report states:

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[98] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 24

[99] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 33

[100] Emphasis mine. "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 33

[101] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 33

> The denial of trade union rights to black workers constituted a violation of human rights. Actions taken against trade unions by the state, at times with the co-operation of certain businesses, frequently led to gross human rights violations.[102]

It continued in its indictment of the mining sector, stating, "rather than relying simply on the forces of supply and demand, the mining industry harnessed the services of the state to shape labour supply conditions to their advantage".[103] This statement supports one of the key totem poles of market orthodoxy: that the market, if left uninterrupted, will tend towards equilibrium, dissipating the problem of inequality.

To define second-order involvement, the commission stated that a distinction had to be made between the businesses that accumulated capital by "engaging directly in activities that promoted state repression", such as supplying arms; and activities that could have contributed to state repression, which, according to the TRC, had to be viewed differently. Another qualifier was added, which was whether those of second-order involvement were aware that their activities were being used for "morally unacceptable purposes".[104]

Those categorised into third-order involvement were any businesses that benefitted because of "operating within the racially structured context of an apartheid society".[105] The commission was aware of the associated problems of this approach. It would mean condemning equally, for example, banks that funded opposition or anti-apartheid movements. Its justification for this particular conceptualisation of third-order involvement was that it challenged the narrative that apartheid had harmed all (including white) business and sought to highlight a more structural judgement: that "the current distribution of wealth (which is substantially concentrated in white

[102] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 58
[103] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 32
[104] "Volume Four. Truth and Reconciliation Commission of South Africa Report." 25
[105] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 26

hands) is a product of business activity that took place under an apartheid system that favoured whites".[106]

Significantly, in its recommendations, the TRC adopted the latter approach, stating that, "Most businesses benefitted from operating in a racially structured context of an apartheid society".[107] For Niccoli Nattrass, this represented a shift in the TRC's focus from individual victims and perpetrators of gross human rights violations to a systemic analysis, where any instance of profitable activity within the apartheid system equated to one being morally culpable for it.[108] Nattrass argues that in effect the TRC endorsed a "radical interpretation of the relationship between state and business," which informed its support of the proposition that all businesses ought to pay a wealth tax.[109]

However, there are several ambiguities in the TRC's findings regarding business, which betray the contradictions contained in the TRC's philosophical and ideological framework. It appears to equivocate on what was 'morally wrong' about apartheid: whether it the human rights violations (the consequences of apartheid policy), or the fact that the violations occurred in the context of the apartheid regime, itself branded a crime against humanity. The final report of findings acknowledges that "Business was central to the economy that sustained the South African state during the apartheid years" and further states that "certain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies".[110]

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[106] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 26

[107] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 58

[108] Nattrass, "The Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation.", 375

[109] The idea for a wealth tax was raised by Sampie Terreblanche; however, his proposal was for a wealth tax of 0.5% annually for 10 to 20 years on those with net assets of more than R2 million, and to use the funds for social services for the "lower 40%". Prof. Sampie Terreblanche testimony at the TRC business hearings. Transcript.

[110] "Volume Five. Truth and Reconciliation Commission of South Africa Report.", 252

The report's analysis is redolent of a particular understanding of the key sin of apartheid as grounded primarily in its racial discrimination, rather than in the logic of capitalism and the inevitable exploitation it generates, as was proposed by certain submissions. To assert that a business benefited (economically) and then propose a restitutive wealth tax masks how – by which mechanisms and operations – that economic 'benefit' was accumulated. In the mining sector, profits were generated by cutting labour and social costs, which amounted to human rights violations: long and strenuous working days, low wages, inhumanely long work contracts and housing conditions. Mining companies went to great lengths to suppress worker strikes by calling in the police.

Implied in the TRC's assessment and recommendation was that a business that treated workers well, or which outwardly opposed apartheid was as culpable as one which supplied arms to the National Party government, or those industries marked by quotidian physical and psychological abuse for workers. This blanket approach undermined the report's statement that there were some industries, like mining, where clear human rights abuses were committed. Businesses were not chastised for the human rights abuses they generated; all businesses were found to be morally culpable for operating in the apartheid system. All business operations were folded within the ideological machinations of apartheid's legal structure. To cite Nattrass,

> the TRC effectively placed corner café owners in the same camp as Anglo-American Corporation and Armscore and proposed punishing them all for the somewhat nebulous crime of having operated in a racially structured environment.[111]

This undermined the more sophisticated analysis relating to orders of involvement and effectively detracted attention from the mining magnates, which accumulated immense wealth as a direct result of exploitative labour practice.

[111] Nattrass, "The Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation.", 390

Moreover, implicit in this approach is that the foremost issue with apartheid's 'racial capitalism' was that it was racialised, and not that it engendered human rights violations. What follows is not to confront racism with anti-racism, but, as Boraine is recorded to have stated on multiple occasions, 'white power' was the thesis and 'black power' the antithesis.[112] The analysis is indeed misplaced, and challenged by evidence gathered during the business hearings. As the report states, "Government reaction to the 1922 'Rand Revolt'… shows very clearly that the [mining] industry was opposed to any form of industrial action designed to raise labour costs – whether by white or black workers".[113] This points to the fact that there was something about the very mode of production that sought to drive down the cost of labour, be that black or white.

The ambiguity in the TRC's approach to the question of violence can be explained by the fact that it is possible to have different discourses on political violence. We are operating in the realm of discourses when distinguishing between legitimate and illegitimate violence. For example, in his survey on processes for legitimating violence, Robin Williams refers to the various ways violence may be either socially legitimated (through law, custom, status or being generally accepted) or morally justified (by ethical principles or reasons or by consensual moral judgement).[114] Because of this, it is possible for there to be violent acts that are legitimate but immoral; and those that are illegitimate but moral. Moreover, Williams asserts that, "the primary legitimating or delegitimating process is very often definitional or classificatory…and the making of public definitions and classifications therefore … a primal political act".[115] Hence, one of the most effective answers to the problem of legitimacy is to deny that the acts

[112] Bell and Ntebenza, *Unfinished Business: South Africa, Apartheid & Truth*.

[113] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 34

[114] Robin. M Williams, "Legitimate and Illegitimate Uses of Violence: A Review of Evidence and Ideas," in *Violence and the Politics of Research*, ed. W Gaylin, R Macklin, and T.M Powledge (New York, 1981), 23–27., 24

[115] Williams., 24

in question can be classified as 'violence' in the first place, or to "exclude the persons injured from the relevant moral universe".[116] It appears that while the business sector hearings created space for alternate discourses on the structural violence endemic to South African capitalism to permeate the commission, in digesting this information it appears that the TRC did not consider these harms to be violations of human rights, nor violence in the strict sense. The harms suffered from migrant labour, through separating families and forced displacement, dangerous working conditions, health hazards and wage exploitation are, under capitalism, socially legitimated, if not morally justified. Indeed, as the following section reveals, the dominant discourses by capitalist corporations apparent during these hearings suggest that the issue of morality is irrelevant to business as long as the law of the state is followed.

3.4 Conclusion: Business, Morality and Violence

The TRC's only concrete recommendation regarding business was a once-off wealth tax on business and industry.[117] It also suggested the establishment of a Reparation Fund into which all beneficiaries of apartheid were urged to contribute.[118] As has been stated in the two preceding sections, the report is laced with a normative tone. There are several moments where the report retreats into obscure counter-factuals, revolving around whether businesses benefitted more than they would have had there been a 'non-apartheid scenario'.[119] This focus took prominence over the legal culpability of business in committing human rights violations, where the focus became the moral culpability. To the extent that violations were the topic of discussion, it centred on what the role of business ought to be in relation to morality in its operations, or, how should the business community have responded to apartheid's myriad

[116] Du Toit, "Discourses on Political Violence.", 120
[117] "Volume Six. TRC," n.d., 727
[118] "Volume Six. TRC.", 727
[119] See Old Mutual submission

forms of violence, and the regime's systematised imposition of human rights violations? Moreover, with the United Nations having already declared the apartheid regime a crime against humanity, the TRC was really asking how institutions (business, the medical and legal field) should have oriented themselves in relation to the state – to a criminal regime. To cite Rosenberg again, Western law holds that one cannot be prosecuted for crimes that are not illegal at the time they are committed. The violations endured by mine workers were not illegal under apartheid. Indeed, they are not illegal under South Africa's constitutional democracy either. This violence is endemic to capitalist relations of production, which is reified as the 'economy'. The liberal response, when faced with evidence of capitalism's inevitable violations, is to propose more morality in business.

This is most evident in the penultimate section of the report on business, titled, "Could Business Have Done More?"[120] Specific attention is paid to the extent that businesses supported apartheid's 'total strategy' and the undermining of international sanctions, and the report outlines clear examples of where certain businesses were seen to collaborate with the apartheid state and have a direct hand in facilitating human suffering.[121] In responding to the question of whether business could have done more, the report outlined two approaches. The first, captured by those businesses that stated that they should have done more, is the notion that business has a moral role.[122] This position was challenged by another portion of the business sector, like SANLAM and Ann Bernstein. Bernstein stated that "business is not the place to protect human rights", but that this is the function of the "Constitution, the government and ultimately elections".[123] According to Bernstein:

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[120] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 49

[121] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 49-51

[122] For example, SACOB stated, "the enormity of the apartheid system required stronger responses from business on certain key issues…" "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 52

[123] Ann Bernstein cited in "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 44

> Corporations are not institutions established for moral purposes. They are functional institutions created to perform an economic task (production of goods and services and so on). This is their primary purpose. They are not institutions designed to promote some or other form of morality in the world.[124]

The TRC Report, in its attempt to refute this claim, noted that, "morality is an important ingredient of viable business", as in South Africa, the "failure by government and business to recognise the fundamental rights of workers" led people to rise up and indeed sacrifice "everything for their beliefs and ideas".[125] While Bernstein is correct that corporations, under capitalism, exist to turn profit, to assert that the economic sphere is somehow separate from the moral sphere is to engage in dissimulation and a mystification of the economy, where production under these circumstances is presented as a natural occurrence. One is reminded of Karl Marx's critique of bourgeoise economists' theorisation of the economy as separate from society. In his criticism of traditional, liberal economists, Marx argued, "Economists express the relations of bourgeois production, the division of labour, credit, money, etc., as fixed, immutable, eternal categories", and continued:

> In constructing the edifice of an ideological system by means of the categories of political economy, the limbs of the social system are dislocated. The different limbs of society are converted into so many separate societies, following one upon the other.[126]

This dissection of society into separate "limbs" is attained through discursive constructions of reality, which is apparent here. The section concludes with the assertion that the future prevention of human rights abuses requires a "conscious commitment to realistic moral behaviour grounded in a culture of international human rights law."[127]

However, the question of morality in this context is moot until one begins to talk about the constraints placed on businesses within a system of economic organisation – capitalism – which

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[124] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 53

[125] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 54

[126] Karl Marx, "The Poverty of Philosophy: Chapter Two: The Metaphysics of Political Economy," Marxists.org, 1847, https://www.marxists.org/archive/marx/works/1847/poverty-philosophy/ch02.htm.

[127] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 54

has moral qualities internal to it, and which produce morally contemptable results, as the mining sector exemplifies. Production, or business in general, is not an amoral sphere of human life. Every action in the world has an implicit moral component, including the action of economic production.

It is often said that transitional justice is required for a society to 'come to terms' with its past legacy of human rights abuses to ensure similar violations do not recur. In common usage, the expression refers to one learning to accept and deal with something unpleasant or abhorrent. Coming to terms with something literally means finding the language to render it intelligible. As Ashforth asserts, official commissions "mediate between the State and Society. They listen to Society and speak to the State; they interrogate society on behalf of the State".[128] Using Scott's similar sensory metaphor, commissions can be viewed as tools of the state to "see" society and to make it legible.[129] There are certainly elements of that, as suggested in the TRC's approach to violence. However, this analysis of the TRC's hearings on business suggests that the commission was attempting to find the appropriate discourse with which to speak 'truth' about apartheid's violence.

Despite the clear instances of human rights violation emerging in the mining sector, as well as the TRC's mandate that required it to investigate structural violations, the TRC did not view the quotidian violence of the mining sector as on par with the gross human rights violations such as murder and severe ill-treatment. While it was in the TRC's mandate to investigate apartheid's structural violence, this form of violence was not understood as coterminous with 'gross human rights violations' that were illegal under apartheid. Instead, the report presents a reified notion of the economy and the abuses it generates, one that can be neatly separated from

[128] Ashforth, "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms," 1990., 9

[129] Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*.

society. The following chapter discusses the reasons for these internal and conceptual constraints.

4. Human Rights Discourse and the Transition from Apartheid

4.1 Introduction

Understanding the 'Marikana moment' requires a reckoning with the South African transition and the place of the TRC in the shift from apartheid's violence to neoliberal democracy.[1] That the Marikana massacre unfolded in the mining sector requires further that one assess how the TRC addressed the question of violence in the South African mining sector. The previous chapter analysed the TRC's business hearings where I argued that the mandate had in fact allowed for a wider interpretation of 'gross human rights violation' than what the commission proceeded to adopt. I also showed how the process of the hearings permitted various discourses to emerge that implicated the corporate sector in human rights violations and posited a nefarious relationship between the state and capitalist corporations.

However, despite the exposition of all the 'facts' concerning business complicity in human rights violations during the TRC's institutional hearings, there was no expectation for leading individuals in the corporate sector to apply for amnesty for these abuses. Chapter 3 detailed the way that the TRC's report on the Institutional Hearings on the business sector swung the focus from gross human rights violations to the question of being a 'beneficiary', to document business's levels of involvement with the apartheid state. Hence, a substantial part of the TRC's Report endeavoured to articulate the degree to which the mining sector benefited while the majority black majority population were systematically disenfranchised and impoverished.

[1] I borrow the term 'Marikana moment' from Michael Neocosmos, "Editorial Introduction: The Marikana Moment, Workers Political Subjectivity and State Violence in Post Apartheid South Africa," *Journal of Asian and African Studies* 51, no. 2 (2016): 135–42.

Although the report barely uses the term - except when summarising the submissions from the ANC, SACP, COSATU, BMF, and Prof. Sampie Terreblanche – I argue that in setting out degrees of benefit, the report was trying to get at the problem of exploitation.

Through the various submissions from the parties, the fact of exploitation that the apartheid regime curated and maintained was glaringly obvious. In digesting the information put to it, therefore, the TRC sought to define the extent that one portion of society gained advantage, while another was systemically disadvantaged. My analysis of the way the problem of exploitation was framed found that the TRC's report implied that the principal issue with this exploitation was that it occurred in the context of a racially unequal regime. In the end, as was argued in the previous chapter, South Africa's seminal post-apartheid truth-seeking commission investigating violence produced an incoherent and contradictory assessment of apartheid's structural violence.

In this chapter, I investigate the broader social and institutional conditions that contributed to the TRC's constrained definition of violence. I argue that human rights developed as a dominant discursive framework at a specific historical moment, and that its embrace in the immediate post-apartheid period operated to fuse democratic freedoms with a more humane form of capitalism. In section 4.2 that follows, I articulate the shift in global discourse to human rights following the end of the Cold War. I then address the complicated and shifting relationship between the apartheid state and the law, drawing on Comaroff and Comaroff's concept of lawfare and Mamdani's argument concerning apartheid's legal fetishism in Section 4.3.[2] I explain the elite negotiations to end apartheid as having developed from an entrenched legal culture on the side of both the apartheid state as well as the dominant liberation movement, the ANC. Sections 4.5 and 4.6 go on to locate the emergence of the TRC in the

[2] Jean Comaroff and John L Comaroff, *Law and Disorder in the Postcolony* (Chicago Ill.: University of Chicago Press, 2006); Mamdani, "The Truth According to the TRC."

legal transition where I argue that, as a transitional justice tool, it was also an intrinsically legal institution, drawing on international law and practice to structure its operations and conceptualisation of violence. Finally, I explain the TRC's struggle to digest violations of a structural nature due to its legal orientation.

4.2 Law, Policing, State Violence and Dawn of Human Rights

The 1980s saw a revival of the language of universal human rights as the dominant discourse of democratic transitions, particularly following the fall of the Soviet Bloc and end of the Cold War. In part, this resurrection was spurred by the threat of ethno-nationalism in the Balkans, which motivated European intellectuals to promote the notion of human rights and a return to enlightenment principles along with liberal democracy in constitutionalist states governed by the rule of law. For example, Jürgen Habermas advanced an idea of the 'nation' derived from the "praxis of citizens" exercising civil rights.[3] Similarly, Michael Ignatieff asserted that nations ought to be founded not on ethnic ties but rather on a "community of equal, rights-bearing citizens, united in patriotic attachment to a shared set of political practices and values".[4] It was, as Francis Fukuyama famously stated, not only the end of the Cold War but the, "end of history" – a victory for economic and political liberalism and universalisation of Western liberal democracy.[5] In Fukuyama's terms, a state could be considered liberal to the extent that it governed through a set of laws that recognised and protected the human right to freedom and it was democratic insofar as the authority had the consent of the governed.[6]

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[3] Jürgen Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe," *Praxis International* 12, no. 2 (1992): 1–19., 2

[4] Michael Ignatieff, *Blood and Belonging: Journeys into the New Nationalism* (London: Chatto and Windus; BBC Books, 1993)., 3-4

[5] Francis Fukuyama, "The End of History?," *National Interest* 16 (1989): 3–18., 3-4

[6] Fukuyama., 5

The TRC came into being as South Africa was remaking its laws, redrafting its constitution and establishing a new state to be reinserted into the international community of sovereign states, after being shunned for its protracted history of human rights violations. The TRC also spurred a conversation about what constituted a gross human rights violation and who could be held responsible for crimes of the past, as discussed in the previous chapter. While it is argued that the TRC project must be understood as developing out of the context of a negotiated settlement amidst a protracted armed struggle and counter-insurgency operation by the National Party's (NP's) security sector, of equal importance is its roots in emergent human rights discourse which, I argue, became increasingly salient in South Africa.

The NP's electoral victory in 1948 marked the official turn to the policy of apartheid and Afrikaner control of the state. This allowed for the suppression of black opposition but also, as Innes argues, marked an opportunity to interrupt the economic control of the English oligopolies in mining, finance and industry.[7] Although they were relatively rare, protests in the mining sector would be violently suppressed as black African trade unions were banned, meaning that strikes were always illegal.

A significant contributor to reform in the mining sector were the increased international attempts to regulate transnational corporations' human rights- related actions since World War Two. In the 1970s, the Group of 77 (G77), a group of developing nations, initiated a movement to regulate corporate conduct with the goal of decreasing behaviour that adversely affected developing nations. The United Nations Economic and Social Council (ECOSOC) formed the ECOSOC United Nations Centre on Transnational Corporations in 1974, which was part of a group of proposals put forward by the G77 comprising the New International Economic Order.[8]

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[7] D Innes, "History and Structure of the South African Economy," in *Visions of Black Economic Empowerment*, ed. G Marcus (Auckland Park: Jacana, 2007)., 55-56

[8] U.N, "Economic and Social Council Resolution 1913 (LVII)" (United Nations, 1974).

The Centre on Transnational Corporations highlighted the impact of transnational corporations on issues such as state sovereignty, development, labour and foreign investment.[9] Moreover, in 1977 the Organisation for Economic Co-Operation and Development (OECD) passed the Declaration and Decisions on International Investment and Multinational Enterprises, outlining a set of voluntary principles for business to follow which would become the basis for the global corporate social responsibility movement.[10]

What this reflects is that there was an extended period in which debates surrounding international legal regulation of transnational corporations were prevalent, and there was increasing pressure for imposing international legal standards on corporate behaviour.[11] It was within this international context that the apartheid regime operated, facing, on the one hand, both international and domestic pressure for its domestic violations of human rights; but equally creating favourable conditions for transnational corporations seeking high investment returns. Section 4.2.1 interrogates legalised violence under apartheid and the shifting relationship of the state to law through the South African transition, followed by Section 4.2.2 which provides historical analysis on the function of law in the political economy of the mining sector. This provides context for explaining the TRC as the product of a particularly legal transition and the implications of this for truth-seeking on past violence.

[9] By 1976, it had started drafting an international code of conduct which was supposed to have been binding on transnational corporations, and draft codes were published in 1983 and 1990, stipulating that companies would have to comply with domestic economic policies; however, the codes were resisted by developed nations. See Jeffrey Atteberry, "Turning in the Widening Gyre: History, Corperate Accountability, and Transitional Justice in the Postcolony," *Chicago Journal of International Law* 19, no. 2 (2019): 333–74.

[10] The U.N Centre for Transnational Corporations was later turned into the Commission of the United Nations Conference on Trade and Development in 1993 when the former lost its independent status within the U.N. Atteberry., 359

[11] After 1993, these issues would continue to be addressed within the Unites Nations, in the U.N Sub-Commission on the Promotion and Protection of Human Rights.

4.2.1 Legalised Violence and The Apartheid State

The apartheid state had a contradictory relationship to law, but it was indeed, as many authors have argued, a regime of laws.[12] The regime reflected a strange hybrid of criminal regime and regime of criminals, to use Tina Rosenberg's distinction mentioned in the previous chapter.[13] What this meant is that it was a regime of white minority rule on the one hand, with all the ostensibly democratic adornments of civil courts, a system of parliamentary sovereignty and seemingly independent press on the other hand. The government went to great lengths to maintain its legalistic façade, exhibiting what Mamdani calls a legal fetishism.[14] Drawing on Ernst Fraenkel's concept of the "dual state" in Nazi Germany,[15] Jens Meierhenrich asserts that the apartheid regime blended the formally rational along with substantively irrational elements.[16] Laws were formed and enacted in accordance with parliamentary procedures, and enforced via bureaucratic security network and judges; yet the regime systematically undermined the substance of the law through its discriminate implementation of emergency laws, and extrajudicial killing of members of society to uphold the racist regime.[17] The character of apartheid's legal fetishism was that it would leverage the law to suspend the law and legitimate its further denial of civil liberties and political freedoms. These laws were

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[12] Stephen Ellman, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (Oxford: Clarendon Press, 1992); Richard L Abel, *Politics by Any Other Means: Law in the Struggle Against Apartheid, 1980-94* (New York: Routledge, 1995); Michael Lobban, *White Man's Justice: South African Political Trials in the Black Consciousness Era* (Oxford: Clarendon Press, 1996).

[13] The Report cites numerous examples, based on evidence given under oath at the commission, of state security agents acting outside the law to stifle political opposition including the system of covert funding for secret operations. See "Findings on the state and unlawful activities" in "Volume Five. Truth and Reconciliation Commission of South Africa Report.", 218-221

[14] Mamdani, "The Truth According to the TRC.", 180

[15] Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Oxford University Press, 1941).

[16] Jens Meierhenrich, *The Legacies of the Law: Long-Run Consequences of Legal Development in South Africa, 1650-2000* (New York: Cambridge University Press, 2008)., 15-23

[17] Meierhenrich., 113-29

officially legitimated through the discourse of maintaining law and order, which was threatened by black communist insurgents – the "*swaart* or *rooi gevaar*" discourse.[18]

Similarly, Anthony Mathews argues that apartheid's 'law and order' machine fostered security forces that in fact undermined the security of "all the members of all groups in society whether black or white, ruling or dominated, majority or minority" with the transformation of the security establishment into an institution that threatened all social groups through the legitimation of laws that undercut the law itself.[19] Hence, detention without trial was sanctioned by law; high numbers of individuals were served with official banning orders or banished; and when there were allegations of torture and death while in custody, foul play would be officially denied, whilst concurrently investigated through public inquests.[20] Commissions of inquiry were part of the state's arsenal of official responses to major political insurrection. Following the Sharpeville massacre in 1960, the 1976 Soweto uprising by students and the 1984 uprising in the Vaal Triangle, the state would formally institute states of emergency, which would eventually be repealed only to be followed by an official commission of inquiry.

The apartheid regime developed a long list of notorious legislation designed to enforce control over the different racial groups and suppress any threats to authority, such as the Population Registration Act (1950), which classified racial groups, restricted movement and constrained all facets of social and economic livelihood for people of colour.[21] However, a series of laws were designed specifically for managing the issue of public violence. The Natives Labour (or Settlement of Dispute) Act of 1953 prohibited people of colour from engaging in any labour strike activity; and the Criminal Law Amendment Act found anyone accompanying or

[18] "Black danger", which referred to the threat of black people; and "red danger" which referred to the Communist threat.

[19] Anthony Mathews, *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* (Berkeley, Los Angeles, London: University of California Press, 1986)., ix

[20] André du Toit, "A Need for 'Truth,'" *International Journal of Public Theology* 8, no. 4 (2014): 393–419, 394

[21] Act No 30 of 1950

associated with a person engaged in political protest or supporting an anti-apartheid campaign guilty of an offence. However, the apartheid state's exceptional powers were entrenched by the Public Safety Act (1953), which provided the legal authority for the ruling party to declare a state of emergency at whim, with emergency powers "so extensive that martial law became almost unnecessary."[22] The Defence Act of 1957 indemnified any state employee, security agent or private citizen who committed a crime with the intention of preserving public order. The consequence was an elaborate legal façade which allowed security forces to systematically violate the civil and political rights of the black majority population. The enforcement of these laws occurred in public, presenting a distorted version of the rule of law while simultaneously developed a 'total strategy' to curtail the 'total onslaught'.

This has similarly been observed by Comaroff and Comaroff who note the paradox of postcolonial societies as being replete with lawlessness, yet exhibiting "a fetish of the rule of law, of its language and its practices, its ways and its means".[23] They continue:

> Even where they are mocked and mimicked, suspended or sequestered, those ways and means are often central to the politics of everyday engagement, to discourses of authority and citizenship, to the interaction of states and subjects, to the enactments, displacements, and usurpations of power.[24]

Apartheid South Africa, while indeed a unique and complicated case of the postcolonial, is a clear example of the law mocked, mimicked, and suspended to serve the political-economic interests of the white minority population. As stated in the TRC's report on its institutional hearings, "both inside the country and abroad who might have been embarrassed by the gross racism and exploitation of apartheid could seek some comfort in the semblance of an independent legal system".[25]

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[22] Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*., 46

[23] Comaroff and Comaroff, *Law Disord. Postcolony*., vii

[24] Jean Comaroff and John L Comaroff, *Law and Disorder in the Postcolony* (Chicago Ill.: University of Chicago Press, 2006), vii-viii

[25] "Volume Four. Truth and Reconciliation Commission of South Africa Report.", 104

This contradictory process of the fetishisation of the law in 'the postcolony', in the context of increased violence, appears to have unfolded along with the globalisation of human rights discourse and constitutionalism, and with neoliberalism.[26] Decolonisation occurring in India and on the African continent, as well as the horrors of Nazi Germany emerging as evidence of the consequence of racist, eugenicist science, meant that the South African state inhabited a world in which racially differentiated domination had become illegitimate. In the very year the apartheid regime came into being, the United Nations General Assembly proclaimed the Declaration of Human Rights on 10 December, 1948. Hence, the apartheid state could not be seen to be wholly authoritarian. The discourse of the civilising influence of the rule of law no longer justified the denial of rights to the majority black African population. It is for this reason that the findings of the Wessels Commission, established following the Sharpeville massacre, produced 'balanced' findings. The technique of persuasion could no longer be merely imperial, argued with reference to the civilising role of law, but had to be global; and, as Sitze argues, "grounded with reference to markets in the United States and Europe, the political institutions of the United Nations, and the totalizing alliances of the Cold War".[27] The Wessels commission's even-handed approach to the causes of the violence was not valuable for its accurate account of what happened, but rather for the claims to justice that its findings implied.[28] This depicts an attempt to heed the boundaries and standards of the law in some form, even while those same laws equated to human rights violations.

These laws were enforced through an intricate state security machine. Between 1960 (effectively, the beginning of South Africa's 'postcolonial' intelligence history and the start of

[26] Neoliberalism can be said to have gained cultural hegemony in the wake of the formation of the Bretton Woods institutions (International Monetary Fund and World Bank) in 1944.

[27] Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*., 180

[28] The Wessels commission stated that both sides were to blame: that a handful of police officers were wrong for having shot fleeing protestors, the PAC were also to blame for having used incendiary language leading up the event and hence Sharpeville was not so much a crime as it was a "lamentable and regrettable tragedy". Sitze., 181

the armed struggle) and 1990 (marking the start of the transition from apartheid), South Africa was a security state, led by Prime Ministers Hendrik Verwoerd and B.J. Vorster, and Presidents P.W. Botha and F.W. de Klerk.[29] In the wake of the Sharpeville Massacre, South Africa left the British Commonwealth due to mounting international anti-apartheid pressure, and promptly banned the leading resistance organisations: the ANC and PAC. In so doing, the state was largely successful in brutally suppressing the organised, but predominantly peaceful, resistance of the 1950s, creating fertile conditions for capital accumulation through mining and industrial expansion.[30] According to O'Brien, while elected Cabinet ministers held political power and authority, the reality was that by 1970, the true centre of power was with the government's central security structures, led by a State Security Council (SSC) comprised of state bureaucrats (or 'securocrats') and the security force officials who were the "super-Cabinet".[31]

Reviewing the period from 1960, we see that the practice of using military force to safeguard political and economic interests became well-entrenched in South Africa, supported by specific laws and chains of command. This amounted to a stark reorganisation of power, facilitated through government inquiries like the Potgieter Commission (1969-72).[32] From 1976 (Soweto uprisings) through the following decade, a covert security apparatus controlled South Africa's political arena, society and the 'counter-revolutionary' strategy.[33] However, in the general, non-

[29] Kevin O'Brien, "Commissions of Inquiry in South Africa's Intelligence History 1960-2005," in *Commissions of Inquiry and National Security*, ed. Anthony Stuart Farson and Mark Phythian (Praeger, 2011), 221–49., 221

[30] Nimrod Zalk, "The Things We Lost in the Fire: The Political Economy of Post-Aparetheid Restructuring of the South African Steel and Engineering Sectors" (SOAS, University of London, 2017)., 102

[31] O'Brien, "Commissions of Inquiry in South Africa's Intelligence History 1960-2005.", 221

[32] This Commission was mandated to inquire into "matters relating to the security of the state" whose recommendations fed the establishment of the security and intelligence dispensation of the ethno-nationalist apartheid state through the adoption of the Security Intelligence and State Security Council Act of 1972 and the formation of the SSC. This fomented the line between the law and state security. The consequence was a single voice that would advise Cabinet on security matters. See Annette Seegers, "South Africa's National Security Management System, 1972-90," *The Journal of Modern African Studies* 29, no. 2 (1991): 253–73.

[33] There were an array of security units, such as the SAP Security Branch, The Security branch counterinsurgency unit C1, set up between 1979 and 1983, comprised of former ANC/SWAPO/PAC fighters operating from *Vlakplaas* and other locations. In addition, the Department of Military Intelligence (DMI) established the Bureau for State Security (BOSS)-Z squads For additional analysis on the SAP's intelligence actions, see Kevin O'Brien, "Counter-Intelligence for Counter-Revolutionary Warefare: The South African

covert security arena, there was growing official consensus by the end of the 1970s that only those officers associated with the South African Defence Force (SADF) were "efficient and prepared" enough to meet the responsibilities of national security, as confidence in the police force waned in the face of increased civil resistance in the 1980s.[34] In the midst of all this, there was an increasing turn to human rights discourse, particularly as the apartheid regime's legs began to buckle. The section that follows depicts the graduate reformist pressure both from within and outside the state.

4.2.2 The Political Economy of Mining and Worker Organisation

Parallel to the development of the security sector were changes in the mining sector, where laws were fashioned to contain labour activism. Minerals extraction remains central to South Africa's economy, which endows considerable financial muscle to mining companies. In 1965, one commentator noted, "Nowhere in the world has there ever existed so concentrated a form of capitalism as that represented by the financial power of the mining houses in South Africa".[35] The spatial and racial divide catalysed by the 1913 and 1936 Land Acts intensified under apartheid with the formation of independent homelands. It has been noted that apartheid can be understood as a continuation of the Union's policy of racial segregation, with apartheid's distinction lying in the way the capitalist class sought to take advantage of cheap black African labour during a period of expanding industrial manufacturing capital, whilst ensuring protection for the white working class in the face of competition from black African workers.[36]

Police National Security Brance," *Intelligence and National Security* 16, no. 3 (2001): 27–59.; Jacques Pauw, *In the Heart of the Whore: The Story of Apartheid's Death Squads* (Halfway House: Southern Book Publishers, 1991)., 122-23

[34] Seegers, "South Africa's National Security Management System, 1972-90.", 254-255

[35] Hobson, cited in Dorcas Good and Michael Williams, "South Africa: The Crisis in Britain and the Apartheid Economy," in *Foreign Investment in South Africa: A Discussion Series* (London: Anti-Apartheid Movement, 1976). np

[36] I am referring to the union of South Africa in 1910. Evans, *Bureaucracy and Race*.; Wolpe, "Capitalism and Cheap Labour Power: From Segregation to Apartheid.", 62

As the Marikana massacre occurred at Lonmin platinum mine, it is worth providing some overview of the history of the platinum mining sector. Platinum was discovered in South Africa in the 1920s, but demand increased exponentially with the realisation that it could be utilised in the manufacturing of automobile emission control equipment. This became desirable with the growing demand for clean air by conservation groups, and so mining of this metal intensified during the 1960s. Lonrho (later Lonmin) opened a mine at Western Platinum in Rustenberg in 1963, followed by the Rand Mines, Anglo American and the General Mining and Finance Company, which formed a consortium in 1964 and made an agreement with the Rustenberg Platinum Mines (RPM) to control production and fix prices.[37]

Significantly, its largest reserves are located in two of the former 'homeland' states: Bophuthatswana (now partially North West and Gauteng), and Lebowa, which is now part of Limpopo. As Capps states, "the areas which had historically been designated as areas of black labour supply would now become the centres of the new platinum industry, signalling the beginning of a shift in the spatial organisation of the mining sector as a whole".[38] During this time, the Industrial Conciliation Act prohibited black African workers from engaging in strike action. An example of official and legal double speak, the Act (originally published in 1924) stated that African workers were not strictly citizens and hence were not 'employees' and, as a result, were not permitted to join unions as part of the official system of bargaining, but had to resolve any disputes via work committees.[39]

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[37] V. L. (Victor Leonard) Allen, *The History of Black Mineworkers in South Africa Volume II: Dissent and Repression in the Mine Compounds 1948-1982* (Keighley: The Moor Press, 2003)., 94-95

[38] Platinum mining will be addressed more fully in Chapter Five; however, it is important to note the key players and where Lonmin fits in. The major companies are Rustenberg Platinum Mines, the principal producer operating under Anglo American Corporation; Impala Platinum, part of the Afrikaner mining firm Glencore; and Lonmin, which was a subsidiary of the British MNC Lonrho, the London and Rhodesian Mining Company established in 1909. All companies were deeply wedged into apartheid's political economy. Interview with Gavin Capps cited in Maren Grimm, Jakob Krameritsch, and Britta Becker, *Business as Usual after Marikana: Corporate Power and Human Rights*, 2018., 87

[39] Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa*., 198

However, by the 1970s, the global economy was deteriorating, and Britain was in recession. Increasing numbers of British companies sought profits through capital investment in South Africa which, due to low labour costs, promised higher returns on profit. Mine owners had over-estimated the demand for platinum leading to over-production and the platinum industry was in depression. According to Allen, the platinum industry "cut its black workforce by 60 per cent".[40] However, this was to change again when the US government initiated regulations requiring automobile manufacturers to produce automobiles that would decrease air pollution by 90% by 1975, leading to an exponential increase in the demand for platinum once again.[41] In 1972, companies like Ford and General Motors of America signed contracts with the Rustenberg Platinum Mines and Impala Platinum Mines respectively, for quantities of platinum that led to a doubling of the labour force. Lonrho's Western Platinum Mines had sold all their output for the following two years in advance.[42]

Despite this, South Africa was experiencing rising unemployment, declining investment rates and diminished growth in manufacturing, due to the overreliance on mining and capital-intensive mineral extraction.[43] There was also bourgeoning activism on the mines, a ripple effect from planned strikes organised by illegal trade unions among African workers that began in Durban in 1973. The rise in African working class activism represented the contradiction of the apartheid state's structure, which "differentiated by race as 'Natives' while integrating them by function as workers".[44] The apartheid "workplace regime", as coined by Karl Von Holdt,

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[40] Allen, *The History of Black Mineworkers in South Africa Volume II: Dissent and Repression in the Mine Compounds 1948-1982.*, 96

[41] Allen., 96

[42] South African Institute for Race Relations, 1972, 297 cited in Allen., 96

[43] Ben Fine and Rustomjee Zavareh, *The Political Economy Of South Africa: From Minerals-Energy Complex to Industrialisation* (London: Hurst, 1996); P Fallon and L.A.P de Silva, "South Africa: Economic Performance and Policies," Informal Discussion Papers on Aspects of the South African Economy (Washington D.C, 1994).; Zalk, "The Things We Lost in the Fire: The Political Economy of Post-Aparetheid Restructuring of the South African Steel and Engineering Sectors."

[44] Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa*., 195

included migrant workers into urban centres as temporary sojourners, where they would live in mining hostels for up to two years, and return to the Homelands for just a few short weeks.[45] This brutal system of racialised repression far exceeded, as Bernard Dubbeld asserts, the "routine exploitation of labour-power under capitalism"[46] and resulted in several strikes and their suppression, as detailed previous chapters. However, unrest on the mines was frequently explained as a consequence of inter-tribal conflict, rather than as rational responses to exploitative and dangerous working conditions, conditions which I have argued constitute examples of structural violence.[47]

In the 1970s, there was also a shift in both the official discourse and practice of major mining firms towards formal structures for labour organisation.[48] In line with the global shift towards neoliberal restructuring some companies began to pursue negotiations with the exiled liberation movements in secret, while publicly opening the discussion concerning the legalisation of black trade unions and worker rights.[49] As was reported in the Financial Mail on 5 April, 1974, "There is a time bomb ticking on every factory floor. And each day the fuse is getting shorter. African discontent is spreading as their wage packets are eaten away by inflation. Real incomes – in many cases already pitifully low – are rapidly declining again."[50] In response to the strike of

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[45] Karl Von Holdt, *Transition from below: Forging Trade Unionism and Workplace Change in South Africa* (Scottsville: University of Natal Press, 2003).

[46] Bernard Dubbeld, "Capital and the Shifting Grounds of Emancipatory Politics: The Limits of Radical Unionism in Durban Harbor, 1974–85," *Critical Historical Studies* Spring (2015): 85–112., 86

[47] For example, in May of 1974, Harry Oppenheimer claimed that there was no evidence that disturbances on mines were caused by "dissatisfaction with wages or conditions of service" and that evidence showed the cause to be a result of "intertribal disputes". Rand Daily Mail, 15 May 1974

[48] Employed as an Anglo-American consultant at the time, Alex Boraine – who subsequently became the Deputy Chairperson of the TRC – stated, "We simply have to learn to anticipate and come to terms with the fact that the face of black labour is changing. The black worker realises his strike power and is flexing his economic muscles". *Sunday Times*, 16 June 1974 cited in Roger Leys, "South African Gold Mining in 1974: 'The Gold of Migrant Labour,'" *African Affairs* 74, no. 295 (1975): 196–208

[49] Willie Esterhuyse, *Endgame; Secret Talks and the End of Apartheid* (Cape Town: Tafelberg, 2012). The discontent reared its head in labour unrest, most notably the police killing of 11 mine workers at Western Deep mine in Carletonville in 1973.

[50] Cited in Good and Williams, "South Africa: The Crisis in Britain and the Apartheid Economy.", 52

more than 12,000 Basotho mine workers at Vaal Reef in 1975, Alex Boraine, at the time employed at Anglo-American, said in an interview:

> Management has to respect the wishes of workers. They have opinions and the only way to make possible a peaceful airing of their views without rioting, death and loss of production is to have rightful and responsible trade unions.[51]

The statement implies that a core problem is the violent rioting by workers causing loss in production for industry, but it also emphasises the need for "rightful and responsible trade unions". Hence, apartheid's fidelity to law, while central to sustaining the regime, was also used as a tool to combat the regime. It was the formally rational element of apartheid's legal fetishism which enabled that fight.[52]

This, combined with mounting international pressure and capital flight, made the need to liberalise increasingly pressing as corporations struggled to maintain profitability despite government strategies.[53] The mechanisation introduced in the boom years necessitated skilled labour in mining and agriculture; however, the apartheid regime had consistently kept black African's labour unskilled and this came at considerable economic cost.[54] The situation incentivised mining capital to improve labour conditions, evidenced by the findings in the Wiehahn (commission of inquiry into labour legislation) and Riekert Commission (1977 commission into legislation affecting the utilisation of manpower) reports.[55] This depicts a shift in capitalism's expression, as capitalists began to recognise that the grounds of political struggle were changing and that apartheid's persistent exclusionary socio-economic character

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[51] *Rand Daily Mail*, 10 January 1975

[52] Nicholas Rush Smith, "The Rule of Rights: Comparative Lessons from Twenty Years of South African Democracy," *Comparative Politics* 50, no. 1 (2017): 123–41, 126

[53] This reached its peak with the 1986 Comprehensive Anti-apartheid Act, which instituted global boycotts, sanctions and disinvestment. Nearly all US universities disinvested from corporations in South Africa, corporations withdrew investments and there was massive decline in the exchange rate. Solomon Johannes. Terreblanche, *Lost in Transformation: South Africa's Search for a New Future since 1986* (Johannesburg: KMM Review Publishing, 2012)., 11-12

[54] John Saul and Patrick Bond, *The Present as History: From Mrs Ples to Mandela and Marikana* (Johannesburg: Jacana, 2014)., 66

[55] Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa*.

was becoming increasingly antithetical to the vital functioning of capitalism.[56] It was recognised that the law required adaptation in line with the international discourse on the importance of union rights in sustaining capitalist production.

4.3 Elite Negotiations and the Emergent Legal Culture

Much has been written on the role of elite pacts on the nature of the South African transition and economic trajectory that followed.[57] It is true that in the 1980s, business began to pursue meetings with the ANC in exile, as the economic elites saw the ruling political leaders "clinging to a status quo that had become a wasting asset".[58] Even more literature attests to the maturing relationship between the exiled ANC cadres and established businessmen at meetings in Lusaka in the late 1980s.[59] At the time, Anglo American was responsible for a quarter of South Africa's economic activity;[60] and, as submissions to the TRC's business hearings confirmed, there was an interdependent relationship between the state and mining capital. In this section, I provide a brief overview of the literature on the elite transition, but suggest that another salient factor impacting the nature of the transition, and the transitional justice mechanism implemented, was the legal culture of both the outgoing NP government and incoming ANC.

The transition from apartheid was occurring amidst a sea change of global politics in the context of the Cold War. The 1970s had seen the financialisation of the American economy following the collapse of the original Bretton Woods system, creating the ground for America

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[56] Dubbeld, "Capital and the Shifting Grounds of Emancipatory Politics: The Limits of Radical Unionism in Durban Harbor, 1974–85.", 88

[57] Patrick Bond, *Elite Transition: Apartheid to Neoliberalism in South Africa* (London: Pluto Press, 2000); Frances Hagopian, "'Democracy by Undemocratic Means'?: Elites, Political Pacts, and Regime Transition in Brazil," *Comparative Political Studies* 23, no. 2 (1990): 147–70

[58] Itumeleng Makgetla and Ian Shapiro, "Business and the South African Transition," 2016, 3

[59] In September 1985 Anglo-American chairman Gavin Relly and other influential businessmen met the ANC's exiled leader Oliver Tambo and others like Thabo Mbeki in Lusaka, Zambia. Bill Freund, "Swimming Against the Tide: The Macro-Economic Research Group in the South African Transition, 1991-1994," n.d., 3; Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC*, 69; Hirsch, *Season of Hope; Economic Reform under Mandela and Mbeki*., 43

[60] Anthony Butler, *Cyril Ramaphosa* (Johannesburg: Jacana Media, 2008)., 117

to lead the charge of the 'neoliberal empire' in the 1980s.[61] However, the anti-apartheid liberation movement was divided on what form the post-apartheid political economy would take.[62]

The Institute for a Democratic Alternative for South Africa (IDASA), an NGO which sought a way out of apartheid through negotiation across race and political lines, convened the Dakar Conference between the 9th and 12th of July, 1987 where, together with a group from the ANC led by Thabo Mbeki and including other members of the ANC's National Executive Committee (NEC), the strategies to advance transition, structure of future government, economic policy and issues like minority rights and power-sharing were discussed.[63] In that same year, a consultant for Consolidated Goldfields in London arranged a meeting between ANC leaders Oliver Tambo, Thabo Mbeki, Jacob Zuma, Aziz Pahad and Mac Maharaj, with the executives of banks, multinational companies and leading figures in the business world.[64] These would

[61] For Terreblanche, 1986 was the "real turning point" in global politics that directly caused the gradual disintegration of the apartheid regime. At this point, the ideological rivalry between the US and Soviet Union remained. The Chernobyl disaster highlighted the structural inefficiency of the Soviets' central planning, exposing its inability to deal with the catastrophe. Solomon Johannes, Terreblanche, *Lost in Transformation: South Africa's Search for a New Future since 1986* (Johannesburg: KMM Review Publishing, 2012)., 7-10

[62] Debates on the 'national question' emerged in meetings of political groupings and trade unions, led by the Communist Party of South Africa (CPSA) with debates shaped largely by the Communist International influenced by Marxist-Leninism in the 1920s; and later in the 1960s with the development of the 'Colonialism of a Special Type (CST) thesis, linked to the theory of 'national democratic revolution'. However, approaches to the 'National Question' took various forms thereafter. For example, the ANC's perspective of the National Question is evident in key policy documents African Claims (1943) and the Freedom Charter (1955), as well as the writings of presidents A.B. Xuma and Albert Luthuli. An overview of the various approaches to the 'national question' is outlined in Eddie Webster and Karin Pampallis, *The Unresolved National Question: Left Thought Under Apartheid*, 2017. See Introduction.

[63] Delegates included Mac Maharaj, Pallo Jordan, Francis Melli and Aziz Pahad. The Idasa delegates were later chastised for meeting with a banned organisation in exile. See Michael Savage, "DAKAR DIALOGUE," n.d.; Hermann Giliomee, "Dakar Remembered, Thirty Years On," *Politicsweb*, June 22, 2017, https://www.politicsweb.co.za/opinion/dakar-remembered-thirty-years-on. It was also at the Dakar conference that Beyers Naude raised the issue that the Afrikaans media was the "uncritical mouthpiece of the National Party" and suggested that a counter-voice be established in the media. Max du Preez agreed to advance this project, which was supported by the ANC delegation. Thabo Mbeki agreed to assist in raising the funds, which was done. The *Vrye Weekblad* was established, a publication in which stories of the National Party's counter-insurgency would leak into the public sphere. Aziz Pahad, *Insurgent Diplomat- Civil Talks or Civil War?* (South Africa: Penguin Random House, 2014).

[64] Pahad writes that these included "Lord Anthony Barber, Chairman of Standard Chartered Bank; Sir Timothy Bevan and Sir Martin Jacomb, respectively Chairman and Deputy Chairman of Barclays Bank; Sir Alistair Frame of Rio Tinto-Zinc; Lord Dennis Arthur Greenhill of the London-based investment bank SG Warburg & Company and the UK's former Permanent Under-Secretary for Foreign Affairs; Sir Evelyn de Rothschild, the British financier; George Soros of the Soros Fund of New York; Sir James Spooner of Morgan Crucible; and

constitute South Africa's initial elite negotiations that preceded the Congress for a Democratic South Africa (CODESA) negotiations. Several works elaborate on the nature[65] and effects of the elite negotiations on the post-apartheid political economy.[66] Relevant to the discussion here on the legal and ideological orientation of the TRC is that the South African Constitution was negotiated through elite pacts, agreements struck between the military and civil society about the conditions under which civilian rule would be established. The TRC was a product of those pacts. Terry Karl writes that pacts entail an arrangement made between various political parties in which they agree to compete according to new rules of governance, as well as "a 'social contract' between state agencies, business associations, and trade unions regarding property rights, market arrangements, and the distribution of benefits".[67] Many argue that the South African transition stemmed from elite pacts, compromises which began between exiled ANC members and mining companies in the 1970s, and which were further discussed during the Dakar Dialogue and later in the CODESA talks.[68]

However, an equally significant component of the negotiated transition was the legal fidelity of the apartheid state (outlined in Section 4.2.1), but also the legal culture of the ANC leaders

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Michael Young, former adviser to British prime ministers Alex Douglas-Home and Edward Heath, who represented Goldfields". Pahad, *Insurgent Diplomat- Civil Talks or Civil War?*

[65] Zwelethu Jolobe, "Getting to CODESA: An Analysis on Why Multiparty Negotiations Began, 1984-1991" (University of Cape Town, 2014)

[66] Hein Marais, *South Africa Limits to Change: The Political Economy of Transformation* (Cape Town; London: UCT Press; Zed Books, 1998); Zalk, "The Things We Lost in the Fire: The Political Economy of Post-Aparetheid Restructuring of the South African Steel and Engineering Sectors"; Pahad, *Insurgent Diplomat- Civil Talks or Civil War?*, especially chapters 7 and 8.

[67] Terry Lynn Karl, "Dilemmas of Democratization in Latin America," *Comparative Politics* 23, no. 1 (October 1990): 1, 11. There is also the belief that pacts can reduce uncertainty about the direction of the transition in tenuous contexts and that this effect is correlated with both their substance and the "political symbolism they convey". Omar Encarnación, *The Legacy of Transitions: Pact-Making and Democratic Consolidation in Spain* (Centro de Estudios Avanzados en Ciencias Sociales (CEACS), 2003).

[68] As Karl asserts, "the very decision to enter into a pact can create a habit of pact-making and an accommodative political style based on a pact to make pacts". Karl further asserts that the nature of transition (whether it is imposed, formed through elite pacts, or effected through reform) impacts on the nature of state that ensues. In the context of pacts, it is probable that the state will be more corporatist and consociational, where competition is regulated by the pacts made at the transition Karl, "Dilemmas of Democratization in Latin America.", 15. The elite pact-making process is outlined in Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000)., 95-103

amidst the global paradigm of neoliberal triumphalism. For Meierhenreich, it was the legal culture – the legal habits and practices imbuing the law with its meaning – that was a fundamental precondition for the trust that allowed apartheid's leaders to negotiate with the liberation movement.[69] The 'legality of the law' created the legal context, which created the basis for political settlement. This may seem counterintuitive in a context where the state liberally declared emergency law and used the law to subjugate the black majority population. Yet, as Nicholas Rush Smith notes:

> As Mandela argues, the legal system did allow for occasional victories, reinforcing the system's formal rationality and ramifying expectations for legally constrained behaviour. The fact that two lawyers—Nelson Mandela and Oliver Tambo—led the African National Congress and Apartheid collapsed only heightened the importance of the "legality of the law" during apartheid's endgame.[70]

During this process, constitutionalism and establishing the rule of law founded on a culture of human rights emerged as the dominant discursive framework within which negotiations would take place. The discursive move can also be read as an attempt to paint English capitalists as more humane and liberal. Human rights and the formation of a civil national identity would be the grounds upon which the new South African nation was formed, in contradistinction to the Afrikaner chauvinism that characterised apartheid's illiberal pseudo-democracy. The discourse of human rights fused with that of liberal democracy as the foundation of the new South African nation at a particular historical moment, which was increasingly connected to capitalism.

As Nicholas Rush Smith asserts, "In important ways, the rule of law in democratic South Africa is the rule of rights. That is, ordinary citizens have the ability to subordinate the state's institutions to their will by appealing to the expansive rights the country's constitution grants them and the rights existing internationally."[71] One the one hand, the constitution embraced

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[69] Meierhenrich, *The Legacies of the Law: Long-Run Consequences of Legal Development in South Africa, 1650-2000*.

[70] Smith, "The Rule of Rights: Comparative Lessons from Twenty Years of South African Democracy.", 127

[71] Smith., 124

multiculturalism, but on the other hand, one culture was held above all: a democratic culture. As Johan Degenaar writes, "in one sense we can still speak of the nation as the congruence of culture and power, but now culture has shifted from communal culture to a democratic culture".[72]

Moreover, congruent with the notion of human rights associated with democratic rule and citizenship was a conception of rights characterised by individual rights, business rights and property rights. Hence, the discussion about rights at the time of the transition, led by a process of elite pact-making, meant that property relations remained largely intact and concretised the main pillars of the apartheid economy – the Minerals Energy Complex (MEC). The MEC is a term describing the set of interdependent institutions in mining, state and energy that maintained continuity in the development path established during the minerals revolution in South Africa following the Anglo-Boer war and entrenched during apartheid.[73]

'Rights talk' emerging from the constitution-building process was, as Wilson states, "indeterminate enough to suit the programs of both the NP and ANC who came together in a power-sharing arrangement".[74] It was ambiguous enough to accommodate the interests of both power blocs, with constitutionalism facilitating sufficient level of consensus. The NP shifted its aim from consociationalism and minority group rights (which was rejected as a veiled racial veto) to advance a strategy of a) a prolonged transition period and b) individual rights coupled with individual checks and balances that would ensure the security of white economic and social privilege. It was the outgoing NP that suggested a system of 'constitutional rule in a

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[72] Johan Degenaar, "Nations and Nationalism: The Myth of the South African Nation," Occasional Paper (Mowbray, 1990)., 12

[73] G Adler and E Webster, "Challenging Transition Theory: The Labour Movement, Radical Reform and the Transition to Democrary in South Africa," *Politics and Society* 23, no. 1 (1995): 75–106; Fine and Rustomjee Zavareh, *The Political Economy Of South Africa: From Minerals-Energy Complex to Industrialisation*; Bond, *Elite Transition: Apartheid to Neoliberalism in South Africa*.

[74] Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001)., 6

participatory democracy',[75] which would promote individual rights, communal vetoes as well as consociationalism. Combined, these elements formed a framework that was, according to Heinz Klug, "designed to insulate private interests and action from public power, with the foreseeable effect of allowing those with the resources and desire to pursue a system of privatized apartheid".[76] The discourse of constitutionalism in this case played an ideological role. A system based on human rights further assured the business elite received its demand of a liberal political economy.

Lastly, the official turn to constitutionalism and intention to build a 'culture of human rights' in the context of a military stalemate and elite-transition catalysed a highly legalised transition. The transition emerged in two stages, with the formation of the Interim Constitution in 1993, and the period of rule by the Government of National Unity before the adoption of the final constitution in 1996. The issue of transitional justice was inscribed in the postamble to the Interim Constitution. Significantly, the question of 'truth' did not feature in the postamble at all. Rather the postamble stated, "*amnesty shall be granted* in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past" and that parliament shall provide for the "mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed" (Emphasis mine).[77] The TRC was the institution through which the state would handle the legally mandated amnesty provided for in the Interim Constitution.

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[75] See "Constitutional Rule in a Participatory Democracy: The National Party's Framework for a New Democratic South Africa," 1991.

[76] Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*., 96

[77] "ACT NO. 200 OF 1993: CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA," Pub. L. No. 15466, State President's Office (1993)

The issue of amnesty has been the topic of much study in transitional justice studies,[78] and is beyond the scope of this thesis to address in depth. However, there are two ways in which amnesty is relevant to my argument. The first is that the issue of amnesty in the context of transitional justice made the transition an exceptionally legalised process, as the question of amnesty came under intense scrutiny from both national and international courts. Questions concerning the legality of amnesty under international law consumed legal minds and occupied South Africa's domestic courts, especially the newly formed constitutional court.[79] Second, aside from the amnesty issue, the legal nature of the transition is found in the process of constitution-making and formation of a Bill of Rights. For legal scholar Heinz Klug, the South African transition amounted to a "legal revolution".[80] Similarly, Nicholas Rush Smith asserts that the rule of law in South Africa really equates to the rule of rights.[81] While truth commissions are distinguished from constitution-making in that they are established to "generate and consolidate new and distinctive conceptions of political morality that can henceforth inform the political culture",[82] in the context of the South African transition a fundamental aspect of this new democratic culture concerned the establishment of a renewed legal and institutional framework for the political order and post-apartheid political culture.

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[78] On the topic of amnesty and the TRC, relevant texts include Stuart Wilson, "The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty," *South African Journal on Human Rights* 17, no. 4 (2001): 531–62.; Peter Parker, "The Politics of Indemnities, Truth-Telling and Recociliation in South Africa: Ending Apartheid without Forgetting," *Human Rights Law Journal* 17, no. 1/2 (1996): 1–13.; Catherine Jenkins, "'They Have Built a Legal System without Punishment': Reflections on the Use of Amnesty in the South African Transition," *Transformation* 64 (2007): 27–65.

[79] For example, the Constitutional Court case, Azanian Peoples' Organization (AZAPO) and Others v President of the Republic of South Africa and Others (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996) in which AZAPO took the state to court over the constitutionality of granting amnesty. This is discussed in detail in Albie Sachs, "War, Violence, Human Rights, and the Overlap Between National and International Law: Four Cases Before the South African Constitutional Court," *Fordham International Law Journal* 28, no. 2 (2004): 432–76.

[80] Heinz Klug, "South Africa's Experience in Constitution-Building," Legal Studies Research Paper Series Paper, n.d., 2

[81] Smith, "The Rule of Rights: Comparative Lessons from Twenty Years of South African Democracy.", 124

[82] du Toit, "The Moral Foundations of the South African TRC: Truth as Acknowledgement and Justice and Recognition.", 125

It was in the legally charged transition period that the TRC came about. The section that follows argues that, contrary to the TRC architect's intention, the TRC was, like its apartheid and pre-apartheid cousins, a highly legalised commission. Legal discourse and procedure were dominant due to the fragile and legalised process of transition, as well as the legal nature of commissions of inquiry in general. The legal orientation was carried into the post-apartheid context. Focusing on the legal aspects of the commission by no means denies that the TRC had additional goals and features. Indeed, the commission's therapeutic and cathartic aims are the subject of many other studies.[83] However, a critical analysis of the TRC's legal aspects reveals the ways in which certain regimes of truth were given primacy over others.

4.4 The TRC as a Post-Apartheid Legal Institution

First, it is necessary to outline why and how I view the TRC as a legal institution. As stated, the postamble to the Interim Constitution declared that amnesty would be granted and that parliament would form the legislation for the body through which amnesty would be generated. The TRC was the institution created for that purpose, given its mandate through the Promotion of National Unity and Reconciliation (PNUR) Act, discussed in detail in the previous chapter. Notably, there is no mention of 'truth' in the postamble. Rather, it contained an explicit call for amnesty and seminal formulations of the national requirement for 'forgiveness', 'national unity', 'reconciliation' and 'ubuntu' which were subsequently incorporated into the final constitution, as well as the PNUR Act. The desire for truth, however, was not advanced by the elite negotiators, nor was it inscribed in the country's new founding legislation, but was rather the product of public calls for, and articulations of the right to, truth by civil society groups.[84] In this section, I argue that while it was not a tribunal, the TRC was indeed a legal institution,

[83] Annelies Verdoolaege, *Reconciliation Discourse*, vol. 27, Discourse Approaches to Politics, Society and Culture (Amsterdam: John Benjamins Publishing Company, 2008), https://doi.org/10.1075/dapsac.27.

[84] This is detailed in du Toit, "A Need for 'Truth.'"

which applied legal reasoning and positivist logics to its truth-recovery project. This paves the way for my discussion of the implications of this legal approach, drawing on the analysis of ideology and the field of critical legal studies.

As South Africa's transitional justice instrument, the TRC attempted to eschew its image as a legal institution. Advocates of the TRC chose that transitional justice mechanism over criminal trials (like those held at Nuremberg to try Nazis), which were seen as undesirable because they would hamper the ultimate goal of reconciliation and the cessation of social conflict. A trial-like process was also deemed harmful to victims of the apartheid regime who, by any standard, had suffered enough. As Boraine stated, there would be no 'stern-faced officials' cross-examining victims to validate their truth. To differentiate itself, the TRC was led by a priest and comprised primarily of non-judges instead of being chaired by a sitting or retired judge. In addition, the language used to describe violations was altered to avoid legal terms associated with crimes under South African law. The word 'killing', for example, was used instead of 'murder'. This was, according to the report, to permit the commission to investigate the violations "without having to consider legal justifications or defences used by perpetrators for such conduct".[85]

However, the TRC was a thoroughly legal institution and a legal approach permeated the way it interpreted its mandate and its approach to truth recovery. Its core mandate was to investigate gross human rights violations, whose conception is intrinsically rooted in international legal traditions and paradigms. As Mark Freeman notes, truth commission have become somewhat of "a fixture of international law and politics" coupled with international legal tribunals.[86] A substantial section of the report is used to clarify the extent to which the TRC deliberated its

[85] "Volume Six. TRC.", 589

[86] Freeman, *Truth Commissions and Procedural Fairness*., 11

findings under the guidance of "International humanitarian law and the Geneva Conventions".[87] The report further outlined the applicability of the Geneva Conventions of Human Rights to the South African context, belabouring which principal treaties applied to the South African conflict at different time periods.[88] This was the framework within which the TRC sought to encapsulate the 'truth' about past violations, which can described as a judicial discourse. People giving testimony would be sworn in and, although hearings would start with the claim "This is not a court of law", the setup of the space, with the commissioners sitting like a panel at the front of the room, made the space hard to distinguish from a courtroom.[89]

In addition, the commission could not avoid its legal nature as it was mandated to establish accountability for past human rights violations. The implications of this are twofold. First, it meant that, as it belonged to the field of transitional justice, a core aim was to establish a human rights culture. As Greg Grandin notes, truth commissions are less about being instruments of justice as they are designed to lay the foundations of a new democratic dispensation founded on human rights.[90] However, the TRC was concerned with justice, as it was also mandated to establish accountability for past violations. This function necessitated a perpetrator-focused amnesty process, which was presided over exclusively by legal practitioners and required that legal due process was followed to respect the rights of those accused. It did, however, see its findings of accountability differently to those of a court. The report states,

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[87] "Volume Six. TRC.", 593

[88] For example, the report cites Resolution 31029(XXXVII) of the UN General Assembly which was adopted in 1973, which states an "armed conflict involving the struggle of people against colonial and alien domination and racist regimes are to be regarded as international armed conflicts", which conferred the legal status of those opposing the colonial or racist rule. "Volume Six. TRC.", 598-9

[89] Lars Buur, "The South African Truth and Reconciliation Commission: A Technique of State Formation," in *States of Imagination: Ethnographic Explorations of the Postcolonial State*, ed. Thomas Blom Hansen and Finn Stepputat (Durham and London: Duke University Press, 2001), 149–81., 161

[90] Grandin, "The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala.", 46

> The Commission made findings of accountability in respect of the various role players in the conflict on the basis of the evidence it received. It should be noted that it did this in its capacity as a commission of inquiry and not as a court of law.[91]

Viewed as a commission of inquiry, the findings were not judicial findings of legal guilt, but instead, findings of accountability within the context of the PNUR Act.[92]

As articulated in Chapter Two, truth commissions are distinguished from generic commissions of inquiry as they are transitional justice bodies established at a moment when a society is undergoing some major political regime change from authoritarian to democratic regime. In line with this role, one may argue that the TRC was an exceptional sub-type of commission that sought not only legal and political accountability, but moral responsibility as well.[93] However, the report explicitly links the moral responsibility under discussion to moral responsibility for the "large scale and systematic human rights violations committed in modern states".[94] Hence, while some might want to argue that the TRC was not a purely a legal institution due to its additional focus on moral and spiritual renewal, ultimately its approach to moral questions was still framed in terms of human rights violations.

The TRC's legal nature extended from the object of its investigation to the form of its investigation. Although it was not a court of law, in setting out its various 'operational and management activities' – aside from its research and investigative function – the TRC described its role as including "legal activities" and "dealing with legal challenges to the

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[91] "Volume Six. TRC.", Section 5, 59. That truth commissions are forms of commissions of inquiry has been omitted from the canon of transitional justice scholarship, which tends to view them conceptually in relation to other transitional justice mechanisms. See for example Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2011

[92] "Volume Six. TRC." Section 5,

[93] According to this category, the commission stated that "all south Africans are required to examine their own conduct in upholding and supporting the apartheid system", this related to obeying commands or submitting to fear of reprisal, as well as "moral indifference" or permitting oneself to be "intoxicated, seduced or bought with personal advantages"., 592

[94] The report states, "What is required is a moral and spiritual renaissance capable of transforming moral indifference, denial, paralysing guilt and unacknowledged shame into personal and social responsibility. This acceptance of moral responsibility will allow all those who benefitted from apartheid – including the business community and ordinary South Africans – to share in the commitment of ensuring that it never happens again" "Volume Six. TRC." Section 5, 592

commission and the Amnesty Committee.[95] Indeed, the goal of attaining truth for victims had to be balanced with the rights of alleged perpetrators, and the TRC was required to balance its objective to create a space for victims to "share the story of their trauma with the nation" with "the importance of due process law that ensures the rights of alleged perpetrators".[96] Indeed, while the commission was being set up, the terms of reference were the subject of extensive legal debate, particularly concerning the issue of procedural fairness: how statements would be gathered, its subpoena powers, powers of search and seizure, the manner in which public hearings would be held and whether or not findings of individual responsibility could be published in the final report.[97] These are questions of legal procedure that both constrained and informed the TRC's work.

The influence of legal discourse and paradigms is evident in several other aspects of the TRC, one of which is the TRC as an instrument of truth production. In a way, the incumbent state was presenting itself as a truth-seeking and impartial judge to mark the transition from the arbitrary and tyrannical apartheid state that used the law to violate the rights of the black majority. The first-hand ethnographic account of the inner workings of the TRC by Lars Buur is instrumental in showing how the TRC's operationalisation of its truth-seeking mandate took on a positivist approach to documenting human rights violations. Buur, in his analysis of the 'micro-politics' of the TRC, argues that the TRC sought to contain the range of human experience within a controlled vocabulary of 'gross human rights violations', amounting to the

[95] "Volume Six. TRC.", 737. The constitutionality of the TRC's amnesty powers was contested. A case was brought before the Constitutional Court relating to the constitutionality of the PNUR Act's Section 20(7), which permitted the Committee on Amnesty to grant amnesty. Once granted amnesty in terms of the Act, the individual could neither be held criminally nor civilly liable. Equally, "the state or any other body, organisation or person that would ordinarily have been vicariously liable for such as act, cannot be liable in law."

[96] "Volume One. Truth and Reconciliation Commission of South Africa Report.", 2

[97] Freeman, *Truth Commissions and Procedural Fairness*., ix

establishment of a process of "bureaucratic truth production".[98] He further maintained that the realist, legalistic discourse that permeated the commission served to decontextualise and depoliticise the past events, and that the universalist discourse of human rights detracted from the particular and localised meaning of the violation in question.[99] Hence, although the TRC sought to distinguish itself from past commissions with their legalistic focus, it maintained a positivist approach to documenting gross human rights violations using an intricate information management system.

The weddedness to legal procedure and discourse can be understood as one of the TRC's schemes of legitimation, or, as Ashforth asserts, part of the "process of legitimation within States".[100] A key component of the scheme of legitimation required forging consensus on the way the post-apartheid political economy would be organised. After the experience of apartheid, which systematically used the law to subjugate the black majority population, the discourse of human rights became fused with the project of building a new state. As Stuart Wilson asserts, following periods of authoritarian rule, as was the case in South Africa, "human rights talk has become a dominant form of ideological legitimization for new nation-building projects in the context of constitutionalism and procedural liberalism".[101] One may add to this that human rights talk becomes inextricably linked to the entrenchment of free-market capitalism in newly transitioned states.

Focusing on the TRC's legal orientation further exposes the limitations of the idea of law as something fixed and pure, where the notion that law is social and political is vehemently denied. From this perspective, the problem with apartheid was that a corrupted form of law

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[98] Buur, "Monumental Historical Memory: Managing Truth in the Everyday Work of the South African Truth and Reconciliation Commission."

[99] Buur., 67-8

[100] Adam Ashforth, "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms," *Journal of Historical Sociology* 3, no. 1 (March 1, 1990): 1–22., 3

[101] Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*., 4

was allowed to flourish. As struggle stalwart Kader Asmal, one of the key ANC proponents of the TRC and a trained legal practitioner, put it, the root of apartheid's violence was a "system of state sponsored lawlessness".[102] For Asmal, the "violence of law" under apartheid related to its lacking the "vital ingredients of democratic legitimacy"; its failure to "provide rational guidance for lawful conduct"; its criminalisation of dissent; its conferring of lawless discretion to functionaries in the bureaucracy and security sector; and a general contempt for the law, which saw the state machinery commandeered for acts of terror and torture.[103] From the legal perspective that Asmal represents, the basic requirements of law-making, which apartheid legislators failed to uphold, was "clear guidance, settled and predictable patterns of enforcement, and an absence of caprice".[104] For Asmal, the apartheid system was a "runaway bureaucracy" rather than an orderly and rule-bound system.[105] Evans makes a similar argument about the development of the labour bureau and Department of Native Affairs.[106] Implicit in this understanding of the law as an orderly and rule-bound system is that there is a pure form of law, devoid of caprice or arbitrary malleability. This position is also indicative of legal positivism, an apolitical vision of the law and legal principles as constituted by universal and timeless values insulated from political and social or economic biases.

It is from this position that the General Council of the Bar, the body that governs the various bars of advocates in South Africa, initially declined to make any written submissions to the TRC. It later did submit a large volume of written submissions; however, no judge gave testimony before the commission and most were openly contemptuous of the process. In one memorandum submitted to the TRC, Justice Michael Corbett stated that it was both

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[102] Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance* (Claremont: David Philip Publishers, 1996)., 75

[103] Asmal, Asmal, and Roberts., 75-6

[104] Asmal, Asmal, and Roberts., 78

[105] Asmal, Asmal, and Roberts., 81

[106] Evans, *Bureaucracy and Race*.

unnecessary and impractical to call upon judges to testify as their legal records were in order, and that in a legal order with parliamentary sovereignty, which is what apartheid was, it is the role of judges to interpret the law as it is written, and nothing more.[107] The idea of law underpinning this worldview is an essentialist and formalist picture of legal rules. However, the moment at which judges who operated under apartheid are forced to confront the consequences of their commitment to the rule of law reveals that the law is value-laden, and a positivist interpretation will always have unequal social consequences.

Hence, when one looks at the way the law actually operates it, cannot be understood outside of politics and the economic and social formation. Dennis Davis, who opposes positivist claims regarding the law, asserts:

> there is no single meaning within the text and that the limits to meaning are not only imposed by the language chosen to be contained in the text but also in terms of the legal and linguistic conventions, themselves *informed by politics*. Constitutional law is politics by a different means but it remains a form of politics.[108] (Emphasis mine)

It has been established that the TRC was a legal institution and that it interpreted its work and modus operandi in terms of international law. Understanding the TRC as a legal institution allows for some new avenues for analysis, relevant to understanding not only the TRC, but post-apartheid commissions more generally, including the Marikana Commission of Inquiry. The section that follows unpacks the idea of law as a form of politics where I argue that legal paradigms are themselves ideological as they, according to Thompson's formulation, maintain systems of social domination. I draw on scholarship belonging to the tradition of critical legal studies, specifically the works of Karl Marx and Friedrich Engels, and Evgeny Pashukanis.

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[107] Micheal Corbett cited in Chapman, "Truth Recovery Through the TRC's Institutional Hearings Process.", 176

[108] Dennis Davis, "Democracy and Integrity: Making Sense of the Constitution," *South African Journal of Human Rights* 14 (1998): 127–45., 142

4.5 Exploitation: A Lacuna in the Law

It was established in Chapter Two that commissions of inquiry have an intricate relationship to law both in the content of their inquiry – having been used in the discovery of laws [Section 2.2.2] – and in their truth-seeking method, as they tend to incorporate legal epistemic frames in their investigation [Section 2.2.3]. Liberal approaches to the law and political economy can be illustrated through the work of John Stuart Mill, who maintained that the law must protect the interests of individual *economic actors*, especially those who owned property.[109] The government may make authoritative interventions in the economy if "conducive to general convenience", in situations such as regulating monopolies, price fixing, and to finance public institutions such as universities, as well as cartographers and explorers that 'discover' new lands that can be exploited for resources.[110] From this position, the law must permit actors to engage effectively in the market, adhering always to imperatives of individual liberty.

Karl Marx challenged this approach to understanding the place of law in the political economy. His critique of law stemmed from his assessment of existing scholarship on the political economy, where he argued that the idea of the 'free' market was illusory. One of his main critiques is that law is a false universal; that it claims to articulate reason and interests of all mankind, but instead represents the interests of the bourgeoisie class. Thus, the law and legal institutions are seen as expressions of political and economic interests, or of the ruling class.[111]

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[109] John Mill, "Principles of Political Economy: With Some of Their Applications to Social Philosophy," no. 1848 (1899).

[110] John Mill, *Principles of Political Economy* (Oxford: OUP, 1994)., 159-65, 311-16, 363-65. See also Ian Ward, *An Introduction to Critical Legal Theory* (London, Sydney: Cavendish Publishing Limited, 1998)., 110-112

[111] In Marx's discussion on the 'Law and Thefts of Wood', for example, he identified that only poor people would be vulnerable to prosecution under that law. He highlights the contradictions between the substance of rights and specific components of positive law, specifically as it pertained to property, as it is because of the right to property that the poor have no property. Hence, when the state criminalises the wood gatherer, it is acting as a party to the dispute and on the behalf of a certain group involved in the dispute. See Karl Marx, "1842: Debates on the Law on Thefts of Wood," Rheinische Zeitung, 1842, https://www.marxistsfr.org/archive/marx/works/1842/10/25.htm.

Similarly, Friedrich Engels asserted that the juridical paradigm equated to the worldview of the bourgeoisie.[112] The Italian Marxist, Antonio Gramsci, also argued that the law is the "repressive and negative aspect of the entire positive, civilizing activity undertaken by the state".[113] For Marx and Engels, legal ideology maintains exploitative relations of production that produce social and economic inequality.[114] Exploitative relations are, from this perspective, a structural feature of capitalism. By analysing the TRC's institutional hearing on busines, the previous chapter showed that exploitation features prominently in the historical development of the capitalist state, as well as in the global distribution of wealth. In taking stock of past political violence, the TRC could not help but bump against the violent nature of capitalist exploitation in South Africa. However, as an essentially legal institution, the commission did not have the capacity to digest the implications of its findings in terms of the exploitation of black workers in the South African mining sector and how these structural violations would endure into the democratic era.

I argue, following Susan Marks, that one way to explain this is because of the absence of the concept of 'exploitation' in international law.[115] Exploitation, and specifically the exploitation of labour, is central to Marx's analysis of the capitalist mode of production. The generation of profit is explained by the distinction between necessary and surplus labour: the former constituting the labour affording the means of subsistence for the worker, and the latter being that labour power devoted to accumulating the surplus value that belongs to the capitalist.[116] For Marx, exploitation is the extortion of surplus value from she who labours. The logic of

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[112] Friedrich Engels, "Juristensozialismus," *Neue Zeit*, 1887.

[113] Antonio Gramsci, "State and Civil Society," in *The Anthropology of the State* , ed. Aradhana Sharma and Akhil Gupta, 2006th ed. (Blackwell Publishing, 1971), 70–85., 77

[114] Evgeniĭ Bronislavovich Pashukanis, *Law and Marxism: A General Theory*, ed. C. J. (Christopher John) Arthur (London : Pluto Press, 1983)., 33

[115] Susan Marks, "Exploitation as as International Legal Concept," in *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008), 281–307.

[116] Karl Marx, "Wage Labour and Capital" in Tucker, *Marx. Read.*, 203-210

capital accumulation, necessary for economic growth, thus relies on the exploitation of working people. To use Marx's image, "Capital is dead labour that, vampire like, only lives by sucking living labour, and lives the more, the more labour it sucks".[117] However, a fundamental part of the ideology of capitalism is that it obscures this fact of exploitation, of exploitation as its life-blood. As Anwar Shaikh adds, what is historically specific about capitalism is that "its relations of exploitation are almost completely hidden behind the surface of its relations of exchange".[118] Whilst in slave societies exploitation is glaringly apparent, under capitalism labour relations are governed by legal contracts that are negotiated among two ostensibly free and equal parties. However, when we cast our gaze beyond the contract and to the relations of production, we find a "world of hierarchy" where the working class must sell their labour power to reproduce the conditions its subordination.[119] It is this structural, perennial form of violence that the law is unable to make sense of.

The reason this is relevant to my present study is because of the TRC's form as a mode of transitional justice, which aimed to establish truth, reconciliation and justice. Moreover, as stated previously, although a generic commission of inquiry, the Marikana Commission too aimed to establish truth, restoration and justice, as its motto proclaimed. A Marxist approach to the law and the problem of exploitation reveals the possible identification of exploitation as injustice in a way that strict legal approaches cannot. A Marxist approach links exploitation to inequalities caused by class divisions and takes seriously the constraints and influences of the capitalist system on individual freedom. Taking this line of thinking to other asymmetries in relations of exploitation, feminist approaches have highlighted exploitation of women by

[117] Karl Marx, "Capital, Volume One" in Tucker., 362-3

[118] Anwar Shaikh, "Exploitation," in *Exploitation,* ed. K Nielson and R Ware (Atlantic Highlands, NJ: Humanities Press, 1997)., 70

[119] Shaikh., 71

men,[120] while scholarship of the 'global south' has critiqued exploitation in the global economy and the ways in which global capital and governments in the 'global north' sustain exploitative and extractive relations with countries in the 'global south'.[121] The analytical exposé of these relations of exploitation allows one a clearer view of the injustices that they sustain.

A key feature of capitalism is not only the material constraints imposed, but the ideologies that legitimate its enduring operative exploitative relations. For Boltanski and Chiapello, the 'spirit' of capitalism refers to an analytical category for those ideological resources that enable or encourage engagement with the capitalist system.[122] I argue that legal paradigms which govern the method and approach of commissions of inquiry, including truth commissions, belong to this arsenal of ideological resources that legitimate the capitalist accumulation process. However, understanding the way ideological legitimation occurs requires a nuanced understanding. As Boltanski and Chiapello assert, "the spirit of capitalism not only legitimates the accumulation process, it also constrains it", and moreover, it legitimates it "only *because* it constrains it" (Emphasis mine).[123] Pashukanis went beyond the statement that the law is an ideological form, stating "it is not a matter of affirming or denying the existence of the ideology (or psychology) of law, but rather demonstration that the categories of law have absolutely no significance other than an ideological one".[124]

For Marx, the ruling ideas of a moment are the ideas of the ruling class, "the class which is the ruling material force of society" that becomes the "ruling intellectual force".[125] Moreover, it is

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[120] M Mies, *Patriarchy and Accumulation on a World Scale* (London: Zed Books, 1986).

[121] Samir Amin, *Maldevelopment: Anatomy of a Global Failure*, ed. M Wolfers (London: Zed Books, 1990).; Walter Rodney, *How Europe Underdeveloped Africa* (London: Bogle-L'Ouverture Publications, 1973).

[122] Luc Boltanski and Eve Chiapello, *The New Spirit of Capitalism*, ed. Gregory Elliot (London: Verso, 2005).

[123] Boltanski and Chiapello., xx

[124] Pashukanis, Law and Marxism: A General Theory. Towards a Critique of the Fundamental Juridical Concepts. 1978. London: Ink Links., 73

[125] Karl Marx, "The German Ideology," in *The Marx-Engels Reader*, ed. Robert C. (Robert Charles) Tucker, 2nd ed. (New York: W. W. Norton & Company, 1978), 146–202., 172

imperative for the ruling class to "represent its interest as the common interest of all the members of society, that is, expressed in an ideal form: it has to give its ideas the form of universality, and present them as the only rational, universally valid ones".[126] The ruling intellectual force apparent in the TRC was that of international human rights law which, as Susan Marks' analysis of exploitation as an international legal concept shows, is a topic on which the international legal community is largely silent.[127] Even the International Labour Organisation's (ILO's) online thesaurus of over 4000 terms does not feature the term 'exploitation', meaning it does not comprise part of the ILO's official discourse.[128] International law associates 'exploitation' with crimes of slavery, forced labour or sex trafficking disproportionately affecting certain groups of people (women, children, indigenous people etc.). The TRC's official discourse on gross human rights abuses shows that it viewed exploitation through the lens of international law. Hence, it obscured the fact that exploitation is a particular form of violence that affects certain classes, and primarily affects the working class. Rather, in the context of South Africa's transition, the TRC adopted human rights talk, as embedded within a more general legal discourse.

There are also very few international regulations regarding social standards in the mining sector, especially binding ones. There are two by the ILO: the first being the Convention Concerning the Indigenous and Tribal Peoples in Independent Countries.[129] However, South Africa has not ratified this convention, nor have most countries in the global north which house

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[126] Marx., 174

[127] Exploitation features in treaties concerning children, women and indigenous peoples and people with disabilities, particularly from sexual exploitation and child labour. Slavery, for example, features prominently in international law, as does exploitation as a type of violence effected against women and children. Marks roots this focus in "a history of international law-making that goes back to the moral panics about prostitution and 'white slavery' of the first half of the twentieth century in parts of Europe and the United States". See Marks, "Exploitation as as International Legal Concept.", 293-298, 299

[128] See Marks., 298-299

[129] This is ILO 69 which recognises the "aspirations of …(indigenous) peoples to exercise control over their own institutions, ways of life and economic development" cited in Michael Reckordt, "Hard Rocks - Soft Rules," in *Business as Usual After Marikana: Corporate Power and Human Rights*, ed. Maren Grimm, Jakob Krameritsch, and Britta Becker (Sunnyside, Auckland Park: Fanele, 2018), 182193., 188

the major mining companies, including Britain, America, Germany, Australia and Canada.[130] South Africa did ratify the ILO's 1995 Convention, Safety and Health on Mines; however subsequent investigations have shown that obligations in this area are not being met even though companies are legally obliged to "take all necessary measures to eliminate or minimize the risks to safety and health in mines under their control".[131] For the most part, however, prescriptions by international bodies like the UN and OECD are non-binding guidelines which urge companies to protect human rights voluntarily.[132] Even so, as argued in this section, structural violations still tend not to be included in the official discourse and lexicon of human rights violations.

4.6 Conclusion

In this chapter, I argued that the TRC was a legal institution and that it was first and foremost a commission of inquiry. I provided an overview of the international and domestic context of the transition and the nature of the elite-led pacts that culminated in a negotiated transition. This was tied to the nature of the transition as a highly legalised process that informed the constitution-making procedure in South Africa. Scholars of transitional justice will argue that truth commissions are different to constitution-making, as they are more concerned with forming a "new moral and political order" than with the specific tasks of establishing a new legal and institutional framework.[133] However, the formation of the TRC cannot be divorced from the process of constitution-making and the legal formation of a neoliberal economy in a post-Cold War global context.

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[130] Reckordt., 188

[131] ILO, 1995 cited in Reckordt., 188

[132] For example, UN guiding principle no. 15 urges that companies formulate systems to assist them to "identify, prevent, mitigate and account for how they address their impacts on human rights in the context of their own relationships and activities". Reckordt., 188-189

[133] André du Toit, "Truth as Acknowledgement and Justice as Recognition," in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I Rotberg and Dennis F Thompson (Princeton University Press, 2000), , 125

Moreover, I argued that that one effect of the TRC's legalistic approach to apartheid's violence was an inability to conceptualise exploitation under apartheid, and the myriad ways that exploitation would continue post-apartheid if the structures of business and labour were not changed fundamentally. The legal approach is found in its overarching constitutionalist discourse and role in helping to institutionalise a 'culture of human rights'. In line with this view, I argued that the TRC's discursive legitimation of the post-apartheid state, based on a 'culture of human rights' in line with international human rights law, overlooked a key dimension of South Africa's historical injustices – the history of exploitation. In the context of South Africa's democratic transition, the discourse of human rights was ideological because it obscured the fact that exploitation is a structural feature of capitalism, a feature that was bound to continue, as per the terms of the negotiated settlement and maintenance of existing relations or production in the mining sector. Here, I drew on Marxist scholarship and the work of Susan Marks in teasing out some of the implications of the absence of the concept of 'exploitation' from the lexicon of international law, particularly pertaining to the exploitation of labour under capitalism's economic relations. For Marx, the 'economy' might appear to us as a distinctive realm, "a very Eden of the innate rights of Man".[134] Yet the critical task of the critique of political economy is to leave this sphere of appearances behind and reveal the actual human labour process and forms of exploitation that make possible the reproduction of capital.

However, the TRC alone could not be and was not intended to be a panacea for South Africa's long history of labour exploitation and structural injustices. To address this, various processes were set in motion during and after the transition period, with the formation of deliberative institutions and structures, such as the National Economic Development and Labour Council (NEDLAC), a statutory body designed to institutionalise policy-making in the interests of

[134] Marx in Tucker, *Marx. Read.*, 343

working-class people via union representation.[135] Another significant commission was established in 1995, which investigated issues pertaining to health and safety conditions in the mining sector: the Leon Commission of Inquiry into Safety and Health in the Mining Sector (1995). After input from a wide cross-section of society, the commission recommended that parliament enact the Mine Health and Safety Act, legislation stipulating regulations for mines and the management of health and safety, and the rights of workers to demand mandatory minimum standards during work.[136] Part of its mandate included recording the, "adverse impact of the migrant labour system on occupational health and safety," and its recommendations included the creation or amendment of statutory law to guide action in management of harmful working conditions like the effects of respirable dust, noise in underground mining, the effects of radiation and hazardous substances in mining, mining explosions and workers' recourse to compensation for injuries sustained while working.[137]

At the same time, we saw the tabling of the Labour Relations Act (1995), whose principle purpose was to "advance economic development, social justice, labour peace and the democratisation of the workplace" and give effect to Section 27 of the South African Constitution.[138] These legal devices - brought about through compromise, and the strength of the working class movement at the time - have effectively sought to set limits on the exploitative impulse of market forces to protect the lives and livelihoods of workers. Nonetheless, the Marikana massacre unfolding on the platinum belt in 2012, and the series of strikes that followed, marks the culmination of the burgeoning contradictions since the

[135] The National Manpower Commission (NMC) and National Economic Forum (NEF) were integrated into NEDLAC by an act of parliament (Act 35 of 1994) in 1995

[136] "Mine Health and Safety Act" (1996).

[137] "Leon Commission of Inquiry into Safety and Health in the Mining Industry," 1995.

[138] "Labour Relations Act," Pub. L. No. 66 (1995). Section 27 of the Constitution contains that "Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security…" and that the state must "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights". "Constitution of the Republic of South Africa" (1996).

transition and evidences the failure of legal provisions to adequately protect workers from mistreatment and quotidian instantiations of structural violence also revealing itself as blatant social neglect. The Farlam commission, established to investigate the violence of this moment, is the subject of the chapters that follow, where we find similar issues emerging to those raised during the TRC's hearings on the mining sector.

5. Commissioning Marikana: A Post-Apartheid "Massacre"?

5.1 Introduction

The two preceding chapters analysed aspects of the South African Truth and Reconciliation Commission (TRC) in its capacity as a founding post-apartheid commission of inquiry investigating past political violence. Through an analysis of the TRC's conceptualisation of gross human rights violations I exposed contradictions apparent at the institutional hearings on business in the way corporate sector-related violence was investigated. I revealed the legitimist character of discourses on violence by flagging testimony from the institutional hearings on business which equated the hardships experienced in migrant labour on the mines – the working conditions and the compound system – with, for example, extrajudicial police killings of people engaged in "so-called-illegal strikes" [Section 3.3].[1] I proposed that a reason why the TRC struggled to operationalise and address sufficiently questions of structural violence was due to its legal character and self-conceptualisation in relation to international human rights legal principles, as well as its liberal approach to the law and political economy. Noting the absence of the concept of exploitation from international law I argued that the TRC was ultimately unable to make sense of, and hence propose appropriate strategies to truly prevent, human rights abuses of the past from reoccurring as is a primary goal of truth commissions.[2] This chapter turns to the Marikana Commission of Inquiry and its approach to the question of violence.

It is worth including an excerpt from an intervention made by evidence leader Geoff Budlender concerning what he considered to be the main purpose of the Marikana Commission of Inquiry:

[1] Alex Boraine in the TRC's Institutional Hearings on Business.

[2] The goal of ending cycles of human rights abuses has been a primary goal of truth commissions since the publication of the report of the National Commission on the Disappearance of Persons in Argentina in 1984, of which the title was *Nunca Màs* meaning "never again".

> Chair, we submit the first purpose of the Commission is a *truth telling* purpose, that South Africans and not only South Africans, want to know what happened in the terrible week, that terrible week in August 2012 culminating in the killing of 34 people by members of the SAPS. They want to know what happened and they want to know why. The second is an *accountability* purpose. Those who are responsible for what happened must be identified and they must be held to account. The third purpose is a *healing* purpose. Steps have to be taken to heal the terrible wounds which were caused by the events of that week. Truth-telling and accountability will be part of the process of healing but it will take more than that to achieve the healing. And fourthly, there is a purpose of *looking forward*. Having identified what went wrong we need to take effective steps to make sure that this *never happens again*."[3]

When viewed alongside the Commission's motto I've noted several times during this thesis (Truth, Restoration, Justice) these purposes outlined by Budlender closely resemble those of a truth commission, and specifically the TRC. Moreover, the Marikana Commission of Inquiry was established with two parts: Phase 1 and Phase 2. Phase 1 would investigate the "immediate facts of the event of that week 9 to 16 August 2012", while Phase 2 was intended to explicate the more "long-range causes," which may have contributed to the conflict.[4] Inquiring into long-term causes of a particular event is somewhat unusual for 'event-specific' commissions, which tend to explore what Chapman and Ball call the 'micro-truth' surrounding an event. An investigation into long term causes, or patterns of violence over time, is more in line with the function of Historical Commissions, or truth commissions, as outlined in 2.3.1 Truth Commission Model].

This chapter begins by providing context surrounding the police shooting on 16th August 2012 highlighting the initial responses to the event by the state, media and civil society. I am aware that in so doing I am constructing a particular narrative of the events that unfolded, which will be imbued with my own positionality and biases as a researcher. However, in constructing this narrative I relied on various sources including interviews with survivors of the shootings

[3] Budlender SC. The Marikana Commission of Inquiry. *Transcript*. Day 294 p. 38494-5 (Emphasis mine) Also cited in Lester, "Truth in the Time of Tumult Tracing the Role of Official 'Truth-Seeking' Commissions of Inquiry in South Africa, from Sharpeville to Marikana."

[4] Matthew Chaskalson, "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 9 April 2014," (n.d.), https://www.justice.gov.za/comm-mrk/docs/20140409-SeminarPhase02-transcript.pdf.

conducted in the days that followed, personal and radio interviews with relevant personnel, transcriptions from the Marikana Commission, the commission report as well as secondary analyses and reports, where I employed a process of triangulation to construct the narrative.[5] My purpose incorporating this was not to create an alternative, or more 'truthful', narrative of events to the one presented in the Report, but rather to trace the development of emergent discourses on the violence that unfolded on the platinum belt as the strike for a living wage of R12,500 progressed. It also provides the necessary context to my analysis of the way the commission attempted to make sense, or come to terms with, the various moments in the days prior to 16th August 2012 and the commission's findings and recommendations contained in its final report, addressed in Chapter 6. Section 5.2.2 below, details some of the initial responses to the police killing from the media and public to show how various linguistic representations of the violence can be coloured by distinct interests and reflect particular ideologies.

Section 5.3 continues to set out the commission's defining legislation: the terms of reference and the regulations guiding the commission's procedure to clarify the approach to "truth" and "justice" in relation to the investigation of violence. This is followed by analysis of the discourses on violence imbued in the foundational documents [5.3.3]. Like in the TRC it is evident how discourses on violence are legitimist and serve to linguistically frame some forms of violence as acceptable, whilst presenting others as examples of criminal violence.

[5] Interviews with surviving mine workers and their family members were conducted in the aftermath of the event both at Marikana and with families of the deceased mine workers in the Eastern Cape and are recorded in P Alexander et al., *Marikana: A View from the Mountain and a Case to Answer*, *Critical and Radical Social Work* (Johannesburg: Jacana Media, 2013)

5.2 Context and Emerging Discourses

5.2.1 The Days Preceding the Massacre

It was on the 9th of August, National Women's Day in South Africa, that a group of Rock Drill Operators working at Lonmin Platinum Mine gathered to address the issue of wage dissatisfaction with the goal to organise an increase. It was, however, a meeting of which the National Union of Mineworkers (NUM) was unaware, which is considered an 'unauthorised' meeting.[6] The Rock Drill Operators decided to lead with a request for R12,500 per month, but stated that they were open to negotiating this amount with management. At the time most took home four or five thousand rand per month, an amount which included a sum to live out of the housing provided by the mine to subsidise the cost of their accommodation.[7]

An enduring feature of the British segregationist period, which continued into apartheid and the democratic, era is the low wages that mine workers and their families live on. These are hardly sufficient to meet workers' subsistence needs or indeed the requirements of social reproduction, as one individual's wages must usually sustain one or more families. The post-apartheid dispensation has rendered additional financial pressures on mine workers, as the mines provide increasingly less accommodation. Employees are required both to sustain themselves near the mine, to manage transport costs and send money to families who live in the labour sending areas. As Benya and Seidman assert, women who often remain in the labour sending areas (previously called native reserves or Bantustans) carry the cost of rearing families

[6] NUM President Senzeni Zokwana stated that the initial meeting was "unauthorised" as the union had not been informed about it. "Interview: Marikana conflict", The Forum at 8 with Xolani Gwala, 15th August 2012, SAFM

[7] The question of Lonmin's responsibility to provide housing is addressed in Chapter 7 in analysing the Commission's findings related to Lonmin's contribution to facilitating an environment of tension and disunity among its employees. For more on the social conditions related to platinum mine workers see Melusi Nkomo, "'Beyond the Compound': The Making and Unmaking of Migrants' Scoail World on South Africa's Platinum Mines" (Geneva Graduate Institute of International and Development Studies, 2018).

that will provide labour power for the mines.[8] In 2013 it was reported by the Benchmarks foundation:

> The overwhelming majority of Lonmin's 28,230 established employees stay in informal settlements or in township shacks. As for the additional 8,300 contract workers, for which accommodation Lonmin takes no responsibility, their residence in informal settlements is almost given by definition. According to a very well-placed source, Lonmin estimates that it provides acceptable accommodation for about 5,000 out of over 28,000 established employees.[9]

Hence, the 'freedoms' gained for workers at the transition has in many ways conferred additional financial burdens on them as they must sell their labour power to pay for their basic needs like housing. As the above quote depicts, the Company no longer takes responsibility for that, effecting a situation which is in many ways more precarious for mine workers. The 1994 Constitutional settlement was, in part, designed to assist in providing protection from the hyper-exploitation seen under the Apartheid regime. Protection for workers, particularly in the mining sector, was also introduced through findings from public inquiries like the Leon Commission of Inquiry into Safety and Health in the Mining Industry (1995), discussed in the previous chapter, which fed into legislation around Corporate Social Responsibility and the development of Social Labour Plans in the mining industry, relating to the company's requirement to provide housing solutions for its employees, among other social services. However, as will be detailed in the chapters that follow, it is clear how the structural violence endemic to the South African mining industry has endured well into the present.

There was an emergent sense that the NUM, which had been the dominant union on the platinum belt up until that point, was failing to sufficiently represent the needs of the rock drill operators or support them when they broached issues pertaining to injuries and dangerous

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[8] Asanda Benya and Judy Seidman, "There Is No Change in Marikana: The Perspective of Women," in *Business as Usual After Marikana: Corpoerate Power and Human Rights*, 2018, 104–23. See also Wolpe, "Capitalism and Cheap Labour Power: From Segregation to Apartheid."

[9] Benya and Seidman, "There Is No Change in Marikana: The Perspective of Women.", 110

work. As one mineworker stated, "We will go to the employer ourselves because the work we do there is very hard and is killing us."[10]

Tension had begun to emerge the year prior, in May 2011, with the suspension of a respected NUM chairperson at Karee, one of the three Lonmin mines. According to one mineworker, the chairperson was perceived to have always acted to advance their interests and did not capitulate to bribes from management.[11] Without NUM's support, workers engaged in an unprotected strike in protest of the suspension and Lonmin responded by firing all 9000 people working at Karee mine. Most were rehired, but their rehiring necessitated their re-joining the union, which many did not and hence NUM lost its base at Karee with many joining the newer union, AMCU. By July 2012 rock drill operators at Karee mine went on strike for a pay increase for the fact that they did not have an assistant and hence did twice the amount of work for which they were not compensated. They received a small increase, with which they were dissatisfied, but were emboldened by their ability to achieve a small win without the assistance of NUM. Rock drill operators working at Lonmin's other two mines voiced that they too required a substantial increase. This spurred the decision to gather on the 9th August to align the rock drill operators' concerns across the mines and it was decided that the rock drill operators would strike on the 10th of August.[12]

The NUM maintained that it did not endorse the strike and despite the cancellation of the mine's bus transport, the union used a vehicle provided by Lonmin to transport workers to their shaft, calling for strikers to return to work.[13] It is reported that a group of workers (between 2000 and 3000) then went to speak to NUM to seek guidance on the course of action towards speaking

[10] The mine workers cited in this text were interviewed days following the massacre. Alexander et al., *Marikana: A View from the Mountain and a Case to Answer*., 29

[11] The dispute related to a pay-out from a trust fund that could have seen workers benefit from previous years' profits. Alexander et al., 27

[12] Gathered though interviews with RDOs from Lonmin mine. Alexander et al., 30

[13] Reported by Chairperson of NUM at Western Mine. Alexander et al., 31

with Lonmin management regarding their grievances. According to a mineworker who was there, they "did not have any weapons that day," but were singing and in good spirits.[14] On route, the group encountered a row of armed men carrying some traditional weapons and guns, who shot at the group with most running for cover while two remained at the scene having fallen from injuries. Many believed that these two people had died as a result of their injuries, but it was later confirmed that they survived and were transported to hospital.[15] Eyewitnesses reported that among the shooters were the top NUM leadership.[16] That some of the NUM leadership had shot at the group of strikers (many of whom remained NUM members) was corroborated in Karel Tip's testimony at the Farlam Commission.

This incident led to heightened fear among the strikers and they decided to take up traditional weapons.[17] On August 12th the mine workers attempted to return to the NUM offices (2000-3000) but were stopped by private mine security guards.[18] According to one mine worker they were shot at by the mine security but that most continued towards their destination. He heard later that two security guards had been dragged from their cars and killed with pangas or spears before their vehicles were set on fire. Later that day two NUM members, Thapelo Madebe and Isaiah, were found stabbed to death; and the following day another NUM member Thambalakhe Mati was killed by gunshot.[19] While the details surrounding those murders are unclear, and no evidence supports the idea that the violence was ordered by AMCU or strike

[14] Mine worker cited in Alexander et al., 32

[15] During the Commission's proceedings it was confirmed that the SAPS had opened dockets in respect to attempted murder charges by the two people who were shot at near the NUM's premises and that they were taken to Andrew Saffy Hospital. Transcript. Day 35: 3848

[16] Jared Sacks, "Marikana Prequel: NUM and the Murders That Started It All," *Daily Maverick*, October 12, 2012, https://www.dailymaverick.co.za/opinionista/2012-10-12-marikana-prequel-num-and-the-murders-that-started-it-all/#gsc.tab=0.

[17] One striker stated, "because they shot at us and we were afraid they will come back. We do not have guns, and so we thought it will be better that we have our traditional weapons." Cited in Alexander et al., *Marikana: A View from the Mountain and a Case to Answer*., 34

[18] According to a source there were ten private security guards. Peter Alexander, "Marikana Commission of Inquity: From Narratives Towards History," *Journal of South African Studies* 42, no. 5 (2016): 815–39., 819

[19] Testimony of Lt. Col Visser (SAPS). Transcript, Day 35: 3850-1

leaders, the events fed into the burgeoning environment of fear, mistrust and anger among the NUM leadership.

Another violent confrontation ensued on August 13th when a group of strikers encountered a group of armed police on their way back to the *koppie* (small mountain). Interview research by Alexander et al. stipulates that police had circled the strikers and threatened to shoot if they did not give up their weapons, and one of the strike leaders, Mambush, (the man in the green blanket) replied that they would do so once they were safely back on the *koppie*.[20] As the strikers attempted to break through the line of police to pass, shots were fired resulting in three strikers and two police officers being killed, as well as a civilian. The police attempted to engage the miners through a negotiator who requested they elect five worker representatives for negotiations; however, when they went to negotiate they maintained their desire to speak to mine management.[21] When the representative returned the following day (August 15th) the Lonmin management were not present, refusing to negotiate.

By this point the narratives related to the 'criminal action' of the workers engaging in a 'wildcat strike' circled public discourse. I remember listening to a radio interview on August 15th, on the station South Africa FM (SAFM) hosted by Xolani Gwala, which provided a picture of the tension and perspectives regarding the strike action. Gwala began the radio show by noting that ten people had been killed in the preceding days. Gwala had previously interviewed Minister Susan Shabangu, who maintained that the conflict on the mine related to an inter union dispute.[22] In this particular interview he was speaking with NUM president Senzeni Zokwana, AMCU president Joseph Mathunjwa and Barnard Mokwena, Lonmin's executive president of

[20] Alexander et al., *Marikana: A View from the Mountain and a Case to Answer*., 36

[21] Two of the five negotiators would be killed on August 16th.

[22] "Interview: Marikana conflict", The Forum at 8 with Xolani Gwala, 15th August 2012, SAFM

human capital and external affairs. Mokwena stated on air that the strike was, "of course illegal," and that, "they [the strikers] had literally broken all laws." He continued:

> …there seems to be a tendency to disregard everything and talk about what needs to be happen and forget the fact that these people have broken the law okay? From the beginning they didn't obtain the permission in terms of the Public Gatherings Act, they had absolutely no respect for existing company procedures in terms of mass meetings and absolutely no regard for prescripts of Labour Relations Act in terms of the rights of workers, so that's how it all started yes.[23]

Mokwena's account was clear that the striking mine workers were responsible for the growing tension as their actions were not compliant with the correct procedure for raising grievances, as outlined by the Labour Relations Act, and had received authorisation from any union representatives for the plan to conduct a wage-related strike. The reiteration that the 'wildcat strike' was "illegal", and the strikers had "broken the law", presented their strike action as criminal. The association with the term 'wildcat' in relation to strike action is that the action is untamed or unruly, like a wild animal; devoid of organisation. Because it was "illegal" the strike was also referred to as an "unprotected" strike. If one follows the logic of the discourse it goes as follows: Without the "protection" of their relevant union representation, the striking mine workers willingly opened themselves up to whatever retaliation came their way, be that from their employer or indeed the state.

In response, Mathunjwa stated that Mokwena had informed them of the plan for workers to strike two weeks prior and that Mathunjwa had asked for a meeting involving all stakeholders to discuss the workers' memorandum, which was never called. Again, the criminality of the strikers is emphasised by Mokwena, who accused Mathunjwa of, "twisting the truth at the expense of 10 lives". He continued, "we have not engaged these groups of people, we will not

[23] Mr Mokwena on SAFM: Lonmin Marikana Discussion. 15th August 2012

engage people who engage in criminal activity outside the union structures".[24] Here, the public battle over the truth concerning the violence had begun.

Public discursive representations of violence are a main concern of this thesis, particularly violence wrought by the state. As stated in previous chapters, discourses on violence are inherently political and ideological in that they contribute to sustaining relations of domination. The ability to frame one side as responsible for violence casts one side as blameworthy, while urging the other side to be sympathised with; it encourages the public to view one group as perpetrators and the other as victims.

As an employee of Lonmin, one can perhaps understand how this narrative of the criminal mine workers was favoured by Mr Mokwena. As outlined in the Introduction, the struggle for wage increases has been a central issue in the South African mining sector and has been the subject of commissions of inquiry like the Native Economic Commission (1930-1932) and Mine Native Wages Commission "on the remuneration and conditions of employment of natives on Witwatersrand gold mines".[25] The strike for a living wage of R12,500 per month was, however, an historic demand in the history of wage struggles in South Africa and would go on to frame mine workers' struggles in subsequent years throughout the country.[26] Nonetheless, similar sentiment regarding the criminality of the striking mine workers was revealed in an email from COSATU president Sdumo Dlamini, read on air by Gwala during the interview. It read:

> As COSATU we are saddened by the loss of life due to this. If people want to organise and recruit members or workers into their union they must follow the law. It does not seem in this case, even listening to Mr Mathunjwa they are not following legal means.

[24] Mr Mokwena on SAFM: Lonmin Marikana Discussion. 15th August 2012

[25] "Report of the Witwatersrand Mine Natives' Wages Commission on the Remuneration and Conditions of Employment of Natives at the Transvaal Undertakings of Victoria Falls and Transvaal Power Company, Limited" (Pretoria, 1944).

[26] Noor Nieftagodien, "AMCU Marikana Massacre 8th Commemoration Lecture" (AMCU, 2020), https://www.facebook.com/AMCU.News/videos/2748560515464415/?extid=m8YZ6rh2D7UuA7a3&v=2748560515464415.

> The loss of lives if regrettable and blame should be placed squarely on those who do not follow the law.[27]

COSATU, South Africa's largest trade union federation and part of the governing tripartite alliance also stressed that the strikers were operating outside the prescription of the law and hence, acting illegally. Blame for the violence up to that point was to be placed on, "those who do not follow the law."

Another prominent discourse, revealed through an intervention from a caller into the radio show, was that the workers' "illegal" strike action was damaging investor confidence and jeopardising South Africa's fragile economy.[28] Hence it was the role of the state to create a secure environment for mining to continue so that the company could meet its industrial targets both for South Africa's economy, for also to meet the needs of the international industry. As expressed in an article titled, "Union Violence hits Lonmin," published in an online investor's media outlet on August 15th, "The deterioration of the security environment for these companies has major implications for global industry given that South Africa accounts for around 80 per cent of the world's platinum production."[29] This commentary speaks to what the post-apartheid state ought to be doing in terms of relations with international capital flows and defines a common position of the state in contemporary neoliberalism.

Later that day, at Lonmin mine in Marikana, both Zokwana and Mathunjwa would address the mine workers in the attempt to call them down from the mountain, at the request of SAPS. The miners refused to engage with NUM president Senzeni Zokwana. This is because Zokwana did not speak to them face to face, but instead spoke from a police "hippo" (armoured vehicle),

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[27] SAFM: Lonmin Marikana Discussion. 15th August 2012

[28] A caller named Koos stated, "…this has been broadcasted overseas which is bad as regarding foreign investment. How people looking at the news, how can they invest here if this is going on?" "Interview: Marikana conflict", The Forum at 8 with Xolani Gwala, 15th August 2012, SAFM. One day following the massacre this sentiment dominated financial news outlets. See "Lonmin Bloodshed Has Global Implications," *Fin24*, August 17, 2012, https://www.news24.com/Fin24/Lonmin-bloodshed-has-global-implications-20120817.

[29] Mark Robinson, "Union Violence Hits Lonmin," *Investors Chronicle*, August 15, 2012,

trying to convince them to return to work,[30] but also because the strikers believed that NUM members had shot at them in the days prior.[31] Subsequently, Joseph Mathunjwa, also attempted to speak to the strikers. He informed them that he too had been unable to speak with management, but that he would try again the following day. Police presence at the mine began to increase.

On the morning on August 16th additional security arrived at the mine from three special units: the Tactical Response Teams, National Intervention Unit and the Visible Police Unit.[32] Mathunjwa visited the strikers once again, informing them that the mine management had not pitched for their scheduled meeting. First, he advised and then pleaded that the group end the strike, admonishing that there may be bloodshed. The strikers maintained that they would remain until the mine management engaged with them. Video footage shows that the police then used razor wire to encircle the strikers, using tear gas and stun grenades, which forced many towards a gap in the razor wire as they attempted to move in the direction of Nkaneng informal settlement, where they lived. It was then that the police force opened fire on the group of strikers, with no warning shots.[33] Thirty-four of the strikers were killed on the 16th August with twenty dying in the initial encounter, or close by. Most were shot at a site known as 'Klein Koppie', execution style, out of sight of sight of the media.[34]

5.2.2 Initial Responses to the Violence

As soon as the killings had occurred the discourse of tragedy was touted by key government personnel attempting to contain the official narrative. In his official statement made a day

[30] Senzeni Zokwana came to speak to the strikers on the evening of Wednesday the 15th August, but he spoke to them from inside the "hippo" (police armoured vehicle).

[31] Felix Dlangamandla et al., *We Are Going to Kill Each Other Today: The Marikana Story*, ed. Riaan de Villiers (Cape Town: Tafelberg, 2013)., 46

[32] Transcript, Day 10: 1158

[33] Video footage shown at the commission shows that teargas was fired 20-30 seconds prior to the shooting. Transcript, Day 17: 1862

[34] Andrew Nash, "Marikana's Path," *Social Dynamics* 41, no. 2 (2015): 387–91., 387

following the killing, President Jacob Zuma remarked, "The loss of life among workers and members of our Police Service is tragic and regrettable".[35] In another statement, Zuma asserted that, "the events of the past few days have unfortunately been visited upon a nation that is hard at work addressing the persistent challenges of poverty, unemployment and inequality."[36] This passive construction omits the agents – the SAPS – responsible for the killing and causing the "loss of life". It presents as equivalent the 'loss of life' by both the strikers and members of the police.

The official presentation as a tragic 'loss of life', or unfortunate necessity, is congruent with Sitze's notion of the tragic discourse prevalent when the state (typically the colonial state) was implicated in violence inflicted upon local, subject populations. To use White's terms, tragedy in this context is part of the narrativizing discourse that brings a sense of discursive order, or closure, to a contentious historical event.[37] The Marikana massacre was, as Nash argues, the first "democratic" massacre, where a democratically elected government ordered the killing of black workers, "those who fought for the overthrow of apartheid and voted the African National Congress (ANC) into power and for whom they were supposedly providing a better life".[38] But the discourse of the criminal strikers mentioned in Section 5.2.1 above pierced through the tragic discourse as distinct views regarding whether the police were justified took hold in the public sphere. Compounding the narrative of the 'criminal' miners, the National Prosecuting Authority (NPA) charged 259 of the surviving miners with the murder of their peers, relying

[35] "Statement from President Jacob Zuma on the Marikana Lonmin Mine Workers Tragedy, Rustenburg."

[36] Following the massacre, President Jacob Zuma stated, "The events of the past few days have *unfortunately* been visited upon a nation that is hard at work, addressing the persistent challenges of poverty, unemployment and inequality". "Statement from President Jacob Zuma on the Marikana Lonmin Mine Workers Tragedy, Rustenburg." In August 2019, seven years after the Marikana massacre, President Cyril Ramaphosa tweeted, "The Marikana *tragedy* stands out as the darkest moment in the life of our young democracy. Today we remember our 44 compatriots who lost their lives in Marikana seven years ago this week. Never again can we allow such a tragedy to befall our nation," Msimang, "Marikana Wasn't a Tragedy; It Was a Massacre."

[37] Hayden V White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore Md. ;London: Johns Hopkins University Press, 1987)

[38] Nash, "Marikana's Path," 2015.

on the criminal doctrine of common purpose. Frank Lesenyego, the NPA's regional spokesperson stated,

> It's technical, but in legal [terms] when people attack or confront [the police] and a shooting takes place which results in fatalities…suspects arrested, irrespective of whether they shot police members of the police shot them, are charged with murder.[39]

The National Police Commissioner congratulated the security forces for a job well done.[40] This move was criticised as being reminiscent of the Apartheid State's use of the law to criminalise those involved in protest action against the NP government, part of the arsenal of such laws cited in 4.3.2 Law and the Apartheid State. While de Vos wrote an article in which he found Lesenyego's statement to be "wrong from a legal perspective" and the murder charges were later dropped;[41] the ordeal influenced public discourse related to the violence in a way that stigmatised the striking mine workers.

It is also worth providing a brief review of the various responses by newspapers across the country at the time as it offers another window into the varying discourses on violence which emerged in the wake of the massacre. In post-apartheid South Africa, the press has become an arena from which the public may speak truth to power, or indeed provide counter narratives to the "official discourse", or the truth *of* power – the truth of state. For Jane Duncan, the press's coverage of the Marikana violence was dominated by the "business voice," which became the "primary definer of events", followed by the versions presented by Lonmin's mine management and owners.[42] Duncan presents her findings as evidence of the way social power

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[39] Amukelani Chauke, "Miners Face Murder Rap," *Sunday Times*, August 29, 2012, https://www.timeslive.co.za/news/south-africa/2012-08-29-miners-face-murder-rap/.

[40] Nash, "Marikana's Path," 2015.

[41] Pierre de Vos, "Marikana: No Common Purpose to Commit Suicide," Constitutionally Speaking, 2012, https://constitutionallyspeaking.co.za/marikana-no-common-purpose-to-commit-suicide/.

[42] Duncan analysed English press published between the 13th and 22nd August 2012 totalling 153 articles. She coded the articles to assess the dominant voices on the killing depending on the type of publication. The categories she identified include the business voice (27%); parliament and political parties (10%); independent experts (8%), workers (3%); AMCU (5%); NUM (6%); Police (5%); Government (9%); Mine management (14%) and other (13%).Jane Duncan, "South African Journalism and the Marikana Massacre: A Case Study of an Editorial Failure," *The Political Economy of Communication* 1, no. 2 (2013): 65–88., 4,7

is reflected in the media, an argument which if one recalls the writing of Burton and Carlen, has similarly been made about commissions of inquiry.[43] She argues that the commodification of media has led to much political commentary favouring the viewpoints of the middle class as "unacknowledged normative frameworks" where ideologically, neoliberal logic is presented as the "only game in town".[44] Her view is echoed by Alexander et al, who state that the English-language media relied primarily on official accounts of what happened, creating a biased view for readers and journalists.[45] It is also important to note here a strong current among the middle class to invest in private security, which displaces the state as that which has the monopoly on the legitimate use of violence. As will be discussed in the chapters to follow, the relationship between Lonmin's private security and the police was a subject of contention.

However, a comparison of the English language media with Afrikaans and isiZulu news coverage provides a more thorough illustration of the contrasting accounts of the 'facts' pertaining to the violence that held in the public domain. For example, an excerpt from an article in the isiZulu newspaper *iSolwezi* titled '*Amaphoyisa alalise uyacaya emayini*' ('Police massacre many in the mines') begins with the description of the events on 16th August as follows:

> The police of this country yesterday created destruction among striking miners at the Lonmin Marikana Platinum mine when they shot at the miners and wiped them away. At the time of writing yesterday evening the number of those who were killed and wounded in this disaster at the mine was not yet established. In a report on television news channel E.TV, they confirmed the names of 12 people. Some of the miners were injured very badly, since it was necessary that a large number of ambulances hastened to come to help, and the hundreds of workers on strike made room for them at the mountain where the strike began.[46]

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[43] Burton and Carlen, *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State*.

[44] Duncan, "South African Journalism and the Marikana Massacre: A Case Study of an Editorial Failure.", 19

[45] Alexander et al., *Marikana: A View from the Mountain and a Case to Answer*.

[46] As cited in Carolyn.E Holmes, "Marikana in Translation: Print Nationalism in South Africa's Multilingual Press," *African Affairs* 114, no. 455 (2015): 271–94., 284

In comparison, while the presentation of the event in the Afrikaans newspapers *Die Burger*, *Die Volksblad* and *Die Beeld* was nearly the same as one another; it was starkly different to the presentation of the event in *iSolwezi.* The Afrikaans newspapers recounted the event as follows:

> Shock waves were sent around the world yesterday by the worst police violence since South Africa's political transition. In which 18-20 people at Lonmin's Marikana mine were shot. The shooting erupted yesterday just after 16:00…when a group of protestors, armed with machetes and spears, stormed a police line. The policemen were nervous because the strikers had stolen firearms from two policemen in the riot on Monday afternoon after the strikers hacked a fellow hostel resident to death. As the miners stormed the group, the policemen opened fire on them with automatic rifles and pistols.[47]

The key differences are found in the use of active verbs in attributing the acts of violence to particular agents or groups. The piece in *iSolwezi* centres on the actions of the police who "created destruction" and wiped the striking mineworkers away. It hones in on the injured miners in a way that is more sympathetic to the "hundred workers on strike". Another significant point is the terminology used to describe the violence. The *iSolwezi* article utilises the isiZulu word for 'massacre' in its title, as well as the word *isibhicongo* - an expressive term meaning catastrophe or devastation - to refer to the violence.[48] There is no reference to the "criminality" of the strike nor those who participated in it.

The Naspers papers use a passive linguistic phrasing in the opening sentences before attributing the eruption of shooting as a response to the strikers "armed with machetes and spears" who "stormed" the police. This presents the strikers as violent and threatening, and the police as being under imminent threat.[49] *Die Volkblad* and *Die Beeld* went on to publish two opinion pieces in the days that followed with headlines stating that the police reaction was "*waarskynlik binne regte*" – that the police were likely within their rights.[50] This indicates an attempt to digest

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[47] As cited in Holmes., 285

[48] Holmes., 286

[49] Holmes., 285

[50] van Wyk, "Dit Is Kriteria Vir Optred: Polisie 'Was Waarskynlik Biine Regte'" [These are the criteria for action: the police were likely within their rights]; van Wyk, "Polisie Tree Op Binne Sy Regte Met

the violence using a legal framework of understanding in the attempt to define the police's use of force as justified in the circumstances.

Another response came from left academic circles and civil society groups, sparking critical engagement with the Marikana event that was sustained throughout the commission, as well as after it had come to an end. A meeting was hosted at the University of Johannesburg to discuss an appropriate response. According to Kally Forrest, there were discussions concerning how the state should respond, which was contested. Some believed that a judicial inquiry would be appropriate, whilst other maintained that a civilian commission would be better. Another view was that the best way to attain truth and justice would be to hold criminal prosecutions, especially because the "killers as the main massacre site were known",[51] while there were also suggestions that there should be another TRC. However, on 12 September President Jacob Zuma appointed the commission of inquiry. This prompted another series of discussions regarding whether there ought to be a parallel commission. As Forrest stated, "A judicial commission, as we know, takes a particular view of things and it's very legalistic," hence it would not have the breadth required to get to the underlying causes of the Marikana violence.[52] A parallel commission was not arranged, due to the resources that would have been required. However, the Marikana Support Campaign was formed, a civil society community organisation which, according to the description in its Facebook page, "works towards ensuring that those responsible for the Marikana Massacre are brought to justice."[53]

The first hearing took place on 1 October 2012 with the final sitting occurring over two years later on the 14th November 2014. The final report was submitted to president Jacob Zuma on

Reaksie."[acting within their rights with reaction] in Holmes, "Marikana in Translation: Print Nationalism in South Africa's Multilingual Press.", 285 fn 46

[51] Kally Forrest, "Marikana Commission Unearthing the Truth or Burying It?," 2015., 2

[52] Interview with Kally Forrest. Wits University. 29 May 2019. Claire Lester

[53] https://www.facebook.com/pg/MarikanaJustice/about/?ref=page_internal

31 March 2015 and after a protracted period, following pressure from civil society, an address was given on national television on 25 June 2015 where Zuma summarised the main findings, following which the Report was released to the public. As stated in the introduction, the Marikana Commission was chaired by retired judge of the Supreme Court of Appeal, Justice Ian Farlam (Hereafter, "Farlam"). The other commission members were Advocate Bantubonke Tokota, SC and Advocate Pingla Hemraj, SC who had both served as High Court Judges. Originally mandated to operate for a four-month period, its deadline was extended several times.[54]

5.3 Defining Legislation

It is worth noting a personal interaction I had with Justice Ian Farlam, the chairperson of the Marikana Commission, as I sought his professional input on the process. Arriving at his home, nestled on the lush, shaded foot of Table Mountain, the serenity of the neighbourhood assuaged my nerves. Farlam greeted me warmly at the gate, welcoming me inside via his study housing hundreds, if not thousands of statute books and papers. He gestured towards the living room, where he said I could wait while he scanned his bookshelf in search of something. Before we could begin he had to find something to photocopy for me – the Commissions Act – because, as I was informed, it was the piece of legislation that set the grounds for all South African commissions. Of course, I already knew this but I was somewhat humbled by his enthusiasm, so I waited for him in the spacious sitting room. He returned holding a copy of the Commissions Act of 1947, which he said I could keep. By handing me a copy of the Act, he was providing me with the key to the commission's interpretation; the statutory framework through which he and his team would define their scope of investigation.

[54] Its deadline was extended by an additional four months in January 2013 and in May it was extended for another four months.

He began by delineating some the core features of commissions in South Africa. I was told that the President appoints commissions and issues the set of regulations. Besides being authorised by the 1947 Commissions Act, commissions of inquiry in contemporary South Africa must comply with the regulations related to their specific establishment, which vary depending on the commission and the matter under investigation. Below, I analyse the Marikana's defining legislation, and they specific ways in which this influenced its approach to the violence seen on 16th August, 2012.

5.3.1 Terms of Reference

The commission's terms of reference indicate that it was an ad-hoc investigatory commission, tasked to, "inquire into, make findings, report on and make recommendations," concerning the key actors involved in the dispute, "taking into consideration the constitution and other relevant legislation, policy and guidelines".[55] While making recommendations was part of its core function, there is no legislation that compels the government to adopt or implement these recommendations.

The terms of reference were set out in a way which centred the commission's gaze on the respective role of each 'party': the conduct of Lonmin Plc, the SAPS, AMCU and NUM. When compared with other post-apartheid commissions established to investigate accidents or incidents of violence in the mining sector this form appears standard. Comparable examples include the Commission of Inquiry into the Accident at Vaal Reefs No. 2 Shaft during the night of 10 May 1995, an incident in which 104 mine workers were killed;[56] and the Commission of Enquiry into violence at the East Driefontein, Leeudoorn and Northam Mines on the 12

[55] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province." 1 (1), 4

[56] "Vaal Reefs, 10 May 1995," Minerals Council South Africa, accessed April 8, 2020, https://www.mineralscouncil.org.za/special-features/113-we-remember-vaal-reefs.

September 1996.[57] In the case of the former, the represented "parties" included the NUM,[58] the department of Mineral and Energy Affairs, the Mining Industry's Employment Grouping, the Government Mining Engineer's Department, the Officials Association of South Africa and the Attorney General; and in the latter the represented 'parties' included Goldfields of South Africa Ltd ("Goldfields") -- the holding company of the companies who owned the three mines; NUM and the United Workers union of South Africa ("UWUSA").[59] As these were strictly investigatory commissions, there is technically no need to refer to groups as "parties", which refers to legal parties of the plaintiff (or the person filing a suit); the defendant (the person who is being charged with a crime); petitioner and so forth. The Marikana Commission report states that although participants, "were not parties in the strict sense, they were treated as such and were for convenience referred to as parties".[60] The affective consequence of this contributed to the courtroom aesthetic and primacy given to legal discourse and procedures in approaching evidence pertaining to the cause of the violence.

Related to the parties under investigation, the mandate had initially included that the commission should investigate the, "role played by the Department of Mineral Resources or any other government department or agency in relation to the incidents and whether this was appropriate in the circumstances, and consistent with their duties and obligations according to law".[61] This meant that the commission was to specifically investigate the actions of a state department and evaluate whether it was exercising legitimate institutional power. In the

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[57] Myburgh, "Report of the Commissions of Inquiry into Recent Violence and Occurences at the East Driefontein, Leeudoorn and Northam Mines."

[58] Represented by Advocate K S Tip, Mr K Pillay and Ms N Dagnall

[59] "Commission of Inquiry into the Vaal Reefs Mining Accident," 1995.

[60] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province." 1 (4), 12

[61] "Terms of Reference of the Commission of Inquiry into the Tragic Incidents at or Near the Area Commonly Known as the Marikana Mine in Rustenberg, North West Province, South Africa." In Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 4

planning of the commission's work, the investigation into the Department of Mineral Resources would comprise 'Phase 2', which was intended to investigate the long-term causes or impetus which may have led to the outbreak of conflict in August 2012. However, a proclamation (no.30 of 2014) signed by then-president Zuma and Justice Minister Jeff Radebe on 25 April deleted clause 1.5 from the commission's terms of reference.[62] According to Terry Bell, this deletion, "bans the commission into the Marikana massacre from investigation [sic] government complicity".[63]

The terms of reference and regulations also sought to clarify the commission's relationship to the law and the legal branches of the state in a post-apartheid context. Among other things, paragraph 5 of the terms of reference enjoined the commission to, "refer any matter for prosecution", where appropriate. Hence, the commission saw it as within its mandate to make recommendations related to civil and criminal liability. However, the report also states, "The Commission is mindful of the fact that it has not been possible (nor would it be appropriate) to hold a series of mini-criminal trials in respect of the persons whose conduct has to be scrutinised by the commission in carrying out its terms of reference".[64] In its interpretation of this, the commission report states that its role could not usurp the, "functions of the National Prosecuting Authority," as laid out in section 179 of the Constitution.[65]

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[62] The Report states that President Zuma wrote a letter to Chairperson Farlam dated 24 April 2015, which stated that the investigation of the role played by the Department of Mineral Resources and other agencies referred to in paragraph 1.5 of the terms of reference would have to be "considered at a later stage", guided by the commission's findings related to the 9-12 August 2012. Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 14

[63] Terry Bell, "Government Off-Limits at Marikana Commission," Fin24, 2014, https://www.fin24.com/Economy/South-Africa/Governmint-off-limits-at-Marikana-commission-20140510.

[64] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 19

[65] The Report states that while the Directors of Public Prosecutions would not be bound by the Commission's recommendations, the commission would expect the recommendations to be carefully considered. Farlam., 19-20

The report states that it would be "undesirable" as well as "unfair" for the commission to find persons "guilty" of any offences.[66] This is because commissions are not courts of law, and although the *procedure* is quasi-adversarial it does not meet the due process requirements of making legal findings of criminal accountability.[67] Instead the commission decided it would recommend where persons' conduct ought to be further investigated and whether another appropriate authority should pursue prosecutions.[68] To guide its fact-finding, the commission accepted input from the civil society legal aid organisation, the Legal Recourses Centre (LRC), which called upon the commission to make findings, "that particular persons or parties may be 'responsible' for deaths and injuries and other events at Marikana," where there was, "sufficient evidence to establish a prima facie basis for responsibility."[69] In making findings of responsibility - which may include potential civil and criminal liability - the LRC argued that it would not be necessary to apply strict standard of the balance of probabilities or reasonable doubt, which meant that the commission ought to take a more "flexible approach to assessing the factual issues".[70]

5.3.2 Regulations and the *A*ffect

Every commission of inquiry established under the Commissions Act will have a unique set of regulations published to guide the way it will execute its work and approach its task.[71] The regulations for the Marikana Commission were published on 28th September 2012. In a sense,

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[66] Farlam., 20

[67] The Report states that due to limited time available to cross-examine witnesses., 18

[68] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 20

[69] LRC Heads of Argument, par 114

[70] LRC Heads of Argument cited in Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province."

[71] Regulations published in the Government Gazette 35730 of 28 September 2012 and amended by proclamation R66 of 2012, published in Government Gazette 35875 of 14 November 2012.

the regulations are a set of strict guidelines to steer the procedure of fact-finding and the legal status of evidence gathered.

Two regulations were particularly important for the Marikana Commission's fact-finding and truth-seeking procedure, and the relationship between the evidence gathered and potential criminal or civil cases. The first was that the commission would not have the protection of self-incrimination, meaning that no one giving testimony or subject to cross-examination could refuse to answer a question.[72] To compensate for this, Regulation 9(2) outlined that any potentially incriminating evidence would not be admissible in a subsequent criminal trial, unless that person were charged with an offence related to section 6 of the Commissions Act, which is lying at the commission, or perjury.[73] Combined, these regulations strongly suggest that the goal of fact-finding took precedent of that of retributive justice. Ensuring that information gathered during the proceedings could not be used in a subsequent criminal trial can be likened to the TRC's 'carrot and stick' approach, where a perpetrator could qualify for amnesty for their past crimes if they told the whole truth (among other prerequisites).[74]

That the commission's main goal was 'fact-finding' is supported in the Report, which cited an excerpt from the 1949 Commission of Enquiry into Riots in Durban on the "proper function of a commission of inquiry". This is:

> …to find the answers to certain questions put [by the State President] in the terms of reference. A commission is itself responsible for the collection of evidence, for taking statements from witnesses and for testing the accuracy of such evidence by inquisitorial examination – inquisitorial in the Canonical, not the Spanish sense.[75]

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[72] Regulation 9 (1) stated "No person appearing before the Commission may refuse to answer any questions on any ground other than the privilege contemplated in section 3(4) of the Commissions Act, 1947 (Act No. 8 of 1947). "Regulations: Commission of Inquiry into the Tragic Incidents at or near the Area Commonly Known as the Marikana Mine in Rustenberg in the North West Province, South Africa," Pub. L. No. 35730, 9 (2012).

[73] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 8

[74] See Sarkin-Hughes, *Carrots and Sticks: The TRC and the South African Amnesty Process*.

[75] UG 36-49: Report of the Commission of Inquiry into Riots in Durban cited in Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province."

The report continued, stating that the function of commissions of inquiry are "generally not truly judicial" due to the fact that "there are no facts in issue to be decided judicially, therefore rules of evidence may be relaxed".[76] It also cited the case *S v Sparks and Others 1980(3) SA 952 (T)* where it was stated:

> A court of law is bound by rules of evidence and the pleadings, but a commission is not. It may inform itself of facts in any way it pleases – by hearsay evidence and from newspaper reports or even through submissions or representations on submissions without sworn evidence.[77]

It was reiterated that the commission a fact-finding body and was "not a court of law nor even a quasi-judicial body".[78] Despite the statement that the commission was not a court of law nor a quasi-judicial body it would draw on legal precedent and principles in the organisation of its proceedings.

Another one of the regulations stated that all parties were entitled to legal representation. The most visceral effect of this regulation was that there was an expectation for each party to be accompanied by legal counsel. This led to a highly legalised process, where lawyers seemed to mediate every statement, interrogate each question and painstakingly dissect the admissibility and relevance of interventions. It argued that this caused the process to become highly polarised. As Forrest stated,

> The judge made the decision to conduct the inquiry as a quasi-judicial court hearing. Legal counsel confronted each other with broadly human rights parties pitted against the police and Lonmin and competing trade unions lining up against one another.[79]

Adv. Dali Mpofu represented the 270 miners who were arrested following the shooting, who were detained and charged with common purpose murder and attempted murder, but were subsequently released with charges provisionally withdrawn pending the outcome of the

[76] Chapter 2: Principles Applied By the Commission in Conducting its Proceedings. Farlam., 22

[77] Farlam., 23

[78] *Bell v Van Rensburg NO 1971(3) SA 693 (C) at 719* cited in Farlam.

[79] Forrest, "Marikana Commission Unearthing the Truth or Burying It?", 8

commission's proceedings.[80] Mr Dumisa Ntebenza represented the twenty families of those who died during the period under investigation by the commission, with the aid and instruction of the Socio-Economic Rights Institute (SERI) Law Clinic, which is a civil society non-governmental organisation (NGO). Another legal team represented AMCU, including Stuart Wilson the Director of SERI, and Adv. Heidi Barnes. The Chamber of Mines was another 'party', represented by the legal firm Brink Cohen Le Roux. Specifically, when introducing itself Willem Le Roux stated, "We represent the Chamber of Mines of South Africa and will [be] representing the interests of members of the chamber."[81] State institutions under investigation, like SAPS, also required their own legal counsel. Adv. Ishmael Semenya represented the SAPS, while Cassie Badenhorst of the Supreme Court represented the Department of Mineral Resources accompanied by senior state attorney Adv. Dikeledi Chabedi and other legal advisors.[82]

As the commission was an official inquiry and not a court of law, the groups were not 'parties' in the strict sense of the term. However, the Report acknowledges that, "they were treated as such and were for convenience referred to as parties."[83] The affective consequence of this is its normalisation of the legal discourse at the commission, but also operated to ingrain an understanding of the 'parties' in legal terms and as legal subjects. The commission itself operated in a courtroom environment which was, according to Alexander et al, "alienating for ordinary people."[84] It is clear, from the multiple court cases cited in the report, that the commission drew on legal precedent in its approach to key elements of its conduct. Because of

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[80] Adv. Dali Mpofu. Transcript, Marikana Commission. Day 1. 1st October 2012, 16; Mandy De Waal, "Apartheid and the Marikana Murder Charges: A Common Purpose Indeed," Daily Maverick, 2012, https://www.dailymaverick.co.za/article/2012-08-31-apartheid-and-the-marikana-murder-charges-a-common-purpose-indeed/.

[81] Transcript, Marikana Commission. Day 1. 1st October 2012, 17

[82] Transcript, Marikana Commission. Day 1. 1st October 2012, 15

[83] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 12

[84] Alexander et al., *Marikana: A View from the Mountain and a Case to Answer*., 21

this, one can assert that the commission, like the TRC, was a legal institution and its fact-finding related to the violence in question was guided largely by legal principles.

However, while one can note that the terms of reference and regulations, which were set by the President, determined a legalised process; a significant point is that they changed as the commission began its work. Regulation 7 stated that, "Any officer or person designated…by the Chairperson may be present at any stage of the inquiry or the gathering of information or hearing of evidence ay the inquiry". However, on day 1 of the commission's proceedings it was noted that none of the family members of those who had been killed or injured were present. Addressing the Chairperson, Adv. Mpofu stated:

> Now I want to put it more pointedly…and say a prayer, so to speak that…the commission should do whatever it is in its power – and we know that its powers are not unlimited – to influence the powers that be that the poor people that we represent, the victims should not be disadvantaged merely because of the economic station in life and that such assistance, financial and otherwise, that has been extended to this commission should also cover these people.[85]

Here Mpofu highlights the distinction between the power of the commission and the power of the State – the "powers that be". It is a vignette of the image of a commission as mediating between the state and society; of listening to society and speaking to the state. Mpofu argued that there was an obligation to the victims to provide for their families' attendance in their search for the truth stating, "although there are no parties as such here, they [are] all in search of the truth".[86] He stated that if those families were not supported in their attendance then "the search for truth, reconciliation and justice that we talk about here cannot happen" in the, "skewed situation where some of the parties…have access to those tens of millions and the rest of the parties who are crucial to the search for truth have to be scraping around and giving each other lifts just to get here".[87]

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[85] "The Marikana Commission of Inquiry Transcription." Day 1, p36

[86] "The Marikana Commission of Inquiry Transcription." Day 1, p36

[87] "The Marikana Commission of Inquiry Transcription." Day 1, p 37

As a consequence of this intervention and additional social pressure the commission's regulations were amended.[88] The amendments declared that the Secretary would need to make the necessary arrangement – transport and accommodation costs - to have the families or representatives of the families "who died in the tragedy" to attend the commission's proceedings for as long as they wished.

There was public pressure for the appear to address the core criteria outlined by Ashforth in his account of the 'Grand Tradition' of commissions in South Africa: representativeness and expertise. It is important that various sectoral interests are represented at an official commission, to lend the process legitimacy in the eyes of the public. The employment of experts to assist the commission rests on the notion that certain questions require expert deliberation, and it is through the utilisation of experts that authority is given to outcomes and recommendations.[89]

The legal approach is addressed more at length in Chapter 6, which follows. The next section draws out discourse on violence evident in the commission's defining legislation.

5.3.3 Discourses on Violence in the Founding Legislation

In Chapter 2 I articulated the notion of discourse relevant to my study. I stated that discourse, in this context, was used more in line with the common usage, to refer to a relatively comprehensive and systematically articulated approach to speaking about an area of social life – be that a Feminist discourse, medical discourse, or legal discourse. It was also asserted that discourses are related to social practices, which often relate to a non-discursive domain and that one may identify different discourses *on* violence that are bound up with processes of legitimation and delegitimation. Citing Williams, it was stated that public definitions of what

[88] The amended regulations were published on 14th November 2012

[89] Ashforth, "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms," 1990., 14

constitutes violence is a primarily political act, one which involves the naming of certain acts as violence or as violations. Through as analysis of the commission's regulations and terms of reference, one can begin to identify a particular discourse and approach to presenting the violence under investigation as the terms of reference is written in such a way as to ascertain each of the parties' relationship with, and complicity in the violence.

For example, regarding Lonmin, the commission sought it investigate whether the response to the "threat and outbreak of violence which occurred on its premises" was appropriate. This phrasing presents an underlying assumption that Lonmin was not directly involved in the "violence", but that the "violence" was carried out by other parties on the company's premises. The terms of reference employs seemingly euphemistic language in describing violence associated with Lonmin's actions. The next sections [1.1.3-1.1.6] provide that the commission ought to investigate whether Lonmin contributed to an "environment…conducive to the creation of tension, labour unrest", or "disunity among its employees", or "other harmful conduct" ; and ascertain whether Lonmin directly or indirectly caused "loss of life" or "damage to persons or property".

In comparison, the discourse on violence in the terms of reference related to the conduct of the unions, AMCU and NUM, is far more suggestive of the illegitimacy of their actions. For example, point 1.3.2 and 1.4.2 contains that the commission should investigate the extent to which AMCU and NUM had "exercised effective control over its membership and those allied to it in ensuring that their conduct was lawful and did not endanger the lives and property of other persons". The phrasing is suggestive of the discourse of the striking mineworkers who were operating without the authorization of the union, and that the mine workers were out of control. The criterion for the assessment of the union's actions is also suggestive of a more severe causal relationship to the violence expressed in the words "lawful" and "endanger…lives and property". It also potentially steers the inquiry towards findings that are

more incriminating for the unions. If the actions of union members is found to be unlawful (for example, engaging in an unprotected strike) then the unions are shown to be unable to 'control' their members, and the members' actions are presented as unlawful and having endangered the lives and property of other persons. The locution used in relation to the actions of the unions is vastly different to that used in relation to Lonmin. The linguistic formulation of the terms of reference holds the assumption that Lonmin acted lawfully. The men on strike can *endanger*, while Lonmin can potentially contribute to disunity.

The legitimist discourse on violence is evident in relation to the SAPS. First, the terms of reference contains that the commission should inquire into, "the nature, extent and application of any standing orders, policy considerations, legislation or other instructions in dealing with the situation." Hence, in relation to violence the commission had to evaluate whether the police were acting in line with the law and regulations related to the legitimate use of force. Hence, the terms of reference stated that the commission should determine the "precise facts" related to the "use of all and any force and whether this was reasonable and justifiable". There seems to be a systematic bias built into the framing of the inquiry into the police's use of force because the police, as a state institution is expected to wield force that is legitimate.

Determining precise facts regarding whether the use of force by police was reasonable and justified was commonplace for colonial 'tumult commissions' – commissions of inquiry used by successive colonial regimes to inquire into state security's use of excessive force to quell a riot or uprising. Under the Apartheid regime -- as seen with the Wessels Commission set up after the Sharpeville massacre and the Cillié Commission following the Soweto Uprisings -- the South African state sought to establish itself as a legal-rational state that operated in accordance with the rule of law. The previous chapter detailed the way the legalistic façade was leveraged to indemnify the use of the apartheid security sector to violate the basic rights and political freedoms of the black majority population. Here, commissions were institutional

modes through which the state would deal with political atrocities in public, whilst at the same time justifying their unfortunate necessity. While the Marikana Commission was established in the context of a constitutional democracy, establishing whether the state security's use of force was justified remained a key function of the Marikana Inquiry.

5.4 Conclusion

The Marikana commission's framing is suggestive of the normative issues regarding the justification or legitimacy of the incident of violence under investigation. Hence, while, as a commission of inquiry, it sought to present itself as a neutral 'fact-finding' body; the very subject matter of violence being investigated necessitated the employment of discourses on violence: whether the act in question can be called 'violence', evaluating the legitimacy of the 'violence' and the right of the individual or institution to wield violence. Considering this, the section that follows analyses the report's assessment of the facts in relation to describing the causes and nature of the violence under investigation, and whether the violence was reasonable and justified. To do so, the commission would rely on legal criteria and approaches to decide on the reasonableness and legitimacy of the violence.

This is because, even though the commission was intended to be merely inquisitorial; having lawyers lead the process meant that legal habits of those lawyers, and ingrained principles, were the framing through which the terms of reference was interpreted.

6. Legitimist Discourse on Violence in The Marikana Commission Report

6.1 Introduction

The violence seen at Marikana during the week of the 9th to 16th of August 2012 spurred the emergence of contested public discourses on violence. These discourses may be characterised as legitimist discourses on violence, which contained within them implicit views regarding the validity of the mine workers' strike and the response of the police. In this dissertation I analyse discourses on violence and their effects in commissions of inquiry established to investigate the forceful state repression of mining sector protest, with my central cases being the Truth and Reconciliation Commission (TRC) of South Africa and Marikana Commission. I have sought to focus on the legal approaches these commissions take, the historical and conceptual development of these particular legal approaches in the South African and global context, as well as the implications of these legal approaches on official findings related to questions of 'truth' and 'justice' after state violence.

Previous chapters in this thesis have touched on the use of commissions of inquiry in the 'discovery' of laws to govern colonies, which I attributed to the project of universalising international law as part of British imperialism [2.2.2 Discovering the Laws to Govern Colonies]. I argued that a consequence of the establishment of laws in colonies, particularly on the African continent, was to define the legal parameters of citizen and subject, of which members of the population would be ruled by civic law, and which would be governed by custom, or through indirect rule.[1] Moreover, examples of commissions investigating violence in extractive industries (like the Forster and Moyne Commissions in Trinidad, and the

[1] Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*.

Witwatersrand Disturbances Commission in South Africa) exemplified the often ambiguous relationship between official commissions and the state, particularly how claims to impartial fact-finding through legal approaches served specific political and economic interests of powerful capitalist corporations. Drawing from these commissions' findings, the relationship between their outcomes and the interests of the state and Capital were explored. Evidently, official reporting on violence against striking workers was a key feature of oppressive state structures to control narratives of violence, particularly those that could potentially disrupt existing exploitative economic relations of production.

The Marikana massacre, which occurred twenty years after the overthrow of apartheid, constituted the lethal suppression of a mine worker strike at Lonmin Platinum mine. As mentioned in Chapter 4 Lonmin is a London-based company, formerly the mining division of Lonrho. As the previous chapter detailed it began as a strike for higher wages and led to a wave of killings of mine workers and police officers before it exploded into the largest post-apartheid police killing of workers engaged in protest action. For some, the event went against the ANC's democratic, nationalist and pro-worker stance;[2] for others, the state's deployment of the police was wholly consistent with the neoliberal tendency to protect capitalist interests at the expense of black lives.[3] The fact that then-Deputy President of the ANC Cyril Ramaphosa was a shareholder at Lonmin at the time, and accused of playing a leading role in the violent state response, added credence to the stance that state power was utilised to defend the interests of mining capital and the interests of the ruling class. This fed the charge of "toxic collusion" between the state and Lonmin that emerged during the commission and which is the subject of Chapter 7 that follows on from this one.

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[2] Lucas Mafu, "Fiction, Reality and Contested Memory in God's Bits of Wood and the Marikana Commission Report," *Journal of Literary Studies* 35, no. 1 (2019): 1–18.

[3] Vishwas Satgar, "Beyond Marikana: The Postapartheid South African State," *Africa Spectrum* 2, no. 3 (2012): 33–62.

This chapter continues my analysis of the Marikana Commission's approach to fact-finding by tracing the official discourse on violence in the final report. First, in Section 6.2 I establish that the commission adopted a legal approach to fact-finding and demonstrate the implications of this on the dominant discourse of violence. I show that while the commission sought to present itself as even-handed, neutral and objective – as has been the orientation of official commissions particularly in the Modern state era - that the legal approach contains implicit moral and political biases regarding the legitimacy of certain forms of violence. I find that the official discourse presents the violence of the striking workers, and decision to strike outside the legal bargaining arrangements, as main cause of the violence. In Section 6.3 I return to an argument made concerning the South African TRC's approach to violence and its inability to conceptualise the structural violations wrought by the mining industry as gross human rights violations, even though the PNUR Act stipulated that the TRC should investigate violations of a structural nature. Structural violations were not a core focus of the Farlam commission for phase 1, which aimed to establish legal responsibility and legal causation. However, it held a series of seminars in phase 2, to address issues of what was called "social responsibility and sociological causation", where details concerning the history of structural violence in the mining sector emerged.[4] However, I argue that the commission struggled to digest the issues of structural violence that emerged during phase 2 as a result on its fidelity to legal modes of forensic argumentation in explaining the emergent violence at Lonmin mine.

6.2 Official Narrations of Violence in the Marikana Commission Report

Like the TRC, the Farlam Commission has received both praise and criticism from many sectors of society. Some of these critiques related to the commission's fact-finding, where it was accused of hiding the truth. For instance, Joseph Mathunjwa referred to the Farlam

[4] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 9 April 2014."

Commission as the "Commission of Omission", implying that key portions of the truth were omitted from the official narrative.[5] It has been accused of operating to clear senior state officials of culpability for the killings and failing to recommend restitution to the slain mineworkers' dependants or those who were injured.[6] These factors have diminished the report's reliability among portions of society, where newspaper articles and statements from civil society have both affirmed and repudiated the "official truth" as presented in the Farlam Commission report. During the commission it became clear that many police, and some Lonmin officials, had lied and/or attempted to hide relevant documents or tampering with evidence. As stated by Evidence leader Geoff Budlender in his closing arguments,

> There is good reason to doubt the truthfulness of a large number of the witnesses to gave evidence to the commission. It has been for me, one of the most dispiriting aspects of this commission. In an attempt to avoid accountability many witnesses have avoided truth-telling.[7]

Nonetheless, as an official truth-seeking commission the report is a significant document that presents an "objective" narrative of the strike and its consequences. As Mafu asserts, "Upon its positive reception as "neutral" and open-ended product of a judicial inquiry, hinges the legitimacy of the state in the eyes of its citizens".[8] This section provides an analysis of the Marikana Commission report's narration of the event with a focus on the legal approach. Section 6.2.1 is an overall analysis of the narrative, where I highlight the linguistic techniques by which the Report attributes overall blame for the violence to the strikers who were acting outside of the legal collective bargaining arrangements. Section 6.2.2 focuses on the related

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[5] Theto Mahlakoana, "Mathunjwa: Farlam Commission One of Omission," *Eyewitness News*, August 15, 2019, https://ewn.co.za/2019/08/15/mathunjwa-farlam-commission-one-of-omission.

[6] Mafu, "Fiction, Reality and Contested Memory in God's Bits of Wood and the Marikana Commission Report.", 5

[7] Geoff Budlender. Evidence Leaders Closing Arguments. "The Marikana Commission of Inquiry Transcription.", pp38494/5

[8] Mafu, "Fiction, Reality and Contested Memory in God's Bits of Wood and the Marikana Commission Report.", 8

aspect of the discourse which presented the mine workers as a violent and irrational "crowd" driven by supernatural belief.

6.2.1 The Illegal Strike and Unruly Crowd: Depoliticising the Mineworkers

One of the most glaring examples on the effects of discourses of violence was finding the language with which to speak of the "incident" on 16th August – was it a tragedy or a massacre? Finding the appropriate language to render the violence under investigation was a subject of debate during the commission's process. The contest over the official language to speak of what Adv. Mpofu referred to it as the "Marikana crisis" is indicative of the potency of discourses on violence and the wielding of legitimate (state) power. As stated in Chapter 2 [2.2.1], Weber's conception of the state is that which successfully has "monopoly of *legitimate* physical violence within a certain territory".[9] A 'massacre' denotes savage and excessive killing of people, associated with killing that it irrational and indiscriminate. It is inconceivable in modern society that a massacre can be construed as *legitimate* violence. Confirming that the post-apartheid, democratic state executed a 'massacre' opens the terrain of culpability and that it was in fact state or Lonmin personnel who acted illegally. The 'massacre' versus 'tragic' narratives allow for certain commitments and makes possible a certain rendering of culpability and guilt. The tragic discourse of official exoneration affirms that the police were performing their duty in sustaining law and order; whereas the 'massacre' narrative is an indictment on the police and ANC government, as well as raises the question of Lonmin's complicity. In this section I argue that although the commission sought to be even-handed in its findings against the various parties, the overall narrative was that of the criminality of the striking mine workers, even where video footage showed that the strikers were not behaving violently.

[9] Weber, "The Profession and Vocation of Politics.", 310-311

In his opening statements Adv. Semenya (representing the SAPS) reminded the commission that the official discourse referred to the event was a "tragedy". Passive language is used with the expressions, "loss of life" and "lives were lost" when referring to the people who were killed, which linguistically removes the agent of the killing, and the person who is potentially culpable:

> The police service are duty-bound to use this opportunity and the forum today to express its deep regret and the loss of life that gave rise to what the government has official termed the Marikana tragedy. Lives were lost among the rank of mineworkers, ex-mineworkers, mine supervisors, mine security and the members of the police service itself. But before any of these persons or those injured were mineworkers, supervisors or police officers, they were in the first instance citizens and residents of this great nation.[10]

The statement by Adv. Semenya can also be read as his attempt to neutralise the distinction between victim and perpetrator in his assertion that "lives were lost" from all sides. He also emphasises the shared subjectivity as citizens or residents of South Africa, evoking the images of all actors as connected to the "imagined community", which her refers to as 'this great nation'.[11] It is a nod to the temporal moment whereby the present is no longer a time where some subjects are excluded from civil society and inadvertently affirms the constitutive relationship between rule of law, legitimate government and the contractual obligations of citizenship. The statement also animates an image of a singular state as distinct from Mamdani's concept of the bifurcated state forged through the colonial encounter, which commissions of the past assisted in catalysing.[12]

After repeated objections by the police it was decided that the word 'massacre' was not to be used during the commission's proceedings. Rather, parties were requested to use the term "tragedy" which implied a more neutral stance related to questions of culpability. In a statement

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[10] "The Marikana Commission of Inquiry Transcription." Day 3, 118-119

[11] Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*.

[12] See Chapter 2; Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*., 16

indicative of the commission's role to provide an authoritative stance on the contentious matter, Farlam asserted, "Whether it's a massacre is a matter *we'll decide at the end of the day"* (Emphasis mine).[13]

In its explanation of the killings that occurred on August 16th, the commission was required to investigate the preceding days (from August 9th). On August 16th it was also revealed that killing took place in two locations, which became known as 'Scene 1' and 'Scene 2'. Scene 1 was most covered by video footage showing the strikers confronting the police line. Scene 2 is an area encircled by a group of rocks and was referred to as 'koppie 3' or 'small koppie' at the commission. Others referred to it as the 'killing koppie' or the 'killing zone'.[14] The report does not contain an executive summary of its findings. Rather, findings are made throughout the report, often clouded by legalised language and with reference to case law. In terms of its form, chapters are arranged either around clarifying particular issues or providing an "objective" account of what occurred on a particular day. My analysis found that the way the violence was narrated in the report tended to paint the striking mineworkers in a way which presented them as violent, criminal or threatening, emphasising that they acted outside the legal parameters for collective bargaining.

Chapter 4 of the report detailing "events that occurred on Thursday 9 August 2012" offers several examples where the mine workers are presented as unruly. The narrative foregrounds that this was an unprotected strike, the implication being that the strikers were breaking the law and thus affirming the public discourse that those participating in the strike action were engaging in criminal activity. This discourse is sustained in Chapter 5, which addresses a series

[13] Judge Farlam cited in David Bruce, "A Massacre by Any Other Name," *Mail and Guardian*, August 14, 2015.

[14] G Budlender et al., "Heads of Arguments of Evidence Leaders, Marikana Commission of Inquiry" (Cape Town, Johannesburg and Pretoria, 2014)., 447-449

of incidents occurring on Friday 10th August.[15] On numerous occasions the report refers to the large and growing "size of the crowd" and repeating that both unions, the Association of Mineworkers and Construction Union (AMCU) and National Union of Mineworkers (NUM), had distanced themselves from the strike.[16] The report also states that "no application [for the strike] had been made in terms of the Regulation of the Gatherings Act".[17]

While stating explicitly that the Gatherings Act had been contravened, the report repeatedly refers to the group of strikers as, "the crowd". Using this terminology, as opposed to a more active description like "strikers" depoliticises the action, deflating the group of agency – political and rational motivation for risking their livelihoods (the workers were threatened with dismissal if they continued the strike) and subsequently lives by engaging in the strike. As has been noted previously in the dissertation, political violence can be differentiated from other forms of violence, like being hit by a car for instance, as it makes claims to moral or public legitimation for any injury inflicted upon others and by the "representative character of the agents and targets of these acts of violence".[18] Using the term "strikers" would mean taking seriously that which was being struck for (or against) and would necessitate engaging with the substance of the strike. The imagery one gets when reading the report is one of a criminal crowd moving about Lonmin mine campus intimidating other mine workers into joining the strike. For example, the report refers to a conversation held between Lonmin security managers Mr Sinclair and Mr Blou with Mr Abey Kgotle, the executive manager for human capital of

[15] These events were identified as follows: "A) the march to Lonmin Platinum Division offices and the meetings with Lonmin Security; B) whether the crown was armed and the mood of the crowd; C) the presence of SAPS; D) The intimidation of employees and the shooting of rubber bullets by Lonmin Security; E) Whether the shooting by Lonmin security was justified; F) The shooting of Mr Mutengwane and Mr Dlomo; G) SAPS contingency plan of 10th August 2012; and H) Lonmin's failure to apply its counter industrial response". Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 57

[16] Farlam., 58

[17] Citing the testimony of Mr Blou who stated that he was "concerned" because SAPS was not present and that the "size of the crowd" had increased. Farlam., 58

[18] Du Toit, "Discourses on Political Violence.", 6

Western Platinum, stating that Kgotle, "informed them that management would not speak to a *faceless crowd* when there were recognised and established structures in place whereby demands could be put to management" (Emphasis mine).[19]

The official discourse of the unruly and faceless crowd employed to describe the striking mine workers highlights the paradoxes of popular sovereignty in post-apartheid South Africa; or as Chowdhury articulated about the ways of speaking of the 'crowd' in Bangladesh, it is "a repository of the nuances of post-colonial sovereignty, where the popular and the uncivil come together".[20] On the one hand, South Africa is led by the ANC, whose foundational document the Freedom Charter of 1955 stated explicitly, as a core values: "the people shall govern" and "the people shall share in the country's wealth".[21] However, it is the same ANC government that is implicated in ordering the shooting of the mine workers protesting for a higher wage mining the country's wealth. The paradox of post-colonial, post-apartheid South Africa is that 'the crowd' is politically valuable when it can be harnessed to elect political parties, or to pay union fees – to legitimate established power. But when 'the crowd' moves of its own volition, outside of the prescripts of power, it is referred to as *faceless* and amorphous, without direction or reason, and should there be violence 'the crowd' is criminal. As Jonsson asserts, the masses have featured, historically, as the eclipse of reason; the antithesis of the well-ordered society.[22]

To cite a section of the report when narrating the response of the mine workers when they were informed they would need to cease their strike action and return to work it reads:

> Whilst dispersing, members of the crowd showed their displeasure, displayed aggressive behaviour, and intimated that management would have to take the

[19] Exhibit OO16 para 12 in Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 59

[20] Nusrat Sabina Chowdhury, *Paradoxes of the Popular: Crowd Politics in Bangladesh* (Stanford, California: Stanford University Press, 2019)., 6

[21] ANC, "The Freedom Charter," 1955

[22] Stefan Jonsson, *Crowds and Democracy: The Idea and Image of the Masses from Revolutions to Fascism* (New York: Columbia University Press, 2013)., 23

> consequences and would be responsible for what was to happen. Mr Sinclair said that the levels of aggression and the number of workers involved were unusual and very disturbing and not something he previously experienced. They realised that people from Karee and other mines were joining the crowd.[23]

The report cites testimony claiming that the 'crowd' were "armed…with sticks and knobkerries".[24] It also cited the testimony of Mr Blou, who stated that, "as the crowd was dispersing, threats from various people in the crowd were uttered" suggesting that, "this was not the end of the issue and something would happen further"- even though Mr Blou could not identify individuals who had uttered the threats. It states, "there were voices from the crowd with a level of verbal aggression which he had not previously experienced on the mine".[25] Mr Malesela William Setelele, the chairperson of NUM branch at Western Platinum Limited (WPL) noted that they had received several reports of strikers intimidating those who attempted to report for work on the 10th August.[26] Although this commission occurred exactly 100 years following the Witwatersrand Disturbances Commission (1913), at first glance the discourse of the criminal and violent strikers with which the report is replete is remarkably similar to that which described the strikers as "hooligans and criminals".[27] This focus in the Marikana Commission Report is indicative of the commission's concern with ascertaining the 'mood' of the striking men and whether it would have warranted the police to believe that they were justified in applying the lethal force that they did.

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[23] Mr Sinclair was the Group Mining Emergency and Security Manager of Lonmin. Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 61

[24] Farlam., 60

[25] Farlam., 61-2

[26] The report also records that Mr Malesela William Setelele was "shot dead at Marikana on 17 October 2013" fn 90; Farlam., 68

[27] Gladstone, "Witwatersrand Disturbances Commission Report.", 103

Figure 1 Photograph by Kevin Sutherland

The image above, by Kevin Sutherland, was one of the images that circulated the media and is one of at least two different photographs I found of this man licking his spear.[28] He seems to be looking directly at the viewer gripping his spear as if poised to hurl it. The image is not published with his name. In this image he is part of the 'the crowd' of other men, also holding spears. The discourse of the 'crowd' evokes a foreboding potential for harm, for the disruption of law and order. As Freud asserts, people are capable of a certain madness or excess when in a crowd.[29] 'The crowd' is savage and indistinct, corporeal, affective and irrational.[30] The 'crowd' of striking men at Marikana, holding *knobkieries* and spears with blankets wrapped around their shoulders is juxtaposed to the ordered line of Tactical Response Team security

[28] "Mr X: We Killed People at Marikana," *News24*, June 19, 2014, https://www.news24.com/news24/mr-x-we-killed-people-at-marikana-20140619.; Greg Marinovich, "The Murder Fields at Marikana," *IOL*, 2012, https://www.iol.co.za/news/the-murder-fields-of-marikana-1373581.

[29] Sigmund Freud, *Group Psycology and the Analysis of the Ego*, ed. James Strachey (New York: Norton, n.d.)., in Chowdhury, *Paradoxes of the Popular: Crowd Politics in Bangladesh*., 188

[30] William Mazzarella, "Totalitarian Tears: Does the Crowd Really Mean It," *Cultural Anthropology* 30, no. 1 (2015): 91–112., 105

officers with their shiny automatic rifles and stiffened uniforms. The lingering image evoked is one of disorder versus order. The image also captures dialectic between the individual and the crowd.

However, the report also presents a counter view expressed by Captain Veerasamy Velayudam Govender – the commander of Visible Policing who was monitoring the march from Wonderkop stadium.[31] According to his testimony the crowd's mood was "peaceful" and while some of them held sticks, he asserted that they did not appear to pose an immediate threat to the police.[32] Presenting both views can then be read as the commission's attempt to be even-handed in its balancing of views and evidence. As a post-apartheid commission, appearing even-handed was important and Farlam was conscious of the widely-held concern among portions of society that the commission would be a whitewash. Farlam was also cognisant that apart from the event's importance in the nation's eyes, it had also gained substantial international attention. As Farlam stated,

> We were very conscious of the fact that apart from internal matters in South Africa there was an enormous amount of international interest in the matter and it was clearly desirable that whatever report we prepared and presented could not be attacked on the basis that we'd been unfair, that we hadn't given people the chance to put their case. [33]

Even-handedness in the gathering and reporting of evidence fulfils the traditional role of the commission as listening to the public, lending it more public legitimacy in its presentation of "truth" [Se 2.2.1]. As a post-apartheid commission held in the context of South Africa's constitutional democracy, the representation of all voices in the final report is significant as a public enactment of democracy in action. It sets the post-apartheid, or post-colonial commission apart from the 'Native Question' ilk, which characteristically used experts to speak

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[31] Day 274, Govender, pp. 35022-35024 and Exhibit LLLL 5 in Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 65

[32] Day 274, Govender, p.35023

[33] Interview Farlam

on behalf of subject populations deemed unable to represent themselves in formal structures of government. Indeed, the 'even-handed' approach was the approach adopted in the TRC's perpetrator findings.[34]

However, even-handedness was also a common feature of past tumult commissions, those not held in democratic regimes. The even-handed approach often operated in tandem with the discourse of tragedy, which would depict the violence inflicted by the state as a series of unfortunate events in which all role players were partially responsible, ultimately absolving the state of culpability. In his analysis of the "balanced" findings in the Wessels Commission Report, that followed the formal investigation into the Sharpeville massacre, Sitze refers to this characteristic as "truth-as-balance".[35] The truth-as-balance approach applies legal reasoning evenly to all actors. However, as was asserted in previous sections, legal approaches while equally applied can have unequal consequences. It is only the mine workers who lose by it being illegal to strike without the permission of union structures.

However, a noteworthy difference between the Marikana Commission held in 2012 and past commissions like the Wessels Commission just mentioned and the Witwatersrand Disturbances Commission held in 1913 is the abundance of video footage taken at Marikana between August 9th and 16th. As stated in the previous chapter, by the 10th of August the news of the burgeoning conflict on the mine had spread and was being discussed at length in the South African media. Events were also recorded by video cameras as part Lonmin's private security paraphernalia, and by video operators attached to Public Order Policing equipment.[36] It is for this reason that

[34] The PNUR Act stipulated that the TRC ought to investigate human rights violations by the state as well as by "any political organisation, liberation movement or other group or individual" and establish accountability for any such violation. "Volume One. Truth and Reconciliation Commission of South Africa Report." 'Objectives and Functions as prescribed in the Act'., 55

[35] Wessels referred to the event as "tragic occurrences" on 21 March, 1960 for which everyone and no one was to blame. Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*., 180

[36] There was video footage shown at the commission from Mr Botha (Exhibit FFFF 1) Mr Miles (Exhibits W2, W3 and W5) and by W/O Masinya (Exhibit W4) in Farlam, 65

Terry Bell referred to the event as a "televised massacre".[37] The Farlam Commission utilised this footage as well as photographs to supplement other forms of evidence.

It has been noted that official commissions claim to present an objective, factual account of a contentious issue or past event. It was the Marikana Commission's task to investigate facts in line with the parties outlined in the terms of reference. The use of memory as historical evidence has been severely criticised by some historians. The root of critiques by scholars in the 1970s is that memory is easily distorted by one's physical deterioration or nostalgia as one ages, by the personal bias of the interviewer and/or interviewee as well as by, "the influence of collective and retrospective versions of the past".[38] Historian Patrick O'Farrell stated that oral history operated in a "world of image, selective memory, later overlays and utter subjectivity" stating that it will lead, "not into history, but into myth".[39] Bourdieu too, in his 1986 article "The Biographical Illusion" discredited the sociological weight of a singular narrative, asserting that is led to an "artificial creation of meaning" with the potential to manifest as sheer "rhetorical illusion".[40] This view challenges the notion of an unmediated biographical account. The legal profession has addressed this foundational credence of positivism through the practise of cross-examining witnesses. This is the process whereby legal truth is verified. While commissions of inquiry are not courts; cross-examination has become an adopted practice, particularly where a commission is concerned with explaining the facts around the causes of fatalities. Indeed, Judge Wessels of the Wessels Commission following the Sharpeville Massacre stated:

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[37] Terry Bell, "The Spectre of Marikana Still Looms Large," *Fin24*, 2016, www.fin24.com/Opinion/the-spectre-of-marikana-still-looms-large-20170816-2.

[38] See Alistair Thomson, "Making the Most of Memories: The Empirical and Subjective Value of Oral History," *Transactions of the Royal Historical Society* 9 (1999): 291–301., 291

[39] Patrick O'Farrell, "Oral History: Facts and Fiction," *Oral History Association of Australia Journal* 5 (n.d.)., 3-9

[40] Pierre Bourdieu, "L'illusion Biographique," in *Identity: A Reader*, ed. Paul Du Gay, Jessica Evans, and Peter Redman (London: Sage Publications, 2004), 297–303., 300

> Where evidence is given under oath or after solemn affirmation, as was the case here, cross examination is a recognized and sometimes effective method of testing the reliability thereof provided it is undertaken by a skilled person…The course of the proceedings proved again that cross examination is sometimes the only way to arrive at the truth.[41]

The scepticism regarding human testimony's ability to arrive at historical 'truth' is expressed in the Marikana Commission Report when it refers to its use of video evidence. According to the report, the video footage could assist in, "getting a better picture of what took place at Marikana," which was important because some of the witnesses may have, "perceived threats differently, some may have been mistaken, some may have been reluctant to reveal the truth for various reasons and some may have feared reprisals after giving evidence".[42] The implication is that the video footage could present a more objective account of what transpired.

However, the video evidence was itself contested by other researchers or witnesses. This reflects that televised accounts can also contain a particular *framing*; a discriminate narrative and discourse in terms of what is included and what is obscured.[43] For example, the video footage of August 10th revealed the crowd dispersed peacefully, even though some videos showed, "some of the persons…reacting with some degree of displeasure."[44] Instead of reporting in a clear way that the striking mine workers were behaving peacefully, it is reported in an evasive way that is shrouded in legal discourse, stating: "The versions of Mr Sinclair and Mt Blou do not find support in the evidence of Mr Mabuyakhulu with regard to the action of

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[41] "Report of the Commission Appointed to Investigate and Report on the Occurences in the Districts of Vereeniging (Namely Sharpeville Location and Evaton) and Vanderbijlpark, Province of the Transvaal, on 21st March, 1960" (Pietermaritzburg, 1961)., 8

[42] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 132

[43] Visual depictions of violence and official discourse of commissions of inquiry has been addressed in van Laun's MA thesis, in which she analyses photographic images of the Paarl march as destabilising the official discourse of the Snyman Commission and the image of Poqo, the armed wing of the liberation movement Pan Africanist Congress. Bianca van Laun, "In the Shadows of the Archive: Investigating the Paarl March of November 22nd 1962" (University of the Western Cape, 2012)., 78-109

[44] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 65

the crowd when the attitude of Lonmin management was conveyed to the strikers".[45] Hence, the video footage offered a counter-truth to the testimony from Lonmin's management team with the commission concluding that it could not be proven that the attitude of the strikers was threatening nor that they were violent. It instead, affirmed the view expressed by Captain Veerasamy Velayudam Govender that on that day the strikers were peaceful. Whereas, video footage from August the 16th at Scene 1 showed something different and instead supported the notion that the strikers were violent and responsible for the massacre. Television footage of the shooting at Scene 1 depicts a scene showing that the strikers are running towards the police who then shoot at them.[46] What the footage did not show, however, was that the strikers had run in the direction of the police because tear gas, stun grenades and rubber bullets had been set off behind them, from which they were fleeing, which emerged during the Commission.[47] On this point the report concedes, "the initial firing of a teargas cannister and a subsequent stun grenade were unreasonable and unjustifiable in the circumstances and was the 'spark' which caused the confrontation between the SAPS and the strikers."[48]

Nonetheless, despite findings like these; the Commission still attributes overall blame for the so-called tragic events to the striking mine workers and the longstanding labour disputes, "characterized by violence, intimidation and loss of life and the undermining of agreed collective bargaining processes".[49] It was, according to the report, a result of the, "decision and

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[45] Farlam., 66

[46] *Marikana: Remembering the Massacre Which Shook SA* (South Africa: Multimedia Live, 2019), https://www.youtube.com/watch?time_continue=76&v=b2SodIOAAUI&feature=emb_logo.

[47] This was revealed during the Commission in the following exhibits: Exhibit UUUU10.3, Annexure V2 – the video presentation of the strikers moving from the koppie to the kraal; Exhibit UUUU10.4, Annexure V3 – the video presentation on the use of the water canon before Scene 1; Exhibit UUUU10.5, Annexure V4, the video presentation on the use of stun grenades and tear gas near Scene 1; and Exhibit UUUU10.6, Annexure V5, the video presentation on the shots fired at Scene 1. David Bruce, "Shot While Surrendering: Strikers Describe the Marikana Scene 2," *SA Crime Quarterly* 65 (2018): 7–22., 9

[48] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 557

[49] Farlam., 42

conduct of the strikers in embarking on an *unprotected strike* and *enforcing* the strike by *violence* and *intimidation*, using *dangerous weapons* for their purpose," that instigated the police's killing of 34 people on the 16th August 2012.[50] In a sense, the decision to strike outside of the legal arrangements was the original sin of the mine workers.[51]

Moreover, the "Violence on the part of the strikers" was found to be a contributing cause to the police response on August 16th, and the report made a point to state that the commission condemned, "in the strongest of terms the violent manner in which the strike was sought to be enforced, and the brutality of the attacks upon those persons who suffered injuries and who died prior to 16th August 2012".[52] The commission found that because the strikers had armed themselves and had used their weapons to enact "unprovoked attacks" on Lonmin Security officers and "civilian employees" signified "an intention on their [the striker's] part to use violence at every instance to promote their cause".[53] Because of this, the report concludes that the strikers "promoted a situation of conflict and confrontation" which led directly and indirectly to the deaths of the Lonmin security personnel and the non-striking workers.[54] In its narration of events, the report states that the "taking up of arms and the use of violence" by the strikers "alerted the police to the type of criminal acts they were required to deal with".[55] The word 'violence' is used repeatedly to refer to the actions of the strikers, whose actions are referred to as criminal.

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[50] Farlam., 42

[51] The report accounts for the possible variance in the account by Captain Veerasamy Velayudam Govender stating that the strikers may have been too far away for Captain Govender and his peers to see the strikers' weapons, that the strikers had perhaps "desisted from any provocative behaviour while the SAPS were present" or that Captain Govender had seen a different group of strikers and not those who were intimidating the employees who wanted to continue working. Farlam., 75

[52] Farlam., 561

[53] Farlam., 562

[54] Farlam., 559

[55] Farlam., 562

The image of the strikers as a 'violent crowd' is juxtaposed with the rationality of the legally entrenched collective bargaining process within which labour disputes are supposed to be resolved. The language used in relation to the law contrasts with the description of the strikers' actions. The report stated that the processes for collective bargaining are embedded in the constitution and "in a set of *sophisticated* enactments, central to which is the Labour Relations Act No. 66 of 1995" (Emphasis mine).[56]

> At its core the labour relations dispensation which resulted from these developments is an arrangement of lawfully organised union and employer entities functioning within a bargaining environment that not only regulates their interaction, but also provides for the possibility of resort to lawful strike or lockout measures.[57]

The words 'lawful' and 'organised' used in the description of the existing structures, along with their description as 'sophisticated enactments' functions as a public affirmation of the official, legal process which the striking mine workers were operating outside of. It implies that any labour organising outside of the sophisticated legal structures is anarchic. The narrative of the strikers as anarchic was also evident when the National Commissioner and Minister of Police addressed the SAPS on 17th August 2012 – one day after the killings took place. The Minister expressed support for the SAP's actions, stating that the rule of law and professionalism must be upheld. He continued:

> We are not going to allow anybody to run amok on this country, to want to turn South Africa into a banana republic. It would be painful that in the process life is lost but we are a professional force and we must keep to that. We must ensure at all times we do everything in our power so that anarchists do not think that South Africa in their stage.[58]

The similarity with the findings of the Witwatersrand Disturbances Commission, discussed in Chapter 2, are notable. Both commissions were concerned that the meetings of the workers were unauthorised – that the strikers had broken the law.[59]

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[56] Farlam., 43

[57] Farlam., 43

[58] Cited in Farlam., 390

[59] Gladstone, "Witwatersrand Disturbances Commission Report."

The Marikana Commission's rubric for coming to terms with the violence was it determining the extent to which each party had diverged from the law. While the Marikana Commission report states that it is not a court of law; the analysis shows that it took a legal lens in its approach to questions of 'truth', 'restoration', and 'justice'.[60] Truth was conceived as legal truth. This legal approach has been criticised. As Kally Forrest, researcher for Phase 2 of the Commission argues, "the commission was overly legalistic in its approach," which meant that it was more concerned with establishing individual responsibility, "to the detriment of understanding the violence in in a broad socio/political context".[61] Hence, like the charge made against the TRC, the Marikana Commission's focus on the micro truth surrounding the event meant that the broader questions of structural violence endured by mine workers was not a core focus.

However, there is another relevant point related to the commission's legal approach to fact-finding that warrants attention. In explaining the use of video footage as evidence the commission referenced subjective or social factors that could influence human testimony, or their recounting of events. In a way, the commission was doubting the empirical value of oral evidence based on human senses, which, according to its own justification for its approach, could be influenced by various social factors. On the other hand, the commission displays a glaring legal fetishism, where law is used to make a claim to truth, ostensibly free from social biases. Instead the law is afforded a privileged institutional position located in the reason of the state.[62] Findings were made with reference to existing law, justified as legal decisions. Implied in the commission's approach to law is that the legal sphere is autonomous in relation to the

[60] Indeed, the word "law", or its derivative terms "lawfully", or "lawfulness" is mentioned 75 times in the Farlam Commission report; whereas 'truth' is mentioned sixteen times, 'justice' is mentioned eighteen times and 'restoration' only once.

[61] Forrest, "Marikana Commission Unearthing the Truth or Burying It?", 3

[62] Van Krieken, "Legal Reasoning as a Field of Knowledge Production: Luhmann, Bourdieu and Law's Autonomy."; Christopher Tomlins, "Framing the Field of Law's Disciplinary Encounters," *Law and Society Review* 34, no. 4 (2000): 911–72.

social world, rather than being produced in and by it. Moreover, it suggests that certain forms of evidence become tainted by the social world in a way that the law is not.

Moreover, what we see throughout the report is the binary of the legal versus illegal: the litany of references to past commissions, legal cases and legislation versus the actions of the striking mine workers. According to Van Krieken, the binary distinction between the legal/ non legal is less concerned with conflict resolution than it is concerned with positioning the law in relation to those disputes in order, "to continue the legal system's own self-reproduction".[63] Citing Luhmann in this regard, Van Krieken asserts that approaching disputes using the binary distinction of legal and non-legal – as the Marikana Commission did throughout – towards the goal reproducing of the legal system, "can be understood as a 'kind of surplus value' skimmed off for the benefit of the system."[64] In other words, clarifying between the legal and the non-legal in official discourse operates beyond the resolution of a particular legal dispute, but has the added effect of legitimising the legal system and its associated logics.

This is all too apparent in the Report, which repeatedly affirms the legitimacy of existing legal structures, whilst delegitimising the strike action which occurred outside of these legal structures. The report states,

> Whilst there exist adequate mediation and negotiation channels to enable issues to be resolved in matters of protests, strikes and stand-offs, it might be a salutary lesson, for all the citizens of this country to take away from Marikana, that the taking up of arms and the resorting to violence is neither constructive nor appropriate in protecting and enforcing one's rights."[65]

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[63] Van Krieken, "Legal Reasoning as a Field of Knowledge Production: Luhmann, Bourdieu and Law's Autonomy.", 6

[64] Niklas Luhmann, "Legal Argumentation: An Analysis of Its Form," *The Modern Law Review* 58, no. 3 (1995): 285–98.cited in Van Krieken, "Legal Reasoning as a Field of Knowledge Production: Luhmann, Bourdieu and Law's Autonomy.", 6

[65] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 563

This statement is an unambiguous example of a legitimist discourse on violence. The striker's resort to violence is deemed unequivocally illegitimate. Alternatively, the legal system and the state are presented as legitimate.

6.2.2 The Mob of Muthi'd-up Mine Workers

Compounding the narrative of the 'crowd' as dangerous, criminal and irrational was the commission's discussion concerning the strikers' use of witchcraft, or *muthi* and how this may have been a contributing factor to the violence on 16th August.[66] This was to make public a topic which is conventionally something secretive. As Ashforth states, "The fundamental predicate of all narratives about witchcraft is that it is perpetuated in secret by means of mysterious and invisible, at least to those uninitiated in the arts of witchcraft and antiwitchcraft".[67] A second central notion of witchcraft is that it is a means by which to inflict harm - a form of violence, or, "the ontology of witchcraft as violence".[68] The issue of *muthi* murders in South Africa and in other African countries – such as attacks on albinos in Tanzania – where body parts are extracted and used in rituals has been the subject of study for many years.[69] In this section I argue that the emphasis on the use of *muthi* by the striking mine workers invoked the caricature of the savage, irrational African.

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[66] "Muthi" is the Zulu spelling, but it may also be spelled "muti" in isiXhosa transliterations and is derived from the Nguni root -thi, meaning 'tree'. In English the term can mean 'medicine' or 'poison' and whether muthi is one or the other depends on the intention of he or she who wields it. Adam Ashforth, "Muthi, Medicine and Witchcraft: Regulating 'African Science' in Post-Apartheid South Africa," *Social Dynamics* 31, no. 2 (2005): 211–42., 211-212

[67] Adam Ashforth, "The Meaning of 'Apartheid' and the Epistemology of Evil," in *Evil in Africa: Encounters with the Everyday*, ed. Walter van Beek and William.C Olsen (Bloomington: Indiana University Press, 2015), 364–80., 375; Secrecy is essential, and it is alleged that should a witch speak openly of their practise they would cease to be a witch and their powers would no longer work. Ashforth, "Muthi, Medicine and Witchcraft: Regulating 'African Science' in Post-Apartheid South Africa.", 215

[68] According to Ashforth, for people who dwell in the world or witchcraft there is no difference between violence that is inflicted by witches and other forms of violence, such as physical violence. Adam Ashforth, "Witchcraft, Justice, and Human Rights in Africa: Cases from Malawi," *African Studies Review* 58, no. 1 (2015): 5–38., 9-10

[69] See John A Cohan, "The Problem of Witchcraft Violence in Africa," *Suffolk University Law Review* 44 (2011): 803–72; John Hund, *Witchcraft Violence and the Law in South Africa* (Pretoria: Protea Book House, 2003).

The use of *muthi* was brought to public attention when the two Lonmin security guards – Hassan Fundi and Frans Mabelani - were killed by a group of strikers and their bodies disfigured, allegedly to use their body parts in *muthi* rituals. In the testimony of 'Mr X' he detailed how they had cut flesh from Fundi's face and that two Sangomas cut it into smaller pieces mixed with blood and then burnt into ash "for the miners to lick".[70] Mr X also confessed, in an affidavit, to being among the group of strikers who had killed two policemen on the 13th of August 2012. Mr X claimed that he was one of the strike leaders and attested that there was violent intent on the part of the striking mine workers. He was conforming the SAPS' narrative that a group of strikers, the "Makarapas", had engaged in rituals that they believed would shield their skin from bullets and whom, according to the police, "could not be contained through normal public order techniques".[71]

It would not be the first time that witchcraft was the subject of commission of inquiry investigation. An official Commission - the Ralushai Commission – was established in 1996 to investigate witchcraft violence and ritual murders in the Northern Province (now Limpopo Province) of South Africa.[72] The Report advised that the law be changed to allow for the prosecution of *inyangas* and other practitioners, as well as any person "who does any act which creates a reasonable suspicion that he is engaged in the practice of witchcraft".[73] The statement affirms the reality of witchcraft and that it ought to be viewed as a crime, especially considering the context of South Africa's new Democracy based on its progressive Constitution.[74]

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[70] "Marikana: Mr X Converts to Christianity," *Mail & Guardian*, 2014, https://mg.co.za/article/2014-07-21-marikana-mr-x-converts-to-christianity/.; "Mr X: We Killed People at Marikana."

[71] SAPS, "Written Submissions" (Marikana Commission of Inquiry, 2014)., 44

[72] It recommended, "it would be in the interest of the people and the country South Africa) to have the abovementioned phenomenon (witchcraft) researched on a more permanent basis…alternatively our universities…should embark on intensive research programmes dealing with witchcraft and ritual killing." N.V Ralushai, M.G Masingi, and D.D.M Madiba, "Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province of South Africa" (South Africa, 1996)., 61-62

[73] Ralushai, Masingi, and Madiba., 55

[74] Peter Geschiere, "Witchcraft and the Limits of the Law: Cameroon and South Africa," in *Law and Disorder in the Postcolony*, 2006, 219–46.

Moreover, the final report of the TRC referenced witchcraft too in its analysis of politically-motivated human rights violations. It's finding was that conflicts deemed rooted in 'tribal disputes' or 'witchcraft', "might have seemed to fall outside the requirement of having political motive in terms of conflicts of the past, yet on closer investigation they frequently masked profoundly political issues".[75]

The 'objective' investigation into a subject like witchcraft in an official commission of inquiry exposes what seems to be another contradiction in commissions of inquiry in their adoption of legal legitimating schemes. As was stated in Chapter 2, commissions developed in tandem with the emergence of the modern state, redolent of its emphasis on reason, enlightenment and legal positivism. Over the years there have been attempts by anthropologists to 'make sense' of witchcraft: In the nineteenth century 'witchcraft' in Africa tended to be viewed as indicative of 'primitive', 'prelogical' and backward thinking.[76] However, this view has since been challenged in several texts, most notably those by Evans-Pritchard who argues that witchcraft is a coherent ontological system of meaning, an African epistemology.[77] According to Nyamjoh, many people in Africa do not conceptualise witchcraft as a matter of belief, but rather as a patent feature of the world, "an order that marries the so-called natural and supernatural, rational and irrational, objective and subjective, scientific and superstitious, visible and invisible, real and unreal".[78] For Evans-Pritchard, witchcraft explains the

[75] "Volume Five. Truth and Reconciliation Commission of South Africa Report.", 12. Witchcraft was also found to be a motivation for several other violations of human rights during the United Democratic front and African national Congress-aligned extra judicial tribunals in the killing of Inkatha Freedom Party members, 248

[76] L Lévy-Bruhl, *How Natives Think* (London: Allen and Unwin, 1926).

[77] E.E Evans-Pritchard, "Oracle Magic of the Azande," in *Sudan Notes and Records*, 1928, xi:1-53; E.E Evans-Pritchard, "Witchcraft (Mangu) amongst the A-Zande," in *Sudan Notes and Records*, 1929, xi:163-249; E.E Evans-Pritchard, "Sorcery and Native Opinion," *Africa* iv, no. 1 (1931): 22–55; E.E Evans-Pritchard, "The Zande Corporation of Witchdoctors, Part 1," *Journal of the Royal Anthropological Institute* 1xxi, no. 1 (1932): 63–100; E.E Evans-Pritchard, "The Zande Corporation of Witchdoctors, Part II," *Journal of the Royal Anthropological Institute* 1xiii (1932): 291–336; E.E Evans-Pritchard, *Witchcraft, Oracles and Magic among the Azande* (Oxford: Clarendon Press, 1937).

[78] Francis B Nyamjoh, "Delusions of Development and the Enrichment of Witchcraft Discourses in Cameroon," in *Magical Interpretations, Material Realities: Modernity, Witchdraft and the Occult in Postcolonial Africa*, ed. Henrietta L Moore and Todd Sanders (Routledge; Taylor and Francis, 2004), 28–49., 29

inexplicable by offering answers to the 'why' instead of the 'how' questions. An often-cited example is the Azande's understanding of why some granaries sometimes collapsed and harmed or killed those nearby. Evans-Pritchard states that they knew scientifically that termites had eaten at the wood which led the granary to fall, which answered the 'how' question. However, witchcraft assisted in answering why a particular person had been harmed, or why the granary had collapsed at the moment it did. Therefore, witchcraft was invoked to answer more cosmological questions.[79]

But in the context of the legalised Farlam Commission, the practise of '*muthi* rituals' was presented as indicative of the irrationality of the striking mine workers, reintegrating the trope of the civilised Western legal system against the superstitious savages. Mr X (whose statement was later discredited through cross-examination) testified that he had contributed to paying the *inyangas* R1,000 and that they had been instructed "to approach the police in a crouching manner which would make the bullets, if fired by the police, to miss us, as we would be invisible to the police".[80] To apply Evans-Pritchard's explanation of African uses of witchcraft, in the context of the striking miners it might not have been that they believed in their immunity to bullets, but perhaps that they hoped magic would enable the bullets to miss them or not kill them, or that the police would not fire at all. Nonetheless, in term of finding responsibility for violence, Mr X's account implies that the mine workers had decided to attack the police prior to the 16th August and that the *muthi* would safeguard them from any offensive or defensive action from the SAPS.

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[79] Cited in Henrietta L Moore and Todd Sanders, *Magical Interpretations, Material Realities: Modernity, Witchcraft and the Occult in Postcolonial Africa*, ed. Henrietta L Moore and Todd Sanders, *Magical Interpretations, Material Realities* (Routledge, 2001), https://doi.org/10.4324/9780203398258., 6

[80] Inyangas are the men who perform muthi rituals. Supplementary statement of Mr X cited in Olivia Walton, "The Marikana Commission: Truth and Voice in Official Documentation" (University of Oxford, 2015)., 32

This depiction of the mine workers did not go without criticism. As one respondent for the South African Human Rights Commission asserted in recounting the SAPS's argument:

> [W]e called it the Four M Case: so you've got as muthi-ed up mob of murderous miners. You're muthi-ed up meaning you're irrational, you're reckless…So you are that delusional and stupid that you think you're invisible to bullets…They're a mob because they're all de-individuated. So I shoot one, I shoot all. I can just as easily mow down the first seven rows as I can shoot the eighth row.[81]

Hence, we see an attempt to fetishize the belief in the supernatural on the part of the mine workers. Not only does this buttress the discourse of the criminal crowd of unruly mine workers but it also undermines the legitimacy of the collective action to come together to address a political goal. Instead, the mine workers are presented as antidemocratic forces devoid of reason, where the violence is located within them rather than in the social conditions in which they live. Geoff Budlender added, "It is…a common recurring theme in our history that when black people take up arms to fight and kill people…there must be some *muthi* or magic behind it."[82] While the context is wholly different, I am reminded of Ann Bernstein's assertion made during the TRC's business hearings, that very few people give up everything for their beliefs and ideas.[83] The argument that the group of miners had undergone these supernatural rituals has the effect of undermining their agency in deciding to risk their lives to improve their lot. Conceptually, it undercuts the notion that the miners' violence could be construed as *political violence,* or violence directed against an oppressive order.

However, there also appears to be an element of hypocrisy in judging the mine workers' use of *muthi* rituals. The *muthi* practices are denigrated as irrational, yet the Farlam Commission's legal, rational constitution is layered with religious ritual and reference to supernatural forces. As the Commission began the names of the deceased were read aloud with a minute of silence

[81] Interview with Michelle Le Roux, April 2015 in Walton., 30

[82] Interview with Geoff Budlender, April 2015, cited in Walton.,33

[83] See Chapter 3

observed and Judge Farlam stating, "May their souls rest in peace".[84] Moreover, before any witness was to testify they would be sworn in by swearing to God. The example below is taken from the swearing in of Mr Dirk Botes, one of Lonmin's security personnel, before he was cross examined:[85]

> CHAIRPERSON: Alright, will you swear that the evidence you'll give before this Commission will be the truth, the whole truth, and nothing but the truth? Please raise your right hand and say, "I swear, so help me God."
>
> DIRK CORNELIUS BOTES: So help me God.
>
> CHAIRPERSON: No, "I swear so help me God".
>
> MR BOTES: I swear.
>
> CHAIRPERSON: So help me God. Alright, please be seated…

This amounts to a farcical display, where Farlam tries - and ultimately fails - to have Mr Botes speak the words, "I swear, so help me God," resulting in Farlam completing the sentence on his behalf. The insistence that people undergoing cross-examination swear this oath with reference to God, a supernatural entity of religious belief, belies the 'objective', rational and positivist approach to evidence otherwise taken. This is the *muthi* of the Western legal profession, an incantation that magically compels one to tell the truth.

However, another element is revealed in Farlam's capitulation, when he completes the sentence, "so help me God" on Mr Botes' behalf so that the proceedings can swiftly continue. Here, Farlam is both reinforcing the ritual, whilst undermining it. Perhaps Farlam realised the absurdity of attempting to have Mr Botes try for a third time. Nonetheless, it is revealing of the fact that the ritual is effective not in its material consequence, but rather for its symbolic value.

However, in the commission space the Judeo-Christian tradition and the African *muthi* practices overlapped in curious ways. The same Mr X announced, during questioning, that he

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[84] Day 1. "The Marikana Commission of Inquiry Transcription.", 5

[85] Day 264. "The Marikana Commission of Inquiry Transcription.", 33328-9

had very recently converted to Christianity and that he had put *muthi* practices behind him. In his attempt to discredit Mr X, Mpofu asserted, "It's not too late Mr X. Now that you found the Lord yesterday, you may want to consider that lying is a sin." Here Mpofu seems to have abandoned his forensic mode of legal argumentation and appeals to manmade law in favour of referencing the religious notion of sin - transgression against divine law. Mr X replies, "I have no motives. I am telling the truth just like Mandela. I speak the truth, just like Mandela."[86] In South Africa, Nelson Mandela carries a Christ-like status, the prophet leading what is commonly referred to as the South African miracle in the relatively peaceful transition from apartheid to multiparty democracy. Mr X was eventually discredited as a witness by cross-examination.[87] His account of the mine workers on *muthi* was countered by testimony from other mine workers, specifically that of Mzoxolo Magdiwana, who was shot several times by the police on the 16th of August 2012 but survived.

However, the witchcraft issue remained in fetish-like focus for a significant portion of the commission, and the notion that the 'mob' of men believed their blankets would protect them from bullets was interrogated with all the severity of South Africa's top legal professionals.

6.3 Legal Discourse and Structural Violence

As stated previously the commission's work was divided into two phases, where the first phase was to investigate the events from 9th to the 16th August 2012 and the second phase was to assess the rest of the issues set out in sections 1.1.3 and 1.5 of the official terms of reference: whether Lonmin had contributed to an environment that fed the creation of "tension, labour unrest and disunity" (1.1.3) and the investigation of the role played by the Department of Mineral Resources and other government agencies (1.5). Although President Zuma altered the

[86] "Marikana: Mr X Converts to Christianity."

[87] Greg Nicolson, "Marikana Commission: Mr X's Tesimony Collapses under Cross Examination," *Daily Maverick*, July 4, 2014, https://www.dailymaverick.co.za/article/2014-07-04-marikana-commission-mr-xs-testimony-collapses-under-cross-examination/.

terms of reference to halt the commission's investigation of the role played by government agencies,[88] section 1.1.3 of the terms of reference meant that the commission could still investigate longer term causes of the "tension" and labour unrest in its mandated investigation into Lonmin. In this section I argue that the commission's legal lens constrained its findings into structural causes of the massacre; however, it also found Lonmin responsible for failing to fulfil its legal obligation to enact its social labour plans.

The massacre has been explained as evidence of the enduring legacy of the "structural violence of apartheid" which was sustained through the manner in which the police suppress social rebellion.[89] However, structural violence for the mine worker is evident before apartheid, through the process of primitive accumulation and establishment of the British colonial project surrounding the mineral revolution.[90] This section argues that similarly to in the TRC, the Farlam Commission was confronted with evidence of structural violence. However, due to its particular legal approach this hardly features in the final report. I draw from three seminars held at the University of the Witwatersrand, which were to comprise part of Phase 2 of the commission: investigating the long-term structural causes of the massacre. Various issues emerged in the course of these seminars which may be classified as examples of structural violence. Although the term 'structural violence' is not used in the seminars, the issues raised may be understood as examples of 'structural violence' as per Galtung's definition, where violence is "built into the structure and shows up as unequal power and consequently unequal

[88] Subsection 1.5 of the terms of reference. Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 4; Forrest, "Marikana Commission Unearthing the Truth or Burying It?", 3

[89] Bill Dixon, "A Violent Legacy: Policing Insurrection in South Africa from Sharpeville to Marikana," *British Journal or Criminology* 55, no. 6 (2015): 1131–48.

[90] See Catherine Meyburgh and Richard Pakleppa, *Dying for Gold* (South Africa, 2018); Wolpe, "Capitalism and Cheap Labour Power: From Segregation to Apartheid."; Francis Wilson, *Labour in the South African Gold Mines 1911-1969.* (London: University Press, 1972).; Saul and Bond, *The Present as History: From Mrs Ples to Mandela and Marikana*., 28-35

life chances".[91] Social injustice may also be a manifestation of structural violence.[92] In this section I address three issues: that of the shifting nature of union representation post-apartheid; problems with collective bargaining law; and the appalling working conditions that mine workers at Lonmin continued that face.

6.3.1 Changing Union Representation Post-Apartheid

During the Phase 2 seminars one of the issues that arose was that of the shifting nature of union representation since the transition. The shift in labour market law and policy during the transition led to formation of professionalised departments for airing grievances, like human resources departments staffed with upwards of thirty staff members. While it is argued that from 1973 the 'black' labour union had attempted to instigate a democratic organisational culture and sought to instil the ideas and practices of "union democracy and worker solidarity"; there has been a particular iteration of democracy as manifesting via the majoritarian principle which has instead served to stifle voices within the union movement, hence undermining democracy.

One way in which this has occurred is with the specialisation of labour. Hartford argues, "the more specialised labour becomes, and that concentration of skills happens in the human resources department – so line management, the people responsible for organising the employees to deliver production become weaker and weaker," making then unable to address the labour issue. He states that by 2012 there was a situation where one would have management state that it is not their role to deal with labour issues, as this has instead become the jurisdiction of the union and the department of human resources.[93]

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[91] Galtung, "Violence, Peace and Peace Research.", 171

[92] Galtung., 171

[93] Gavin Hartford. "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 9 April 2014.", 17

On each mine there now exists a band of higher-paid trade union functionaries who no longer work underground. For example, Hartford asserted, "In the case of Implats they'll have about 60 fulltime shop stewards, maybe 100 fulltime shop stewards at Angloplats, who are paid significantly more than the ordinary members they represent".[94] Moreover, these workers are removed from production, which has led to "the collapse of constituency-based representation" and weakened the democratic process in the union.[95]

Moreover, there has been the elevation of the union's leadership away from its members that has caused high levels of alienation among the mine workers who went on strike. The reason, according to Hartford, that these workers went on strike to address their employment conditions was due to them being, "alienated from the production process subjectively as well as objectively".[96] This point was, of course, made by Marx in his critique of capitalism where he maintained that the wage labourer under capitalism faces a triple alienation: alienation from that which he produces, from the production process, and hence from himself.[97] While Marx states that "*political economy conceals the estrangement inherent in the nature of labour by not considering the direct relationship between the worker* (labour) *and production*", the law is part of the political economy that conceals this alienation.[98] It is a product of ideology that it is not seen as such.

Gavin Hartford argued that the post-apartheid context led to an additional experience of alienation caused by the bureaucratisation and professionalisation of the labour union system.[99]

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[94] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 9 April 2014.", 16

[95] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 9 April 2014.", 16

[96] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 9 April 2014.", 18

[97] Karl Marx, 'Economic and Philosophical Manuscripts of 1844' in Tucker, *Marx. Read.*, 70-73

[98] Marx in Tucker., 73

[99] The effects of the professionalisation of the labour union movement is also argued in Raphaël. Botiveau, *Organise or Die? : Democracy and Leadership in South Africa's National Union of Mineworkers* (Baltimore, Maryland :;Johannesburg [South Africa] : Project Muse,;Wits University Press, 2018).

6.3.2 Problems with Collective Bargaining Law

A running theme was the political issues pertaining to collective bargaining law and the potential explanations for why the Lonmin workers would have resorted to operating without the backing of a union.

A presentation by Ian Macun, Director of Collective Bargaining at the Department of Labour, unpacked "good practical reasons" why workers would decide to engage in action outside trade unions. He highlighted common problems related to trade union membership and the problem of a union not having enough members to negotiate organisational rights in the workplace, even within the legal framework of the Labour Relations Act.[100] He noted that in addition to issues arising from non-unionised workers and minority groups in the workplace there is contestation of the rights of unions in certain situations which existing legal frameworks cannot contain.[101] Macun noted further the problem of worker disaffection with unions, stating that spontaneous striking does happen from time to time when workers have pressing issues that they believe unions will be unable to address. He also highlighted a "worrying trend post 2012" for the state to step in to respond to situations like this, and asserted that "calling for legal intervention" or state intervention in workplace matters is unfavourable. He continued:

> There is a greater consensus today that the law does not offer solutions to the issues that cause workers to bypass unions, thinking of some of the scenarios that are sketched in very few cases, in very few are there legal solutions to those sorts of situations.[102]

Macun also highlighted the political effects of existing labour law. He explained that the Labour Relations Act promotes a model of majoritarianism – a "winner takes all" model – which can have unintended consequences in the workplace as certain groups are not formally represented. The NUM's "virtual monopoly" over a large portion of the workforce was also

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[100] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014" (Johannesburg, 2014)., 9

[101] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014.", 10

[102] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014.", 14

raised by Prof. Sakhela Buhlungu, who noted that when workers feel like they have "no other option" it increases the likelihood of their desire to bypass the union to air their grievances.[103]

The political problem of the majoritarian principle was discussed during the commission's seminars. It was noted that at the time it was "instituted and put into law, maybe it made sense", but now it has created a monopoly which in the environment of strained worker relations and enduring exploitation has led to "serious problems".[104] The idea being relayed is that laws develop to suit a situation at a particular historical conjuncture, but that as society evolves and develops, laws designed to reform or guard against one form of harm caused by capitalism may in turn create the foundation for new contradictions. While the South African transition was in part negotiated through elite pacts;[105] the content of legislation like the LRA (1995) was won through broad struggle of the working class against diachronic exploitation, as depicted in the multiple examples of strikes in the mining sector mentioned in this dissertation. As stated in Chapter 4 the LRA was a piece of legislation which sought to, "advance economic development, social justice, labour peace and the democratisation of the workplace" and animate Section 27 of the Constitution.[106] However, as Rosa Luxemberg wrote in her famous essay *Reform or Revolution*, "Labour legislation is enacted as much in the immediate interest of the capitalist class as in the interest of society in general… at the same time, private property becomes more and more the form of open capitalist exploitation of the labour of others, and State control is penetrated with the exclusive interests of the ruling class."[107] We see that in

[103] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014.", 30

[104] Prof. Sakhela Buhlungu. "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014.", 62

[105] Bond, *Elite Transition: Apartheid to Neoliberalism in South Africa*; Hagopian, "'Democracy by Undemocratic Means'?: Elites, Political Pacts, and Regime Transition in Brazil."

[106] Labour Relations Act. Section 27 of the Constitution contains that "Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security…" and that the state must "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights". Constitution of the Republic of South Africa.

[107] Rosa Luxemburg, *Reform or Revolution* (Marxists.org, 1899), https://www.marxists.org/archive/luxemburg/1900/reform-revolution/ch04.htm.

this context the LRA can be used to legitimate lawful exploitation and curtail workers' constitutional right to protest.

Another related issue raised during the seminar was the dissonance between the legal structures of collective bargaining and the daily experience of deprivation of the mine worker in South Africa. Buhlungu noted the widely held assumption that, "workers will go on strike and…they'll manage." But, he continued:

> The fact of the matter is that from day one workers do not manage. They find it very hard to cope. We have this strange thing in the union movement that nobody ever talks about, how do these people buy bread on a daily basis? How do they get taxi fare for their kid to go to school? How do they pay for their electricity?[108]

One can interpret Buhlungu's words as suggesting that even within unions there has been an acceptance or internalisation of labour law's "universal quality": that it applies equally to all. However, he is suggesting what Marx notes about the law - mentioned in Chapter 4 of this dissertation - that law is a false universal. It is a false universal because while law may ostensibly apply equally to all, different classes of people experience the effects of the law differently: some are advantaged by it while others are disadvantaged. In this case, collective bargaining law forms part of the legal ideology which effectively obscures the structural violence of working life as a mine worker under capitalism. It is ideological as, to use Thompson's formulation, it is informed by a, "system of representations which serves to *sustain existing relations of class domination* by orienting individuals … towards images and ideals which conceal class relations and detract from the collective pursuit of social change (Emphasis mine).[109] Viewing the problem through the legal veneer, as the Marikana Commission did - cannot account for the material question of how the mine workers will buy

[108] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014.", 35

[109] Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication*., 41

bread on a daily basis; how the mine workers who went on strike are able to fulfil their basic needs.

The inadequacy of collective bargaining law in the context of the high levels of worker sub-contracting in the platinum industry was an additional structural issue flagged during in the course of the commission's investigation.[110] As one subject expert noted, approximately a third of workers in the platinum sector were employed via labour brokers and were not generally organised through unions -- a significant portion.[111] The practice of using labour brokers for recruiting workers is rooted in the restructuring of the workplace as a consequence of neoliberal globalisation. This process has seen a tendency towards the casualisation and informalisation of labour, which started in the 1980s and was consolidated with the transition to democracy in the 1990-1994 period.[112]

As stated, the commission report has a section titled, 'the process of collective bargaining', where it emphasises the "sophisticated" legislation undergirding processes of lawful collective bargaining through trade unions. However, this severe legal lens cannot account for the reality of what occurs on the ground, and the way mines have accommodated the Labour Relations Act, seeing it as conferring legitimacy to labour brokers, which become the workers' primary employer. As Forrest states,

> Young workers, in particular, are recruited by the unregistered 'bakkie brigade', who pay as little as R60 a day and may demand a R150 registration fee. Workers recruited in this way enter very short-term work, making union recruitment impossible. Larger contractors offer a total service to the mine, from sourcing [of labour] to supervision and payroll management.[113]

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[110] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014.", 52

[111] Andries Bezuidenhout from the Sociology Department at Pretoria University. "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014."; Lester, Claire-Anne. Interview with Kally Forrest. Personal Interview. Johannesburg, May 29, 2019

[112] See Siviwe Mhlana, "Worker Resistance in a Time of Labour Market Restructuring," *Amandla*, no. 55 (2017), https://aidc.org.za/worker-resistance-time-labour-market-restructuring/.

[113] Kally Forrest, "Marikana Was Not Just about Migrant Labour," *Mail & Guardian*, September 13, 2013, https://mg.co.za/article/2013-09-13-00-marikana-was-not-just-about-migrant-labour/.

The use of labour brokers by mines is a loophole within the law that has been leveraged to keep wages low.[114] Herein lies another source of alienation for the worker: alienation from legal processes for collective action. At the time the Marikana massacre occurred, many workers did not have access to union protection as they were not employed by the mine. So, while permanent labour on mines is unionised; a large portion of the workforce remains weakly organised or unorganised brokered labour. As noted in one of the seminars, there was a situation where conditions were being improved for, "one section of the workforce, but you have in your midst a lot of these other people with no basic worker rights on the shop floor."[115] This has also functioned to divide the workforce, created large pay gaps and created a legal means for worker exploitation in the context of scarce jobs and rising unemployment.

These issues were raised during the commission's investigation, with evidence leaders and the Chairperson present. The sessions were transcribed and became an enduring part of the Marikana Commission archive, which the commission could draw upon in compiling its final report. One could certainly and reasonably argue that practices of using labour brokers to exploit a large portion of the workforce by Lonmin would have contributed to the creation of "tension, labour unrest and disunity", as per section 1.3 of the terms of reference. However, this important systemic feature of the labour scene is not mentioned at all in the Marikana Commission report.

6.3.3 Appalling Working and Living Conditions

During the commission's investigative phase, the abhorrent working conditions of mine workers was a recurrent issue. As Buhlungu asserted, "the mining industry for years and years, for decades the mining workers has been regarded with the greatest contempt of the working

[114] See Kally Forrest, "Rustenberg's Fractured Recruitment Regime: Who Benefits?," *African Studies* 72, no. 2 (2014): 149–68.

[115] Sakhela Buhlungu, "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014.", 61

class, even by fellow workers in other industries."[116] Any cursory inquiry into the treatment of black African mine workers in South Africa's mines will lead to policies of migrant labour, images of single-sex hostels resembling prisons with workers sleeping on concrete beds, undignified medical examinations, strip searches and contracts that would extend sometimes two years with no visit home.[117] The Wiehahn Commission reports detail the conditions under which black African mine workers lived and worked.[118]

The dangerous working conditions in mining naturally facilitate physical violence - accidents where workers are harmed on the job. An added layer that when accidents did occur, workers have not been protected by their unions. For example, Buhlungu noted that when he had been doing research on labour unions, "people would undress for us to see the wounds that they carry in [sic] their bodies and that the union is not doing anything about it".[119] Of course, health and safety has been a focus area of unions for quite some time, particularly since the 1995 Leon Commission of Inquiry and there is an internal history to this struggle in the mining sector.[120]

Historically, platinum demand has been high due to it being used in the manufacturing of myriad products: jewellery, equipment for laboratories, in catalysts for petroleum refining, for the production of fertiliser, drugs to treat cancer, for dental alloys, fuel cells to generate electricity and for manufacturing glass.[121] As the market for the product expanded, the mining operation became more complex and grew in scale. The mining conditions are different to the

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[116] Sakhela Buhlungu, "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014.", 28

[117] Meyburgh and Pakleppa, *Dying for Gold*.

[118] The Wiehahn Commission published seven reports dealing with issues considered "urgent and crucial to the review of national labour policy".Wiehahn, "Wiehahn Commission Report," 1979.

[119] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014.", 30

[120] "Leon Commission of Inquiry into Safety and Health in the Mining Industry." See also Paul Stewart, Andries Bezuidenhout, and Christine Bischoff, "Safety and Health before and after Marikana: Subcontracting, Illegal Mining and Trade Union Rivalry in the South African Mining Industry," *Review of African Political Economy* 47, no. 163 (2020): 27–44.

[121] Allen, *The History of Black Mineworkers in South Africa Volume II: Dissent and Repression in the Mine Compounds 1948-1982.*, 97

conditions of mining gold because platinum reefs are comprised of igneous rock found in fractured conditions, which heightens the possibility of loose, falling rocks while working.[122] Moreover, these mines are relatively shallow with less resilient roof supports, which makes rockfalls more frequent and harder to prevent. In addition, temperatures rise faster in virgin rock compared to in gold mines and hence, "mine workers suffered from heat stress and heat stroke in relatively shallow mining conditions."[123]

Even with the list of "sophisticated" legislation designed to attenuate the harsh work conditions since the transition and advance labour rights in the workplace, mine workers continue to face appalling working conditions. Rock drill operators are performing the, "the toughest, most dangerous, most production critical, core mining function," with little prospect for upward career mobility due to their functionally illiterate status.[124] Moreover, they are aware of their underpayment in relation to their colleagues.

Besides the treacherous work conditions is the history of exploitation of workers in this sector, manifesting in depreciated wages. A 1973-4 investigation by the British House of Commons Select Committee – the Trade and Industry Sub-Committee on Expenditure sanctioned by the British parliament examined wages and policies of British firms operating in South Africa. The report was, as Allen writes, "the most comprehensive and authoritative documentary account of the recruitment, terms of employment, wages and conditions of black workers in South Africa ever published".[125] The Report confirmed that the average wages for black African workers in all sectors (besides banking and insurance) were far beneath the Poverty Datum

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[122] Allen., 97

[123] Allen., 97

[124] Gavin Hartford, "The Mining Industry Strike Wave: What Are the Causes and What Are the Solutions?," GroundUp, accessed May 17, 2018, https://www.groundup.org.za/article/mining-industry-strike-wave-what-are-causes-and-what-are-solutions/.

[125] Allen, *The History of Black Mineworkers in South Africa Volume II: Dissent and Repression in the Mine Compounds 1948-1982*., 320

Line (PDL).[126] The report cited a study done in March 1972 by the South African Wage and Productivity Association, showing that 79 percent of black workers in every sector in were paid below the PDL.[127] When Lonrho's managing director, Sidney Newman, was speaking at a wage symposium in April of 1973 he asserted, "the PDL is being used as an excuse to establish the minimum we can get away with".[128] This reflects the tendency by corporations under capitalism to attempt to pay workers as low as is possible to cover their minimum subsistence costs: just enough to keep the worker going.

Companies defended the low wages paid to South African workers with an array of excuses steeped in racist stereotypes. The Chamber of Mines, for example, justified low wages stating that paying black workers more would result in them working less.[129] Other arguments for depreciated wages, such as that advanced by Goldfields, included that it was not in the interest of black workers to pay them more because if could lead to greater mechanisation and hence, increase unemployment.[130] It is beyond the scope of this thesis to delve into the specific fluctuations in wages for mine workers and the catalysts in South Africa since this period. However, necessary to note is that the struggle for a living wage has been a feature of the South African mining sector for decades and determining the appropriate wages, particularly for black

[126] "House of Commons Select Committee on Expenditure" (London, n.d.). 718

[127] "House of Commons Select Committee on Expenditure." 1028

[128] "House of Commons Select Committee on Expenditure.", 352

[129] In his evidence to the House Commons Select Committee W E Luke the chairperson of the UK Trade association said the following: "There is a tendency for the black African, if you pay him more money, to put in less time. He will absent himself as soon as he gets what he considers enough". "House of Commons Select Committee on Expenditure.", 9 May 1973, 4

[130] Allen, *The History of Black Mineworkers in South Africa Volume II: Dissent and Repression in the Mine Compounds 1948-1982*., 321-322

African workers, was the subject of various commissions of inquiry;[131] and post-apartheid wages adjusted for inflation have largely remained stagnant or declined since the late 1990s.[132]

While it is 'common cause' (to use the commission's legal expression) that the mine workers were on strike for a wage increase, the term 'exploitation' does not feature in the final report at all. There is, however, sparse description of the poor living and working conditions the striking mineworkers faced. The Report states that it was common cause that "large numbers of the Lonmin workers live in squalid informal settlements surrounding the Lonmin mine shafts," affirming that the living conditions are "very poor" and that those who lived there "lack basic social services".[133] This finding was extracted verbatim from the evidence leaders' heads of argument report based on the research by Kally Forrest and photographic evidence by Asanda Benya, who conducted research on the social conditions at Lonmin mine and Nkaneng informal settlement. It was also conceded in the cross examination of Lonmin executive Mr Seedat, who acknowledged the appalling living conditions in the informal settlement in Lonmin's doorstep.[134] Forrest's Phase 2 report confirmed that the homes in the informal settlements were constructed from zinc sheets, were usually ten by eight feet in size and housed different families, where one room acted as kitchen, bathroom and bedroom. Evidence to the Commission further highlighted the failure of the Madibeng municipality to provide access to basic social services in the informal settlement: that roads were not tarred and often flooded, and that lack of water often forced residents in having to queue at water tankers or purchase

[131] "Report of the Witwatersrand Mine Natives' Wages Commission on the Remuneration and Conditions of Employment of Natives at the Transvaal Undertakings of Victoria Falls and Transvaal Power Company, Limited."

[132] Niall Reddy, "Labour Income Stagnates as Profits Increase," *Mail & Guardian*, May 2, 2014, http://mg.co.za/article/2014-05-01-labour-income-stagnates-as-profits-increase.

[133] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 527

[134] Mr Seedat. "The Marikana Commission of Inquiry Transcription.", Day 292 p38273

water.[135] To fulfil basic hygiene requirements evidence showed that most mine workers washed at work because they had no water at home.[136]

Moreover, one could argue that basic human rights are being undermined due to the poor living conditions in Nkaneng informal settlement, where many of the mine workers live. The right to human dignity is most palpable, where evidence submitted to the Farlam Commission highlighted that while the Madibeng municipality built a few ventilated pit latrines to try prevent contamination of underground water, there was a critical shortage of ablution facilities and "as many as twenty people may share a pit toilet".[137] Although I have argued that the commission took a legal approach, this reveals that it was in fact discriminate about which legal principles it applied. There is no mention of people's basic human rights being undermined by their living conditions in the Marikana Commission Report.

Related to the issue of working conditions, which has long been a structural feature of the mining sector is migrant labour and which was an issue emphasised during the TRC's hearings on the mining sector. Gavin Hartford's presentation raised the significant point that the strike was led by migrant workers, primarily amaPondo from the Eastern Cape, Lesotho and Mozambique.[138] Hartford asserted that the working conditions had remained much the same for 20 years, noting that the last major strike in the mining industry was the 1987 or 1989 strike led by Cyril Ramaphosa and that not much had changed with regards to the collective bargaining process either.[139] One major socio-economic change was, however, a consequence

[135] Forrest report cited in Budlender et al., "Heads of Arguments of Evidence Leaders, Marikana Commission of Inquiry.", 13-16

[136] Budlender et al., 15

[137] Exhibit NNNN2 Chapter 3 in Budlender et al., 16

[138] The amaPondo come from Pondoland, the coastal areas of the Eastern Cape, as distinct from the amaThembo who hail from the "more inland part of the Eastern Cape". These areas have historically supplied a specific employment category rock drill operators. Hartford, "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 9 April 2014.", 11

[139] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 9 April 2014.", 12

of labour pressure to phase out the hostel accommodation system. Prior to 1994 migrant labourers lived in single-sex hostel accommodation, situated near to the shaft, where workers' individual subsistence and transport costs would be covered by the company. A main demand of collective bargaining after 1994 by NUM was improving living conditions, where an option for workers was proposed called a living out allowance, which was to subsidise rental payment for a mine worker who arranges his/her own accommodation.[140] It is common for employees to opt for the living out allowance and use it to build a shack in the surrounding settlements, where additional expenses of running the household, and often another family, accumulate. IN Francis Wilson's presentation he attested to the effects of migrant labour on uneven development in South Africa, where using an index of "multiple deprivation" (income, electricity access, education and so on) his evidence showed that former Bantustan areas, especially the Eastern Cape which the majority of the striking mine workers called home, had been "driven into poverty by the migrant labour system over the [past] hundred years.[141] This evidence of real and relative deprivation can be understood as a legitimate impetus for the decision to strike in August 2012.[142]

Nonetheless, according to the Farlam Commission report, structural violations were not construed as legitimate motivation for the mine workers to strike outside of the legal processes for collective bargaining. This is because acknowledging and taking seriously the reality of structural violence has implications pertaining the legitimacy of the strike and ipso facto, the ability of the law to adequately deal with issues of this nature. Structural violence, as a concept, can be invoked when there may be no clear instances of violence in the literal, physical sense, but where one may still argue that *political* violence is present. As André du Toit states:

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[140] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 9 April 2014."

[141] Francis Wilson in "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 9 April 2014.", 28

[142] On Relative deprivation see Ted Gurr, *Why Men Rebel* (Princeton: Princeton University Press, 1970).

> "The concept of 'structural violence' essentially serves to shift the primary onus for legitimation: if violent protests or insurrection disrupts the normal order, then the burden of justification rests heavily on the perpetrators of such violence; but if that 'normal' order is in fact itself a form of structural violence, then violent protests or even revolution can more readily be legitimated as a species of self-defence".[143]

If one were to take seriously the violence of migrant labour, exploitation, dehumanisation and alienation of these mine workers, as was depicted in the swathes of evidence gathered by not only the Farlam Commission, but multitude of commissions investigating violence in the mining sector before; then one would have to acknowledge as legitimate any violent protest against that order as legitimate or indeed as a demonstration of self-defence against an illegitimate system.

6.4 Conclusion

This chapter provided a cursory overview of the dominant discourse on violence in the Farlam Commission's narration of the violence that occurred at Lonmin mine from the 9th to the 16th of August 2012. I noted that the very language used to describe the violence was constrained by legal associations of discourses on violence, where the use of the term 'massacre' was discouraged from use in the Commission space so as to remove questions of blame. This is an example of how the language of violence has implicit and embedded legitimist notions in describing the act of violence as it occurs in the world.

An analysis of sections of the Farlam Report revealed the commission's attempt to approach its subject matter in an even-handed way, allowing all sides to air their views. However, in the final report the commission defaulted to a legal approach to evidence and in so doing, the resounding discourse is that of the 'criminal crowd' gathering outside of the legally defined collective bargaining arrangements. A revealing motif in the report is that of 'the criminal crowd' which was substantiated with the discourse of the irrational men fuelled by *muthi*

[143] du Toit and Chabanyi Manganyi, *Polit. Violence Struggl. South Africa*., 6

rituals. Here the effects of the distinction between legal and illegal action was interrogated, where I argued that the distinction both underpinned legitimist discourses on violence, and undermined the mine worker's strike violence, but that the distinction also operated to create a 'surplus value' to legitimate the legal system itself.

Nonetheless, as was the case with the TRC's hearings on the mining sector, the process of gathering evidence exposed the Farlam Commission to the glaring fact of the decades of exploitation and poor working conditions of the mine workers who had engaged in the "illegal" strike action, which I argued were examples of structural violence as per Galtung's definition. The investigation exposed clear evidence of structural violence, which experts attributed as a main contributing reason why the mine workers decided to strike outside of existing collective bargaining arrangements. Structural violence was evident both in terms of inadequate collective bargaining law through which workers can democratically air grievances, and by way of the squalid living conditions of the mine workers who went on strike outside of the union protection for a wage increase. However, these issues hardly feature in the final report.

As was the case with the TRC's investigation into the violence of the mining sector under apartheid, here we see that since the transition, structural violence has continued to be a feature of the 'normal' order, despite the enactment of labour laws designed to reform the labour environment and enhance workers' rights and collective bargaining power. However, the particular legal lens adopted by the Marikana Commission was that the elements of structural violence raised in Phase 2 of the commission were not acknowledged as the main catalysts of the violence seen from the 9th to 16th of August 2012.

The chapter that follows continues my analysis of the legal approach of the Marikana Commission. However, I show that the legal approach allowed the commission to make findings against the state and Lonmin mine.

7. Unofficial and Contestatory Discourses on Violence in the Farlam Commission

7.1 Introduction

It has been argued that although the Marikana Commission was, by its own admission, not a court of law; it adopted a legal lens in its approach to its task. The previous chapter showed how the legal lens contained implicit biases regarding the legitimacy of the strike and that it constrained the commission's focus, settling limits upon what it identified as 'violence'. I argued that, consequently, the official discourse on violence tended to attribute overall responsibility for the violence to the 'crowd' of mine workers who decided to strike outside of legal collective bargaining structures circumscribed by legislation like the Labour Relations Act. Drawing on Marxist scholarship on the law under the capitalist mode of production I analysed the commission's approach to collective bargaining law and found it to be ideological, as it concealed existing relations of social domination.

In this chapter I expand on the effects and implications of the Farlam Commission's legal approach to its subject matter and outline the legal reasoning behind findings on Lonmin on the one hand, and against the South African Police Service (SAPS) on the other. While the Farlam Commission sought to produce an official discourse on violence; it created space for the emergence of other 'non-official' and contestatory discourses on violence to emerge. One of these was the discourse of "toxic collusion" between state and capital, or, between the African National Congress (ANC) government and Lonmin mine. I trace the emergence of this discourse and the way it was dealt with in the commission space to argue that the "toxic collusion" discourse challenged and became integrated into the official discourse and is archived in the final report.

7.2 'Toxic Collusion' Between the State and Lonmin

As stated, the official discourse of the 'criminal crowd' of mine workers permeated the Farlam Commission report. As a result of this the SAPS lawyers contended that the police officers, "reasonably believed their lives and that of their members to be in imminent danger", leading them to respond in the way that they did.[1] However, other competing discourses explaining the violence saturated public discourse – both from the media, and from within the Farlam Commission itself. Another view, promulgated by the South African Human Rights Commission (SAHRC), was that the police may have misunderstood the actual level of threat and while the shooting may not have been premeditated it was, "massively disproportionate, indiscriminate and unlawful".[2]

An additional prominent narrative, which is the subject of this section, was that there was "toxic collusion" between the SAPS and Lonmin, and that there was murderous intent on the part of the police who had executed their plan in such a cunning way so to allow for plausible deniability.[3] Indeed, the Farlam Commission found itself bumping up against themes that emerged during the Truth and Reconciliation Commission's institutional hearings on business – the collaboration of certain industries (particularly mining and agriculture) with the state, thereby implicating certain corporations violations of human rights. Furthermore, in addition to the notion of toxic collusion between the state and Lonmin was the idea that the commission itself would be biased to the state. This was, as mentioned in the previous chapter, of great

[1] SAPS, "Opening Statement on Behalf of the South African Police Service, Exhibit FF9," 2012, https://justice.gov.za/comm-mrk/exhibits.html.

[2] MM Le Roux et al., "Written Submissions of the South African Human Rights Commission Regarding 'Phase 1'" (Centurion, 2014), https://www.justice.gov.za/comm-mrk/docs/201411-HoA-SAHRC.pdf., 391

[3] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 505-510; Dali Mpofu, Mpati Qofa, and Reghana Tulk, "Marikana Commission of Inquiry Heads of Argument on Behalf of Injured and Arrested Persons" (Centurion, 2014), https://justice.gov.za/comm-mrk/docs/201411-HoA-InjuredArrested.pdf., 142-181; 219-221; A Higginbottom, "The Marikana Massacre in South Africa: The Results of Toxic Collusion," *Researchgate.Net*, accessed October 31, 2018, 4

concern to the commission, which sought public legitimacy both within South Africa and internationally. As Ashforth wrote about commissions, "Independence is the first requirement of Truth".[4]

In this section I elaborate on the way the discourse of 'toxic collusion' became a central theme of the commission in its attempt to ascertain the facts about the causes of violence at Lonmin Mine between the 9th-16th August 2012. I show how this narrative was affirmed by evidence given in the course of the commission, but that the report attempts to refute this charge. For Higginbottom, these findings were "unconvincing and even perverse against the weight of discovered evidence".[5] On this point I revive the argument begun on the previous chapter concerning the use of photographic evidence in corroborating or disrupting official discourse on violence by showing how photographic evidence of the slain mine workers refuted the police's charge that the strikers were armed at Scene 2 where they were killed by the police.

However, I add that the findings were in line with the Farlam Commission's legal approach which had endorsed the notion that that the strikers had sparked the violence with their criminal actions. Nonetheless, the emergence of this discourse reveals that alternative, popular versions of the 'truth' emerged and were sustained as the Commission conducted its work and after the publication of the final report.

7.2.1 Emergent Discourse of Toxic Collusion

As stated, there were two sites of killing on the 16th of August 2012, which became known as Scene 1 and Scene 2. The killing at Scene 1 occurred as the group of strikers moved away from the big *koppie* as a response to the police beginning to lay down a circle of barbed wire to herd the group in a particular direction toward the police. Brigadier Calitz ordered the shooting,

[4] Ashforth, "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms," 1990., 9

[5] Higginbottom, "The Marikana Massacre in South Africa: The Results of Toxic Collusion.", 1

which incited a team of over 50 Tactical Response Team officers, armed with assault rifles, to shoot "328 bullets in a burst of fire lasting 12 seconds", which killed 17 of the miner workers.

From the offset, Lonmin denied that it was responsible for any of the violence that had ensued, arguing that the source of the conflict was a dispute between the labour unions. This was refuted by the unions themselves, with evidence that both unions had members on the strike committee.[6] The charge was further cast aside by the work of Alexander et al, who argued that the strike had the effect of uniting the mine workers.[7] If this is compared to past mine conflicts seen during apartheid, for example, there is a similar deflection of responsibility by the mining company. Whereas in the past, conflict in the compound was largely attributed to inter-tribal or ethnic rivalry; it is commonplace for official discourse to explain the causes of violence among mine workers as rooted in union in-fighting.[8] While there is indeed evidence of inter-union conflict; this narrative tends to focus on the illegitimate violence of the unions, and hence paper over the enduring structural violence in the South African mining sector which may explain individuals' resort to violent protest action.

Shortly following the massacre on the 16th August 2012 the narrative emerged of collusion between the state (powerful personnel in the state and SAPS) and Lonmin in defence of the company's economic assets, facilitated by Lonmin director and ANC leader, Cyril Ramaphosa.[9] Moreover, there was the additional narrative that these actors were acting in

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[6] Sam Adelman, "The Marikana Massacre, the Rule of Law and South Africa's Violent Democracy," *Hague J Rule Law* 7 (2015): 243–62., 246, fn14

[7] Peter Alexander, *Marikana: A View from the Mountain and a Case to Answer - Peter Alexander - Google Books*, 2012., 171

[8] Linda Flood, "Union Conflict Rages on in South Africa," *Inter Press Service News Agency*, August 21, 2017, http://www.ipsnews.net/2017/08/union-conflict-rages-on-in-south-africa/.

[9] See Hattingh, "What the Marikana Massacre Highlights"; Alexander, *Marikana: A View from the Mountain and a Case to Answer*.

Cyril Ramaphosa was a founder of the National Union of Mineworkers and the Congress of South African Trade Unions (Cosatu) and was one of the key negotiators at Codesa and in the writing of the South African Constitution. Like other ANC leaders he has also been a major beneficiary of the post-apartheid economic restitution programme of Black Economic Empowerment. As Davies writes, "By August 2012, through his company, Shanduka, Ramaphosa was reckoned to be worth some $700m, with shares and directorships in

concert to conceal the 'truth' and mislead the Farlam Commission of Inquiry. As one commentator wrote in a piece published just prior to the report's release to the public:

> Those who may find themselves accused of colluding in the police action include not only senior figures from the ruling African National Congress but also Lonmin, the British company that owns the Marikana mine.[10]

The discourse of 'toxic collusion' between the state and Lonmin in killing the band of striking mine workers fortified the widely accepted view in left circles – drawn from various iterations of Marx's writings – that the state acted as an instrument of the ruling class, or bourgeoisie, as mentioned in Section 2.2.1 of this dissertation.[11] It appeared as if that state had done just that – enacted violence upon the mine workers to abruptly end the strike that had caused interruptions in Lonmin's production process.

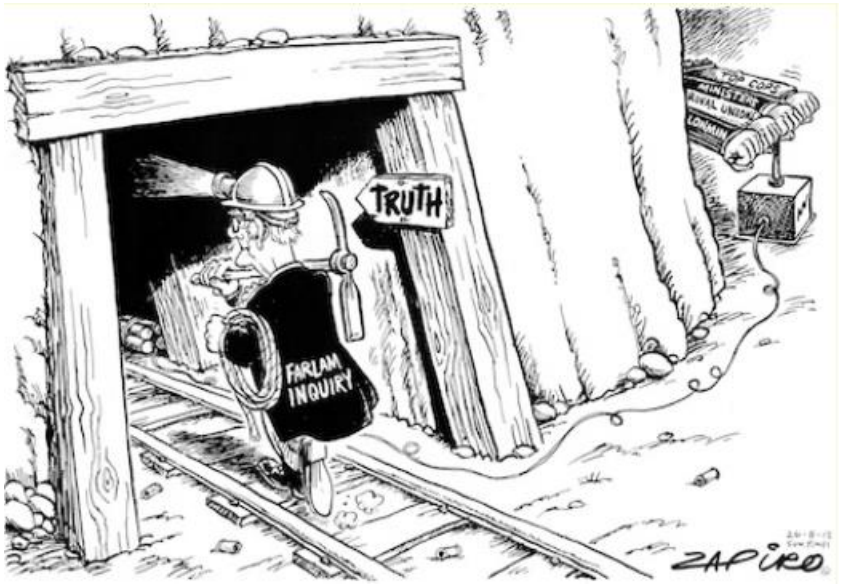

Figure 2, Sunday Times on the 26th August, 2012

numerous companies – including Lonmin". Nick Davies, "Marikana Massacre: The Untold Story of the Srike Leader Who Died for Workers' Rights," *The Guardian*, May 19, 2015, https://www.theguardian.com/world/2015/may/19/marikana-massacre-untold-story-strike-leader-died-workers-rights.

[10] Davies, "Marikana Massacre: The Untold Story of the Srike Leader Who Died for Workers' Rights."

[11] See Barrow, *Critical Theories of the State: Marxist, Neo-Marxist, Post-Marxist.*

The image above by political cartoonist, Zapiro, depicts visually this public discourse.[12] The figure walking into the mining shaft represents the Farlam Inquiry in its search for 'truth'. However, there is dynamite visible inside the shaft. The hands holding on to the device that will ignite the dynamite represent "top cops", "ministers", "rival unions" and "Lonmin". It is implied that these actors are attempting to sabotage the Farlam Commission's ability to find out the 'truth' behind the causes of the violence and that they are working in tandem to do so to protect certain interests.

During the commission the discourse of "toxic collusion" was maintained by counsel for the injured and arrested mine workers. They submitted that the manner in which the SAPS and Lonmin dealt with the situation under investigation "went beyond acceptable legal limits", that the behaviour was unlawful and that it was a main cause of the massacre.[13] Evidence submitted to the commission indicated that Lonmin had emphasised the criminality of the strikers' actions and that Lonmin provided logistical aid to the police, including access to CCTV cameras, "food and accommodation, helicopters on the day of the massacre, and a detention centre".[14]

The theme emerged during the commission's proceedings, becoming more animated as additional evidence was aired. As Adv. Dali Mpofu stated when cross-examining Lonmin witness and member of the security team, Mr Dirk Botes:

> You might know that our case is that the majority of deaths in the period under discussion, a total number which is 44, were caused by a *toxic collusion* between SAPS and Lonmin. You're aware of that hey? (Emphasis mine)[15]

[12] The cartoon was published in the Sunday Times on the 26th August, 2012

[13] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 505

[14] Lonmin's evidence cited in Adelman, "The Marikana Massacre, the Rule of Law and South Africa's Violent Democracy.", 247

[15] Adv. Dali Mpofu, Day 266. "The Marikana Commission of Inquiry Transcription.", 33651

The charge was instantly refuted by Botes, who attempted to shield Lonmin from culpability or complicity. He repkied, "I'm aware of that, but not…against Lonmin, because the police acted on that day and not Lonmin".[16] In demarcating the subjects about which Botes would be questioned Mpofu sought to utilise the cross-examination of Botes to entrench the 'toxic collusion' thesis. It is worth citing an extract from the cross-examination below:[17]

> MR MPOFU: And one of those variations of the theme of why we say, we will say for example that Lonmin should be held responsible for the 41 deaths that started with the deaths of the security policemen, is that we're going to be talking about what I would call ineptitude and wrong decision making on the part specifically of Lonmin Security, of which you are a part and so I'll deal with that aspect of it with you. You understand?
>
> MR BOTES: I understand…
>
> MR MPOFU: Yes, because you cannot be held responsible for the hard-line stance, what we call the hard-line stance of management not to speak to the strikers. You had no role to play in fashioning that hard-line stance. Is that correct?
>
> MR BOTES: That's correct…
>
> MR MPOFU: Ja, nor can you be held responsible for the political pressure which induced the police brutality which resulted in the 39 deaths. You had no part in the political pressure. Correct?
>
> MR BOTES: That's correct…

Here, Mpofu is inviting Mr Botes to confirm what he cannot be held responsible for, but is inadvertently having him confirm that there was a) a hard-line stance by Lonmin management not to speak to the strikers to negotiated their wage increase, and b) that the 'police brutality' resulting in 39 deaths (at Scene 1 and Scene 2) had been incited by political pressure. Mpofu uses legal argumentation to advance a narrative that is favourable to the party he represents: the families of the injured and arrested mine workers.

The interaction was interrupted by Adv. Semenya, the SAPS's lawyer, who added that the question assumed a fact which had not yet been proven in evidence. He stated, "There's no political pressure that has been demonstrated. There's the *contention* for it which Mr Mpofu

[16] Mr Dirk Botes, Day 266. "The Marikana Commission of Inquiry Transcription.", 33651

[17] Day 266. "The Marikana Commission of Inquiry Transcription.", 33653

insists on repeating" (Emphasis mine).[18] Farlam agreed and noted that the charge of toxic collusion could not be made "on the basis of established fact", but that it was acceptable to make the point on the basis of contention. Hence, while not a court of law, the legal principles surrounding determining culpability remain the guiding frame for responsibility: innocent until proven guilty, which must be substantiated with evidence.

In the course of the cross-examination Mpofu said that he "blamed" Botes for his role in being, "the agent between the SAPS and Lonmin in respect of the alleged toxic collusion" and accused him of "deliberately concealing or altering evidence with the intention to mislead the commission, or to conceal certain facts from the Commission."[19] This accusation, however, raised a significant issue that the commission would confront on multiple occasions: the issue of individual versus collective responsibility. Of course, the terms of reference required the Commission to investigate the relative contribution to violence made by the various 'parties' and not any individuals. Hence, Farlam interjected the cross-examination to inquire whether Mpofu was accusing Botes as an individual of misleading the Commission, or Lonmin. Mpofu responded:

> Fair enough. Yes, thanks…Okay, look Mr Botes, in fairness to you I'll be saying "you" in the sense of Lonmin, which does not mean that you were not involved. It's just that this Commission is not about apportioning blame to you as an individual. I'm questioning you as a representative of Lonmin. It's something that I think gets lost a lot of times in this Commission. So whether you as Botes were involved or not is neither here nor there.[20]

It was important for Mpofu to prove that there had been toxic collusion between SAPS and Lonmin, for, as he stated himself, "the meaning of that collusion…would be that both of those parties are guilty of the deaths…" and that both parties are "responsible for concealing

[18] Mr Semenya SC, Day 266. "The Marikana Commission of Inquiry Transcription.", 33653-4

[19] Mpofu, Day 266. "The Marikana Commission of Inquiry Transcription.", 33656

[20] Mpofu, Day 266. "The Marikana Commission of Inquiry Transcription.", 33657

evidence".[21] Because of the public nature of commissions of inquiry in South Africa anyone is able to attend hearings, including the media. As a result, the "toxic collusion" discourse filtered into the media and into the public sphere countering the official police narrative that the striking mine workers to blame for the violence.[22] The 'toxic collusion' notion pointed to a far more conspiratorial affair and points to intent on the side of both Lonmin and the state to supress the strikers in a violent manner.

However, while the open nature of the commission permitted the dispersion of this narrative it is also evident that Judge Farlam attempted to control and prevent this narrative from taking hold until such facts had been proven through evidence. This is seen when Farlam interrupts Mpofu as he is cross-examining Mr Botes after Mpofu suggests that there had been collusion between Lonmin and the SAPS. Farlam reminded Mpofu that he was not to question Mr Botes concerning matters related to SAPS and should only question him in relation to his conduct at Lonmin. He then cautioned Mpofu for attempting to sway his narrative to the media:

> …I know there will be a contention that SAPS endeavored to mislead us in certain respects. Whether they succeeded will be another matter, but whether that's correct or not is not presently under discussion. You will argue it later. There's a lot of cross examination on which your argument will be based, but you don't have to traverse with this witness, and you don't have to make sort of statements as you go along which are picked up by the media, you know that the police were guilty of misleading-[23]

Here Farlam is attempting the steer the cross-examination back to the proper process. Mpofu is reminded that the collusion charge is merely *contention* and not a legally admissible fact that has been approved through the formal legal process and that he cannot make statements as he goes along. This extract is further indicative of the way the legal approach seeks to compartmentalise the matter into atomistic issues that can be dealt with on their own terms.

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[21] Mpofu, Day 266. "The Marikana Commission of Inquiry Transcription.", 33662

[22] "'Toxic' Lonmin-Police Collusion Blamed for Marikana Massacre," *Mail & Guardian*, July 30, 2014, https://mg.co.za/article/2014-07-30-toxic-lonmin-police-collusion-blamed-for-marikana-massacre/.

[23] Day 266, "The Marikana Commission of Inquiry Transcription.", 33658

Mpofu is told that this is not the time for a discussion on the SAPS's conduct nor to make that argument. The exchange that follows between Farlam and Mpofu is significant, as it peels away the formal adornments of the commission process. Mpofu requests that Farlam withdraw the "grossly unfair accusation" that he may me questioning the witness with the idea of manipulating the media, stating that he had, "laid the basis for a collusion between the two parties" which informed his questioning.

> MR MPOFU: How can you say that? How can you say that? How can -
>
> CHAIRPERSON: Give me -
>
> MR MPOFU: - you when I'm questioning a witness, want to involve issues about the media?
>
> CHAIRPERSON: Give me an opportunity to put -
>
> MR MPOFU: This is not a game, Chairperson.
>
> CHAIRPERSON: I know, I'm fully aware of that…And I understand what I -
>
> MR MPOFU: It's not a game, Mr Chairperson –
>
> CHAIRPERSON: Please – [inaudible, speaking simultaneously]
>
> MR MPOFU: - or a television story –
>
> CHAIRPERSON: I'm perfectly aware of that, thank you. You don't have to remind me.
>
> MR MPOFU: People died here.
>
> CHAIRPERSON: I'm aware of that too… And I'm determined to find out the truth with my colleagues as to how they died and why.

In this exchange, Mpofu's reiteration of the words 'this is not a game' is contending with the critiques of official commissions as tools of the state, or 'theatres of power'; political games to legitimate the state. His reminder that "People died here" can be read as an attempt to wade through the legal obfuscation to get to the heart of the matter: that people had died and that he had in fact laid a basis for collusion between the police and Lonmin, a collusion which resulted in the mass of deaths.

Fuelling the 'toxic collusion' thesis was the role of then-Deputy President of the country and African National Congress (ANC), Cyril Ramaphosa who also held the position of Chairman

of Shanduka Group, a company he founded and which is a holding company that invests in various sectors of the economy: mining, fast-moving goods, energy, telecommunications and financial services. Shanduka acquired interest in Lonmin through Incwala Resources, a shareholder in Lonmin, when a group of the black economic empowerment shareholders required refinancing. Ramaphosa was then invited to be on the board and had served as the Chairperson of the Transformation Committee. According to his description given during his cross-examination at the Marikana Commission, the Transformation Committee's task was, "to look at all the transformation activities of the company to see the extent to which the company could transform issues of housing in the company, for the workers …, employment equity and indeed to look more closely at the mining plan that had been…filed with the Department of Mineral Resources."[24]

Ramaphosa was testifying in his capacity as a non-executive director of Lonmin, and denying that he had influenced then-police minister Nathi Mthethwa as well as Minister of Minerals and energy, Susan Shabangu on the course of action to respond to the strike. As Ramaphosa underwent questioning the proceedings were interrupted by a group in the audience, allegedly members of opposition political party the Economic Freedom Fighters, who began to chant, "Blood on his hands; Ramaphosa has blood on his hands", and calling for Ramaphosa's resignation as deputy President, forcing Farlam to adjourn proceedings.[25] When Farlam returned he referred to what had transpired as serious misconduct, stating that the interruption was inhibiting the commission's goal – to "get to the truth of what happened at Marikana". Cross-examination of the witnesses was deemed essential to verify the testimony of the witness. In response, Farlam asserted, "This is serious misconduct which cannot be tolerated

[24] Day 271, "The Marikana Commission of Inquiry Transcription.", 34406

[25] Day 271, "The Marikana Commission of Inquiry Transcription.", 34515; Much of the chanting and calling for Ramaphosa's resignation was not included on the record of transcription. Footage of this was shown on SABC news and discussed in a broadcast on that day. "Ramaphosa Heckled at Farlam Commission" (South Africa: SABC, 2014)

in any *civilised society* and no commission of this kind can function in the face of misbehaviour of this kind" (Emphasis mine).[26] However, this spectacle of a civil society group disrupted the formalised legal proceedings of the courtroom-like commission to interject a counter-narrative to that which the police, as a wing of the state, sought to put forward. It broke the convention and decorum of what was expected in the commission space which was captured on camera and aired on the news, the words "Ramaphosa has blood on his hands" reaching television screens across the country on SABC news. This speaks to the unintentional role of official commissions, which even when tightly controlled for procedure and subject matter, when open to the public create space for alternative narratives to emerge and take root in society, feeding the development of *un*official discourses. Moreover, as the debacle was aired on national television, there is a sense in which the line between the official and *un*official discourse becomes less clear-cut.

A key source of evidence to corroborate the 'toxic collusion' narrative was a set of emails and phone calls shared between Ramaphosa, Lonmin executives and government personnel, commencing on August 11th after there had already been some deaths resulting from the conflict. Indeed, the commission's broad investigative capacities allowed it to access phone records and record several phone calls made between Ramaphosa and the two Ministers: the Minister of Police and the Minister of Minerals and Energy Affairs. An example of such communication was evidence of email exchanges with Thandeka Ncube, the Transformation Manager at Shanduka, who updated Ramaphosa on the strike, informing him of the two people had already been shot and that the company was proposing to fire the workers engaged in the illegal strike action.

[26] Day 271. "The Marikana Commission of Inquiry Transcription.", 34517

Under cross-examination Ramaphosa was questioned as to why he responded to Ncube that the situation was "grave". He responded that it was grave because people had been injured, but also that it was a grave situation, "because the [wage] differential between rock drill operators at Lonmin and the other mines was…quite big", which he conceded, "would be a huge issue of concern to the rock drill operators at Lonmin". Indeed, Mr Unterhalter cited from the email where Rhamaphosa had written that Lonmin's solution was "clearly not workable" and the idea to pay a special bonus instead of raising the salary would be ineffective. In the email Ramaphosa wrote, "I'm not surprised that the rock drill operators have rejected it".[27] There was another email exchange between Ramaphosa and Mr Jamieson, the Marketing Director of Lonmin, who attested to the situation on the ground and wrote, "At this stage is clear that probably only a massive police and possibly army presence" will attenuate the situation, and stated further, "We simply do not have the capability to protect life and limb and I urge you please to use your influence to bring this over to the necessary officials who have the resources at their disposal. We need help."[28]

Ramaphosa was further questioned on the housing situation. During the commission, Farlam noted the state of affairs they had witnessed when inspecting Lonmin mine, where hostels that had previously housed eight or sixteen mine workers had been converted to a single room or double room respectively, effectively reducing the availability of housing by 87.5%.[29] Mr Ngcukaitobi - the advocate cross-examining Ramaphosa from the Legal Resources Centre (LRC) - also highlighted the target of 5500 houses Lonmin had assured it would build, but that a mere three show houses had been built.[30]

[27] Day 271. "The Marikana Commission of Inquiry Transcription.", 34413
[28] Day 271. "The Marikana Commission of Inquiry Transcription.", 34417
[29] Day 271. "The Marikana Commission of Inquiry Transcription.", 34520
[30] Day 271. "The Marikana Commission of Inquiry Transcription.", 34522

7.2.2 'Toxic Collusion' in the Marikana Report

The issue of 'toxic collusion' was addressed in the final report in a section titled 'capita selecta', special topics. In the attempt not to use language that may insinuate blame, the report refers to the "allegedly collusive relationship" and sets out the various ways in which the "alleged" collusion manifested, as argued by Counsel for the injured and arrested persons. This included that SAPS utilised surveillance tools supplied and set up by Lonmin; that Lonmin had transferred its concerns to the police and encouraged them to engage with the strikers when it was apparent that it was "both unnecessary and inopportune to do so"; that Lonmin management had played a decisive role in devising the police plan; that the police had made use of Lonmin's equipment, like the chopper; that Lonmin personnel (Sinclair and Botes) had paired with SAPS members "to hunt down the breakaway group on 13 August"; the synchronisation of Lonmin security and the police; as well as the Ramaphosa emails, which showed coordination between high level politicians, the police and Lonmin management.[31] It was argued that while the interactions between these group may seem "acceptable or neutral on face value" that "the toxicity thereof stems from the fact that it was intended to and did result in the massacre/tragedy".[32]

However, the Commission did not agree that there was toxic collusion between the police and Lonmin. Instead, in addressing this point, the report reiterates the violent actions of the strikers and that "at least some of them" were attempting to enforce the illegal and unprotected strike using "violence and intimidation". The Report stated further that those on strike had broken laws including the Dangerous Weapons Act read with Government Notice 1633 of 1996 as they were at a public gathering in possession of "dangerous weapons such as spears, assegais,

[31] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 505-506

[32] Farlam., 507

knobkieries and pangas".[33] Here the Report also mentions that some of the striking mine workers had "used these weapons to kill Messrs Mabelane, Fundi, Mabede and Langa and Warrant officers Monene and Lepaaku" and that they had also inflicted "serious injuries on Lieutenant Baloyi and Mr Janse Van Vuuren and two others at K4 shaft", and that "they burnt seven vehicles".[34] The 'collusion' between Lonmin and the SAPS is explained as a reasonable response to the violence wrought by the strikers and that Lonmin's request for SAPS' assistance was "to restore law and order to arrest those responsible for the crimes they had committed and to prevent a recurrence".[35]

The report uses strong language to discredit the toxic collusion charge, stating that it would have been "absurd" and "unreasonable" for Lonmin not to have shared its facilities, equipment and intelligence with the SAPS, or for Lonmin's security personnel not to have assisted in the way it did. Moreover, the report states that given the violence that occurred from August 10th, it was, "reasonable for the SAPS to infer that this group, many of whom were armed with dangerous weapons and busy contravening the Dangerous Weapons Act, had embarked on a mission to intimidate and possible assault workers…who were not participating in the strike."[36]

Furthermore, in dealing with the Ramaphosa emails, upon its evaluation of the evidence, the commission report states, "his conduct in endeavouring to get the police to do their job to stabilise the situation and arrest those strikers who had committed serious offenses was not improper".[37] It states that the commission found, "no basis…to find even on a prima facie basis that Mr Ramaphosa is guilty of the crimes he is alleged to have committed".[38]

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[33] Farlam., 507
[34] Farlam., 507
[35] Farlam., 507
[36] Farlam., 509
[37] Farlam., 509
[38] Farlam., 438

The "collusion" narrative raises questions concerning the limits of the state's reach into various areas of social life. During phase 2 of the commission's investigation Bahlungu emphasised the "tragic results" whenever the state intervened in labour matters.[39] He referenced events from the past where whenever the state was called in to quell labour disputes "people were killed" and concluded that, "precisely because of these things, where there's tension, you just do not call a police force in," because, "ethically a police force [is] unprepared to deal with industrial relations," and hence calling in the police is a, "recipe for disaster in highly charged environments such as those".[40] This view was confirmed in Ramaphosa's evidence, which depicted that he was aware of the potentially disastrous impact of increasing the police presence and had acceded that the source of the striker's grievances was legitimate. However, the Commission's rubric of interpretation was clear cut: the strikers had damaged property and harmed others, and hence calling in the police was rational, reasonable and appropriate to restore law and order even through there was additional evidence that in terms of the particular conflict, police intervention was bound to lead to more casualties and exacerbate the situation. As Ramaphosa stated in his cross-examination, and with his personal history of leading the National Union of Mineworkers under apartheid: negotiating with the workers and coming to a workable solution was the only method likely to be effective.

7.3 'Justice' in the Farlam Commission Report

Although the Marikana Commission's motto was 'truth, restoration, justice', it was criticised for failing to deliver justice. For example, after the report's release, investigative journalist Greg Marinovich wrote that the Judge Ian Farlam's recommendations were, "legally and socially conservative, and morally weak", because they suggested further investigations into

[39] "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014.", 60

[40] Sakhela Buhlungu in "The Marikana Commission of Inquiry Transcription, Seminar Phase 2. 31 March 2014.", 60

individuals like former Police Commissioner Riah Piyega, without recommending any reparations for the families of the deceased or injured persons.[41] On this point, evidence leaders and other parties had maintained that the commission ought to compel the state pay compensation on the basis of "loss without liability" to the dependants of those who were killed by the SAPS and the mine workers who were injured by the gunfire, as well as to the dependants of those who had been killed or injured by the striking mine workers in the preceding days.[42] However, the commission held that the terms of reference were not broad enough for it to recommend compensation for the victims of the August 16th massacre.

Marinovich claimed, further, that, "The report's recommendations are a great disappointment to the families of victims, as well as to anyone who believes that accountability goes hand in hand with power. There are, startlingly, no clear findings in the report."[43] Another lawyer who represented the SAHRC asserted, "They actually don't commission inquiry, they de-commission inquiry. It's a way to say you're doing something but it doesn't actually achieve anything".[44]

[41] Greg Marinovich, "In the Shadow of Marikana; a Lost Opportunity for Justice," *Daily Maverick*, 2015, https://www.dailymaverick.co.za/article/2015-06-29-op-ed-in-the-shadow-of-marikana-a-lost-opportunity-for-justice/.

[42] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 518

[43] Marinovich, "In the Shadow of Marikana; a Lost Opportunity for Justice."

[44] Interview with Michelle Le Roux, April 2015 in Walton, "The Marikana Commission: Truth and Voice in Official Documentation."

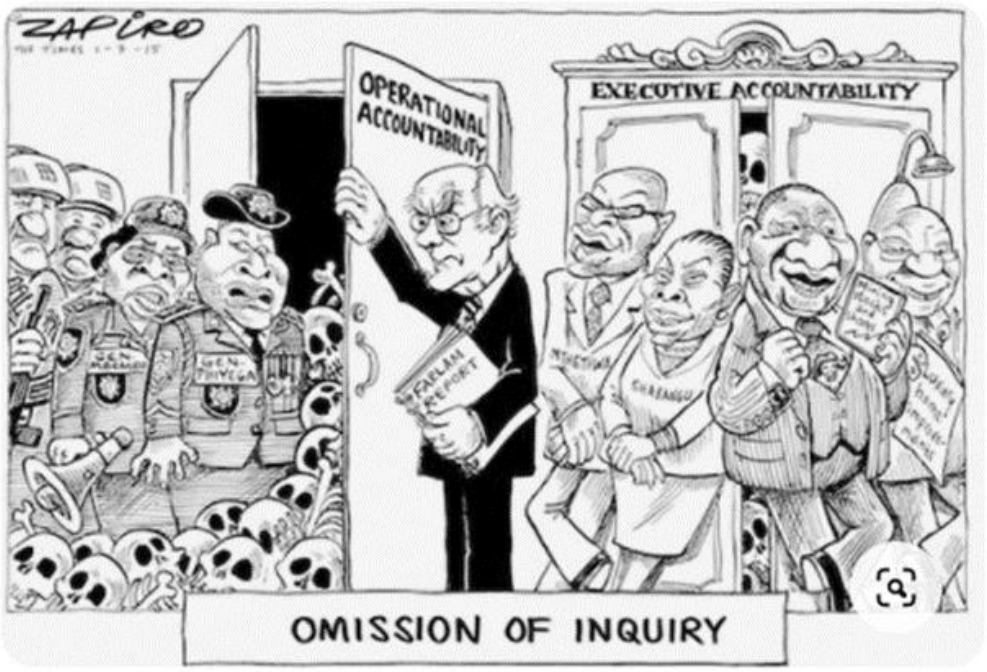

Figure 3 Omission of Inquiry. The Times. 1 July 2015

However, the satirical cartoon above (Figure 3), again by Jonathan Shapiro ("Zapiro") presents a slightly different, perhaps more nuanced, view.[45] It is titled "Omission of Inquiry", which was a commonly held accusation of the commission.[46] Here, the commission of inquiry is presented as aiding the protection of executives in government, but that some findings were made in terms of "operational accountability" against the SAPS, depicted by Farlam opening the closet and the skeletons tumbling out. The reference to the idiom, 'skeletons in the closet' concerns undisclosed facts or 'secrets' which can damage the reputation of the person or organisation, in this case the SAPS. Of course, the skeletons are a direct reference to the deceased, probing at who can be held responsible for the Marikana deaths. While Marinovich is correct that the findings are not clear; the commission did make a significant finding regarding the SAPS's actions and the liability of the state for the deaths that ensued on the 16th August. This finding

[45] Jonathan Shapiro, "Omission of Inquiry," *The Times*, July 1, 2015, https://www.zapiro.com/component/zoo/advanced-search/55654?Itemid=464&page=5.

[46] See Dale T McKinley, "Commissions of Inquiry or Omission?," The South African Civil Society Information Service, 2015, https://sacsis.org.za/site/article/2347; Mahlakoana, "Mathunjwa: Farlam Commission One of Omission."

has gone largely ignored in analyses of the commission's findings.[47] Hence, in this section I argue that the Marikana Commission's fidelity to legal reasoning meant that it encountered conflicts within the legal field itself and that applying a legal approach does not necessitate a foregone conclusion in the interest of one social group over another.

The commission's faithfulness to legal logic led it to make two significant findings against the state on the one hand, and against Lonmin on the other. While indeed the findings and recommendations of Commissions of inquiry are not binding on the state the findings were significant in establishing precedent for the public recognition that the police acted wrongly in their plan to neutralise the strike; and that Lonmin had shirked on its legal obligations to fulfil its social labour plan, which contributed to the tension on the mine.

7.3.1 Contest over Law

The Farlam Commission was indeed highly legalised. It followed a quasi-adversarial style of proceedings where evidence leaders, with the assistance of two investigators, investigated the facts surrounding the violence, and who "led some witnesses and cross-examined others".[48] However, the fidelity to legal procedure also led to contestation surrounding *which* legal precedent ought to guide the commission and its findings. With almost sixty lawyers working at the commission at one point,[49] interests and egos competed to have certain legal interpretations hold over others.

One of the first ways this manifested was in the interpretation over the terms of reference. For example, during the proceedings the question was raised regarding whether any party had the burden of proof: the obligation to prove or disprove an allegation, as well as what the legal

[47] Forrest, "Marikana Commission Unearthing the Truth or Burying It?"

[48] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 16

[49] Interview with Heidi Barnes and Anthony Gotz, April 2015 in Walton, "The Marikana Commission: Truth and Voice in Official Documentation.", 43

status of affidavits or statements was of people, such as the policemen who fired shots at Scene 1 and Scene 2 who were not made to provide oral evidence.[50] Counsel for the SAHRC interpreted the terms of reference to mean that the burden on proof rested on SAPS to prove that their resort to violence, which led to the killings, was 'justified', and hence, lawful.[51] The SAHRC is distinct from an ad-hoc commission in that it is a permanent independent body inaugurated in 1995 as a chapter nine institution. According to its submission the SAHRC acted in the "public interest" and in line with its role as a "national human rights institution" to monitor the commission's proceedings and ensure that they were fair and impartial, as per its function set out in the Constitution.[52]

Counsel for the SAHRC drew on two cases of international law to advance the position that the burden of proof lay with the SAPS.[53] This contest over which laws, or legal precedent, applied to the interpretation of these events is indicative of the contests internal to the legal field itself. The Farlam Commission contended, however, that in both of these cases, suits had been brought against the state party where the tribunal had to determine "whether the killings were lawful" in a context where "one of the parties had to lose"; however, in the commissions there were "no parties *stricto sensu* and no winners and losers".[54] Hence, the commission disagreed with the legal interpretation offered by the SAHRC, and stated that there was no burden of proof on the state.

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[50] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 23

[51] Par 2.4 in Le Roux et al., "Written Submissions of the South African Human Rights Commission Regarding 'Phase 1.'"

[52] Section 2.4.1 (a) in Le Roux et al.; see Section 184 of the Constitution of the Republic of South Africa, 1996

[53] The two cases included *Bleier v Uruguay* in a decision by the United nations Human Rights Committee; and *Bektas and Ozlap v Turkey*, a decision by the European Court of Human Rights. In Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 25

[54] Farlam., 25

Another point of contention related to the interpretation of evidence was related to the standard of proof. Counsel cited another case – Orhan v Turkey, decided upon by the European Court of Human Rights - where the court had drawn an inference against Turkey because the state failed to "submit the information which it had in its possession relating to the allegations of the applicant, to which information it had sole access". They held that this principle did apply in South African law,[55] and that the commission ought to adopt a similar approach where the SAPS failed to provide adequate explanation for not providing the commission with essential information and that the commission ought to apply a lower standard of proof in making findings against the SAPS because of this. However, the commission drew on another resource to interpret its mandate – Standards of Proof in International Humanitarian and Human Rights Fact-Findings and Inquiry Missions – to ascertain what it deemed the more appropriate standard of proof to apply on this case, which was no lower than the civil standard. There were several points of contention such as this, with various sides arguing for their legal approach to be followed. This is indicative of the diversity in legal points of view and that a legal approach does not determine a foregone conclusion that will necessarily work in one favour or another.

Bourdieu's approach to the law is relevant in explaining this. He asserts that, "the juridical field is the site of a competition for monopoly of the right to determine the law".[56] This is because within the legal field itself there is a contest among those individuals who have technical competence to interpret a body of texts and thus sanctify a, "correct or legitimized vision of the social world".[57] In the case of commissions of inquiry investigating violence, one may add that there is a contest in the application of legal principles to advance a legitimised vision of the past incident of violence, to find the acceptable legal discourse on violence.

[55] The report cites *Galante v Dickinson 1950 (2) SA* 460 (AD) (at 465) in Farlam., 25-26
[56] Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field.", 817
[57] Bourdieu., 817

Acknowledging this is significant as it highlights the law's relative autonomy but also that it exposes the "illusion of the law's absolute autonomy" – the notion that the system of juridical norms are wholly independent of power relations in society, which the legal system contributes to sustaining.[58] It is probable, then, that which legal approach is followed becomes a political decision; the result of who has the monopoly on persuasion in a particular circumstance. It is also determined by what the commission believes will be politically possible.

7.3.2 Finding the State Liable: A Defective Plan under International Law

The chapter preceding this elaborated on the repeated reference to the image of 'the crowd' in describing the mine workers on strike. Another feature of the report is its treatment of both the police and the mine workers in a generalised way, attributing motivations and plans to *groups* instead of individuals. Critics of the Farlam Commission are correct that no adverse findings were made against individual SAPS members who fired the shots. The argument for this is that no particular death could be linked to an individual police officer who was shooting. However, according to Farlam, making these individual findings of responsibility was unnecessary. It would be through the application of an international legal principle that the Commission would find the state liable for the deaths of the striking men on 16th August.

All the police present at Scene 1 were exonerated as a collective. This is despite the fact that the Commission did not hear testimony from nor cross examine any of the officers belonging to the Tactical Response Team - the officers who fired the guns.[59] To excuse this gap in its evidence, the report offers, "the [security police] who did not testify in all probability saw the situation as their commanders did".[60] There was no legal test of the reasonableness of this

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[58] Bourdieu., 817

[59] Stuart Wilson, "Judge Farlam's Accidental Massacre," *Daily Maverick*, June 26, 2015, https://www.dailymaverick.co.za/opinionista/2015-06-26-judge-farlams-accidental-massacre/.

[60] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 252

assumption via legal processes. A core reason why individual SAPS members who shot on the 16th August were not cross-examined was due to time constraints and hence, Farlam stated that the SAPS were required to 'justify' all the shootings by their members that had led to injury or to death.[61]

However, the commission's verdict regarding the guilt of the police officers is ambivalent. On the one hand the Report states, "in the case of certain shooters there is prima facie evidence that the [police officers] concerned may well have been guilty of attempted murder, but it cannot be said that any shooter is guilty of murder because it cannot be shown which of the shooters actually killed anyone".[62] This is because there group of police officers who shot was so large, and the firing frenzy so chaotic, that it could not be told which officer shot which mine worker. Using collective terms to describe the police (i.e. "shooters") operates to lure one, discursively, away from issues of individual guilt and accountability. In relation to this finding, the Farlam commission's finding appears strikingly similar to those made by tumult commissions established in British colonial and apartheid contexts: the discourse that everyone, and hence no one is to blame is evident. It was because of this that for some, the commission was a commission of 'omission'.

On the other hand, the report also makes unfavourable findings against the state, or arms of the state. An example is the Report confirming that the National Police Commissioner's address to the media concerning the event was "materially misleading" as it gave the impression that there was only one shooting incident, where the police were defending themselves against "the militant group [which] stormed toward the police…wielding dangerous weapons".[63] The commission compared the media statement to the report written and sent by Commissioner

[61] Farlam., 30
[62] Farlam., 258
[63] Farlam., 396

Phiyega to the President and Minister of International Relations, where in that report it is clear that there were two sites where killing took place - the sites that came to be known as scene 1 and scene 2.[64] After her undergoing cross examination the commission found that Piyega was unable to account for the reason why the narrative of events was different when recounted for the public, even though she admitted that she was "both the owner and reader of the statement".[65] Here the Commission adopts the conclusion made in the Evidence leader's report, that the report prepared for the President and Minister had been, "deliberately amended when it was reformulated into a media statement in order to obscure the fact that there had been two shooting incidents, separate in time and space" amounting to a "deliberate misleading of the public".[66] Hence, the commission exposed the SAPS' attempt to whitewash the massacre with a doctored narrative.

The commission also found that some of the officers might have "exceeded the bounds of self and private defence".[67] The SAPs had argued that the firing of shots by its officers on the 13th and 16th of August - where in both cases strikers were killed or harmed (as well as a non-striker who was near scene 1 on 16th August who was fatally wounded) - was in self-defence and hence, "that the shots fired were accordingly lawful".[68] The same argument was made by NUM, which submitted that the shooting from their office building on 11 August was justified and lawful because they believed the strikers were planning to set the NUM office alight.[69] To respond to this the Commission drew on relevant case law to establish the legal principles and

[64]Day 105, Phiyega. "The Marikana Commission of Inquiry Transcription.", 11351-11352

[65] Day 105, Phiyega. "The Marikana Commission of Inquiry Transcription." 11361

[66] Budlender et al., "Heads of Arguments of Evidence Leaders, Marikana Commission of Inquiry.", para 891 in Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 397

[67] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 558

[68] Farlam., 32

[69] Farlam., 32

precedent surrounding self-defence and the right to life. This is a further example of the application of a legal principle to make an adverse finding against the state.

However, the government was held liable because the plan that was implemented was found to be "prepared in haste" and defective.[70] This finding was made by applying the McCann Principle, a legal principle derived from the landmark ruling by the European Court of Human Rights (hereafter, European Court) in a case concerning the right to life according to Article 2 of the European Convention of Human Rights (hereafter, 'the Convention'). The McCann Principle derived from case concerned an incident occurring on 6 March 1988, when soldiers were part of a British special forces unit were sent to assist local civil police in Gibraltar. The mission was to apprehend a band of terrorists that were planning a car bomb attack. The British military forces located the group and shot the suspects, resulting in them all being killed. Article 2 of the Convention provides for the legal protection of one's right to life; however, makes allowances for exceptional circumstances, such as the circumstances in which the state may legitimately apply lethal force. In *McCann and Others v The United Kingdom (1996) 21 EHRR 97*, the European Court was tasked to interpret and apply this principle to balance the right to life with the authority of the state to wield violence in a democratic society.

Article 2 of the Convention is split into two parts and was cited in full in the commission report.[71]

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of forces which is no more than absolutely necessary:
    a. In defence of any person from unlawful violence;

[70] Farlam., 514

[71] Farlam., 36

b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. In action lawfully taken for the purpose of quelling a riot or insurrection.

Farlam stated that although it was not included in the report, the issue of applying the McCann principle, and whether it was applicable to South African law, was contentious and debated internally by personnel within the Commission.[72] For example, representatives of the South African Police Service hotly denied that this principle applied to the law. However, the report indicates that the McCann principle was recognised as part of South African law and that it was contained in section 13(3)(a) of the South African Service Act, which notes that the police may only use, "the minimum force which is reasonable in the circumstances".[73] In the same vein, courts in democratic societies must consider deprivations of life with the most careful scrutiny, "particularly where deliberate lethal force is used".[74] The European Court of Human Rights' ruling also stated that in applying the proportionality principle one would be required to take into consideration both the actions of the state agents as well as "all the surrounding circumstances, including such matters as the planning and control of the actions under examination".[75]

Hence the report states:

> As far as the events of 16th August 2012 are concerned, the decision to implement the 'tactical option' on that day at a time when a large number of armed strikers were present at the koppie was unreasonable and unjustifiable. The plan put together on that day was defective. It appears prima facie that some of the SAPS members who fired at the strikers at scene 1 exceeded the bounds of self and private defence. The principle

[72] Interview with Judge Farlam

[73] Paul Hoffman, "Three Years after Marikana the Legal Fraternity Still Bristles with Accusations of Bias," Mail & Guardian , 2015, https://mg.co.za/article/2015-09-01-three-years-after-marikana-the-legal-fraternity-still-bristles-with-accusations-of-bias.

[74] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 37

[75] Cited in Farlam, 37

> that only the minimum amount of force reasonable in the circumstances should be used was not complied with.[76]

This finding is an unambiguous example of legal discourse with its emphasis on reason and rationality. The McCann Principle was applied in terms of the doctrine of proportionality, used as a criterion for justice and fairness. It was seen to apply in South Africa as it had been dealt with in other jurisdictions "where the right to life is sacrosanct", as is the case in South Africa's Constitutional democratic dispensation since the transition.[77] However, in this case claims to reason are not invoked to defend the state's actions, but instead to criticise them.

The topic under examination is the limits on the state's right to wield lethal force vis a vis one's right to life. However, the commission also considered the issue of the law conferring someone who is the subject of an attack the liberty to wound or kill their aggressor. It cites Andrew Ashworth who notes some legal systems posit that the aggressor forfeits their right to life when he or she decides to attack another.[78] However, the commission ultimately stated that this approach goes against South African law and quoted Chaskalson who asserted that one ought to balance the "rights of the aggressor against the rights of the victim and favouring the life or lives of innocents over the life or lives of the guilty".[79] Justice, in this legal milieu, means applying the test of proportionality, where the interest of the wrongdoer is weighed against that which is to be protected.

An additional case to which the Marikana Commission referred to interpret and make its findings of fact and responsibility against the state was *Andronicou and Another v Cyprus (1998) 25 EHRR 491 at 545* determined by the European Court of Human Rights. In this case

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[76] Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province.", 558

[77] Guiding principles as prescribed by the European Court of Human Rights interpreting article 2 of the European Convention of Human Rights in Farlam., 36

[78] Principles of Criminal Law, 7 ed in Farlam., 38

[79] This was stated by Chaskalson P in the landmark court case S v Makwanyane and Another 1995 (3) SA 391 (CC), para [138] at 448 H -449 A Farlam., 33; 38

the Cyprus special police unit, in its attempt to rescue a hostage, shot and killed both hostage and the abductor. In the verdict, one judge argued that there had been a violation by the state, and remarked that, "the State has the duty of planning as well as controlling the operation so as to limit the circumstances in which force is used and, if the use of force is unavoidable, to minimise its effects".[80]

This is where legitimist discourses on violence become so pivotal. Finding the appropriate language to speak about the past incident(s) articulates, officially, which group is the aggressor and which group was under attack. When the mine workers are presented as a criminal crowd wielding weapons and violence, they are presented as the aggressors.

However, the commission instead found the state liable for administrational reasons; because it had implemented a defective plan. It cited the Provincial and National Police Commissioners' paucity of work experience as reasons why the plan was defective. Concerning the Provincial Commissioner, the Report concluded that she had neither the skill nor experience to "make decisions as to what should be done in the complex and difficult situation at Marikana" as she was unqualified.[81] Hence, her decision to implement the 'tactical option' if the striking mine workers did not surrender the strike was, according to the Report "inexplicable", "reckless" and could not be justified. The Report cites a similar lack of relevant work experience by the National Commissioner. Hence, a key flaw on part of the state unveiled by the Commission report was that "two senior officers in the decision-making line were entirely unqualified to make any decisions at all bearing on police operational matters", which was presented as a key cause of the scale of killing.[82] The inefficiency of the commanding officers in this operation presents a contrasting image to Weber's legal-rational, professional state. Rather it is the

[80] Farlam., 37
[81] Farlam., 367
[82] Farlam., 368

antithesis: state personnel who are ill-equipped for their duties. As the Commission belongs to the genealogy of commissions of inquiry established with the birth of Positivism and the legal-rational state, it is pointing out where the state has deviated from this standard.

Finally, another aspect related to findings the state liable was the issue of the "militarization and demilitarization" of the police force. The Report cites the National Development Plan and National Planning Commission, stating that while there was a goal to demilitarise the police force after 1994, that there had in fact been a remilitarisation of the police.[83] As was explained previously [Section 4.3.1] the apartheid state security forces were endowed with considerable powers to uphold the racist regime, powers legitimated through law and which were bolstered with Emergency Laws. Similar to Martial law, emergency laws under Apartheid indemnified security officers from acts of violence ex-ante if those actions were enacted under the belief that the actors were restoring law and order. In explaining the violence at Marikana Jane Duncan explains there has been a "tectonic shift" in the role of the security forces since the transition towards increasingly safeguarding those in power - even at the expense of the population - under the Jacob Zuma administration.[84] Duncan uses the term 'securocrats' to refer to the officials from the police, intelligence services and military having the power to influence government policy. She argues that the Marikana killings are an effect of the militarization of police and centralisation of the security cluster's influence under the Zuma administration, which she takes as evidence of, "deliberate political decisions…taken to move South Africa towards a more repressive state".[85] I have argued that this securitisation was a feature of the apartheid state in the 1970s and 1980s and that this became ossified by apartheid

[83] The section of the National Development Plan is chapter 12 that concerns 'building safer communities'. Farlam., 371

[84] She refers to certain state officials as 'securocrats' in her analysis of the police violence in the Marikana massacre. Jane Duncan, *The Rise of the Securocrats: The Case of South Africa* (Aukland Park: Jacana Media, 2014)., 4

[85] Duncan., 273

law and policy. Following the transition, however, the militaristic rank structure was done away with; the label 'Police Force' was rebranded to 'Police Service' alongside other more palatable sounding operations like community policing and crime prevention.[86] However, here, in the democratic context, the Commission is exposing this 'remilitarization' as antithetical to the National Development Plan which envisions 2030, "a country which we have remade" since apartheid.[87] It is highlighting that the state had diverted from its own policy in permitting a return to militaristic modes of policing.[88]

7.3.3 Lonmin at fault for Shirking on Legal Social Obligations

Previous sections have argued that the legal lens constrained the official discourse on violence in the Marikana report, where structural violations endemic to the mining sector were not reported as key catalysts of the violence seen at Marikana between the 9th and 16th of August 2012. It would be tempting to dismiss this as an example of the law, or legal ideology, as serving the interests of the ruling capitalist class, as there certainly seems to be evidence of this. However, as the Commission conducted its work evidence supporting 'unofficial discourses' entered the official realm of the Commission. Another one of these findings was made concerning Lonmin's role in contributing to the violence, relevant to commission's fact-finding for section 1.3 of the terms of reference. A key issue raised was Lonmin's failure to comply with its housing obligations, as mandated by its Social Labour Plan (SLP). In this instance, we see a turn to rights discourse but in this case, it is in relation to Lonmin's mining rights rather than human rights.

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[86] Johnny Steinberg, "Policing, State Power, and the Transition from Apartheid to Democracy: A New Perspective," *African Affairs* 113, no. 451 (2014): 173–91., 174

[87] "Our Future - Make It Work: National Development Plan 2030" (Republic of South Africa, n.d.), https://www.gov.za/sites/default/files/Executive Summary-NDP 2030 - Our future - make it work.pdf.

[88] For Steinberg this has been a process developing since the 2000s with Jackie Selebi's appointment as police commissioner at a time where the ANC was increasingly concerned with controlling the agencies which investigated corruption and advance political agenda within and among the ANC. He also writes how this is exacerbated under Bheki Cele. See Steinberg, "Policing, State Power, and the Transition from Apartheid to Democracy: A New Perspective."

As stated previously, Phase 2 of the Commission was to investigate the possible long term, sociological causes of the Marikana killings. Kally Forrest, a researcher at the University of the Witwatersrand's Society, Work and Politics Institute (SWOP), was asked to conduct a research report to submit to the commission.[89] A central concern was for her to report on financial issues relevant to the commission's mandate: the competitiveness of the Lonmin rock drill operator's wages; whether Lonmin would have been able to afford the proposed increases; and Lonmin's capacity to provide "decent work and living conditions for its employees".[90] For Forrest to conduct her research the Commission requested that Lonmin supply access to its audited financial reports.[91] The investigation by Forrest refers to various documents that had been submitted to the South African Competition Commission prior to Lonmin's two acquisitions in 2005/6 and 2006/7; to equity reports that had been sitting with the Department of Labour spanning from 2006-2013 and data stored at the Department of Mineral Resources. Moreover, the Commission requested that Lonmin submit financial information regarding its subsidiaries Western Metal Sales Limited in Bermuda as well as Lonmin Management Services (Lonmin's 'external company') from the period between 2009 and 2012.[92]

With these documents available for public scrutiny a number of unfavourable findings were made regarding Lonmin, again posing a counter-narrative to the 'official discourse' of the state. In one research study derived from the documents and through further investigation Dick

[89] SWOP had been doing research on mining prior where Gavin Capps had led research related to land issues around mining, and Kally Forrest was conducting research around contracted labour in the Rustenberg platinum belt. Evidence Leader Geoff Budlender phoned SWOP to ask for someone to provide a report for Phase 2. Lester, Claire-Anne, Interview with Kally Forrest. Personal Interview. Johannesburg, May 29, 2019

[90] Cited in Dick Forslund, "The Bermuda Connection: Profit Shifting, Inequality and Unaffordability at Lonmin 1999-2012," 2015., 5

[91] Reports for the financial years 2000-2010 were accessible, following a particular procedure; however,, the reports for 2011 and 2012 were missing due to an issues with the electronic filing system which began in that year but the annual report for 2012 was finally submitted to the Commission.

[92] Forslund writes that one of the Commission's Evidence leaders Matthew Chaskalson was at one time permitted access to look at financial statements from Western Metal Sales Limited, but he was not allowed to make copies. Forslund, "The Bermuda Connection: Profit Shifting, Inequality and Unaffordability at Lonmin 1999-2012.", 6

Forslund, the lead author, exposes Lonmin's history of wage evasion and argues that Lonmin could have afforded to pay the R12 500 in 2012 and that had the financial capacity to honour the obligated stipulated by the Mining Charter to build 5 500 houses for mine workers. The report was released on 2 June 2015 as civil society demanded for the Farlam Commission's findings to me made public as they remained in the possession of former President Jacob Zuma. Moreover, this report exposed that Lonmin was part of a structure of illicit capital flight from South Africa totalling an excess of R300 billion in 2012 alone.[93]

Moreover, evidence provided at the Farlam Commission revealed that Lonmin had repeatedly failed to meet its legal requirements as per social labour plans to provide housing for its employees. It was "common cause", as the Report states, that for its old order mining rights to be converted to mining rights under the Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPDRA) its social labour plan had to be approved by the Department of Mineral Resources.[94] In its plan, Lonmin had assured it would phase out the single sex hostel system and turn the hostels into single person of family accommodation for migrant workers who had been previously housed in single sex hostels by constructing 5 500 houses for workers.[95] The social labour plans had been approved by the Department of Mineral resources whereby Lonmin became "legally obliged to comply with its terms", which included building the 5 500 houses by September 2011.

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[93] AIDC, "Lonmin, the Marikana Massacre and the Bermuda Connection Seminar and Press Conference," Alternative Information & Development Institute, 2015, http://aidc.org.za/lonmin-the-marikana-massacre-and-the-bermuda-connection-seminar-and-press-conference/; Forslund, "The Bermuda Connection: Profit Shifting, Inequality and Unaffordability at Lonmin 1999-2012."

[94] As per sections 23(1)e) and 25(2)f) and (h) of the MPDRA. Farlam, "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana in the North West Province."

[95] Marikana mine was acting as a single mine and hence Western Platinum Ltd and Eastern Platinum Ltd had submitted a joint social labour plan. Farlam, 526; Day 293, Seedat. "The Marikana Commission of Inquiry Transcription.", 38282

However, the Commission found that a mere three houses were built. Citing cross examination of Manager Mr Seedat, the Commission report states that there was "critical shortage of decent housing for the employees of Lonmin and that the board and Executive of Lonmin understood that the tragic events at Marikana were linked to that shortage".[96] Moreover, Mr Seedat acknowledged that Lonmin was aware of the "critical housing shortage at Marikana and the squalid conditions in Nkaneng for years".[97] The report further highlights that Lonmin was aware of the risks of an unfulfilled social labour plan, which is to have its mining licences revoked.[98]

The language with which the commission addresses the issue in the report it the extent to which Lonmin did not adhere to its legal obligation. While a clear connection is made between the failure of Lonmin to provide adequate housing, and the Marikana violence; the Report still refers to the Marikana violence as a 'tragedy'. To reiterate, the tragic narrative removes the question of perpetrator and responsibility and likens the event to a natural disaster or unfortunate accident. While it is clear that Lonmin broke the law, the actions are not referred to as 'criminal' in the way the mine workers are depicted in having broken the law in their decision to strike outside of the legal bargaining structures. This reflects a bias concerning the criminal subject, and which acts of law-breaking are construed as criminal.

Nonetheless, the report is significant in outlining the extent to which Lonmin did break the law and repudiates Lonmin's attempt to justify its failure to comply with its legal obligations, one of which was affordability following the 2009 financial crisis. It was stated that the legal obligation stood and that the affordability argument was "on its own terms, incorrect" and that during the 2007-2011 period Lonmin was able to pay its shareholders dividends of US$607

[96] Farlam, 527-8

[97] Farlam, 528

[98] Lonmin's Sustainable Development Report. Exh SSSS2, p. 1404 cited in Farlam, 533

million to Lonmin Plc and Incwala Resources (Pty) Ltd as well as "paid more than R1.3 billion in 'marketing commission' payments to Lonmin Plc (in the form of its SA branch company Lonmin Management Services …and/or its Bermudan registered subsidiary, Western metal Sales Ltd."[99] Hence, the company was exposed for having broken the law and being untruthful in its defence of why it failed to comply with the law.

7.4 Conclusion

This chapter has provided some overview of the various unofficial discourses and counter-narratives that emerged during the Marikana Commission. I have also showed how some of the unofficial discourse was made official through the commission's process of hearing evidence publicly, and through the application of its own legal reasoning. The Commission was highly legalised, yes. But involved lawyers from a broad political spectrum, representing different social interests of the 'parties'.

As Foucault wrote:

> Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the status of those who are charged with what counts as true.[100]

The 'regime of truth' in the Marikana Commission was the regime of legal truth. Facts and findings were deemed as such by applying legal principles, where narratives were constructed based on legal rules and laws. However, in following legal principles – such as transparency and representation – the commission opened itself to an array of views and counter narratives or unofficial discourses.

[99] Cited in Farlam, 538

[100] Foucault, "Truth and Power.", 131

This can be attributed to a process whereby post-Apartheid commissions have become all the more professionalised and legalised, both in their approach and constitution. These alternative discourses were advanced in the commission and legitimated through legal means. Hence, one could say that the legal regimes of truth affirmed the 'official discourse' of the police, as well as undermined it when wielded by Counsel for the injured mine workers.

The chapter argued that a legal approach does not mean that a commission will have a foregone conclusion. As a commission of inquiry following a legal approach the Marikana Commission ran up against conflicts internal to the law itself, contests about which laws ought to be applied in a particular case and how to balance the relative applicability of international legal principles with constitutional freedoms and statutory laws.

For George Bizos, the renowned human rights lawyer who represented Nelson Mandela during the Rivonia trial, the Marikana Commission took place at a moment where the expectations of the state had shifted demonstrably, where the 'tragic' discourse, or narrative of accidents with no perpetrator no longer held water. According to him the "days of no one to blame were over".[101] However, the manner and discourse in which blame for violence is attributed manifests differently when the commission speaks about different subjects

[101] Interview with Geoff Bizos, April 2015, cited in Walton, "The Marikana Commission: Truth and Voice in Official Documentation.", 40

8. Commissioning Truth and Violence in Post-Apartheid South Africa: A Conclusion

Spurred by the Marikana massacre, this dissertation began as an investigation into how post-apartheid commissions of inquiry have dealt with violence in the mining sector. South Africa is a notoriously violent society, and while democracy brought an end to racist discriminatory laws, myriad forms of violence continued into the democratic era, leading von Holdt to interrogate the term, "violent democracy".[1] The massacre, marked by police killing 34 mine workers, was a resounding signal that the nation was a far cry from the new South Africa projected in the 1996 Constitution. As stated by Hart, "Along with the corpses, hopeful visions of a new South Africa lay shattered on the killing fields of Marikana".[2] The violence was all the more disturbing as it was authorised by the democratically-elected ANC government, presenting a stark breach of the rule of law, and undermining the constitutional protections those on strike ought to have had, all for the protection of private interests. It is for this reason that Marikana's violence and the Farlam Commission, like the TRC, became of such interest to both domestic and international law.[3]

The televised footage of striking mine workers being shot at with live ammunition by police portrayed a 'struggle to the death' of the most corporeal kind, with the mine workers' struggle for recognition ending in their death.[4] However, the moment also led to a struggle over the official narrative of what had transpired and the extent to which each party was responsible for

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[1] Adelman, "The Marikana Massacre, the Rule of Law and South Africa's Violent Democracy"; K Von Holdt, "The Transition to Violent Democracy in South Africa," *Review of African Political Economy* 138 (2013): 589–604; Karl Von Holdt, "On Violent Democracy," *The Sociological Review* 62, no. 2 (2014): 129–51.

[2] G Hart, *Rethinking the South African Crisis: Nationalism, Populism, Hegemony* (Pietermaritzburg: University of Natal Press, 2013)., 2

[3] Stuart Wilson, "After Marikana Commission: What Now?," *Daily Maverick*, 2014, https://www.dailymaverick.co.za/article/2014-11-26-op-ed-after-marikana-commission-what-now/.

[4] G.W.F Hegel, *The Phenomenology of Spirit*, ed. VA Miller (Oxford: Oxford University Press, 1977).

the violence. While the jostling over the narrative began among the public as soon as tensions heightened on the mine, this was soon funnelled into the core aim of the Marikana Commission of Inquiry. It was the second commission to promise truth and justice in post-apartheid South Africa following state-sanctioned violence. It is significant because, like the TRC, it focused on a principle and contested domain of the state and its ability to wield legitimate violence. For this reason, my core research question was:

How was violence conceptualised in two post-apartheid commissions of inquiry investigating violence in the mining sector: the Truth and Reconciliation Commission and Marikana Commission of Inquiry?

Clarifying this revealed some of the emergent contradictions in commissions of inquiries' modes of official truth-seeking. Therefore, the second research question sought to clarify some of these contradictions. It was:

Why do the TRC and Marikana Commission frame violence in the way they do and what are the implications of this framing of 'truth' and justice?

Through an analysis of the historical functions of commissions of inquiry as they have been used in processes of state formation and colonisation, I distinguished between four conceptual schema which, I argued, the varied commissions have performed. These included the generic role of *fact-finding*; the additional stated aim of official *truth-seeking* by some commissions, like truth commissions and tumult commissions, which usually are accompanied by associated aims for victim healing and reconciliation; the *narrative* or *discursive* role, in fomenting official discourse on a matter; and finally, the *ideological* machinations, in which official discourse produced in and by a commission reifies or obscures the relationships of domination that are socially made.

As the same time, beyond the empirical question of how these post-apartheid commissions produce official discourses on violence, I sought to conduct an ideological critique of the commissions' ways of seeing, speaking and writing about violence. A preliminary comparison of commission reports from past tumult commissions established in South Africa, but also in other British colonies, distilled that while they indeed carry out, to varying degrees, the task of fact-finding, truth-seeking and forming an official narrative of a pressing social issue or past events, they also position themselves and their findings in relation to the law. If one is to assess their task in general, it is to ask – when the usual law-making and enforcing bodies are overly extended or have been delegitimised – why the law was not followed at certain points and how to ensure the law is complied with in future.[5] Because of this, commissions of inquiry have an ambiguous relationship to the law. On the one hand, they are not courts of law: They do not make legal judgements and they follow a different approach to verifying evidence, with a different standard of proof. Moreover, while they often are presided over by judges, this is not always the case, as in the TRC where the presiding officers were respected religious figures with social status and public trust, i.e. Archbishop Tutu and Alex Boraine, also an ordained minister. On the other hand, when making findings pertaining to responsibility for violence – as in the TRC and Marikana Commission – findings are very much shaped by the law and legal paradigms.

The deference to legal frameworks, salient in the earliest of commissions of inquiry I mention – such as the Witwatersrand Disturbances Commission (1913) – has arguably become more pronounced in the post-apartheid era, as the law now constitutes the single 'equalising' force for citizens. It is 'equalising' in that it applies equally to all and may be invoked equally by all social groups to advance a particular agenda. This is, after all, what constitutes the rule of law

[5] Lester, "Commissions of Inquiry and the Role of Law: Towards a Materialist Approach.", 88

as distinct from the rule of an autocrat. As Pravin Gordhan asserts, "the law constitutes the foundation of our young democracy, providing an all-embracing framework where our collective rights and obligations are preserved in the Constitution".[6] However, to invoke George Orwell's adage from *Animal Farm*, while all may be equal under the law, some are more equal than others. I argue that when viewed in terms of how different social groups are actually affected by certain laws, the law is not as equalising as it may appear to be on paper. Law which prohibits swathes of workers from striking for a living wage without the permission of their union only affects and disadvantages those workers whose social conditions have moved them to strike in the first place. It is a law such as this which in 2012 led to 34 workers being shot and killed by the South African police at Lonmin mine at Marikana, after being presented as a band of criminals engaging in an illegal strike.

Yet, while being concerned with the law, this thesis did not advance legal prescriptions or make legal arguments about commissions of inquiry and their methods, for this has been done by others.[7] Rather, I became interested in how legal approaches operated in official commissions of inquiry at particular historical moments and in specific social formations. Comparing, for example, the post-apartheid era to the mercurial and contradictory application of the law under apartheid revealed how the law may indeed be deployed strategically to serve particular interests and undermine others', and indeed how this has influenced commissions' findings regarding responsibility for violence.

The analysis of the TRC's investigation into violence in the business sector – situated in the context of the domestic transition to democracy and global shift towards neoliberalism after the Cold War – initiated the discussion about the way certain forms of violence become

[6] Foreword in Michelle le Roux and Dennis David, *Lawfare: Judging Politics in South Africa* (Johannesburg: Jonathan Ball, 2019)., ix

[7] Freeman, *Truth Commissions and Procedural Fairness*.

permissible, or presented as natural, in the language of the law. I exemplified this by noting the inconsistencies in findings of violence by the TRC and the way it conceptualised gross human rights violations. My close reading of the TRC's mandate, the Promotion of National Unity and Reconciliation Act, revealed that the TRC *was* in fact directed to investigate past political violence of a structural nature, and that its constrained conceptualisation of 'victim' and human rights abuse was in fact absent from the legislation, which included that the TRC should investigate "severe ill-treatment" among individuals and/or groups, as well as the relatives or dependants of the victims. I found that while the Business Hearings allowed various parties to describe the harms caused by exploitation and poor treatment in the mining sector, these were not conceptualised as egregious forms of violations, such as those encoded in international humanitarian law and the taxonomy of crimes against humanity. This is despite the fact that apartheid, as a system of racial capitalism, had already been declared a crime against humanity by the United Nations. Citing Susan Marks, I noted that the concept of labour exploitation is glaringly absent from international law, and this reflects in the official discourse of commissions of inquiry, which adopt legal approaches to their fact-finding and production of official narrative of events. As was shown in the TRC's findings, exploitation and more abstract forms of structural violations were reported during the hearings, but these were not construed as forms of gross human rights violations or reprehensible violence deserving of punitive action for its perpetrators in the final report. Instead, while various submissions attested to direct and structural experiences of violence in the mining sector, the final TRC report chose to avoid the question of human rights abuses perpetrated by the business community, opting instead for a bizarre taxonomy of the extent to which certain businesses benefited from apartheid and suggesting that businesses act with more of a conscience in the future.

The second part of the dissertation turned to the Farlam Commission's depiction of the strike action at Marikana. I traced the development of competing discursive versions of the emergent

conflict on the platinum belt, revealing how diverse social groups framed the burgeoning violence differently in the days leading up to the massacre. I presented the way that various narratives of violence were in fact imbued with embedded attitudes regarding the legitimacy and legality of the strike action. It is in moments such as these that the ideological nature of discourses on violence becomes most apparent. The discourses are ideological in that they have implications for the way power is organised and maintained in society and particularly in how they have the capacity to assist in sustaining harmful relations of domination.[8] This was acknowledged in the contestation over whether the incident should be referred to as a 'tragedy' or a 'massacre'. Indeed, the ability to successfully present the actions of the Marikana workers as criminal, while painting the SAPS as rightfully enforcing law and order, is a powerful weapon against any labour organising outside of union structures.

In terms of ideological analysis, the Marikana case depicts that truth can exist within ideological or discursive frameworks. For example, within a particular legal framing it is possible to say that Lonmin workers did break the law; but when one brings in other considerations, particularly around material inequality or structural violence, it reveals that other truths exist beyond the discursive framework of the law, which cannot fully grasp these truths and operates to conceal them. As we know about many effective ideologies, they are often real and true enough in what they assert, but false in what they conceal. What they conceal was partially revealed during the Marikana Commission's investigative seminars for Phase 2. These seminars offered vignettes of the structural violence lurking beyond the prescriptions of the commission's terms of reference. For example, experts illustrated deep and enduring problems of representation within collective bargaining law, as well as the way capitalists have sought to circumvent the protection of labour laws by employing casualised labour via brokers.

[8] Thompson, *Studies in the Theory of Ideology*.; Therborn, *The Ideology of Power and the Power of Ideology*.

Indeed, the legal veneer is pierced in a moment where Prof. Buhlungu asks the simple question of how the mine workers are able to buy bread on a daily basis. The constrained legal approach adopted by the Farlam Commission was unable to fully digest and appreciate this.

Nonetheless, the dissertation found that the argument that a commission tells the 'truth of state' only holds if one adopts a view of the state as a web of social relations and practices. The notion of the state as a singular, coherent entity becomes stretched when one observes that one of the key players in the Marikana saga – Cyril Ramaphosa – was both Deputy President of South Africa and a minority shareholder in the company where the shootings occurred. This mere fact lends credence to the Marxist view that the state serves as an instrument of class domination to promote the interests of those in charge of its institutions [See Section 2.2.1]. However, as seen in the comparison to previous commissions held under different social formations, the relationship between the state and an official commission shifts in accordance with various moments and social pressures. Thus, while politics indeed plays a crucial role, there also seems to be an internal logic to the commissions studied here in their tendency towards legal approaches. On some points, this approach yielded favourable outcomes for capitalist corporations, individuals and state institutions, but on other points did not.

This was illustrated with regards to both the TRC and Marikana Commission, which highlighted the contestatory discourses that emerge when space to participate is provided to the public. In both commissions, which sought to provide an official account of violence in the mining sector, the theme of toxic collusion between the state and capital emerged, offering critical perspectives on the state but also the harmful outcomes of this for the labouring class. Moreover, the fact that a commission adopts legal logic in its method does not necessitate that its findings will be a whitewash, nor that only the interests of the capitalist elites will be protected. As Naura Erekat reminds us in her brilliant analysis of the role of law in the Israel-

Palestine conflict, "The law has the capacity to dominate as well as to resist".[9] While it may indeed act as a constraint, the law does not necessitate an inevitable course of action; rather, it promises a battle.

These battles played themselves out in the Marikana Commission itself, from interpretation of the terms of reference to making sense of the findings. The diversity in legal point of view, as shown in the case of the Marikana Commission, is redolent of the way the law is used by competing interest groups to advance certain agendas. Hence, while a legal lens indeed sets parameters for the range of truth that can be sought, legal truth is not static; it is itself always open to contest, application and interpretation depending on the balance of social forces at a particular moment.

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Although the final reports have long been published, the stories of both the TRC and Marikana Commission are not yet complete. The TRC's life has continued in several ways as the subject of artistic interpretations in theatre, literature and film,[10] which has also occurred in relation to the Marikana massacre.[11] While this was not the focus of the thesis, is it indicative of the way that society engages in unofficial mnemonic forms when interacting with these periods of violence and exceptionally violent events. These creative works keep discussion of the

[9] Noura Erekat, *Justice for Some: Law and the Question of Palestine* (Stanford, California: Stanford University Press, 2019)., xi

[10] Examples include John Kani's 2002 debut play *Nothing but the Truth*, which was later produced as a film; Antjie Krog's autobiographical text *Country of my Skull* (1998) which was also developed into a film, *In My Country* (2004); Jane Taylor's play *Ubu and the Truth Commission*, which used testimony from witnesses at the South African TRC; the book by Gillian Slovo, *Red Dust*, also later developed into a film of the same name. There are also several documentaries like Confronting the Truth (2006) by Steve York and A Long Night's Journey Into Day (2000)

[11] For example, *The Kingmakers* by Louis Viljoen is a 2014 play that follows a group of opposition party members strategising to enhance their power after an internal power struggle left them outside the main circle of influence in the party. They seek cooperation with a large corporation to assist their ascendency to power and the play ends with a police massacre of protesting workers. There has also been the award-winning adaptation of the book by Dlangamandla et al., *We Are Going to Kill Each Other Today: The Marikana Story*., into *Marikana the Musical* by Aubrey Sekhabi (2019) and the song 'Marikana' by Lilitha and Tshepo Stoan Seate.

historical event alive, and indeed spur critical engagement with the official narratives, as contained in documents like the TRC and Marikana Commission final reports.[12]

The TRC's work has also continued in subsequent administrations. At the time of writing this thesis, the TRC's website advertised a call for applications for "education assistance for the TRC-identified victims".[13] According to the web page, those who qualified for assistance included a person who had been declared a victim by the TRC, as well as their dependants or relatives. Hence, while programmes related to restitution still exist, it is also clear how the original definition of 'victim', which was narrowly and legally defined, continues to exclude thousands of people in equal need of financial assistance for higher education. In the current context, as the #FeesMustFall student movement showed, access to funding for higher education has been flagged as a key hurdle for those seeking tertiary education, and the criterion of being a TRC-identified victim seems arbitrary, especially as being a victim of the so-called 'bantu education system' did not afford one the label of victim according to the TRC's definition. This points to the continued pitfalls of a narrow definition of human rights violation that excludes structural harms.

There have also been developments since the publication of the Farlam Commission report. In the immediate aftermath, then-police commissioner Riah Phiyega was suspended on full pay while her fitness to hold her position was investigated by another commission – the Claasen Board of Inquiry – as per the Farlam Commission's recommendations. The Claassen Inquiry found that Phiyega was not fit to hold office and that she should be held responsible for the deaths of the 34 mine workers because of her poor leadership of the operation.[14] While this

[12] Nduka Mntambo, "How 'Marikana the Musical' Has Contributed to Cultural Amnesia," *The Conversation*, August 17, 2017.

[13] https://www.justice.gov.za/trc/ [Accessed 8 December 2020]

[14] Amanda Khoza, "The Riah End: Suspended Phiyega Completes Term as Police Boss," *News24*, 2017, https://www.news24.com/news24/SouthAfrica/News/the-riah-end-suspended-phiyega-completes-term-as-police-boss-20170612.

demonstrates some measure of accountability, it also individualises a problem that, as I have argued based on evidence presented at the Farlam Commission, is structural in its cause.

Other investigations of the police have ensued, including the trial for the murder of five people who died at Marikana on August 13th – three miners and two police officers. On trial is North West deputy police commissioner Major-General William Mpembe and four other police officers who face charges including murder, attempted murder, defeating the ends of justice and for giving false information under oath at the Farlam Commission.[15] Yet, as of 2020, only one legal case had been settled, while those who were most harmed, and their dependents, have yet to be compensated by the state.

However, the effects of Marikana have reverberated beyond the incident itself. Since the Marikana massacre, the wages of mine workers in the platinum industry have nearly doubled.[16] August 2012 – July 2015 has been noted as marking a potential revitalisation of the trade union movement, as mine workers broke away from NUM and entrenched a negotiating strategy with employers. Civil society groups acted in solidarity with Marikana workers, and Rehad Desai's award-winning documentary film, Miners Shot Down (2014), has been an organising tool which has been taken on roadshows across the Eastern Cape to counteract official narratives that the strikers were criminals who attacked the police.[17] It led to the official birth of another opposition party, the Economic Freedom Fighters (EFF), which was launched in October, 2013

[15] Officers standing trial are those responsible for compiling evidence at Lonmin's K3 shaft in Marikana on the 13th of August 2012. They are accused of doctoring or failing to collect quality evidence. Sesona Ngqakamba, "Marikana Trial: Here's a Summary of What Happened in Court This Week," *News24*, 2020, https://www.news24.com/news24/southafrica/news/marikana-trial-heres-a-summary-of-what-happened-in-court-this-week-20201022.; Canny Maphanga, "Marikana Trial: Case against Former Deputy Police Commissioner Continues in the High Court," *News24*, October 19, 2020, https://www.news24.com/news24/southafrica/news/marikana-trial-case-against-former-deputy-police-commissioner-continues-in-the-high-court-20201019. At the time of writing this thesis, the trial was still ongoing.

[16] Flood, "Union Conflict Rages on in South Africa."

[17] The film was shown by the Socio-Economic Rights Institute in towns in the Eastern Cape, where the families of the miners live. The film would be shown, followed by a discussion session. See also Nash, "Marikana's Path," 2015.

at Marikana, signalling that it was the true workers' party, as opposed to the ANC which killed workers for striking. Reference to Marikana was a core part of the EFF's 2014 election campaign. The platinum belt strike went on to influence other movements, such as the farmworkers' strike beginning in de Doorns in the Western Cape, which galvanised over 9000 farm workers in the Hex River Valley who followed suit in following unions and organisations independent of COSATU.[18] Workers decided to strike on August 27th on Keurbosch Farm when new owners attempted to have workers sign contracts detailing wage cuts. These workers were among the lowest paid in the country at R69 per day (about $4), and demanded an increase to R150 per day ($9.10). During the strikes, reference was made to the Marikana strikes. As one representative of a Citrusdal-based NGO asserted, "If anything, the initial strikes were reminiscent of the first Marikana miners' strike, in the sense that they were a product of workers being *gatvol* [fed up] of employers, political parties and the major labour unions."[19] In a sense, the direct, physical violence depicted by the police's bullets penetrating the mine workers' bodies at Lonmin mine highlighted the lengths that capitalist corporations would go to in order to prioritise production over the lives of workers, which only accentuated the structural violations that had prompted the strike in the first place. The Marikana moment also precipitated a series of various processes within COSATU itself, and resulted in NUMSA being expelled from COSATU in late 2014, after they repudiated the ANC.

Moreover, aside from the official discourse, 'Marikana' has taken on new and varied meanings. As stated previously, its invocation marks a temporal reference point from which to contemplate the maturing of South Africa's democracy led by the ANC, and the pace of transformation for the majority black working class. However, the word 'Marikana' has also become a metaphor for the state failing to address the needs, or protect the rights, of citizens

[18] Sean Christie, "Leaderless Farm Strike Is 'Organic,'" *Mail & Guardian*, November 16, 2012, https://mg.co.za/article/2012-11-16-00-leaderless-farm-strike-is-organic/.

[19] Cited in Christie.

while prioritising the interests of foreign capital.[20] For example, according to the Human Rights Institute of South Africa, the Life Esidimeni tragedy, where over 150 mentally ill patients died after their care had been outsourced by the state to negligent third parties operating without the requisite licenses, was the "medical Marikana".[21] Marikana is evoked as the Life Esidimeni tragedy occurred partially as a consequence of the state's slashing funds for daily healthcare, and in both cases the basic rights of people were violated. This attests to the varied and multiple meanings of Marikana, which is on the one hand a location where a massacre occurred, but which has taken on a symbolic meaning of resistance to power, neoliberalism and state neglect.

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This dissertation focused on one aspect of Marikana's narrative, which I argued was connected to that of the TRC. I hope my work contributes to ongoing scholarship on the role of law in commissions of inquiry, or in official truth-seeking into violence. As my research finds, it is essential to expand current legal definitions of violence if one is to truly understand the root causes of harrowing instances of state violence, such as that seen at Marikana. This necessitates understanding the law as it has evolved under the capitalist mode of production and developing a critical view of the actual effects of laws on human well-being versus on individual capitalist interests. This can be done, but only with enough pressure from the working class. If this is not done, it is probable that South Africa will see more events like Marikana and indeed new iterations of truth-seeking commissions as panaceas for enduring forms of violence.

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[20] Mia Swart, "Introduction," in *Marikana Unresolved: The Massacre, Culpability and Consequences*, ed. Mia Swart and Ylva Rodny-Gumede (Cape Town: UCT Press, 2019), xii–xvii.

[21] Puseletso Peterson, "Human Rights Institute Compares Life Esidimeni Tragedy to Marikana," *East Coast Radio*, February 3, 2017, https://www.ecr.co.za/news/news/human-rights-institute-compares-life-esidimeni-tragedy-marikana/. See also Michael Simpson, "Tender, Loving Greed: The Medical Marikana of the Life Esidimeni Case – News24," *South African Non-Comminicable Diseases Allowance (Originally Published on News 24)*, February 9, 2017, https://www.sancda.org.za/tender-loving-greed-the-medical-marikana-of-the-life-esidimeni-case-news24/.

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