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**A relational investigation into artisanal mining: recognising artisanal mining as  
an a-legal activity**

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## **ABSTRACT**

Artisanal and small-scale mining (ASM) is a contentious but highly topical phenomenon that occurs in South Africa. The Mineral and Petroleum Resources Development Act of 2002 (the 'MPRDA') is responsible for much of the confusion that surrounds ASM because it defines illegal mining as any mining that takes place without a mining permit. Therefore, in terms of the way in which the MPRDA has been drafted, ASM is regarded as illegal mining, and this results in immense challenges and tensions coming to the fore. This dissertation finds that ASM can, in fact, be used as an excellent poverty alleviation activity in South Africa (a country where poverty is rife), especially by women in ASM communities; however, the way in which the MPRDA is currently being interpreted by lawmakers prevents ASM from being used as such. The dissertation finds that formalisation is not the key to relieving the challenges associated with ASM and, in order to determine what it would take for ASM to be understood as a poverty alleviation activity, ASM is examined as an a-legal activity through relying on the work of Hans Lindahl which focuses on the boundaries, limits, and fault lines that the law is capable of creating. It is found that ASM is able to expose normative claims that fall outside the scope of a collective's practical possibilities in terms of the MPRDA. Therefore, through understanding ASM as an a-legal activity, a whole new realm of practical possibilities is evoked. One of these practical possibilities is the ability to understand ASM as a poverty alleviation activity. Once it is accepted that ASM is an a-legal activity, Jennifer Nedelsky's relational approach is applied in order to emphasise the importance of the relationships that could be created through using the other practical possibilities that a-legality exposes in terms of ASM. The relational approach is advantageous because it is able to ascertain whether law undermines or promotes core values. Through relying on Nedelsky's work, I suggest a move away from a court-centred approach when addressing a-legal activities such as ASM, and I suggest Nedelsky's Alternative Social Charter as a forum that could be used to address a-legal behaviour such as ASM because of its central focus on poverty and disadvantage, as well as its emphasis on the importance of law's relations.

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## **LIST OF ABBREVIATIONS**

ASC	Alternative Social Charter
ASM	Artisanal and Small-Scale Mining
DMR	Department of Mineral Resources
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
LSM	Large-Scale Mining
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
MPRDAA	Minerals and Petroleum Resources Development Amendment Act 49 of 2008
NCSMT	National Coordination Strategic Management Team
SAHRC	South African Human Rights Commission
SRC	Social Rights Council
SRT	Social Rights Tribunal
TEM	Transworld Energy and Minerals

**A relational investigation into artisanal mining: recognising artisanal mining as  
an a-legal activity**



## **CHAPTER ONE: INTRODUCTION**

The South African economy has been built ‘on the back of mining’.<sup>1</sup> For many years, mining has been the driving force behind South Africa’s economy and the mining industry has been, and is, responsible for shaping South Africa’s socio-political and cultural development.<sup>2</sup> Mining continues to make a significant contribution to the South African economy.<sup>3</sup> Mining affects a number of human rights such as the right to human dignity, a safe environment, occupation, fair labour practices, redress for past discrimination, health, and access to information.<sup>4</sup> This indicates that mining, as an industry in South Africa, has an incredibly significant impact on the social dynamic in South Africa.

The following quote by Thomas Hentschel *et al* sparked my initial interest in artisanal mining because it is a concept that I had not considered prior to conducting research:

Anyone who buys jewellery today can no longer be sure that their purchase does not in some way either support child labour or slave-like working conditions in a struggling developing country or contribute to the wanton destruction and annihilation of a war.<sup>5</sup>

At surface value, mining may seem one dimensional– large companies exploit the earth’s minerals in order to make a profit. However, the mining industry is composed of many complex relations that deserve further investigation. It is incredibly challenging to only investigate one aspect of mining; however, in this dissertation, I explore artisanal mining in sub-Saharan Africa, with a specific focus on South Africa and women. I rely on research that has been conducted in other sub-Saharan African countries because minimal research has been conducted on artisanal mining in South Africa. Artisanal mining is such a complex field of study that I do not have scope to discuss every relation involved. However, I have chosen to focus on a few select relations that I are relevant to my research problem. I acknowledge that there is certainly plenty of scope for further studies on artisanal mining in South Africa, specifically with regard to women, which I will be essential in any discussions about artisanal mining in the future.

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<sup>1</sup> C Smit ‘The Role of Mining in the South African Economy’ 2013 <https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/> (Accessed: 23 May 2017).

<sup>2</sup> C Smit ‘The Role of Mining in the South African Economy’ 2013 <https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/> (Accessed: 23 May 2017).

<sup>3</sup> CSmit ‘The Role of Mining in the South African Economy’ 2013 <https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/> (Accessed: 23 May 2017).

<sup>4</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013).

<sup>5</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 78.

## 1. Research Problem and Motivation

In South Africa, artisanal mining is treated as an illegal activity because it is not given due consideration in the mining laws of South Africa—i.e. the Minerals and Petroleum Resources Act 28 of 2002 (hereafter, the ‘MPRDA’). Artisanal mining has the potential to be promoted as an effective poverty alleviation and sustainable livelihood activity. Therefore, I investigate how relations can be structured through using the law, the relational approach, and the theory of a-legality, in order for artisanal mining to be treated as such.

Artisanal mining is often overlooked because it has not been defined by the mining legislation in South Africa. It is also known as small-scale mining; however, it is frequently mistaken for illegal mining because it is clandestine and unregulated. Artisanal mining (hereafter, ‘ASM’—i.e. artisanal or small-scale mining) constitutes mining operations that are ‘run by local enterprises, as opposed to large-scale mining (LSM) operations, which are usually run by transnational companies’.<sup>6</sup> What makes ASM particularly significant is the fact that it is able to generate a living for many people—even more so than large-scale mining<sup>7</sup> (hereafter, ‘LSM’).<sup>8</sup> As a general rule, ASM is mining that individuals, groups, and families engage in and it has very little to no mechanisation.<sup>9</sup> Some countries distinguish between artisanal mining and small-scale mining by observing whether permanent installations are established at the mining site.<sup>10</sup> However, in this dissertation the terms ‘artisanal’ and ‘small-scale’ are interchangeable.

Subsistence mining, invasive mining, and community mining are all dealt with in the same manner by the South African mining legislation.<sup>11</sup> These various types of mining are deemed to be illegal because they all take place without mining permits, and this causes uncertainty amongst lawmakers, and society alike. Subsistence mining is simply a synonym for ASM because the people involved in ASM subsist off their mining activities. Invasive mining is mining that takes place using techniques such as blasting and excavation to extract minerals.<sup>12</sup> Community mining is mining that a community

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<sup>6</sup> The African Mining Vision ‘Boosting Artisanal and Small-scale Mining’ [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>7</sup> Large-scale Mining Companies in South Africa include Transworld Energy and Minerals (TEM), Anglo American Platinum, Anglo American Corporation, African Rainbow Minerals, De Beers, and Petmin.

<sup>8</sup> The African Mining Vision ‘Boosting Artisanal and Small-scale Mining’ [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>9</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 5.

<sup>10</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 5.

<sup>11</sup> K Nhlengetwa ‘Why it doesn’t make sense that all informal mining is deemed illegal’ (2016) <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> Accessed: 3 May 2016.

<sup>12</sup> ‘Non-invasive Mining Methods: In-Situ Recovery of Metals and Minerals’ (2016) Available at: <http://www.miningandmoney.com/single-post/2016/06/27/Noninvasive-Mining-Methods-InSitu-Recovery-of-Metals-and-Minerals> [Accessed: 4 January 2019].

relies on in order to subsist. Therefore, the problem that I have identified is that all mining—including subsistence mining—which takes place without a mining permit is dealt with as though it is a form of illegal mining, and this prevents ASM from being used as a sustainable alternative livelihood and poverty alleviation activity.

There are a number of reasons that people become involved in ASM. In some regions, ASM is a traditional community activity.<sup>13</sup> In other regions, ASM has been a result of a rush.<sup>14</sup> South Africa, and specifically Johannesburg, is a case in point. Gold was discovered near Krugersdorp in 1852 and small mining activities started in the Witwatersrand; however, the first official mining activities that took place in South Africa were proclaimed in 1886.<sup>15</sup> It is therefore argued that LSM has its roots in ASM.

ASM activities are also conducted in case of an economic crisis.<sup>16</sup> Economic crises often force people to participate in ASM activities because of the lack of other employment opportunities when economic crises occur.<sup>17</sup> As a general rule, ASM is often a response to a shock such as droughts. ASM is frequently used as an alternative and complementary off-season activity to agriculture and it is in this sense that ASM is used as a response thereto.<sup>18</sup> Conflicts are another example of how ASM is used as a response to shock. People are forced to migrate as a result thereof, and ASM usually provides the only accessible and viable income opportunity.<sup>19</sup> This is often the case in Africa, where ‘increased participation in ASM has been linked to a decline in the viability of agriculture.’<sup>20</sup>

Most donor and policy making committees are highly opposed to ASM activities and condemn people who take part in ASM because they do not secure licenses.<sup>21</sup> They are therefore treated as persons who evade the law.<sup>22</sup> Of course, the fact that ASM causes significant environmental degradation (i.e. land degradation and mercury contamination), and the fact that it is frequently associated with prostitution, as well as

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13 “Traditional” in this context refers to the fact that ASM is an activity that has been conducted by a community for many years.

14 R Pelon & G Walser for CASM *Mining together: Large-Scale Mining meets Artisanal Mining* (2009)10.

15 South African History Online ‘First Mines are proclaimed in Johannesburg’ [Online] Available at: <http://www.sahistory.org.za/dated-event/first-mines-are-proclaimed-johannesburg> [Accessed 18 April 2018].

16 R Pelon & G Walser for CASM *Mining together: Large-Scale Mining meets Artisanal Mining* (2009)10.

17 R Pelon & G Walser for CASM *Mining together: Large-Scale Mining meets Artisanal Mining* (2009)10.

18 R Pelon & G Walser for CASM *Mining together: Large-Scale Mining meets Artisanal Mining* (2009)10.

19 R Pelon & G Walser for CASM *Mining together: Large-Scale Mining meets Artisanal Mining* (2009)10.

20 Fraser Institute ‘What is Artisanal and Small-Scale Mining?’ [Online] Available at: <http://www.miningfacts.org/communities/what-is-artisanal-and-small-scale-mining/> [Accessed: 18 April 2018].

21 G Hilson “‘Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa’ (2013) 33 *SAIS Review* 53.

22 G Hilson “‘Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa’ (2013) 33 *SAIS Review* 53.

alcohol and narcotics abuse, exacerbates the common negative misconception that surrounds ASM activities.<sup>23</sup>

Because most of the focus that surrounds ASM is on its negative attributes, ASM activities, and the growth thereof, have been widely portrayed as nuisance, especially by lawmakers, and this has influenced public perception significantly.<sup>24</sup> This has resulted in a promotion of foreign investment to develop large-scale projects and to formalise ASM.<sup>25</sup> It has also become significantly more difficult for individuals to secure the necessary paperwork and licenses to participate in formalised ASM activities.<sup>26</sup>

ASM plays an important role in society because it is used as a tool to escape poverty, and it creates numerous employment opportunities; however, ASM is controversial because of its negative effects (i.e. the vast environmental damage, the negative health and safety consequences for miners and surrounding communities, and the disputes between communities).<sup>27</sup> There are frequent reports made about *zama-zamas* being murdered which is indicative of the perceived violent nature of ASM;<sup>28</sup> however, I will clarify the nature of ASM in my project. The word *zama-zama* is loosely translated to mean ‘those who try,’ and it is the common name given to all informal miners.<sup>29</sup>

My initial interest in ASM was piqued by two crucial aspects—firstly, the absence of a clear definition of artisanal mining and, secondly, the role of the South African mining legislation. I briefly expand on both of these here; however, I discuss these aspects in more detail in Chapter 2. ASM has not been defined in any legislation pertaining to South African mining, and the South African Human Rights Commission (hereafter, the SAHRC) suggests that the controversial nature of ASM has been brought about because it has been labelled as “illegal” mining.<sup>30</sup> The problem with labelling ASM as an “illegal” activity is that, in many cases, ASM is conducted by subsistence miners who are not linked to crime syndicates and, therefore, the South African mining laws deal with subsistence miners inadequately.<sup>31</sup> The second aspect relates to the role that the South African mining legislation plays in terms of ASM. In South Africa, any

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<sup>23</sup> G Hilson “‘Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa’ (2013) 33 *SAIS Review* 53.

<sup>24</sup> G Hilson “‘Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa’ (2013) 33 *SAIS Review* 53 – 54.

<sup>25</sup> G Hilson “‘Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa’ (2013) 33 *SAIS Review* 54.

<sup>26</sup> G Hilson “‘Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa’ (2013) 33 *SAIS Review* 54.

<sup>27</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham vii.

<sup>28</sup> See the most recent report I came across, Pelane Phakgadi for Eye Witness News ‘Benoni Ward Councillor says Zama Zama Murder a National Crisis’ (2018) [Online] Available at: <http://ewn.co.za/2018/01/16/benoni-ward-councillor-says-zama-zama-murders-a-national-crisis> [Accessed: 18 April 2018].

<sup>29</sup> K Nhlengetwa ‘Why it doesn’t make sense that all informal mining is deemed illegal’ (2016) <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> Accessed: 3 May 2016.

<sup>30</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 11.

<sup>31</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 11.

mining that takes place without a permit is deemed to be illegal (specifically in terms of the MPRDA).<sup>32</sup> Through my research, I show how this requirement, as set out by the MPRDA, has structured certain relations towards ASM activities.

## **2. Research Questions**

In order to conduct research on how ASM in South Africa can be promoted as a poverty alleviation activity, I propose a number of research questions. Firstly, the question as to what ASM constitutes and how it is defined and regulated in terms of the MPRDA is asked. In connection with this question, the further sub-question as to what impact the MPRDA has had on ASM activities in South Africa, especially with regard to the tensions and challenges it has posed for ASM miners, is asked. I then also ask how these tensions and challenges have affected women involved in ASM.

The second research question asked is what the current proposed solutions in respect of ASM are, and whether or not the proposed solutions could be effective. In addition to this question, a further question is posed as to how formalisation and regulation would impact upon ASM activities. In connection with these questions, I address the question as to whether there is a solution that could be proposed in order to promote ASM as a poverty alleviation activity. This question leads to the investigation of the concept of a-legality. I investigate the difference between legality, illegality, and a-legality. Further, the question as to what kind of effect an interpretation of ASM as an a-legal activity would have, especially in terms of promoting ASM as a poverty alleviation activity, is also asked and answered. In addition to answering these questions, I also determine why it can be said that ASM is an a-legal activity.

My dissertation examines the relationship between a-legality and the relational approach and, therefore, I define what the relational approach is and what the relational approach to law would entail. I address the question as to how the relational approach and the theory of a-legality could be used together in order to address ASM activities while also promoting ASM as a poverty alleviation activity.

## **3. Approach and Method**

The project is a desktop-based study whereby journal articles, books, legislation, and other resources are used in order to conduct research on ASM activities in South Africa, the concept of a-legality, and the relational approach.

Firstly, the investigation into ASM commences through the examination of the MPRDA in Chapter Two of the project. The significance of the MPRDA is discussed in terms of ASM, and the sections that I deem to be applicable to ASM are also discussed. I then

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<sup>32</sup> K Nhlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

rely on the works of Janet Love,<sup>33</sup> Remi Pelon and Gotthard Walser,<sup>34</sup> Hentschel *et al*,<sup>35</sup> Yolandi Groenewald,<sup>36</sup> and Lucky Mabasa<sup>37</sup> in order to discuss ASM in South Africa. The works of Jennifer Hinton *et al*,<sup>38</sup> Cynthia Bowman,<sup>39</sup> Gavin Hilson,<sup>40</sup> Salimah Valiani,<sup>41</sup> Karin van Marle,<sup>42</sup> and Adriana Cavarero<sup>43</sup> are also examined in order to address specific aspects of ASM.

Hans Lindahl's work<sup>44</sup> is relied upon in Chapter Three of the project in order to discuss the notion of a-legality. Through using Lindahl's work it is argued that ASM should be understood as an a-legal activity in order for it to be promoted as a poverty alleviation activity.

Jennifer Nedelsky's work<sup>45</sup> is further relied upon in order to complement Lindahl's work, and in order to show how using the relational approach would benefit ASM activities and promote ASM as a poverty alleviation activity.

#### 4. Overview of Chapters

I begin my investigation into ASM in Chapter Two. In this chapter, I focus on the fact that ASM is a misunderstood sector of the mining industry, and that despite the fact that it generates a living for many more miners and their families than LSM, ASM is still treated as an illegal activity. I also discuss the meaning of the term *zama-zama*. I examine the MPRDA and its significant sections in great detail, and I explain its significance in terms of ASM in order to pave the way for my discussion on a-legality and the relational approach in Chapter Three and Four of this project. From my examination of the MPRDA, I conclude that the MPRDA is incapable of addressing

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- <sup>33</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013).
- <sup>34</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009).
- <sup>35</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham.
- <sup>36</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].
- <sup>37</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].
- <sup>38</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).
- <sup>39</sup> C Bowman 'The Path From Feminist Legal Theory to Environmental Law and Policy' *Cornell Journal of Law and Public Policy* Vol 22 (2013).
- <sup>40</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review*
- <sup>41</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015).
- <sup>42</sup> K van Marle 'Refusal, Transition and Post-apartheid Law' (2009) 15 – 22.
- <sup>43</sup> A Cavarero 'In Spite of Plato: A Feminist Rewriting of Ancient Philosophy' (1995).
- <sup>44</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013)
- <sup>45</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012)

ASM appropriately, and that using the current mining laws in South Africa would not result in the promotion of ASM as a poverty alleviation activity. I discuss the challenges and tensions that surround ASM in order to show the types of relations that have been structured through using the current mining legislation in South Africa. The aim of raising these tensions and challenges is to show the reader the complexities associated with ASM, and to lay the groundwork for a meaningful discussion on a-legality. I pay particular attention to the role of women in ASM, and I identify the challenges and tensions that affect women directly. I discuss a number of women's stories based on a 'Special Report' written by the African Minerals Development Centre in order to illustrate how ASM affects women practically. I focus on women because I argue that women should play an essential role in any decisions made about ASM, particularly because empowering women in ASM communities would lead to 'substantial alleviation of poverty'.<sup>46</sup> I conclude that artisanal mining is an incredibly significant activity that has potential to create employment opportunities and to act as a poverty alleviation activity.

Chapter Three centres on Lindahl's concept of a-legality. A-legality is the first step towards beginning to interpret ASM as a poverty alleviation activity. The chapter focuses on the idea that many people, including researchers and small-scale mining experts, believe that informal or artisanal miners should be absorbed into the legal order by deeming the activities to be legal under certain conditions.<sup>47</sup> I call this the formalisation fix. In this chapter, I discuss exactly what the formalisation fix would entail, and I explain why formalising ASM is not a suitable solution. I discuss Hernando de Soto's theory of extra-legality, and I explain how it led me to Lindahl's theory of a-legality. I then introduce Lindahl's concept of a-legality (as an alternative to the formalisation fix), and I show the benefits of addressing ASM as an a-legal activity. I explain how a-legal behaviour opens up other practical possibilities that may be available to a legal collective if the legal collective were to shift its existing boundaries about who ought to do what, where, and when,<sup>48</sup> and I discuss how this would be a beneficial approach in addressing ASM. In this chapter, I rely on Nedelsky's work to distinguish between legality and illegality, and I explain Lindahl's third type of behaviour—that of the a-legal. I explain that a-legality is able to transgress the boundaries of a legal order and expose other possible legalities.<sup>49</sup> A-legality is significant because it illustrates the fact that there are other ways to draw the distinction between legality and illegality within a legal order. I conclude that ASM should be understood as an a-legal activity in order for it to be understood as a poverty alleviation activity. I explain that because ASM can be regarded as an a-legal activity,

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<sup>46</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 30.

<sup>47</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>48</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 4.

<sup>49</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 143.

it evokes another realm of practical possibilities.<sup>50</sup> I argue that one such possibility is to promote ASM as a poverty alleviation activity.

In Chapter Four, I focus on Nedelsky's work. In this chapter, the role that the law plays in structuring human behaviour is examined and emphasised. A-legality is a useful tool that is able to show the law's fault lines and to show the other practical possibilities that could be available to a legal collective were it to shift its existing boundaries about who ought to do what, where, and when; however, it becomes an even more powerful tool when used with Nedelsky's relational theory. I argue that a-legality is not able to give insight into the types of relations that law structures, and it is incapable of revealing the types of relations that could be fostered if the existing boundaries were to be adjusted. Relationality focuses on the importance of underlying relationships and how the law has created these relationships. I argue that addressing ASM through the use of the relational approach would allow the types of relationships that the law has created to become central. I then compare and contrast Lindahl's work with Nedelsky's work, and I ultimately show how the two theories may be used together in order to promote ASM as a poverty alleviation activity. In the final section of this chapter, I present Nedelsky's Alternative Social Charter (hereafter, the 'ASC') as an alternative to a court-based approach because the ASC could promote ASM as a poverty alleviation activity. The ASC emphasises relationships, disadvantage, and vulnerability.<sup>51</sup> I promote the ASC as a way to address the challenges and tensions that are both affected and created by ASM, and I assert the fact that the ASC would be able to provide an excellent framework for a way in which ASM's contributions to the South African economy could be adequately understood. I argue that the ASC would promote more appropriate solutions to the challenges and tensions associated with ASM and that, through using a model based on the ASC, ASM could be properly promoted as a positive poverty alleviation and sustainable livelihood activity.

## 5. Core Concepts

### 5.1 A-legality

I rely on Lindahl's theory of a-legality in order to begin to address ASM as a poverty alleviation activity instead of addressing it as an undesirable, crime-ridden industry. I illustrate ASM as an example of a-legal behaviour, and I discuss this point in Chapter Three. At this point, it is important to understand that Lindahl works from the basis that any type of legal or political order should be mainly understood as the product of a sort of joint action—that is, 'an acting together which institutes and shapes collective behaviour'.<sup>52</sup> Lindahl works from the basis that all legal orders imply a 'normative setting' in the sense that legal orders dictate 'who ought to do what, where, and

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<sup>50</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

<sup>51</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>52</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 920.



when'.<sup>53</sup> Legal orders are the product of an 'instituting process,' and an instituting process 'articulates itself in a setting of boundaries which inevitably includes something by excluding something else'.<sup>54</sup> In short, all legal orders are limited and defined by boundaries.<sup>55</sup>

This means that one cannot assume that legal orders will always stay the same.<sup>56</sup> It means that legal orders are always susceptible to the possibility of questioning their own formation.<sup>57</sup> It also indicates that no order that claims to be universal—such as globalisation or even the idea that human rights are universal—will ever be able to vanquish the fact that legal orders are limited and made up of boundaries.<sup>58</sup>

A legal order is limited because of its ability to limit membership, content, space and time—i.e. a legal order can only be a legal order if it establishes who ought to do what, where, and when.<sup>59</sup> A legal order can only be transformed when a demand for its transformation exists.<sup>60</sup> It is imperative to understand that, according to Lindahl, a demand for the transformation of a legal order cannot take place within the realm of the conventional legal/illegal distinction.<sup>61</sup> In other words, a demand of this kind, does not take place simply on the inside of a specific legal order, but neither does it take place outside a specific legal order, and this is where Lindahl's concept of the 'a-legal' comes into play.<sup>62</sup> Lindahl explains that a demand of this kind is to be conceived of as being the 'a-legal'.<sup>63</sup>

A-legal behaviour comes from a normative claim that registers as either legal or illegal, and in this way, a-legal behaviour is 'inside' the order. However, a-legal behaviour is also able to bring into question the distinction between what an order regards as either legal or illegal and, in this sense, a-legal behaviour is then also 'outside' the legal order.<sup>64</sup> Because a-legality has this unique characteristic, it is able to expose different possibilities that the legal order that it is questioning can work from, but it can also

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<sup>53</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 920.

<sup>54</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 920.

<sup>55</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 921.

<sup>56</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 921.

<sup>57</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 921.

<sup>58</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 921.

<sup>59</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 921 – 922.

<sup>60</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

<sup>61</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

<sup>62</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

<sup>63</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

<sup>64</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

expose the different possibilities that are available from outside the scope of the legal order.<sup>65</sup>

Put simply, a-legality constitutes an act or behaviour that results in a disruption of a legal order.<sup>66</sup> A-legality has the ability to show how something forms part of a concrete order where boundaries establish who should behave in a certain way, in a certain place, and at a certain time.<sup>67</sup> In exposing the boundaries of a legal order, a-legality is also able to show how the legal order could be ordered or structured differently.<sup>68</sup>

It is also important to note that a-legality is not the opposite of legality.<sup>69</sup> The opposite of legality is illegality.<sup>70</sup> Illegality connotes legal disorder whereas a-legality connotes the idea that there is another legal order.<sup>71</sup> Illegality/legality reaffirms the boundaries that have been drawn by that order; however, a-legality questions the boundaries that have been drawn by a legal order.<sup>72</sup> This means that a-legality (like illegality) is capable of showing the legal boundaries that govern behaviour, but it is also capable of showing that legal boundaries depend on behaviour.<sup>73</sup> The difference between a-legality and illegality is that illegality serves to show that boundaries take precedence over behaviour, but a-legality shows that behaviour is capable of drawing boundaries in different ways.<sup>74</sup> Therefore, according to Lindahl, a legal order's boundaries can never actually be set in stone, and they can never be erased permanently and, in this sense, 'an inside and an outside are a constitutive feature of legal orders'.<sup>75</sup>

Lindahl makes use of examples to illustrate legality,<sup>76</sup> illegality,<sup>77</sup> and a-legality<sup>78</sup> respectively. According to Lindahl, a legal order is 'a form of joint action in which authorities mediate and uphold who ought to do what, where, and when with a view to realizing the normative point of acting together'.<sup>79</sup> Therefore, his emphasis rests on analysing the spatial, temporal, subjective, and material dimensions of the scenarios, and the way they interconnect with one another.<sup>80</sup>

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<sup>65</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

<sup>66</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 1.

<sup>67</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 1.

<sup>68</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 1.

<sup>69</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

<sup>70</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

<sup>71</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

<sup>72</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

<sup>73</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

<sup>74</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

<sup>75</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 923.

<sup>76</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 18.

<sup>77</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 26.

<sup>78</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 31.

<sup>79</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 8.

<sup>80</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 18.

Lindahl does not aim to echo the existing legal doctrine, but rather, he aims to point out, and make explicit, the things that are taken for granted in the doctrinal analysis of the law.<sup>81</sup> I use Lindahl's theory to show and identify the underlying legal structures that impact upon ASM activities and which are so often taken for granted. My project does not necessarily present a solution to the problems faced by South African law makers and artisanal miners, but rather, it encourages a different way of thinking about the challenges present in ASM in a way that promotes debate and dialogue about ASM.

Behaviour is legal when it actualises the four dimensions of legal order. In contrast, behaviour is illegal when it breaches one of the four dimensions of legal order.<sup>82</sup> The boundaries of a legal order become obtrusive when behaviour breaches the legal norms and, therefore, it can be said that when illegal behaviour interrupts a legal order, it actually has the effect of entrenching the legal order.<sup>83</sup> Therefore, the boundaries of a legal order become obtrusive through illegal behaviour.<sup>84</sup> If illegality is the privative manifestation of legality, then a-legality 'denotes behaviour that calls into question the very distinction between legality and illegality as drawn by a legal order in a given situation'.<sup>85</sup>

According to Lindahl, illegal behaviour undermines 'our capacity to orient ourselves normatively in the world, thereby exposing our constitutive vulnerability as beings that are not simply "in" an order but need to take up a relation to an order'.<sup>86</sup> In order to understand this notion, one needs to make sense of Lindahl's concept of the 'first person plural perspective'.<sup>87</sup> This concept refers to the qualification of an act as illegal. The person (or people) who qualifies (or qualify) an act as illegal does not (or do not) refer to a legal order as being 'a' legal order, rather, he or she (or they) refer (or refers) to it as being 'our' legal order or the legal order that 'we' live by.<sup>88</sup> What is important to note is that 'legal behaviour takes place within a framework of mutual expectations about what the other members of the collective ought to expect [of a person or people] and vice versa'.<sup>89</sup>

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<sup>81</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 22.

<sup>82</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 84.

<sup>83</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 85.

<sup>84</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 85.

<sup>85</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 87.

<sup>86</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 85 – 86.

<sup>87</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 86.

<sup>88</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 86.

<sup>89</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 86.

## 5.2 Relationality

Chapter Four flows from Chapter Three as it is accepted that ASM is an a-legal activity based on Lindahl's work. In this chapter, I promote using Nedelsky's work as a way in which to address a-legal activities such as ASM. This is because a-legal behaviour resists falling into the categories of legality and illegality, and by adopting a relational approach, better decisions can be made about activities that resist inclusion into the legal order. I suggest that the theories of a-legality and relationality should be used in order to address a-legal activities such as ASM because, although a-legality is useful in showing law's fault lines, and in illustrating other practical possibilities that could be available to a legal collective in respect of a normative claim if it were to shift its existing boundaries about who ought to do what, where, and when, it is not capable of providing an understanding of the kinds of relations that have been structured by the law or the relations that would be structured by shifting the law's boundaries.

The relational theory is a move away from a court-centred approach because it aims to distance itself from focusing only on the individual, the state, and regulations.<sup>90</sup> The main point in terms of this is that juridical norms are not necessarily found in a court-based system but, rather, they are found in agreements, arrangements, and other patterns of interaction between parties.<sup>91</sup> Nedelsky's relational theory professes that every human being is moulded by the complex networks of relationships that they are a part of.<sup>92</sup> The network can, of course, include the relationship between the individual and the law.

The relational approach is a two-pronged approach in terms of law.<sup>93</sup> The first prong deals with the fact that when rights and law are questioned, they should be scrutinised in terms of how rights and law structure relations. The second prong deals with the idea that, in order to properly understand the law, one needs to understand that what rights and law, in fact, do is structure relations, which can either promote or undermine core values.<sup>94</sup> In my project, I discuss the core democratic values as contained in the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (hereafter, 'The Constitution')—i.e. human dignity, equality, and freedom.

In Chapter Four, I illustrate how the law fosters negative perceptions towards ASM miners; however, I also show how relations towards ASM could be fostered to promote it as a poverty alleviation activity.

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<sup>90</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 567.

<sup>91</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>92</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 19.

<sup>93</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 65.

<sup>94</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 65.

Much of the application of the relational theory is based on the idea that it creates debates about competing values.<sup>95</sup> Debates are advantageous because they allow one to examine how well disputed laws undermine core values.<sup>96</sup> Debates also promote meaningful participation in decision making.<sup>97</sup> Debates are able to transform law from being a barrier to democratic participation to being a vehicle for democratic participation.<sup>98</sup>

The relational approach is an incredibly beneficial approach towards ASM because it is able to show how the existing law contributes to a problem, and it is also able to show how the law could potentially be shifted in order to promote relations that are conducive to a value at stake.<sup>99</sup> The relational approach can be used as a tool to elucidate how the state's power has shaped relationships that have been destructive to core values and, once it has established this, it can then be used to illustrate and establish how the state can exercise its power differently.<sup>100</sup>

The relational approach has the effect of placing disadvantage at the centre of discussions and debates which is essential in shifting perceptions and potential decisions about ASM activities.<sup>101</sup> The relational approach also allows those whose rights are affected by decisions to be heard which is incredibly important when dealing with sensitive issues such as ASM.<sup>102</sup>

In order to illustrate all of the above observations in terms of the relational theory, I rely on Nedelsky's Alternative Social Charter, and I provide an in-depth discussion about how a model based on the ASC could be used in order to address a-legal activities such as ASM.

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<sup>95</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 67.

<sup>96</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 67.

<sup>97</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>98</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>99</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 71.

<sup>100</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>101</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>102</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

# CHAPTER TWO: ASM, THE MPRDA, AND CHALLENGES AND TENSION

## 1. Introduction

The problem at the heart of this project is that ASM in South Africa is treated as an illegal activity by lawmakers and society, even though it also creates extensive employment opportunities for those living in poverty. This problematic because it forces ASM to become a clandestine activity that is then exposed to a vast array of abuses, challenges, and tensions, and ASM miners do not have access to any form of legal protection when they suffer injustices.

Mining, in all of its various forms, plays a significant role in the South African economy. A seemingly misunderstood sector of the mining industry that is often overlooked is that of artisanal or small-scale mining. ASM can be loosely defined as the 'mining operations run by local enterprises, as opposed to large-scale mining (LSM) operations, which are usually run by transnational companies'.<sup>103</sup> ASM is generally overlooked, despite its significance, because of its clandestine and unregulated nature.<sup>104</sup> Its significance lies in the fact that it is able to generate a living for many more miners and their families than large-scale mining (LSM) is able to.<sup>105</sup> Therefore, in this project, ASM is examined as a necessary livelihood activity, and not as the crime-ridden, brutal industry that it is so often painted out to be by the media.<sup>106</sup>

The word *zama-zama* has come to be associated with viciousness, murder, and savagery in the context of illegal mining.<sup>107</sup> However, as I have explained above, the actual meaning of the word is loosely translated to mean 'those who try,' and it is the common name used to describe all informal miners.<sup>108</sup> The media has fuelled the poor misunderstanding of what informal mining constitutes because of the way in which it uses the word *zama-zama* in relation to the turf wars and violence associated with illegal mining.<sup>109</sup> It has led to the widespread misconception that all *zama-zamas* are involved in crime syndicates. However, this is not always the case. In many instances,

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<sup>103</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>104</sup> Unregulated in the formal sense.

<sup>105</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>106</sup> See <https://www.news24.com/SouthAfrica/News/bodies-of-7-suspected-illegal-miners-found-20180114> , <http://ewn.co.za/2018/01/30/13-illegal-miners-due-in-court-after-shootout-with-police> and <https://www.timeslive.co.za/news/south-africa/2018-01-22-illegal-miner-dies-while-destroying-evidence/> to see the type of language used in the media to describe illegal mining.

<sup>108</sup> K Nhlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> Accessed: 3 May 2016.

<sup>109</sup> S Mashaba 'Savage Zama-zama Killings Continue Unabated' (2018) [Online] Available at: <https://www.iol.co.za/the-star/news/savage-zama-zama-killings-continue-unabated-12846664> Accessed: 22 February 2018.

most *zama-zamas* did not initially intend to become involved in crime syndicates.<sup>110</sup> In fact, more often than not, external factors—such as the current socio-economic climate in Gauteng—are actually responsible for pushing people into illegal mining as a last resort, and they then become involved in crime syndicates.<sup>111</sup>

In this chapter, I examine the MPRDA, and I discuss its significance in terms of ASM. It is argued that law (and in this case, the MPRDA) has the ability to shape certain relations towards specific activities. I discuss each section that I have identified as being applicable to ASM and then, in section 3 of this chapter, I link the challenges and tensions that are associated with ASM to the appropriate section of the MPRDA.

From my discussion on the MPRDA, it becomes clear that the current mining laws in South Africa are incapable of addressing ASM appropriately, and that using the current mining laws will not result in positive changes in the lives of ASM miners. With reliance on the report written by Love of the SAHRC,<sup>112</sup> as well as on the ‘Guide for Action’ written by Pelon and Walser,<sup>113</sup> I explain the significance of ASM and, thereafter, point out some of the tensions and challenges associated with ASM. Firstly, I rely on Hentschel *et al*,<sup>114</sup> the African Mining Vision,<sup>115</sup> and Love<sup>116</sup> to identify the challenges and tensions created by the law. Secondly, I identify the challenges and tensions with, and between, traditional leaders and communities by relying on the works of Hentschel *et al*,<sup>117</sup> and Pelon and Walser.<sup>118</sup> Thirdly, with reliance on the works of Pelon and Walser,<sup>119</sup> as well as Love,<sup>120</sup> I identify the challenges and tensions with, and between, LSM and ASM. Fourthly, I rely on articles written by Groenewald,<sup>121</sup> Mabasa,<sup>122</sup> and

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<sup>110</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 59.

<sup>111</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 59.

<sup>112</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013).

<sup>113</sup> R Pelon & G Walser ‘Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action’ (2009).

<sup>114</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham.

<sup>115</sup> The African Mining Vision ‘Boosting Artisanal and Small-scale Mining’ [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>116</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013).

<sup>117</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham.

<sup>118</sup> R Pelon & G Walser ‘Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action’ (2009).

<sup>119</sup> R Pelon & G Walser ‘Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action’ (2009).

<sup>120</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013).

<sup>121</sup> Y Groenewald ‘Mining’s Ugly Underbelly’ (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>122</sup> L Mabasa for the Legal Resources Centre ‘Zama zamas: Trying to make ends meet in the face of the apocalypse’ (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].

the works of Hinton *et al*,<sup>123</sup> as well as the works of Hentschel *et al*,<sup>124</sup> in order to identify the challenges and tensions with and between the environment and ASM. Lastly, the challenges and tensions with, and between, women and ASM are discussed with reliance on Hinton *et al*.<sup>125</sup>

Section 3.5 of this chapter related to women in ASM which is given significant discussion because I argue that women have the ability to play a fundamental role in effecting positive change in relation to ASM. I argue that women have the ability to change perceptions about ASM by illustrating the fact that it is, in fact, a poverty-alleviating activity, and not a crime-ridden syndicate. Section 3.5.1 is divided into further subsections namely, the Role of Women in ASM which is discussed with reference to Hinton *et al*;<sup>126</sup> Women, Farming, and ASM in which I rely on Hinton *et al*,<sup>127</sup> Bowman,<sup>128</sup> and Hilson;<sup>129</sup> Women, LSM, and Patriarchy relies on Valiani;<sup>130</sup> Women, Cyclical Time, and ASM refers to the works of van Marle<sup>131</sup> and Cavarero;<sup>132</sup> Women, ASM, and Gender Specific Illness is discussed with reference to Hinton *et al*,<sup>133</sup> and, finally, Women and Other Gender Specific Challenges is also discussed with reference to Hinton *et al*.<sup>134</sup> In 3.5.1.6, I outline the stories of women involved in ASM by relying on the 'Special Report' written by the African Minerals Development Centre.<sup>135</sup>

The aim of raising these tensions and challenges is to show how these key issues have come about as a result of the MPRDA, and they also illustrate the current attitude towards ASM. I also show that discussing these tensions and challenges helps to facilitate a debate about how viewing ASM as a-legal could help to address these

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<sup>123</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

<sup>124</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham.

<sup>125</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

<sup>126</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

<sup>127</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

<sup>128</sup> C Bowman 'The Path From Feminist Legal Theory to Environmental Law and Policy' *Cornell Journal of Law and Public Policy* Vol 22 (2013).

<sup>129</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review*

<sup>130</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015).

<sup>131</sup> K van Marle 'Refusal, Transition and Post-apartheid Law' (2009) 15 – 22.

<sup>132</sup> A Cavarero 'In Spite of Plato: A Feminist Rewriting of Ancient Philosophy' (1995).

<sup>133</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

<sup>134</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

<sup>135</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.



issues, and to show how a system like the ASC could allow for a different approach towards addressing these issues. By discussing women in ASM, I hope to have paved the way for a meaningful discussion about a-legality and relationality.

## 2. The MPRDA and its significance with regard to ASM

It is important to discuss the laws and regulations that affect ASM in order to seriously investigate ASM. I argue that laws and regulations shape the boundaries and the relations that affect ASM. For this reason, I have investigated the MPRDA as amended by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (hereafter, the MPRDAA) in order to establish the sections that are applicable to ASM so that an investigation can be made into the relations that the South African mining laws have created towards ASM activities. I argue that the laws and regulations relating to mining in South Africa are responsible for a number of the challenges and tensions that can be found in the ASM sector. I identify and explain the important sections of the MPRDA in this section, and I then link the challenges and tensions associated with ASM to the appropriate section of the MPRDA in section 3 of this chapter.

Section 2(d) of the MPRDA<sup>136</sup> sets out the objectives of the mining legislation, and one such objective is that it should ‘substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources,’ and section 12 of the MPRDA elaborates on how the opportunities for previously disadvantaged persons may be given effect.<sup>137</sup> In terms of section 12, ‘The Minister may facilitate assistance to any historically disadvantaged person to conduct prospecting or mining operations.’ This assistance is subject to certain factors that the Minister needs to take into account in order to determine whether or not a person deserves assistance. These factors are both inclusive and exclusive in their very nature.<sup>138</sup>

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<sup>136</sup> As amended by section 2(d) of the MPRDAA.

<sup>137</sup> Interestingly, the proposed Mineral and Petroleum Development Amendment Bill of 2013 actually further amends section 2(d) of the MPRDAA so that it no longer places emphasis on women and communities. Instead, it proposes to change the wording simply to, ‘...historically disadvantaged South Africans’. It is my belief that this would result in a further shift away from the focus of the mining industry and society on the particular challenges faced by women and communities. However, I do not wish to discuss this issue and its consequences at length at this point in time because it would further extend the scope of this already complex topic. It is, however, duly noted, and if the bill were to be enacted, it would be interesting to conduct a study on this particular amendment and its consequences. Because the amendment bill has not yet been enacted, it will be sufficient to simply focus on the MPRDA and the Amendment Act of 2008 for my project.

<sup>138</sup> Section 12(3)(a)-(d): Before facilitating the assistance contemplated in subsection (1), the Minister must take into account all relevant factors, including-

- (a) the need to promote equitable access to the nation's mineral resources;
- (b) the financial position of the applicant;
- (c) the need to transform the ownership structure of the minerals and mining industry; and

Section 12(3)(a) provides that the Minister must take into account 'the need to promote equitable access to the nation's mineral resources' when assisting an historically disadvantaged person to conduct prospecting or mining operations. Section 12 makes no mention of ASM activities. Instead, it makes reference to 'mining operations' which has a broad definition in terms of the Act. 'Mining operations' are defined as 'any operation relating to the act of mining and matters directly incidental thereto'. The word 'operation' leads to the assumption that the Minister's assistance should be targeted at those wanting to enter LSM operations. In order to fulfil the objective of assisting historically disadvantaged persons, I propose that involvement in ASM be encouraged, and that ASM be approached from an a-legal and relational perspective instead of from a punitive enforcement perspective. ASM has the potential to substantially and meaningfully expand opportunities for historically disadvantaged persons and particularly women who already play such an important role in ASM activities.

There are a few significant sections contained in the MPRDA that are relevant to this project. Among these sections is section 3 of the MPRDA which deals with the custodianship of the nation's mineral and petroleum resources. Section 3(1) states that, 'Mineral and petroleum resources are the common heritage of **all** the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.'<sup>139</sup> This section is particularly interesting because it seems to suggest an inclusiveness as is indicated by the use of the word 'all'. This would suggest that **all** South Africans should be able to benefit equally from the nation's minerals. And, if this were the case, the MPRDA would certainly be fulfilling its objective in terms of section 2(d). However, section 3(2)(a) sets out the duties and responsibilities of the state as the custodian of the nation's minerals. This speaks to the exclusive aspect that is created by the MPRDA. The Minister may 'grant, issue, refuse, control, administer and manage reconnaissance permission, prospecting right[s], permission to remove, mining right[s], mining permit[s], retention permit[s], exploration right[s] and production right[s]'. By requiring a mining permit or mining right to mine, the MPRDA immediately becomes exclusionary. A mining permit allows certain persons to mine for the nation's minerals and excludes certain other persons from having that same access to the nation's minerals. This inclusive/exclusive and inside/outside nature of the legislation will be explained in more detail in terms of Lindahl's theory of a-legality below.

Section 5A of the MPRDA<sup>140</sup> deals with the prohibition relating to illegal acts. This is a particularly important section because it sets out precisely what an illegal act is in terms of the MPRDA:

'No person may prospect for or remove, mine, conduct technical co-operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any areas without—  
(a) An environmental authorisation;

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(d) the extent to which the proposed prospecting or mining project meets the objects referred to in section 2(c), (d), (e), (j) and (i).

<sup>139</sup> Own emphasis added. Section 3(1) of Act 28 of 2002

<sup>140</sup> Inserted by section 5 of Act 49 of 2008.

- (b) A reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and
- (c) Giving the landowner or lawful occupier of the land in question at least 21 days written notice.'

Put simply, this means that no person may mine without having proof of an environmental authorisation, without a mining permit, and without giving the landowner or lawful occupier of the land 21 days' written notice. This section sets out the conditions that must be met in order for a person to benefit from the nation's minerals. Although the objective of the Act is to expand opportunities for historically disadvantaged persons, these requirements seem to contradict the objective because historically disadvantaged persons do not have the same opportunities and resources to meet such cumbersome requirements. The barriers that the legislation presents to ASM miners and women is discussed in the next chapter. These inside/outside and inclusive/exclusive barriers of the legislation are further discussed below.

In order to apply for a mining permit, one must meet the requirements of section 27. According to this section, anyone who wishes to apply for a mining permit has to apply to the Minister and must simultaneously apply for an environmental authorisation. Section 27(2)(c) sets out the fact that a 'prescribed non-refundable application fee' is also payable by the applicant. The requirements that must be met in order for a mining permit to be issued are both inclusive and exclusive. They are inclusive in the sense that those who are able to apply to the Minister, who are able to acquire an environmental authorisation, and who are able to pay the prescribed application fee will be granted a mining right and will then be able to mine. Those who are not able to meet the requirements will not receive a mining permit and will subsequently not be able to mine legally.

Section 28 places certain duties and obligations on the holder of a mining permit. The holder has to keep proper records of their mining activities and they must keep proper records of their finances with respect to their mining activities. These are quite complex requirements to meet which can result in further exclusion for those who are not able to keep proper records of their activities and finances because their work is informal.

As Marie Hoadley and Daniel Limpitlaw observe, the MPRDA makes provision for small-scale mining but not specifically for artisanal mining.<sup>141</sup> From my previous discussion on the distinction between small-scale mining and artisanal mining, it was noted that small-scale mining usually has some mechanisation and a few people involved in the mining operations, whereas artisanal miners often work alone and for themselves with no mechanisation. Hoadley and Limpitlaw explain that a "one-man" operation is not practical and that its impracticality is as a result of the finance, skills, and effort that is required in order to acquire a mining permit.<sup>142</sup> Therefore, because the people who are involved in ASM are usually the disadvantaged people in society,

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<sup>141</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 5.

<sup>142</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 5.

the requirements for financing and operating make acquiring a mining permit an incredibly difficult undertaking.<sup>143</sup> Hoadley and Limpitlaw observe that the provisions in the MPRDA that relate to small-scale mining place severe constraints on the ability of the small-scale mining sector to participate as a poverty alleviating activity.<sup>144</sup> If this is true for small-scale mining then the same is certainly true for artisanal mining.

The current mining legislation was drafted with large-scale mining operations in mind and, therefore, a lot of the provisions are not applicable to, or appropriate for, the ASM sector.<sup>145</sup> Hoadley and Limpitlaw set out a practical example of this. They explain that the MPRDA requires miners to comply with an Environmental Management Plan (hereafter, 'EMP') before miners will be issued with a mining permit. This EMP is supposed to be easier for ASM miners to comply with because it only incorporates a very simple Environmental Impact Assessment (hereafter, 'EIA').<sup>146</sup> Despite the fact that the EIA for informal miners is supposedly simpler than the EIA that LSM companies have to comply with, ASM miners are still not in a position to complete the forms on their own and they require assistance from consultants.<sup>147</sup> This means that their expenses increase, and it cannot be said for certain that the applicants actually understand the laws and regulations that will be imposed on them once the mining permit has been granted.<sup>148</sup> In order for an applicant for a mining permit to be granted a permit, he/she is expected to familiarise him/herself with the sections of the MPRDA that are applicable to him/her, and he/she is also expected to be aware of any other legislation that may be applicable.<sup>149</sup> This is an unrealistic expectation because legislation is not written with the layperson in mind.<sup>150</sup> Even where an ASM miner does have formal education, it is possible that the legislation might not be accessible because it might not be in the language that the miner understands.<sup>151</sup>

### 3. Challenges and Tension in ASM

Through examining MPRDA, it becomes clear that it is unable to take into account all of the important facets of ASM adequately. The context in which something takes

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<sup>143</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

<sup>144</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

<sup>145</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

<sup>146</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

<sup>147</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

<sup>148</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

<sup>149</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

<sup>150</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

<sup>151</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

place is an important aspect to investigate because it gives insight into specific issues such as why something takes place, who is involved, and how they are affected. It is clear from the analysis of the MPRDA that the South African mining legislation does not explicitly place emphasis on the context in which ASM takes place and it is also not interpreted with ASM in mind.

Because the South African mining legislation does not take context into account—i.e. by not addressing ASM and its specific challenges relating to women, communities, and the environment—a number of tensions and challenges within ASM have come about either as a direct or indirect result of the legislation. The challenges and tensions surrounding ASM have been shaped through the way in which the MPRDA has been interpreted. I rely on the SAHRC's report<sup>152</sup> in order to identify and explain the challenges that affect ASM miners. I also rely on Pelon and Walser's 'Guide for Action'<sup>153</sup> to identify some of the tensions that present themselves in the world of ASM. I discuss the tensions and challenges together because they are inherently interlinked—i.e. tensions affect challenges and challenges affect tensions, or tensions come about as a result of challenges and challenges, too, are able to come about as a result of tensions.

Many of the challenges that ASM miners are faced with result in the miners being kept under the poverty line—for example, ASM miner frequently have to sell their minerals to middlemen at much lower prices than the market value which results in miners being kept below the poverty line.<sup>154</sup> The work is cyclical because it often depends on the seasons, which can have either a negative or a positive impact on the economy.<sup>155</sup> ASM miners are migratory because they regularly move from site to site in order to find mineral that are easy to extract. Once they find the minerals too difficult to extract, they abandon the site and move on to other, more lucrative, sites.<sup>156</sup>

ASM miners face other challenges which include inadequate policy and regulatory frameworks, limited technical capacity and access to appropriate technology (and consequent environmental degradation), lack of finance, inadequate access to exploration and mining areas, difficulties in accessing the market, issues associated with conflict minerals, and women and child labour concerns.<sup>157</sup>

As a result of these challenges certain tensions also come about, such as the tension which is present between LSM and ASM, or the tension between traditional leaders and communities. However, it is important to note that tensions are not only limited to being the result of challenges, but they can also contribute to the creation of

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<sup>152</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013).

<sup>153</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009).

<sup>154</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 23.

<sup>155</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 23.

<sup>156</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 24.

<sup>157</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 24.

challenges. In this section, I outline the tensions and challenges that are evident in ASM so that the way in which the South African mining legislation contributes to these tensions and challenges can be illustrated, and so that the context in which ASM takes place can be made clearer.

One of the most obvious challenges in ASM is the role that the law plays in its regulation. I argue that the three other challenges that I discuss below are simply symptoms of the role that the law has played in the regulation of ASM. However, I have chosen to discuss the three other challenges separately because I wish to give the reader a concrete understanding of the types of challenges and tensions that are present in ASM. I have also chosen to discuss these challenges in order to refer back to them when I discuss relationality in terms of Nedelsky so that I may show how these challenges may be adequately addressed by the ASC.

### 3.1 Challenges and Tension Created by the Law

There are a number of key challenges and tensions that have come about as a result of the lack of adequate regulatory and legal systems relating to ASM. The challenges and tensions indicate that the way the law currently structures relations towards ASM in South Africa is problematic and that a different approach towards ASM needs to be adopted. Most countries do not have policies or laws that are flexible enough to sufficiently accommodate ASM activities, and this has an effect on the ability of ASM miners to carry out ASM activities.<sup>158</sup> As I have mentioned above, South Africa has its own mining legislation known as the MPRDA; however, this legislation was not drafted with ASM in mind.<sup>159</sup>

In most cases, ASM miners operate within the informal sector because they have no knowledge of the legal requirements that are involved in the process of obtaining a mining permit.<sup>160</sup> In terms of section 5A, in order to mine a miner must be in possession of an environmental authorisation, a mining permit (or other permit in terms of section 5A (b)), and must have given the landowner or lawful occupier of the land at least 21 days' written notice in order to partake in any mining activities. Therefore, even if miners are aware of the fact that mining permits are a requirement, they often don't understand how the process to obtain one works—this is mostly a result of the bureaucracy that is associated with legal processes.<sup>161</sup>

In South Africa, it is particularly difficult for ASM miners to get hold of mining permits as the application process is mainly focused on LSM companies.<sup>162</sup> Therefore, ASM

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<sup>158</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>159</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

<sup>160</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 41.

<sup>161</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 41.

<sup>162</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

miners mainly operate without mining permits—i.e. illegally in terms of section 5A(b) of the MPRDA—and this prevents them from acquiring security of tenure, and it affects their abilities to take out loans and to invest.<sup>163</sup> Without legal mining permits, artisanal miners are often accused of trespassing on legal concessions which then has the added result of provoking local disputes.<sup>164</sup> The challenges that ASM miners face with regard to the MPRDA result in tensions being created, mainly between ASM miners and legal concession owners.

In many cases, however, ASM miners operate with the knowledge that what they are doing is, in fact, illegal. When ASM miners are aware of the illegality of their activities, other challenges present themselves. When mining operations are legal, ASM miners are required to pay tax.<sup>165</sup> This makes working outside the scope of the law appealing to ASM miners because it means not having to pay tax.<sup>166</sup> If there are no obvious incentives, becoming a legal operation seems unappealing to informal ASM miners.<sup>167</sup> Many ASM miners are aware that governments lack capacity to enforce penalties or to provide benefits which means that informal miners often do not see the appeal of becoming a legalised operation.<sup>168</sup>

Most ASM miners are unable to obtain capital, which then forces them to work outside the formal financing solutions, and this exposes them to the inconvenience and risk of becoming involved with middlemen.<sup>169</sup> Middlemen have a negative impact on the profits that ASM miners can achieve as miners have to sell their minerals at low prices.<sup>170</sup> This, in turn, traps the miners in a never-ending poverty trap.<sup>171</sup> ASM miners face a further challenge because transparent markets are inaccessible to ASM miners.<sup>172</sup> ASM miners usually only work with one middleman who provides the miner with mercury and tools, thus forcing the ASM miner to be dependent on him or her.<sup>173</sup> The middleman then has the power to determine what the selling price will be instead

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<sup>163</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>164</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>165</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 41.

<sup>166</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 41.

<sup>167</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 41.

<sup>168</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 41.

<sup>169</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>170</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>171</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>172</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>173</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

of allowing the market to determine it.<sup>174</sup> This prevents miners from getting fair prices for their minerals which creates tension between miners and middlemen.<sup>175</sup>

Requiring ASM miners to have formal mining permits and to meet the specific requirements (for example, section 27 states that prospective miners must apply for environmental authorisation) in order to acquire a mining permit is in contrast to the objectives of the Act which specifically promote expanding opportunities for historically disadvantaged persons, including women and communities, because it is incredibly difficult for most historically disadvantaged persons to meet the requirements in order to acquire a mining permit.<sup>176</sup> However, if ASM were to be promoted as a poverty alleviation activity, it would expand opportunities for historically disadvantaged persons.

In addition to the abovementioned challenges, ASM miners usually have very little knowledge about the laws and policies that regulate health and safety, the environment, and having a safe working environment, which presents many technical challenges.<sup>177</sup> Because ASM is informal, miners usually do not have a business strategy and they often do not have access to decent mining equipment.<sup>178</sup>

Because ASM miners are not aware of the laws and regulations that regulate health and safety (or even when they are aware of the laws but they do not have the capacity to conform), occupational health and safety issues are a major concern in the ASM sector and it is a concern that is well-documented by the media. Safety equipment like boots, helmets, and dust masks do not contribute directly to miners' daily income and it is therefore not a top priority in their eyes. Exaggerated safety requirements act as a deterrent for miners and fear of sanctions prevent miners from reporting mining accidents.<sup>179</sup>

As a result of the nature of ASM, miners are vulnerable to the risk of mining accidents. In the report written by the SAHRC,<sup>180</sup> the mining accident that took place at the Bontekoe mine which affected the lives of the mining community in Kommagas, Northern Cape is discussed and serves as an excellent illustration of how the law and law enforcement deals with ASM miners who have been involved in mining accidents.<sup>181</sup> The incident happened in 2012 at the De Beers Bontekoe mine, which had been temporarily closed. The mining site collapsed which resulted in the loss of

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<sup>174</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>175</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>176</sup> Section 2(d) of the MPRDA.

<sup>177</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>178</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>179</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 51.

<sup>180</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013).

<sup>181</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 12.



lives of many informal miners.<sup>182</sup> Whenever there is a mine collapse, the Department of Mineral Resources (the 'DMR') is supposed to draft a report that illustrates the reasons for the collapse. The community was concerned about the report and approached the DMR to find out how far the investigation had gone. However, the DMR informed them that they needed to voice their concerns to the South African Police Services (SAPS) because all the activity on the site was deemed to be illegal mining.<sup>183</sup> This incident is significant because it illustrates the difficulties that informal mining communities face as a result of falling outside the ambit of the law. In Chapter Three, I discuss Lindahl's concept of a-legality as an approach to address people and communities that lie outside the ambit of the law. The case illustrates the boundaries that informal miners and communities are faced with because they do not have legal status in the eyes of the law. Because the activities that took place at Bontekoe were deemed to be illegal, neither the DMR nor the SAPS wanted to take responsibility for the consequences that resulted from the unregulated mining activities.

At the time that the accident took place, the De Beers Bontekoe mine had been temporarily shut. The SAHRC identified an interesting issue regarding the process of closing mines in this regard.<sup>184</sup> There are often delays when mines are going through the closure process which is an indication that the process for closure is flawed. The result is a situation that actually allows ASM to thrive.<sup>185</sup> Along with the discovery that the closure of mines is flawed, the SAHRC also found that partially closing mine shafts and the lack of monitoring Social and Labour Plans and Environmental Management Plans result in major problems which contribute to dangerous and illegal activity that takes place around mines.<sup>186</sup> This is indicative of how complex the issues surrounding ASM can be. There are a number of underlying issues, such as the fact that mines are sometimes only partially closed which is a phenomenon known as "warehousing" (i.e. the owner of the mine is no longer mining),<sup>187</sup> that affect ASM that many lawmakers are not aware of. If lawmakers have no knowledge of the underlying issues that affect ASM miners, they cannot be expected to interpret legislation with the context of the situation in mind. This is why I argue that it is essential to adopt an approach such as Nedelsky's ASC in order for proper debate and deliberation to take place. Debate and deliberation would allow underlying issues to come to the surface so that lawmakers would be able to make decisions about ASM that are relevant and that would take the specific context of the ASM miners into account.

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<sup>182</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 12.

<sup>183</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 12.

<sup>184</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 12.

<sup>185</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 12.

<sup>186</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 12.

<sup>187</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 37.

The SAHRC interviewed a number of respondents for the compilation of their report; the respondents included the Chamber of Mines,<sup>188</sup> the Department of Health, the Department of Labour, and the Department of Mineral Resources. The report highlights the fact that all of the respondents have responses with respect to ASM. The contradictory responses are indicative of the fact that no communication exists between the different role-players in ASM.<sup>189</sup> This lack of communication is something that I argue could be easily rectified by adopting Nedelsky's ASC which would promote communication and deliberation between role-players, and which will be discussed in the next chapter. The report also explains that 'regulatory frameworks are often crafted on assumptions of transparency and access to information' but that this does not necessarily reflect the reality of the situation—quite a number of documents that are created through legislation are 'a product of consultations in the public domain and need to be in the public domain' but they are often not easily accessible.<sup>190</sup> This is another aspect that could be avoided if an ASC were to be adopted.

However, all the respondents mentioned in the SAHRC report did note and agree that illegal mining practices take place outside the framework of South African legislation.<sup>191</sup> The respondents also agreed that ASM activities cannot be ignored in a country where there are severe socio-economic factors at play such as 'widespread poverty, unemployment, high and rising inequality, and uneven enforcement of legislation, policies, and regulations'.<sup>192</sup>

In its report, the SAHRC identified the lack of a supportive ASM policy and regulatory environment as a boundary because the informal nature of ASM results in ASM being amenable to illegal dealings.<sup>193</sup> Because ASM is an informal activity with very weak or even non-existent legal protection, artisanal miners become easy victims of, and targets for, organised crime.<sup>194</sup>

Because the law has not adequately addressed ASM and because problems persist, there is a misconception that the legalisation of ASM should be promoted so that negative social and environmental effects can be better addressed. Hentschel *et al* argue that the legalisation of ASM should lead to the normalisation of informal

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<sup>188</sup> As of May 2018, the Chamber of Mines has been renamed the 'Minerals Council of South Africa'.

<sup>189</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 47.

<sup>190</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 47.

<sup>191</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 59.

<sup>192</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 59-60.

<sup>193</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 24.

<sup>194</sup> J Love Report of the SAHRC Investigative Hearing: *Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 24.

mining.<sup>195</sup> However, Lindahl's work is able to show that simple legalisation of an activity such as ASM does not necessarily result in a positive and progressive outcome.

### 3.2 Challenges and Tension With and between traditional leaders and communities

In 2016, hearings at the SAHRC took place which exposed the 'ugly underbelly of mining in South Africa'.<sup>196</sup> These hearings took place because of the violent clashes that had taken place between mine workers, mining affected communities, and government.<sup>197</sup> According to these hearings, the SAHRC had received numerous complaints about the negative consequences of mining on communities in Mpumalanga, Kwa-Zulu Natal, and Limpopo.<sup>198</sup>

The fact that consultations need to be made with all people involved in ASM, and not just the leaders of an ASM community, is often overlooked.<sup>199</sup> Most of the organisations at the hearings reprimanded the government and LSM mining companies for not consulting with mining communities directly, and explained that this forces the communities to deal with consultants.<sup>200</sup> During the hearings, the Legal Resources Centre (the 'LRC') explained that it had pursued approximately 700 complaints against traditional leaders in Limpopo.<sup>201</sup>

Therefore, mining communities are not only forced to deal with consultants, but they are also forced to rely on traditional leaders. The problem herein lies in the fact that traditional leaders often have significantly different interests from the interests of ASM miners and communities which creates another very large tension in the mining sector.<sup>202</sup> According to the LRC, traditional leaders often side with LSM companies because LSM companies have a tendency to curry favour with the leaders so that the

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<sup>195</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 42.

<sup>196</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>197</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>198</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>199</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 70.

<sup>200</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>201</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>202</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 70.

leaders convince the communities to agree to the proposed mining operations.<sup>203</sup> This, of course, does not necessarily link up with what is best for the community, and tension between the community and the LSM companies is further exacerbated.

Hentschel *et al* note that 'indigenous groups have a different understanding of the law, particularly with respect to natural resources'.<sup>204</sup> They also point out that, like Pelon and Walser, another tension occurs as a result of artisanal miners' informal status. This informal status usually means that ASM miners 'do not normally maintain good relations with central government'.<sup>205</sup>

### 3.3 Challenges and Tension With and Between LSM and ASM

In South Africa, the state is responsible for the issuing of the mining permits that allow LSM companies to mine in a certain area. In some cases, the state issues a mining permit to an LSM company which allows it to mine in an area which is considered to be an artisanal mining area. This has the result of fostering certain relations towards mining in society. Society might perceive and accept that LSM is more important or has greater value to the government than artisanal mining as a result of government's treatment of LSM. Therefore, it can be said that society's relations towards ASM are, to a great extent, influenced by the state's relations to, and decisions about, ASM. Pelon and Walser argue that 'in many circumstances, the government should be the one taking the lead and providing arbitration or law enforcement'.<sup>206</sup> In South Africa both arbitration and judgment are state regulated. However, this is not necessarily the correct approach, and working from a relational perspective advocates a move away from a court/state-centred approach towards arbitration and judgment.<sup>207</sup> This will be discussed in more detail in Chapter Four when I explain Nedelsky's relational theory.

Therefore, most conflicts arise between ASM and LSM when an LSM company is allowed to develop its activities in an area that was previously an ASM area.<sup>208</sup> In this type of situation, the ASM community is usually not informed of the LSM plans.<sup>209</sup> The lack of communication between the LSM companies and the ASM miners causes conflict because LSM companies frequently begin to explore a potential mining area

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<sup>203</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>204</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham I 70.

<sup>205</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham I 70.

<sup>206</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 21. This quote does not necessarily reflect my own view because I argue that arbitration and law enforcement is not the key to overcoming issues associated with ASM. Rather, I have included this quote to show support for my claim that relations are often structured by the attitude of the government.

<sup>207</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 232.

<sup>208</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 10.

<sup>209</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 10.

without consulting with the ASM community in the area. This causes misunderstanding and fear amongst communities and community miners who feel threatened by the initial exploration of the area.<sup>210</sup> On the other hand, some LSM companies do consult with communities but they entice the communities with seemingly fantastic social and labour plans.<sup>211</sup> This builds unrealistic expectations in the communities because the mining companies fail to carry out their promises and they fail to highlight the negative effects that the mining operation could have on the communities.<sup>212</sup>

ASM miners mistrust the legal system because they perceive the legal systems and governments to be biased in favour of large-scale investments.<sup>213</sup> In many countries, such as South Africa, minerals are vested in the state and, as a result thereof, permits are required in order to mine. However, ASM communities often believe that they should have rightful access to the minerals because of their traditions that they associate with subsistence mining. Interestingly, 'nationalistic-like feelings' are also cited as a potential cause of conflict.<sup>214</sup> This is because ASM activities are 'managed by nationals and LSM [is] often [managed] by foreigners.'<sup>215</sup>

Tension also occurs when ASM miners begin to work on the same land that is leased to an LSM company.<sup>216</sup> When clashes between LSM companies and ASM miners begin, various disruptions and suspensions of operations begin to occur.<sup>217</sup> LSM companies become frustrated when they have complied with all of the necessary legal requirements, and have obtained all the necessary permits, but ASM miners still begin to encroach.<sup>218</sup> LSM companies perceive encroachments as potential safety threats for both company employees and ASM miners.<sup>219</sup>

When organised crime elements become evident, further complications arise in the context of LSM and ASM.<sup>220</sup> These crime elements are a form of power relations and,

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<sup>210</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 11.

<sup>211</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>212</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>213</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 11.

<sup>214</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 11.

<sup>215</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 11.

<sup>216</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 12.

<sup>217</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 12.

<sup>218</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 13.

<sup>219</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 13.

<sup>220</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 13.

generally, organised crime occurs when diamonds and gold are involved.<sup>221</sup> However, it is important to keep in mind that although there are cases that are clearly organised crime cases, the vast majority of ASM activities do not constitute organised crime and are rather legitimate, ‘vital livelihood activit[ies]’.<sup>222</sup> For an LSM company, any disruptions or stoppages that happen because of crime syndicates will jeopardise their activities, and will translate to a loss on the part of the company.<sup>223</sup> LSM companies become concerned about their reputation when ASM starts to take place because a number of factors and issues begin to come to the surface. Issues such as ‘child labour, environmental damages, illegal activities, [and] human rights abuses’ are exposed, and they affect the reputation of the LSM company even when the LSM companies are not directly involved in the issues.<sup>224</sup> The reputations of LSM companies affect their shareholders and investors’ confidence in the company.<sup>225</sup> When the reputation of an LSM company is affected by ASM, it results in opportunities for the company to work on future projects in the country being jeopardised.<sup>226</sup>

A further challenge takes place when a mining right expires and a mining company has to terminate its operation at the specific mine. This is challenging because, in most cases, the mine’s reserves have not been completely depleted.<sup>227</sup> An LSM company’s right to mine usually comes to an end when it is no longer profitable to extract the minerals from the mine’s reserves.<sup>228</sup> Because the reserves have not been completely depleted, mining companies feel that they do not need to make a closure application for the mine.<sup>229</sup> When a closure application has not been made, *zama-zamas*<sup>230</sup> arrive and begin their ASM operations.<sup>231</sup> The informal miners operate under incredibly dangerous conditions in order to eke out a living. In 2006, the South African Chamber of Mines (i.e. today’s Minerals Council of South Africa) conducted research that showed that there is an uninterrupted link between mine workers being retrenched and the growth of informal mining because former mine workers have knowledge of

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<sup>221</sup> R Pelon & G Walser ‘Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action’ (2009) 13.

<sup>222</sup> R Pelon & G Walser ‘Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action’ (2009) 13.

<sup>223</sup> R Pelon & G Walser ‘Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action’ (2009) 13.

<sup>224</sup> R Pelon & G Walser ‘Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action’ (2009) 13.

<sup>225</sup> R Pelon & G Walser ‘Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action’ (2009) 13.

<sup>226</sup> R Pelon & G Walser ‘Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action’ (2009) 13.

<sup>227</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 32.

<sup>228</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 32.

<sup>229</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 32.

<sup>230</sup> As defined by K Nghlengetwa in his article, ‘Why it doesn’t make sense that all informal mining is deemed illegal’ (2016), the ‘zama-zamas’ are a type of miner that ‘spend a long time underground digging for gold’. The word ‘zama-zama’ comes from the Zulu word ‘zama’ which means ‘to try’. Therefore, loosely translated, ‘zama-zama’ means ‘those who try’.

<sup>231</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 32.

the process, workings, and underground infrastructure of the mines.<sup>232</sup> This simply illustrates the complex relationships between LSM companies, former employees, and artisanal mining.

When former formal miners are retrenched, ASM is usually the alternative that they turn to because ASM miners still need to make a living, and they have good knowledge of the mines which puts them in a unique position that allows them to become more easily involved in ASM. Because miners are employed at mines for a limited period of time, former LSM miners are often left without employment once the formal mining operations have come to an end. This is a challenge that needs to be addressed, and that could be addressed, through using Nedelsky's ASC and the relational theory through the emphasis of relationships between LSM companies and their former employees. Placing emphasis on relationships would hopefully result in an increased sense of responsibility on the part of LSM companies for the lives of their former employees. There is certainly a need for LSM companies and artisanal miners to work on building and maintaining strong and understanding relationships.<sup>233</sup> Better relations between LSM and ASM could be fostered if ASM were to be dealt with as an a-legal activity and if a model like Nedelsky's ASC were to be followed.

### 3.4 Challenges and Tension With and Between the Environment and ASM

During the abovementioned 2016 hearings at the SAHRC, poor environmental governance was highlighted as the main reason for the numerous violations of environmental rights.<sup>234</sup> The Mining Affected Communities United in Action ('Macua') explained how both formal and informal mining had ruined the lives of many communities through polluting numerous communities' water which made the water unpotable.

Agnes Molemela, a mining affected community member of Limpopo (and notably a woman), explained that the livestock in the community were dying, or had died, because they were drinking the water that had been polluted by mining.<sup>235</sup> Not only had the water become unpotable, the blasts from the mining had caused cracks in the community's houses causing, as Agnes Molema explained, never-ending dust.<sup>236</sup> Agnes also pointed out that her community's concerns had been falling on deaf ears

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<sup>232</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 11.

<sup>233</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 13.

<sup>234</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>235</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>236</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

in terms of the government. She said, “And government never listens to us.”<sup>237</sup> Agnes’s observations were further supported by Macua, who were also scathing of government’s lack of interest in dealing with large-scale mining polluters. Macua explained that even though polluting mines had been violating the Constitution, the Minerals Department was reluctant to do anything about it.<sup>238</sup> The use and implementation of Nedelsky’s ASC could adequately address government’s failure to listen to the pleas of mining affected communities because the ASC would ensure that the voices of those to whom rights and issues actually mattered would be heard through the use of the institutions outlined by Nedelsky as discussed further in Chapter 4.<sup>239</sup>

One area that serves as an excellent example of the types of environmental challenges that are related to ASM is Ermelo, Mpumalanga.<sup>240</sup> Ermelo is home to many abandoned coal mines, and it is in Ermelo that the true working conditions of ASM miners, and the environmental damage that is caused by ASM miners, can be found.<sup>241</sup> I rely on an article written by Lucky Mabasa for the Legal Resources Centre in order to illustrate the environmental destruction that takes place in Ermelo.<sup>242</sup> What is interesting about this article is that it shows that although ASM miners cause environmental damage, they are also, in equal measure, victims of the environmental damage.<sup>243</sup>

Mabasa describes the scene he came across in April 2016.<sup>244</sup> He explained that the coal seams had been on fire for months.<sup>245</sup> The earth surrounding the coal seam in

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<sup>237</sup> Y Groenewald ‘Mining’s Ugly Underbelly’ (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>238</sup> Y Groenewald ‘Mining’s Ugly Underbelly’ (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>239</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

<sup>240</sup> L Mabasa for the Legal Resources Centre ‘Zama zamas: Trying to make ends meet in the face of the apocalypse’ (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].

<sup>241</sup> L Mabasa for the Legal Resources Centre ‘Zama zamas: Trying to make ends meet in the face of the apocalypse’ (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].

<sup>242</sup> L Mabasa for the Legal Resources Centre ‘Zama zamas: Trying to make ends meet in the face of the apocalypse’ (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].

<sup>243</sup> L Mabasa for the Legal Resources Centre ‘Zama zamas: Trying to make ends meet in the face of the apocalypse’ (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].

<sup>244</sup> L Mabasa for the Legal Resources Centre ‘Zama zamas: Trying to make ends meet in the face of the apocalypse’ (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].

<sup>245</sup> L Mabasa for the Legal Resources Centre ‘Zama zamas: Trying to make ends meet in the face of the apocalypse’ (2016) Available at:



Ermelo is full of sinkholes because of the burning layers of coal beneath the earth's surface.<sup>246</sup> The damage that ASM causes to landscapes is a hazard to both people and animals.<sup>247</sup> The fires had caused immense ecological damage, rendering the land desert-like and useless.<sup>248</sup> Vegetation is unable to grow in this area, and the existing trees and plants had been damaged by the fires.<sup>249</sup> The fires, of course, cause huge plumes of smoke. Mabasa describes the inevitability of having to inhale the smoke and how it caused coughing amongst himself and the activists who had taken him to see the mine site.<sup>250</sup> The long-term effects of smoke inhalation can be fatal. Methane gas and other toxic gas is also released through the cracks in the surface of the earth during the process of ASM.<sup>251</sup> These gases have resulted in some of the houses in the area catching alight because the gases are flammable and they get released into homes that are built on old coal seams.<sup>252</sup> Mabasa makes mention of meeting a woman who had to move away from where she used to live because fire from the mines would spark up into her home.<sup>253</sup> The sparks are a result of the chemicals that were left behind by the previous LSM companies that used to mine the area.<sup>254</sup>

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- <sup>246</sup> <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].
- <sup>247</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].
- <sup>248</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].
- <sup>249</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].
- <sup>250</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].
- <sup>251</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].
- <sup>252</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].
- <sup>253</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].
- <sup>254</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].

ASM is also responsible for acid that seeps into rivers and boreholes and pollutes them.<sup>255</sup> The acid is poisonous to people, fish, and wildlife.<sup>256</sup> In this chapter, I discuss the environmental effects that ASM has on women in mining affected communities because, as I will explain, women are primarily affected by the environmental degradation caused by mining. ASM activities degrade the natural environment and, where women are involved in subsistence agriculture and ASM activities, the ecological impacts can be far-reaching—the environmental destruction can even extend beyond national boundaries if water becomes polluted through gold mining practices.<sup>257</sup> When water becomes contaminated, fishing communities are exposed to risks associated with mercury such as sterility which can also have an effect on unborn children.<sup>258</sup>

There is often an overlap between women and the environment because women, as care-givers, are usually the first to be affected by environmental change.<sup>259</sup> In ASM communities, women are generally responsible for providing food to the community.<sup>260</sup> This is made even more complicated when economies are informal because women depend on the natural environment (for example using medicinal plants and providing clean drinking water) to fulfil their roles as providers.<sup>261</sup> However, the strong link between women and the environment means that women can play a highly influential role in land management and that they hold the power to promote environmentally friendly practices that protect both the environment and the community's health.<sup>262</sup>

Hinton *et al* quote Noeleen Heyzer:<sup>263</sup>

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<sup>255</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].

<sup>256</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].

<sup>257</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 3

<sup>258</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 11.

<sup>259</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 11.

<sup>260</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 11.

<sup>261</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 11.

<sup>262</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 12.

<sup>263</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 20.

In conditions of rapid change—including environmental deterioration, the outmigration of men, changing economic activities and aspirations, and government interventions—women play an even more crucial role in the maintenance of livelihoods, cultural continuity, and community cohesiveness.

Over the years, environmental issues have become increasingly more concerning.<sup>264</sup> Governments have tried to address environmental concerns by implementing new environmental laws.<sup>265</sup> These laws have been fairly easy for LSM companies to comply with; however, the same cannot be said for the ASM sector.<sup>266</sup> Because environmental authorities and governments are not equipped to handle issues like ASM, environmental authorities force ASM further into the illegal realm because ASM is unable to comply with legislation.<sup>267</sup> ASM is difficult to control and regulate because ASM operations take place in inaccessible areas and are carried out by individuals rather than large groups of people. Hentschel *et al* explain that one should not follow an approach that promotes enforcing penalties and traditional monitoring—a notion with which I agree.<sup>268</sup>

### 3.5 Challenges and Tension With and Between Women and ASM

The central research problem of this project concerns the fact that lawmakers in South Africa treat ASM as an illegal activity although it is capable of creating numerous employment opportunities in a country where poverty is a grave concern. Because ASM is treated as an illegal activity, the ways in which it could be treated as a poverty alleviating activity are mostly overlooked.

In this section, I discuss the challenges and tension with and between women and ASM. By relying on Hinton *et al*'s work, I argue that women, although often victims of ASM, are also capable of being excellent advocates for change in the ASM sector.<sup>269</sup> Women, as crucial partakers in ASM, are involved in ASM as it is a supporting off-season activity to agriculture.<sup>270</sup> According to Hinton *et al*, the greatest percentage of female artisanal miners can be found in Africa. Further to this, between 40 to 50% of ASM miners in Africa are women.<sup>271</sup> It is important to look at women in ASM as a group

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<sup>264</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 75.

<sup>265</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 75.

<sup>266</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 75.

<sup>267</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 75.

<sup>268</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 48.

<sup>269</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

<sup>270</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 2.

<sup>271</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 2.

because many of the challenges that I have discussed above affect women directly. In addition to dealing with the discussed challenges, women are also faced with gender-specific challenges which affect them on a daily basis.

As I will show below, it is essential to discuss women in ASM because they serve as a practical example of how ASM affects people and how the law plays a role in the way ASM affects people. In the previous section, I noted that women and the environment often overlap with the concerns associated with ASM; I therefore believe that it is incredibly important to consider and discuss women in relation to the social and environmental issues that are often associated with and, in fact, related to ASM. However, this is not the only overlap that I have identified, and I will illustrate and discuss the overlapping tensions and challenges below.

### *3.5.1 The Role of Women in ASM*

Women usually play a much larger role in ASM than in LSM. However, because women are usually associated with the transportation and processing of minerals, and not really with the physical digging of minerals, they are often overlooked as 'miners' in the ASM sector. They are, therefore, not given the significant attention that they deserve from researchers, initiatives, and organisations.<sup>272</sup> Although women have always been involved in mining, mining is still regarded as an essentially masculine activity.<sup>273</sup> Researchers and writers often fall prey to 'gender-blindness' which is particularly predominant in the mining field.<sup>274</sup> Although female participation in ASM is high, women are usually given the subordinate or subsistence work in the ASM sector because they are usually responsible for their households as a result of their familial obligations.<sup>275</sup>

I have divided this section into six parts namely; 3.5.1.1 Women, Farming, and ASM; 3.5.1.2 Women, LSM, and Patriarchy; 3.5.1.3 Women, Cyclical Time, and ASM; 3.5.1.4 Women, ASM and in order to show the complex and significant roles that women play in ASM.

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<sup>272</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 2.

<sup>273</sup> K Lahiri-Dutt 'Gendering the field: Towards Sustainable Livelihoods for Mining Communities' (2011) 6 *Asia-Pacific Environment Monograph* ix.

<sup>274</sup> K Lahiri-Dutt 'Gendering the field: Towards Sustainable Livelihoods for Mining Communities' (2011) 6 *Asia-Pacific Environment Monograph* ix.

<sup>275</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 4.

### 3.5.1.1 Women, Farming, and ASM

Women in Africa are responsible for the majority of agricultural work which means that their activities depend on the health of the environment, their work is seasonal, and they rely on the temperamental and unpredictable weather.<sup>276</sup> Women are responsible for producing food for their families and for the markets so that they can sell it and make an income. In addition, they are responsible for fetching and gathering firewood (as a source of fuel) and water, and they also make charcoal.<sup>277</sup>

In informal economies, the natural environment plays a crucial role in women's capacities to generate income and to provide for the household.<sup>278</sup> Women are usually responsible for crop production and for providing water and biomass fuels.<sup>279</sup> Women also rely on the natural environment for medicinal plants.<sup>280</sup> Artisanal mining can have massive negative impacts on the natural environment, especially through deforestation and through the modifications of hydrologic systems.<sup>281</sup> Of course, these negative impacts then further negatively impact upon women and their families.<sup>282</sup> This indicates that there is an inherent link between women and the environment.<sup>283</sup>

According to Hinton *et al* there is a substantial link between women, family, health, and the environment.<sup>284</sup> Hinton *et al* state that there is 'a material truth that underlies the connection between women and the environment, for women as a group still perform most of the tasks involved in nurturing children and providing for their households'.<sup>285</sup> It is certainly obvious that these activities have a substantial impact on

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<sup>276</sup> C Bowman 'The Path From Feminist Legal Theory to Environmental Law and Policy' *Cornell Journal of Law and Public Policy* Vol 22 (2013) 642.

<sup>277</sup> C Bowman 'The Path From Feminist Legal Theory to Environmental Law and Policy' *Cornell Journal of Law and Public Policy* Vol 22 (2013) 642.

<sup>278</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 11.

<sup>279</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 11.

<sup>280</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 11.

<sup>281</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 12.

<sup>282</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 12.

<sup>283</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 11.

<sup>284</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 11.

<sup>285</sup> C Bowman 'The Path From Feminist Legal Theory to Environmental Law and Policy' *Cornell Journal of Law and Public Policy* Vol 22 (2013) 642.

the environment, but the activities also depend heavily on the environment.<sup>286</sup> Therefore, women are the first to be affected by changes to the environment.<sup>287</sup> However, it also means that women are in a prime position to be mighty agents for change.<sup>288</sup> Women have the potential to become successful in land management and to be incredibly influential in promoting practices that prevent environmental damage and the human health hazards that accompany it.<sup>289</sup> This is why it is so important for development organisations to take women into account when they make decisions and investments regarding ASM.<sup>290</sup> It is also important for lawmakers to take this kind of context into account when making decisions about ASM activities. Through Nedelsky's ASC, women's concerns could be voiced and the ASC could promote women as 'powerful agents for change'.<sup>291</sup> I discuss this in further detail in Chapter Four.

Many African families rely on smallholder farming; however, it is becoming increasingly impossible for African families to solely rely on farming.<sup>292</sup> Because of this, many African families have turned to other non-farming activities in order to supplement their income.<sup>293</sup> As I have mentioned above, women in Africa are generally responsible for agricultural work, and it can therefore be deduced that the people who are turning to these 'non-farming' activities are, in fact, women. One of the biggest alternatives to subsistence farming (or smallholder farming) is, in fact, informal (unlicensed) artisanal and small-scale mining.<sup>294</sup> Employment in the ASM sector fluctuates because of external factors such as droughts.<sup>295</sup> Usually, when droughts occur, many farmers temporarily become artisanal miners.<sup>296</sup> Therefore, ASM has become an integral part of numerous rural communities' economies across sub-Saharan Africa.<sup>297</sup>

ASM activities allow families to receive a significant increase in their income which results in them being able to purchase farm inputs that are crucial to maintain their

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<sup>286</sup> C Bowman 'The Path From Feminist Legal Theory to Environmental Law and Policy' *Cornell Journal of Law and Public Policy* Vol 22 (2013) 642.

<sup>287</sup> C Bowman 'The Path From Feminist Legal Theory to Environmental Law and Policy' *Cornell Journal of Law and Public Policy* Vol 22 (2013) 643.

<sup>288</sup> C Bowman 'The Path From Feminist Legal Theory to Environmental Law and Policy' *Cornell Journal of Law and Public Policy* Vol 22 (2013) 643.

<sup>289</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11)(2003) 11.

<sup>290</sup> C Bowman 'The Path From Feminist Legal Theory to Environmental Law and Policy' *Cornell Journal of Law and Public Policy* Vol 22 (2013) 643.

<sup>291</sup> C Bowman 'The Path From Feminist Legal Theory to Environmental Law and Policy' *Cornell Journal of Law and Public Policy* Vol 22 (2013) 643.

<sup>292</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 53.

<sup>293</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 53.

<sup>294</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 53.

<sup>295</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>296</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>297</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 53.

plots, to pay their children's school fees, and to acquire better quality housing.<sup>298</sup> Although there is a significant increase in benefits of ASM for rural families, donor communities, organisations, and policy making communities still support smallholder activities such as farming instead of ASM, even though subsistence/smallholder farming is limited in creating enough disposable income for rural families.<sup>299</sup> In fact, the informal artisanal gold mining economy has absorbed millions of rural farm families who are no longer able to subsist off their crops alone.<sup>300</sup> Rural farm families are no longer able to rely on subsistence farming as their main livelihood source because their previous support services have been dismantled, and there has been an increase in the removal of subsidies on vital farm inputs being removed such as fertilizer.<sup>301</sup> These changes have led to a desperate search for alternative livelihood activities in sub-Saharan Africa.<sup>302</sup> From this observation it is easy to see how ASM would fall into the realm of Lindahl's a-legal behaviour—i.e. it is behaviour that is not necessarily illegal, but by the same token, it is not necessarily legal. This will be discussed in greater detail in Chapter Three.

### 3.5.1.2 Women, LSM, and Patriarchy

There are many connections between women and mining; therefore, WoMin<sup>303</sup> has written a paper to address these connections. WoMin is mainly concerned with the impacts that LSM has on women, and it observes that 'mineral and oil-based development involves the misuse of important resources, which are typically undervalued and hence under or unaccounted for in policy making.'<sup>304</sup> WoMin identifies these important resources as being 'a) community wealth; b) systems of food production; and c) women's labour.' The impacts of formal mining on women is relevant in order to give a full picture of how all mining is capable of impacting upon women's lives. Since LSM and ASM are interlinked in some ways, as described in section 3.3 of this chapter, it is certainly appropriate to discuss the impacts that LSM has on women because LSM often leads to environments that are conducive to ASM activities.

The historical structures of patriarchy in the mining industry in South Africa can be seen through looking at the experiences of the South African women who live in the

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<sup>298</sup> G Hilson "Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 53.

<sup>299</sup> G Hilson "Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 53.

<sup>300</sup> G Hilson "Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 55.

<sup>301</sup> G Hilson "Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 55-56.

<sup>302</sup> G Hilson "Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 55-56.

<sup>303</sup> WoMin is an Africa Gender and Extractives Alliance which works with national and regional movements and organisations for women and mining-impacted communities.

<sup>304</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 5.

rural Somkhele and Fuleni in Kwa-Zulu Natal.<sup>305</sup> The Johannesburg-based company, Petmin, has expanded its anthracite coal mine into Somkhele and Fuleni.<sup>306</sup> The women in the villages are said to have tried to raise their concerns about the socio-environmental effects of the mine, but as a result of their gender, and their political position in the Zulu culture, the women's voices have not been heard.<sup>307</sup> The tribal authorities, which are patriarchal in nature, often favour the mines and, naturally, the tribal authorities hold the primary decision-making power around land use.<sup>308</sup> This description serves as a practical example of the challenges and tension with and between traditional leaders and communities as discussed above in section 3.2 of this chapter. According to Valiani, 'women have incurred numerous fines issued by the tribal chief upon their repeated attempts to object to the expansion of the mine'.<sup>309</sup> This is indicative of the patriarchy present in mining affected communities and that women do not receive support from the tribal authorities with respect to mining activities in the area.

In section 3.4 of this chapter, I discuss the challenges and tensions with and between ASM and the environment, and I make mention of the fact that women and the environment are interlinked. Mining usually concerns women because mining plays a phenomenal role in the pollution of water and land.<sup>310</sup> In fact, 'many of the environmental problems associated with mining stem from the contamination of, and competition for, surface and groundwater' and that the access to, and the quality of, water are 'especially critical when mining occurs close to agricultural and/or fishing communities'.<sup>311</sup> As I have explained above, agricultural communities are usually run by women and, therefore, women are the first to be affected by the polluted environment. From studying Valiani's paper, it is clear to see that when competing with LSM companies, traditional communities—like Somkhele and Fuleni—have small voices with very little impact on decisions made about how the land and water will be affected when a LSM company is involved. If one considers the already small voices of traditional communities which are predominantly patriarchal, one can then imagine how insignificant the voices of women are in these traditional communities. By using a model similar to Nedelsky's proposed ASC, it is argued that women's voices and their environmental concerns would be given greater consideration. This is because the ASC ensures that the discussions that take place about rights include opinions and discussions from those people to whom rights actually matter and, in this case, the focus would be on women.<sup>312</sup>

In order to compensate mining affected communities for the damage that the large-scale mines might (or have) cause (or caused), the mining companies engage in compensation agreements 'with the predominantly male traditional chiefs and other

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<sup>305</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 7.

<sup>306</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 7.

<sup>307</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 7.

<sup>308</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 7.

<sup>309</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 7.

<sup>310</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 7.

<sup>311</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 7.

<sup>312</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.



men of mining affected communities'.<sup>313</sup> Because the compensation agreements are only discussed with the male traditional chiefs, the monetary compensation is then out of reach of the women in the mining communities.<sup>314</sup> According to Valiani, this is because 'women constitute less than 15 percent of land holders across sub-Saharan Africa'.<sup>315</sup> Most of the men in mining affected communities 'do not tend to have the mathematic, financial, and other skills required to equally engage with companies on valuation methods'.<sup>316</sup> Clearly, this is a massive disadvantage with enormous consequences for mining affected communities. As Valiani points out, when the poor experience even a small loss of their resources, it can be devastating on their daily survivability and human dignity.<sup>317</sup> According to her, 'Combined with the effects of climate change on arable land in the global South as a whole, a mineral and extractives based development vision does not hold much promise for those drawing their sustenance from agriculture, which today is the majority of Africa'.<sup>318</sup> In Africa, women are cultivators and women are highly productive in agriculture.<sup>319</sup> In situations where mineral and oil extraction has had devastating effects on a community's wealth, women still perceive themselves as, and are still perceived as, being responsible for the community's survival.<sup>320</sup> Because of this perception, women often shift away from their 'usual production of food and other agricultural goods' and they shift towards 'consumption and trade'.<sup>321</sup> Instead of being able to focus on agriculture and food production, women are forced to become involved in trading 'petty goods produced elsewhere, selling ... mobile phone airtime, artisanal mining in mine dump sites, and sex work'.<sup>322</sup> The mining industry brings to light 'the unequal terms of relations between mining/oil affected communities and corporations'.<sup>323</sup> This is but one relation that WoMin has exposed in terms of mining and women.

The WoMin report uses the example of the Bubi community in Zimbabwe to illustrate the consequences that mining has on women.<sup>324</sup> Although it is not a South African example, it is a significant illustration because it serves as a concrete example of the ways in which mining is capable of changing social structures and how it is capable of affecting women and their statuses in their own communities.

The Bubi communities are a gold mining affected set of communities in Zimbabwe.<sup>325</sup> According to Valiani, the Bubi communities have 'endured operations of the large-scale Durban gold mine since the 1970s'.<sup>326</sup> As a result of the mining activities that have taken place, the water, land, and forests that the Bubi communities rely on have been completely degraded and destroyed, which has resulted in the loss of the

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<sup>313</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 9.  
<sup>314</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 9.  
<sup>315</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 9.  
<sup>316</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 9.  
<sup>317</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 10.  
<sup>318</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 9.  
<sup>319</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11.  
<sup>320</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11.  
<sup>321</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11.  
<sup>322</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11.  
<sup>323</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11.  
<sup>324</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11.  
<sup>325</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11.  
<sup>326</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11.

traditional system of food production based on small grains, livestock farming, fishing and wild fruit harvesting.<sup>327</sup> Mining is capable of shaping relations between people. In order to provide for the community, and as a result of the loss of the traditional food production system, women in the Bubi communities have had to turn to 'sex work, brick molding [sic], and sifting for gold in mine dump sites'.<sup>328</sup> Valiani even suggests that the young girls of Bubi have veered 'towards early marriage to miners' in order to secure what they perceive to be better futures for themselves.<sup>329</sup> However, these marriages are not ideal because many women end up in polygamous marriages where 'power is tilted heavily toward male miners originating mainly from outside Bubi and hence beyond the reach of community elders and norms'.<sup>330</sup> Of course, this results in an increase in gender inequality.<sup>331</sup>

### 3.5.1.3 Women, Cyclical Time, and ASM

Another aspect of ASM that is worth noting in terms of women is the idea of cyclical time. In general, artisanal miners are migratory.<sup>332</sup> It is accepted that artisanal mining is migratory because artisanal miners travel from site to site in order to find easily extractable minerals.<sup>333</sup> There are a number of factors that cause this migratory phenomenon to come about for example, the ease of finding minerals, the 'lure of high-value mineral strikes in other areas,' the displacement of communities as a result of land being allocated to LSM companies, and the need to follow the agricultural seasons.<sup>334</sup> Artisanal miners have a very low capital investment.<sup>335</sup> This means that the cost of moving from place to place does not stand in their way.<sup>336</sup> Hinton *et al* suggest that migration may have a heavy negative impact on the psychological well-being of women, especially in cases where women are forced to migrate to other mining areas for long periods of time because they have to leave their families and children behind.<sup>337</sup>

However, the cyclical element of ASM can be regarded as being beneficial to the lives of women and the families that they take care of. This suggestion is based on my

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<sup>327</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11.

<sup>328</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11.

<sup>329</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11.

<sup>330</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 11 – 12.

<sup>331</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015) 12.

<sup>332</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>333</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>334</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>335</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>336</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>337</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 12.

reading of K van Marle’s “Refusal, Transition and Post-apartheid Law.”<sup>338</sup> Van Marle is interested in women’s subjectivity and agency and, more specifically, ‘women’s existence as subjects and ... as subjects with the capacity to resist and refuse’.<sup>339</sup> She notes that, in South Africa, there is a notion that ‘transformation, socio-economic reparation and other social problems like poverty, violence and disease are addressed mostly through law and human rights.’<sup>340</sup> I agree with van Marle when she says, ‘But, as it is often argued and exposed, law and human rights are lacking in the capacity to effect real change’.<sup>341</sup> This project is based on the idea that law is incapable of effecting real change with respect to ASM and the challenges and tensions that I have discussed illustrate the law’s incapacity to effect change because these challenges and tensions have come about as a result of the mining laws in South Africa. In an effort to address this, it is suggested in Chapter Three and Four that ASM be treated as an a-legal activity and that a relational approach be adopted.

Van Marle makes reference to A Cavarero’s work, ‘In Spite of Plato: A Feminist Rewriting of Ancient Philosophy’,<sup>342</sup> and she relies on Cavarero’s interpretation of Plato’s Penelope, which I find inspiring.<sup>343</sup> Penelope’s job is to weave; however, Penelope weaves and unweaves the fabric of her cloth.<sup>344</sup> She unweaves her cloth because she does not want to accept the advances of her suitors, and as long as she keeps unweaving her cloth, she can delay her wedding day.<sup>345</sup> Therefore, Penelope weaves during the day and, in the evening, she unravels what she has done during the day in order to delay getting married to the man who has occupied her house.<sup>346</sup> Van Marle interprets this to mean that through the weaving and unweaving, Penelope ‘refuses the space and the role given to her by patriarchy’.<sup>347</sup> Penelope is said to be challenging the “natural” cyclical process of labour as well as the functionality related to work’.<sup>348</sup> In terms of ASM, women are also given certain roles by their patriarchal communities, such as taking responsibility for agriculture and unpaid care work. However, it is suggested that through becoming involved in ASM they too challenge the cyclical process of labour.

Through the weaving and unweaving, Penelope creates a ‘symbolic power of her own that is open to different readings’.<sup>349</sup> This is significant because, at the heart of this project, it is argued that ASM can also be interpreted (or ‘read’) differently. On the one hand, it can be seen as a lawless activity that creates a plethora of social and environmental problems but, on the other hand, it can be seen as an activity that creates job opportunities for many unemployed people in South Africa, which has the

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<sup>338</sup> K van Marle ‘Refusal, Transition and Post-apartheid Law’ (2009) 15 – 22.

<sup>339</sup> K van Marle ‘Refusal, Transition and Post-apartheid Law’ (2009) 15.

<sup>340</sup> K van Marle ‘Refusal, Transition and Post-apartheid Law’ (2009) 15.

<sup>341</sup> K van Marle ‘Refusal, Transition and Post-apartheid Law’ (2009) 15.

<sup>342</sup> As cited by K van Marle in her work, ‘Refusal, Transition and Post-apartheid Law’ (2009), ‘A Cavarero *In Spite of Plato* (1995)’.

<sup>343</sup> K van Marle ‘Refusal, Transition and Post-apartheid Law’ (2009) 19.

<sup>344</sup> A Cavarero ‘In Spite of Plato: A Feminist Rewriting of Ancient Philosophy’ (1995) 11.

<sup>345</sup> A Cavarero ‘In Spite of Plato: A Feminist Rewriting of Ancient Philosophy’ (1995) 11.

<sup>346</sup> A Cavarero ‘In Spite of Plato: A Feminist Rewriting of Ancient Philosophy’ (1995) 11.

<sup>347</sup> K van Marle ‘Refusal, Transition and Post-apartheid Law’ (2009) 20.

<sup>348</sup> K van Marle ‘Refusal, Transition and Post-apartheid Law’ (2009) 20.

<sup>349</sup> A Cavarero ‘In Spite of Plato: A Feminist Rewriting of Ancient Philosophy’ (1995) 13.

effect of alleviating poverty. In relation to this, Cavarero says, 'Thus Homer's sketch disseminates clues for other possible hermeneutical trajectories.'<sup>350</sup> Cavarero interprets this as an indication that the clues are 'for a symbolic order that has its own rhythms and spaces, that seeks its *figures* by stealing them from a context that has dealt with them otherwise'.<sup>351</sup> Cavarero believes that, by stealing the figures, an already established place is turned into a new place where perspectives that have been denied by a previous context can now be acknowledged.<sup>352</sup> This is important in terms of this project's purpose because Nedelsky's tribunals that put the ASC into effect could be regarded as spaces where perspectives about ASM that have been previously ignored can, in fact, come to the fore and be given due consideration. It is also argued that treating ASM as that which is a-legal opens up the possibility of creating a place where ASM could be interpreted as a poverty alleviating activity instead of a social and environmental problem.

According to Cavarero, Penelope is 'the emblem of an order that requires her to be an industrious and faithful wife; but, precisely for this reason, she also becomes a figure who denies and disrupts the time and place assigned to her.'<sup>353</sup> It is argued that women in ASM are also an emblem of an order. This order requires the women in mining affected communities to provide for their families by taking on the unpaid care work and by collecting fuel and water for the household—i.e. being industrious and faithful wives. This is the role that mining affected communities have given to women; however, the women in these communities often deny the role that has been given to them by becoming involved in ASM activities in order to make more money to provide for their families. As I have mentioned above, women are predominantly responsible for agricultural activities in the communities and, therefore, when these women become involved in ASM, they deny this role and become figures who deny and disrupt the times and places assigned to them.<sup>354</sup> This is an interesting concept because a-legal behaviour also disrupts the times and places that have been established by the legal order—i.e. a-legal behaviour disrupts who ought to do what, where, and when in a particular legal order.<sup>355</sup> The idea that women are able to deny and disrupt times and places that have been assigned to them is interesting because it agrees with the notion that women are capable of bringing about positive change as pointed out by Bowman<sup>356</sup> and Hinton *et al.*<sup>357</sup>

As a result of ASM being cyclical and informal, it makes a significant contribution to the world of mineral extraction<sup>358</sup> and it makes a significant contribution to the lives of

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<sup>350</sup> A Cavarero 'In Spite of Plato: A Feminist Rewriting of Ancient Philosophy' (1995) 13.

<sup>351</sup> A Cavarero 'In Spite of Plato: A Feminist Rewriting of Ancient Philosophy' (1995) 13.

<sup>352</sup> A Cavarero 'In Spite of Plato: A Feminist Rewriting of Ancient Philosophy' (1995) 13.

<sup>353</sup> A Cavarero 'In Spite of Plato: A Feminist Rewriting of Ancient Philosophy' (1995) 16.

<sup>354</sup> A Cavarero 'In Spite of Plato: A Feminist Rewriting of Ancient Philosophy' (1995) 16.

<sup>355</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 91.

<sup>356</sup> C Bowman 'The Path From Feminist Legal Theory to Environmental Law and Policy' *Cornell Journal of Law and Public Policy* Vol 22 (2013) 643.

<sup>357</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 8.

<sup>358</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

women and their families. This means that ‘ASM has become integral to the economies of many mining countries in the developing world.’<sup>359</sup> ASM is an important poverty-reducing activity, and it can present itself as an important opportunity to improve the living conditions of many rural communities, especially when there is a lack of alternative livelihood activities.<sup>360</sup> This project is based on this idea. Instead of viewing ASM as an illegal and undesirable activity, it should be viewed as an opportunity to alleviate poverty. I look at how the law has structured these attitudes of apprehension towards ASM activities, and then I show how these attitudes might be changed by viewing ASM as that which forms part of the ‘a-legal’ instead of the ‘illegal’.

Throughout the world, women tend to be in charge of certain roles.<sup>361</sup> Women mainly take on the roles of ‘labourers, providers of goods and services,’ and they are also often ‘solely responsible for domestic chores’.<sup>362</sup> This can be seen from the women’s stories that I discuss below. In terms of ASM, women are usually responsible for a vast range of activities such as ‘crushing, grinding, sieving, [and] washing and panning,’ as well as the ‘amalgamation and amalgam decomposition in the case of gold mining’.<sup>363</sup> Sometimes, women are ‘concession owners, mine operators, dealers and buying agents, and equipment owners’.<sup>364</sup> This can also be seen from the women’s stories below. The women’s stories that I discuss serve to corroborate and illustrate the findings of Hinton *et al* as well the findings of Valiani of WoMin.

#### 3.5.1.4 Women, ASM and Gender-Specific Illness

Hinton *et al* discuss the health and safety issues that women involved in ASM are exposed to or affected by. Sometimes women are driven into informal mining because a family member becomes ill—ironically, sometimes the illness of a family member is actually brought on by ASM activities.<sup>365</sup> Because ASM is such a labour intensive activity, and because there is a lack of knowledge about the dangers of exposure to

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<sup>359</sup> The African Mining Vision ‘Boosting Artisanal and Small-scale Mining’ [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>360</sup> The African Mining Vision ‘Boosting Artisanal and Small-scale Mining’ [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>361</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 2.

<sup>362</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 2.

<sup>363</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 2.

<sup>364</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 2.

<sup>365</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 8.

chemicals, many people become sick from ASM activities.<sup>366</sup> This has the potential to create a vicious cycle because when one of the family members becomes ill from ASM, it sometimes forces women to become involved in ASM and they then, too, become ill.<sup>367</sup>

Some of the gender-specific illnesses that occur as a result of ASM include the inhalation of fine silica dust, and according to Hinton *et al*, 'advanced stages have been documented among women and children as young as 14 in Ghana'.<sup>368</sup> It is regarded as a gender specific illness because women are usually involved in the crushing of minerals. In Zambia, women are predominantly involved in the crushing of marble which also creates a fine dust. Women are, therefore, more susceptible to developing pneumoconiosis.<sup>369</sup> When mechanisation is low, women are more likely to be involved in the activity, and because women are predominantly involved in the processing aspects of ASM activities, they are usually the ones who are more susceptible to chemical dangers.<sup>370</sup> Gold mining is particularly risky in terms of chemical dangers because mercury is used to process the gold from the gold-bearing ore.<sup>371</sup> Usually, gold processing takes place in the home on the kitchen stove which poses serious health risks to women when the mercury vapour is released into the air.<sup>372</sup> Through the use of the ASC, gender-specific illnesses may be raised as a concern, and it is argued that the ASC would ensure that significant consideration would be given to gender-specific illnesses.

#### 3.5.1.5 Women and other Gender-Specific Challenges

There are four main gender-specific challenges that women are challenged with that I have identified through my research—patriarchy, sexual exploitation, superstition, and regulations as barriers. I have identified patriarchy as a main gender-specific challenge above, and I have found that patriarchy is a particularly significant aspect for the

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<sup>366</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 8.

<sup>367</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 8.

<sup>368</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 9.

<sup>369</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 9.

<sup>370</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 10.

<sup>371</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 10.

<sup>372</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 10.

purposes of my study because, in many developing countries, and especially in rural communities, 'women's voices are largely absent from political decision-making'.<sup>373</sup> According to Hinton *et al*, 'women's perspectives, needs, knowledge and proposed solutions are often largely ignored'.<sup>374</sup> Because women are excluded from such important decision-making activities, the result that usually comes about from the decisions is usually that women's ASM activities become even more susceptible to policies that criminalise the activities, and this then marginalises their activities even further.<sup>375</sup>

The second gender-specific challenge that I have not yet discussed is sexual exploitation. Women and girls are exposed to sexual exploitation in the ASM sector, and girls are especially susceptible to sexual exploitation because of the value attached to virginity, and because they are unlikely to be carriers of HIV/Aids or any other sexually transmitted diseases.<sup>376</sup>

The third gender-specific challenge I have identified is superstition. Women are often excluded from participating in ASM because of cultural taboos and superstitions.<sup>377</sup> Hinton *et al* explain that, in Zambia, women involved in artisanal gemstone mining often face challenges because of the belief that women should not approach a gemstone mine because the spirits of the stones could drive the gemstones even deeper into the earth, or because the spirits could make the stones disappear totally.<sup>378</sup> Women in Mozambique are also faced with similar challenges because there is a belief that women attract bad spirits.<sup>379</sup> Because of this belief, women are often banned from working in the mines.<sup>380</sup>

In addition to these three gender-specific challenges, there is a fourth challenge—that of the regulations surrounding ASM. These regulations are usually extremely male

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<sup>373</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 17.

<sup>374</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 17.

<sup>375</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) Ahead 17.

<sup>376</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 12.

<sup>377</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 15.

<sup>378</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 15.

<sup>379</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 15.

<sup>380</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 15.

orientated and this creates a barrier to women's participation in ASM activities.<sup>381</sup> Therefore, in addition to dealing with the daily challenges that all ASM miners are exposed to, women are exposed to even further challenges. This points to the fact that women need to be given due consideration in any discussions and decisions made about ASM. Through using Nedelsky's ASC, gender-specific challenges could be given more attention, deliberation, and contemplation, and therefore better, gender-specific solutions could be raised.

*3.5.1.6 Women's Stories from the Special Report<sup>382</sup> by the African Minerals Development Centre (hereafter the 'AMDC'):*

The AMDC has collected stories from eight women who are involved in ASM throughout Africa. Unfortunately, the stories are not from women in South Africa. The AMDC collected stories from women from Ghana, Tanzania, and Guinea.<sup>383</sup> This places a limitation on my study because one cannot generalise the experiences of women involved in ASM. Each country has different challenges that affect women; therefore, what may apply to one country may not necessarily apply to another. This is a limitation; however, it is still important to discuss experiences of women for the purpose of my project in order to show the general challenges that women involved in ASM face, and also to show the types of women who become involved in ASM in order to change the face of ASM. The stories also show how women in Africa are linked through their challenges with respect to ASM.

It is a common misconception that mining is the realm of the 'man' and so I hope to challenge this misconception through using the women's stories.<sup>384</sup> I submit that conducting interviews with South African women involved in ASM would be a very interesting study as it is not something that is common, and it would serve to challenge the ideals about ASM, and I therefore submit that this would be an excellent idea for a further study to contribute more to the very limited research in South Africa.

The women's stories are concrete examples of the tensions and challenges that have been discussed above. They serve to illustrate how each of the tensions and challenges are interlinked, and they also serve to show how ASM and the mining laws affect women. However, the women's stories are also used to illustrate how ASM is used as an opportunity by women to relieve the strains of poverty.

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<sup>381</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 18.

<sup>382</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>383</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>384</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.



The AMDC interviewed three women from Ghana. The first woman is a woman named Esi Ahema and she, at the time of the report, was 37 years old.<sup>385</sup> She is married with three children and she is an ASM miner.<sup>386</sup> Esi's story shows how ASM is often used by women as a supplementary activity in order to support their small businesses. For women, ASM acts as an alternative income-producing activity. Esi explained to the AMDC that she was initially involved in the petty trade of goods but that she was not making enough money to support her family.<sup>387</sup> In order to make more money for her family, Esi would buy rocks to crush and she would then sell them.<sup>388</sup> She would use the money that she received from selling the rocks to invest into her petty trading business, but she explained that this was still not financially viable.<sup>389</sup> She eventually decided to focus on the quarry business but she explained that it is not easy for women to start up a quarry business.<sup>390</sup> What is particularly interesting is that she explains that she never had access to technical support from any individuals or organisations (neither local nor international).<sup>391</sup> This is something that is observed in each of the women's stories. She also explained that the quarry business has had a physical toll on her body and that she experiences pain as a result of the long hours and repetitive movement of crushing rocks.<sup>392</sup> The report is interesting because the AMDC was able to delve into the lives of these women—the lives that go beyond just ASM. Esi's day involves waking up at 5am to clean her compound, bathe her children, get breakfast ready, and get her children ready for school.<sup>393</sup> Esi leaves the quarry at around 4pm in order to make supper for her family.<sup>394</sup> This is significant because it shows the type of 'unpaid care work'<sup>395</sup> that these women still have to endure while being involved in ASM at the same time. Aside from being involved in ASM, Esi is also heavily involved in her community and she even contributes some of her money to promote the infrastructure in the community.<sup>396</sup> Esi's story shows how women use ASM as a way to reduce poverty in their communities. This is important because my project argues

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<sup>385</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>386</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>387</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>388</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>389</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>390</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>391</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>392</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>393</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>394</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>395</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>396</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

that ASM should be encouraged as a poverty alleviating activity, and not shunned as an illegal activity by lawmakers.

The second women from Ghana is Rebecca Awosua.<sup>397</sup> Her story also illustrates how ASM is used to reduce personal situations of poverty so that women can provide for their families. She was 21 years old at the time of the report, and she is educated to secondary school level but she has no technical training.<sup>398</sup> She became involved in ASM because she had a baby but the baby's father abandoned her.<sup>399</sup> She had to find a way to make money to support herself and her child, and therefore she became involved in ASM in order to make ends meet.<sup>400</sup>

The third women that the AMDC interviewed from Ghana is Amina Tahiru.<sup>401</sup> She was 41 years old at the time of the report and, interestingly, she owns a few concessions for alluvial gold.<sup>402</sup> Amina's story is particularly interesting because it shows the importance of women in the community, and it shows the specific challenges that women in ASM face on a daily basis.<sup>403</sup> At the time the report was written, Amina had been involved in the ASM business for ten years and she had employed 30 permanent male workers and approximately 100 temporary workers (of which about 60% were women).<sup>404</sup> Her situation is different from the other women's situations because she became involved in ASM as a gold buyer.<sup>405</sup> She explained that a concession owner cheated her, and this enabled her to seize his land and mine gold in order to get her money back.<sup>406</sup> Because she was able to earn some money from her unique situation, she was then able to apply for her own concession, and she even managed to acquire her own licence so that she could conduct a small-scale mining operation.<sup>407</sup> She also managed to conduct an environmental impact assessment of the site.<sup>408</sup>

Amina explained that she, too, had never received any assistance from any initiatives and she also did not receive any financial assistance from any donor-funded

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<sup>397</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.  
<sup>398</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.  
<sup>399</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.  
<sup>400</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.  
<sup>401</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.  
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<sup>405</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.  
<sup>406</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.  
<sup>407</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.  
<sup>408</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

programmes.<sup>409</sup> Amina suggested that a way to improve or promote opportunities for women involved in ASM would be for governments to make it easier for women to apply for concessions.<sup>410</sup> She is also of the opinion that government could play a bigger role in the lives of women who are involved in ASM by organising training support.<sup>411</sup> Another challenge that Amina has identified is the fact that banks are reluctant to loan women money for their ASM ventures.<sup>412</sup> Amina also believes that a relationship between LSM and ASM could be fostered if LSM companies would allow the female miners to access the land that they are no longer using because women involved in ASM are still able to benefit from this land.<sup>413</sup> It is argued that Amina's suggestions could be given due consideration through using the ASC.

Amina's story is interesting because she gives the reader a first-hand account of what the challenges are for women involved in ASM. She explained that access to land that has minerals is a problem, regulations are very strict, and taxation complicates things for these women.<sup>414</sup> Interestingly, she also explained that there has been an increase in people who have become involved in mining but that they do not have an understanding of the issues that surround mining.<sup>415</sup> She has observed politicians bringing people in to mine which also causes problems because they create pits and they leave without any reclamation.<sup>416</sup> Because these people have the protection of politicians, they are not held accountable for the damage they cause.<sup>417</sup>

She also explained the personal challenges she faces as an ASM miner, indicating that there has been an increase in the demands on her—she has to maintain herself and her family all from her mining activities because 80% of her income comes from her involvement in mining.<sup>418</sup> This is also indicative of the fact that ASM is usually a supplementary activity, and where it is a main activity, it still needs to be supplemented—it is not as lucrative as one is often led to believe. Amina supplements her income with her real estate investments.<sup>419</sup> Although Amina has been fairly successful in her ASM endeavours, she still has to take part in unpaid care work on

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<sup>409</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>410</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>411</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>412</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>413</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>414</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>415</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>416</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>417</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>418</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>419</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

top of all the work she does in ASM.<sup>420</sup> Amina also takes part in the development of the community like many of the other women involved in ASM.<sup>421</sup>

Amina's story indicates the gender-specific challenges that women face in ASM.<sup>422</sup> She lists her gender-specific problems as being challenges with compensation and challenges with meeting chiefs and communities.<sup>423</sup> She explained that because she is a woman, people in the village look down on her and that women are often cheated in the communities.<sup>424</sup> She explains that women are seen as a threat, and it is therefore a constant struggle for her to prove herself.<sup>425</sup>

The first ASM female miner from Tanzania that the AMDC interviewed is Sarah Boniface Lusambagula.<sup>426</sup> Sarah mines for titanium in Central Tanzania and she holds the title of being the only female titanium miner in Tanzania.<sup>427</sup> She managed to seize an opportunity and she got her licence to mine.<sup>428</sup> She was also fortunate enough to receive a grant from the Tanzania Investment Bank.<sup>429</sup> Her story is interesting because she explains the challenges that she faced initially when she was first trying to market titanium.<sup>430</sup> She explained that marketing minerals is fairly difficult so many ASM miners rely on dealers to market the minerals.<sup>431</sup> She also identified education and transparent market arrangements as being key for women to be able to increase their profit margins.<sup>432</sup>

One of Sarah's main points is that ASM is still highly patriarchal and she believes that this is a problem that needs to be challenged.<sup>433</sup> She identifies the fact that most men prefer to work with other men.<sup>434</sup> She also explains that women have a lack of access

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<sup>420</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>421</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>422</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>423</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>424</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>425</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>426</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>427</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>428</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>429</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>430</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>431</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>432</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>433</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>434</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

to capital which means that many female ASM miners operate at a loss, or do not make enough income because they have to pay back debts or loans.<sup>435</sup> To men, this makes women less appealing to work with because they would prefer to work with people who have capital.<sup>436</sup> Therefore, in addition to dealing with the normal challenges of ASM, women also have to deal with patriarchy as a further challenge.

Leah Kalua is a widowed woman from Tanzania whose husband had a mining claim; however, he passed away.<sup>437</sup> She explained to the AMDC that she and her husband depended on the mine to eke out a living, and when her husband passed away, she had to take over the mining operations.<sup>438</sup>

Leah's story is significant because it illustrates how 'harmful traditional practices' that relate to inheritance come into play with respect to the lives of women.<sup>439</sup> These 'harmful traditional practices' are patriarchal in nature, and Leah explains how she had to fight off her husband's relatives who had all lodged claims to repossess her husband's mine because they believed it was the property of the family.<sup>440</sup> However, she managed to get the licence put in her name with the assistance of the Chunya District Resident Mining Office.<sup>441</sup> She also explains that running the mining operations as a woman is very difficult because women cannot go down into the mine shafts and, therefore, they cannot supervise activities underground.<sup>442</sup> As a result of this, Leah has been swindled in the past. Another challenge that Leah faces is the problem of having the correct machinery.<sup>443</sup> She explains that when someone else has better machinery or technology than she does, she immediately becomes subservient to them because she sometimes has to rely on them.<sup>444</sup> She believes that being able to own appropriate machinery, having easier access to capital, and being able to access important information are some things that could significantly improve the lives of female ASM miners.<sup>445</sup> The challenges that Leah identifies support the challenges that Amina has identified. It is often difficult for women to receive financial help from institutions because financial institutions do not have an understanding of ASM and,

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<sup>435</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>436</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>437</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>438</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>439</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

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<sup>442</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>443</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>444</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>445</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

unfortunately, ASM activities produce income that is not steady. Therefore, Leah suggests that financial institutions be educated about the nature of ASM.<sup>446</sup> Once again, these are suggestions that could be given due consideration if the ASC model suggested by Nedelsky were to be followed.

Happiness Mabula is a Tanzanian woman who is a small-scale gold miner.<sup>447</sup> Happiness's story is interesting because she explains that she operates a mine under the licence of two male colleagues.<sup>448</sup> She explains that she has this arrangement with her male colleagues because women are not prioritised when it comes to applications for mining claims (or rights).<sup>449</sup> She is of the opinion that 'people in positions of power create too many obstacles for women to own mining claims' because they make women wait in vain for the claims or they do not give women relevant information relating to the claims and opportunities.<sup>450</sup> This is indicative of the bureaucracy that is present in the rules and regulations responsible for ASM. Happiness also draws attention to the fact that women are involved in the physical handling of mercury in the amalgamation process.<sup>451</sup> This is an example of a gender-specific challenge (in the form of gender-specific illness—as mercury is highly toxic) that women have to deal with in the ASM sector.

Guinea is a third African country in which ASM is rife. The AMDC interviewed two women from Guinea. These women do not have mining permits, and one of the women, Fanta Kante, claims that she has never even heard of a mining permit and that she has never been asked to produce one.<sup>452</sup> This is indicative of the fact that ASM miners are sometimes not even aware of the fact that their activities are illegal. It also shows that the laws are impractical in situations where poverty is rife and that a new way of addressing ASM (as a poverty-alleviating activity) is needed. Her husband is unemployed, she has had no formal schooling, and she is the sole breadwinner of the family (she has nine children to support).<sup>453</sup> 90% of Fanta's income comes from her ASM activities; however, she also has to be involved in trading during the rainy seasons in order to supplement her income.<sup>454</sup> The other woman that the AMDC interviewed is Saran Keita who also has no formal schooling.<sup>455</sup> 70% of Saran's

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<sup>446</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>447</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>448</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>449</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

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<sup>455</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

income comes from ASM activities.<sup>456</sup> She is also responsible for the unpaid care work that needs to be done in her household which she explains is time-consuming and labour intensive.<sup>457</sup> Unpaid care work is an extra burden on women involved in ASM. Saran's site has never been inspected before and she explains that she does not even know what an inspection would entail.<sup>458</sup> This once again illustrates how some women are not privy to the fact that their activities are considered to be illegal.

From many of the women's stories above, it is evident that they did not receive any financial or technical support to help them with their ASM activities. Esi Ahema, Amina Tahiru, Fanta Kante, and Saran Keita all explained that they did not receive financial or technical support—Esi Ahema even draws attention to the fact that she never had access to starting capital. In fact, if one looks at Amina Tahiru's story, one can see that the advantage that she had over the other women was the fact that she managed to seize a concession owner's land, thus allowing her to get her hands on a capital asset. Leah Kalua also had access to a capital asset in the form of her deceased husband's mines; therefore, in this way, she also had an advantage over the other women involved in ASM. From Sarah Boniface Lusambagula, as well as Leah Kalua's stories, one can see how patriarchy has had an impact on the women who are involved in ASM. Sarah Boniface Lusambagula and Fanta Kante both illustrate their lack of access to education from their stories. Happiness Mabula's story illustrates the fact that women are not given priority when applications for claims are tendered—this is indicative of the role that political power plays. Amina Tahiru's story also illustrates the role of political power that is evident in the communities with regard to the chiefs by explaining that she often has trouble communicating with the chiefs.

The women's stories serve as a practical illustration of the tensions and challenges that ASM miners face on a daily basis. Male ASM miners face similar challenges; however, women have added gender-specific challenges to contend with, such as patriarchy and gender-specific illnesses. Outlining the tensions and challenges has the effect of showing that ASM is a challenging activity that people elect to become involved in not because they have the intention of becoming involved in lucrative syndicates, but rather as a means of survival and to 'relieve the strains of poverty'.<sup>459</sup> The women's stories also serve to illustrate Hinton *et al's* point that 'inequities of power, distribution of income, capital assets, and access to education and information have resulted in the increased susceptibility of women to chronic poverty'.<sup>460</sup>

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<sup>456</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>457</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>458</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>459</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 1.

<sup>460</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 1.

Not only do women play important direct roles in ASM, but they also play equally important indirect roles.<sup>461</sup> These indirect roles also deserve to be recognised and discussed because of their significance. Hinton *et al* explain that, although women play incredibly essential indirect roles in ASM, ‘women occupying roles not directly related to mineral production have received minimal attention by researchers, development programmes, and governments.’<sup>462</sup> Women who are a part of ASM communities contribute to the productivity of the community and they play a critical role in ‘community stability, cohesiveness, morale and general well-being’.<sup>463</sup> As Hinton *et al* explain, women ‘act as primary agents in facilitating positive change’.<sup>464</sup> The community relies on women to provide goods and services, and a vast array of domestic chores.<sup>465</sup> This means that, because of the gender-based divisions in most communities, women tend to work longer hours in a day than men.<sup>466</sup>

Hinton *et al* explain that, often, women’s situations are further exacerbated by patriarchal structures because women are usually not in control of the money that they earn and they also participate in positions that form part of the unpaid economy.<sup>467</sup> These unpaid economy positions can also be seen from the women’s stories as discussed above. Many of the women explain that, in addition to their ASM activities, they are also responsible for the unpaid care work in their households and communities.

#### 4. Conclusion

From this chapter, it is clear that ASM can be the life-blood of informal communities; however, it is also evident that ASM poses a threat to human health and the environment.<sup>468</sup> The aim of this project is to show how ASM can be treated as a

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<sup>461</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 8.

<sup>462</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 8.

<sup>463</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 8.

<sup>464</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 8.

<sup>465</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 8.

<sup>466</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 8.

<sup>467</sup> J Hinton, M Veiga, and C Beinhoff ‘Women and Artisanal Mining: Gender Roles and the Road Ahead’ in ‘The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries’ (Chapter 11) (2003) 1.

<sup>468</sup> L Mabasa for the Legal Resources Centre ‘Zama zamas: Trying to make ends meet in the face of the apocalypse’ (2016) Available at:



poverty-alleviating activity instead of a criminal activity. The aim is to rely on women's stories, a-legality, and relationality to shape different perceptions about ASM and to show that it is possible for more than one interpretation about a certain issue, such as ASM, to exist.

In this chapter, I discuss the MPRDA in relation to ASM and I show how the MPRDA does not address ASM adequately, and how it does not effect positive change for the lives of ASM miners. In the next chapter, I show how simply relying on the law to address difficult social and environmental problems such as ASM is an ineffective approach and that a different way of looking at ASM activities—one that does not only rely on the law—is needed.

I also discuss the challenges and tensions associated with ASM activities in Africa—I rely on evidence from countries in Africa to support my argument. Through my discussion on the tensions and challenges associated with ASM, I show that the current mining legislation in South Africa has helped to facilitate these challenges.

The challenges and tensions that I outline and discuss above are not easy to address and, although some countries have already tried to review their policies to make provision for ASM, I argue that simply making provision for ASM in legislation will not bring about the much needed changes to the ASM sphere. Where countries have made provision for ASM, the negative effects still continue.<sup>469</sup> It is not simply a matter of introducing new policies and regulations, or incorporating ASM into a poverty reduction strategy.<sup>470</sup> I elaborate on this in Chapter Four in my discussion on the 'Formalisation Fix'. Often, this simplistic approach leads to completely unintended consequences such as a complete and overwhelming escalation of informal mining, or a significant encroachment of artisanal miners on LSM concessions, or an increase in accidents and increased environmental damage.<sup>471</sup> All of these are important factors that need to be considered when addressing ASM.

I discuss the challenges and tensions with, and between, women in ASM in detail. This is because many of the challenges and tensions that I had already discussed affect women; however, women are also exposed to a unique set of gender specific challenges through ASM that they also have to contend with. I relied on women's stories to illustrate the challenges and tensions that I had previously identified. The women's stories tie the challenges and tensions together to show a complete picture.

In the discussion about women and ASM, I show why it is necessary to approach ASM with gender sensitivity in mind, and it is argued that any approach towards ASM should aim to empower women and increase their participation in all phases of ASM as a

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<https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].

<sup>469</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>470</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>471</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

poverty-alleviating activity.<sup>472</sup> Based on Hentschel *et al*'s work, I show why it is essential to give women due consideration in any decisions made about ASM. I agree with Hentschel *et al*, who find that empowering women in ASM communities could certainly lead to a substantial alleviation of poverty, and I therefore find it imperative for women's needs and concerns to be discussed in any forum that makes decisions about ASM.<sup>473</sup> ASM cannot be transformed into a poverty alleviation activity unless the specific needs of women involved in ASM are taken into account, especially because women make up a significant 30% of the ASM sector.

Women's challenges are unique and, therefore, in order for ASM to be recognised and promoted as a poverty alleviation activity, any approach towards ASM needs to include and promote women's roles in ASM.<sup>474</sup> Women play a critical role in mineral production and in creating sustainable communities. Enhancing the role of women is one way to put all of the well-conceived technical and socio-economic changes that are so often prescribed for the improvement of ASM into place.<sup>475</sup> I agree with Hinton *et al* in their explanation that ASM has the potential to 'become a stepping stone towards economic fulfilment' if women were to be 'empowered to transform their skills and capabilities into well-being'.<sup>476</sup>

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<sup>472</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 30.

<sup>473</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 30.

<sup>474</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 1.

<sup>475</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 1.

<sup>476</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 1.

# **CHAPTER THREE: ARTISANAL MINING, THE 'FORMALISATION FIX', AND A-LEGALITY**

## **1. Introduction**

As recently as December 2016, there have been discussions about how to improve the lives of informal miners.<sup>477</sup> South Africa's rising unemployment rates have meant that there has been an increase in the number of people who have turned to informal mining as a means to make a living.<sup>478</sup> The problem surrounding informal mining is that it cannot simply be defined as 'illegal mining' because this type of mining has been taking place for many years as part of customary tradition.<sup>479</sup> As has been explained in Chapter Two, miners often have no knowledge of the laws and regulations that regulate mining, and they usually operate under the impression that their activities are legal because they have been given permission from their local chief to mine.<sup>480</sup> Although they may have permission from the chief, they usually do not hold the legally required mining permits to carry out the mining activities.<sup>481</sup>

In Chapter Two, I focus on the MPRDA and its significance with respect to ASM by looking at certain sections which are applicable to ASM. I then also look at the challenges and tensions that have been created under the rule of the MPRDA, and I argue that, although these tensions and challenges may not have come about as a direct result of the MPRDA, they are certainly a product of the MPRDA, and the MPRDA has been fundamental in fostering these tensions and challenges. I then focus predominantly on the role of women in ASM because women play a crucial role in changing perceptions about ASM. I rely on their stories in order to illustrate the challenges that women in ASM are faced with, and in order to show that, contrary to what we are fed by the media, ASM is often a coping mechanism for women, and vulnerable people, in times of economic struggle, and not necessarily a lucrative criminal activity for those seeking riches and wealth.

I conclude that relying on the current South African mining laws would not have the effect of fostering ASM as a poverty alleviation activity, which brings me to the current

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<sup>477</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>478</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>479</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>480</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>481</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

chapter in which I begin to discuss a way in which ASM could be interpreted as a poverty alleviation activity instead of being regarded as a criminal activity.

In this chapter, I examine the way in which many researchers and small-scale mining experts believe that informal miners should be brought within the realm of the legal system through formalisation.<sup>482</sup> These researchers and experts are under the impression that formalisation would open up opportunities for informal miners to gain access to technical knowledge and markets.<sup>483</sup> There is a notion that informal miners need to be educated about the 'benefits of working within the law,'<sup>484</sup> however I show why simply formalising informal mining is not an appropriate solution. I briefly discuss H de Soto's theory by relying on an interview called 'Hearing the Dogs Bark,' in which de Soto succinctly explains his theory.<sup>485</sup> I then rely on The African Mining Vision's work<sup>486</sup> in order to illustrate the short-comings of De Soto's theory.

The main problem surrounding ASM is where it lies in terms of the South African mining laws. In South Africa, illegal mining, as it stands currently, is a term that covers all aspects of unpermitted mining<sup>487</sup>—i.e. mining that takes place without a permit. As I explain in Chapter Two, the current definition of illegal mining in South Africa does not make a distinction between invasive illegal mining and informal community mining.<sup>488</sup> Unfortunately, although they are two different types of mining, the current mining laws in South Africa give them the same legal status under the law.<sup>489</sup> This means that both of these types of mining can be classified as artisanal mining or small-scale mining, and this then further leads to the common misconception that both types of mining should be dealt with as though they are illegal activities.<sup>490</sup>

It is important to distinguish between invasive illegal mining and informal community mining because, if a distinction is not made, the particular context in which the informal

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<sup>482</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>483</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>484</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>485</sup> Jeremy Clift interviews Hernando de Soto 'Hearing the Dogs Bark' *Finance and Development* 2003 8 – 11 Available at: <https://www.imf.org/external/pubs/ft/fandd/2003/12/pdf/people.pdf> [Accessed on: 5 November 2016].

<sup>486</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>487</sup> K Nhlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>488</sup> K Nhlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>489</sup> K Nhlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>490</sup> K Nhlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

mining activities take place is not taken into account. This results in certain unsuitable interpretations of what ASM constitutes coming about. According to Nghlengetwa, 'As the law in South Africa stands, a group of women mining the semiprecious tiger's eye quartz as a community in the Northern Cape province is considered [to be] equivalent to illegal miners who trespass on old abandoned mines.<sup>491</sup> He also explains that even when individuals who mine without permits use rudimentary techniques to mine, they are also considered to be illegal miners although trespassing or invasion of old mines may not have taken place.<sup>492</sup>

When context is not taken into account, ASM activities can be further affected by the fact that, in South Africa, customary practices are governed by the Traditional Leadership and Governance Framework Act of 2003.<sup>493</sup> Traditional communities are, in fact, recognised by the law and they are led by traditional chiefs.<sup>494</sup> This means that many ASM communities are subject to customary practices, as well as the law, and this leads to further confusion.<sup>495</sup> Members of the community assume that once they have gained the permission of the chief to mine a certain area, they are then allowed to mine.<sup>496</sup> In this type of case, the customary law has been followed but the informal mining is still deemed to be illegal by the MPRDA because the mining takes place without a mining permit from the DMR.<sup>497</sup>

Small-scale mining is illegal when it takes place without a mining permit and when informal miners trespass on the land of large-scale mines.<sup>498</sup> Small-scale mining is often deemed to be illegal under the Precious Metals Act 37 of 2005 because it is illegal to be in possession of unwrought gold. Ultimately, small-scale gold miners are

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<sup>491</sup> K Nghlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>492</sup> K Nghlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>493</sup> K Nghlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>494</sup> K Nghlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>495</sup> K Nghlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>496</sup> K Nghlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>497</sup> K Nghlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>498</sup> K Nghlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

constantly in possession of unwrought gold because they physically mine the precious metal.<sup>499</sup>

The MPRDA requires a mining permit to be issued by the DMR in order to deem small-scale mining legal. Therefore, any mining activities that take place without a mining permit from the DMR are deemed to be illegal despite the context in which they take place.<sup>500</sup> Context is an important concept in this project because it is argued that the South African mining laws are incapable of taking context into account which results in certain boundaries and limits being drawn.<sup>501</sup> This makes the issue of (il)legality complex. Because context is often ignored by the law, the significant role that ASM actually plays in 'overall mineral production' is frequently overlooked.<sup>502</sup> In fact, it is predicted that ASM accounts 'for approximately 15 to 20 percent of the world's non-fuel mineral production in recent years'.<sup>503</sup>

Hilson sets out the barriers that prevent the context surrounding ASM from being taken into account. One such barrier is that many lawmakers are unaware that the informal sector does, in fact, pay significantly to stay in business; however, they pay to corrupt public officials. Hilson identifies the fact that most ASM miners would rather pay to governments legitimately than to these individuals because their actions can be unpredictable.<sup>504</sup> ASM miners often choose to remain in the informal sector, not to avoid taxes, but rather because of other restrictive considerations, such as the inflated costs that are associated with being formal, as well as the lack of accessible legal alternative.<sup>505</sup>

Other barriers that can be identified from Hilson's study include a 'lack of access to development policies, in particular to [micro] credit programs, [vocational] training, and the marketplace'.<sup>506</sup> Tax burdens and bureaucratic regulations also affect artisanal miners.<sup>507</sup> These barriers are the reason for the fast and massive growth of the informal gold mining sector in Africa.<sup>508</sup> In an attempt to address what many people

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499 K Nhlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

500 K Nhlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

501 K Nhlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

502 T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 19.

503 T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 19.

504 G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 55.

505 G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 55.

506 G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 55.

507 G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 56.

508 G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 56.

see as the 'issue' of ASM, there has been a call to formalise the informal mining sector.<sup>509</sup> The idea of formalisation being a solution to the problems created by ASM activities comes from the belief that if regulatory imperfections could be rectified, people who are operating informally would be encouraged to enter the formal economy.<sup>510</sup>

Hilson states that it is short-sighted to make efforts to position informal economies within regulatory frameworks that are newly implemented and sector-specific.<sup>511</sup> Hilson is also of the opinion that one of the main problems with the regulation of ASM activities is that specific provision has not been made for ASM—it usually forms part of LSM, and it appears in the general mining laws of a country.<sup>512</sup> This is problematic because it results in poor implementation, and it appears to hide the true intention or aim of the sector reforms.<sup>513</sup> Hilson explains that research has confirmed that throughout sub-Saharan Africa, under reform, priority has been given to developing large-scale gold mining and mineral exploration activities.<sup>514</sup>

I argue that through understanding and accepting ASM as an a-legal activity, ASM's contributions to poverty alleviation could be appropriately acknowledged, and different relations towards ASM could be fostered. Through using Nedelsky's ASC, the potential harm that ASM could cause to the environment and surrounding communities could be reduced, and ASM could be promoted as a poverty alleviation activity, and a sustainable development tool.<sup>515</sup>

In this chapter, I explain why a simple 'formalisation fix' will not work within the context of South African ASM. I then outline legality and illegality in relation to ASM by drawing on the work of Lindahl. The chapter then focuses on the notion of a-legality which is a concept that appears in Lindahl's work, and it will be used to illustrate how viewing ASM as an a-legal activity would be beneficial to ASM and miners.

## 2. The Formalisation Fix

The 'Formalisation Fix' is a term that I use to describe acts and suggestions of interested parties who believe that formalising and legalising ASM is the cure to all of the tensions and challenges that ASM presents. Many parties are to blame for this

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<sup>509</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 55.

<sup>510</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 55.

<sup>511</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 57.

<sup>512</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 57.

<sup>513</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 58.

<sup>514</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 58.

<sup>515</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 25.

simplistic notion, including Mark Olalde,<sup>516</sup> Hoadley and Limpitlaw,<sup>517</sup> as well as de Soto.<sup>518</sup> In order to explain the formalisation fix, I discuss these authors briefly in this section.

Hentschel *et al* argue that the ASM sector should be approached in a holistic manner which takes into account local socio-economic systems in order for ASM to become a tool to fight poverty.<sup>519</sup> A holistic approach is an approach that would address or, at least, attempt to address each of the tensions and challenges that have been outlined in Chapter Two. In accordance with this, it is argued that using a-legality and relationality together would provide such a holistic approach.

The ASM sector has the potential to act as an economic cornerstone that would stimulate 'the development of complementary, sustainable revenue-generating activities' and, in so doing, it would serve as a poverty alleviating activity.<sup>520</sup> Although ASM forms part of the extractive industry, ASM can still be regarded as being sustainable. Hentschel *et al* explain that ASM can serve as a sustainable activity if 'ASM activities ... make a positive contribution to rural and regional development', if the 'activities ... operate legally' within the existing legal framework, if 'operations ... comply with international social standards,' if 'operations [are] environmentally sound,' if there is no conflict between ASM miners and surrounding communities, if small- and large-scale operations co-operate, and if 'there [is] continuous operation over a longer period of time'.<sup>521</sup> Hentschel *et al* claim that there is great potential for ASM to make an instrumental contribution to development that is sustainable.<sup>522</sup> Although ASM can be a beneficial sustainable development activity, it is argued that the legalisation of ASM would not necessarily result in positive change for ASM miners.

Hoadley and Limpitlaw contradict Hentschel *et al*. Hoadley and Limpitlaw agree that ASM is an illegal activity which is poverty driven, and like Hentschel *et al*, they too believe that ASM has the potential to be a useful sustainable development tool. However, they argue that as ASM currently stands, it causes extremely negative consequences to the environment and it has significantly negative social impacts.<sup>523</sup> They therefore do not share Hentschel *et al*'s optimism for sustainable development.

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<sup>516</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>517</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004).

<sup>518</sup> H de Soto 'The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else' (2003).

<sup>519</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 28.

<sup>520</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 28.

<sup>521</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 35.

<sup>522</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 35.

<sup>523</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 1.



The problem that ASM poses is that it is a form of livelihood for miners but it comes at large costs.<sup>524</sup> Usually, these costs actually affect the miners through occupational health and safety issues or the costs affect the surrounding communities through environmental degradation and social disruption (examples of social disruption that Hoadley and Limpitlaw have identified are alcoholism, prostitution, and gambling).<sup>525</sup>

However, unlike Hentschel *et al*, Hoadley and Limpitlaw argue that ASM should only be promoted if significant restrictions are imposed, and if ASM is regulated properly.<sup>526</sup> This indicates that Hoadley and Limpitlaw support the notion of a 'formalisation fix'.

Unfortunately, this is idealistic on Hoadley and Limpitlaw's part because ASM is an incredibly complex phenomenon. It is possible that ASM could benefit from better regulations and restrictions, but as Hentschel *et al* show, ASM has a number of factors that influence it. Implementing better regulations and restrictions is a simple approach that would not necessarily result in improvements to the ASM sector. Respectfully, Hoadley and Limpitlaw are of the narrow view that ASM can only contribute to sustainable development if it acts 'within the ambit of the law'.<sup>527</sup> The authors believe that legalisation would allow the state to enforce licensing and payment of tax;<sup>528</sup> however, the authors neglect to remember that this would act as a disincentive for ASM miners to comply with as is illustrated by Hentschel *et al*'s work.<sup>529</sup>

De Soto also falls prey to the notion that formalisation is the solution to the problems faced by the people who form part of the informal economies such as ASM. De Soto developed his own theory to address informal economies in his book, 'The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else'.<sup>530</sup> It is imperative to briefly discuss de Soto's work because his idea of the 'extra-legal' is a concept that initially inspired the idea for this dissertation.

According to de Soto, in order to spur development in informal economies, the millions of entrepreneurs in the third world need to 'become part of the system rather than excluded by bureaucracy and red tape'.<sup>531</sup> De Soto identifies the fact that poor people in third world countries lack the title to any assets that they already own.<sup>532</sup> His idea is

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<sup>524</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 1.

<sup>525</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 1.

<sup>526</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 3.

<sup>527</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 3.

<sup>528</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 4.

<sup>529</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 41.

<sup>530</sup> H de Soto 'The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else' (2003).

<sup>531</sup> Jeremy Clift interviews Hernando de Soto 'Hearing the Dogs Bark' *Finance and Development* 2003 8 Available at: <https://www.imf.org/external/pubs/ft/fandd/2003/12/pdf/people.pdf> [Accessed on: 5 November 2016].

<sup>532</sup> Jeremy Clift interviews Hernando de Soto 'Hearing the Dogs Bark' *Finance and Development* 2003 8 Available at: <https://www.imf.org/external/pubs/ft/fandd/2003/12/pdf/people.pdf> [Accessed on: 5 November 2016].

that a legal system that is ‘based on the realities already on the ground,’ and which is capable of adapting to these realities, needs to be created so that the poor entrepreneurs can have easy access to the titles of the property that they already own.<sup>533</sup>

His work is interesting because he explains how the laws and regulations in many countries keep people from operating within the law, and that it is therefore not surprising that so many people bypass the laws and operate without licences.<sup>534</sup> His work is thought-provoking and his quote, ‘... it was not so much that the poor were breaking the law as that the law was breaking them’ is particularly interesting.<sup>535</sup> De Soto goes on to explain that the people in informal economies operate outside the law, and that any type of reform will not work unless extra-legality is also dealt with.<sup>536</sup> He states, ‘... the poor are already in a market economy, albeit an extralegal one, fragmented into little pieces.’ The idea of an extra-legal sphere is an interesting concept which led to the investigation of Lindahl’s realm of the ‘a-legal’. De Soto’s work initially seemed incredibly compelling, but it soon became clear that what he was proposing was to bring the extra-legal sector within the ambit of the law—an approach that has, thus far, failed to make any real and positive impacts on the lives of ASM miners.

There is plenty of evidence to suggest that the simplistic approach of enforcing and implementing better regulations (and thereby bringing ASM within the ambit of the law) is not an appropriate approach. According to the African Mining Vision, countries such as Tanzania, Ghana, Ethiopia, and Mozambique have tried to introduce systems with the aim of marketing ‘artisanally’ mined minerals by creating an opportunity to sell minerals to private or state-run buyers with a licence.<sup>537</sup> However, this has not been a successful endeavour because it is too difficult for the proposed systems to remove illicit trading which ‘remains rampant’.<sup>538</sup> Governments have tried to assist ASM miners with their problems regarding access to capital by introducing loan schemes but ASM miners struggle to pay back the loans.<sup>539</sup>

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<sup>533</sup> Jeremy Clift interviews Hernando de Soto ‘Hearing the Dogs Bark’ *Finance and Development* 2003 8 Available at: <https://www.imf.org/external/pubs/ft/fandd/2003/12/pdf/people.pdf> [Accessed on: 5 November 2016].

<sup>534</sup> Jeremy Clift interviews Hernando de Soto ‘Hearing the Dogs Bark’ *Finance and Development* 2003 10 Available at: <https://www.imf.org/external/pubs/ft/fandd/2003/12/pdf/people.pdf> [Accessed on: 5 November 2016].

<sup>535</sup> Jeremy Clift interviews Hernando de Soto ‘Hearing the Dogs Bark’ *Finance and Development* 2003 10 Available at: <https://www.imf.org/external/pubs/ft/fandd/2003/12/pdf/people.pdf> [Accessed on: 5 November 2016].

<sup>536</sup> Jeremy Clift interviews Hernando de Soto ‘Hearing the Dogs Bark’ *Finance and Development* 2003 10 – 11 Available at: <https://www.imf.org/external/pubs/ft/fandd/2003/12/pdf/people.pdf> [Accessed on: 5 November 2016].

<sup>537</sup> The African Mining Vision ‘Boosting Artisanal and Small-scale Mining’ [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>538</sup> The African Mining Vision ‘Boosting Artisanal and Small-scale Mining’ [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>539</sup> The African Mining Vision ‘Boosting Artisanal and Small-scale Mining’ [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

In South Africa, small-scale mining policies and regulations fall under general mining policies, and therefore, there exists no distinction between ASM and LSM.<sup>540</sup> This means that the specific challenges that pertain to ASM do not receive the adequate attention they deserve.<sup>541</sup> However, the SAHRC report also observes that even when countries do have specific policies and laws that deal with ASM, the process involved for acquiring a mining permit is complex and exclusive, and this acts as a barrier (or boundary) to entry.<sup>542</sup> Therefore, I argue that simply legalising and formalising ASM is not an appropriate solution to the complex problems associated with ASM.

South Africa's DMR has indicated that even if it were able to provide mining permits to ASM miners, they have noted that regulation of ASM has not, in fact, managed to 'promote the growth of legal artisanal mining'.<sup>543</sup> In the past, the DMR has suggested sealing the open mine shafts to prevent entry, and the National Coordination Strategic Management Team on Illegal Mining (the 'NCSMT') has focused on law enforcement and prevention strategies such as making arrests and investigating organised criminal activity.<sup>544</sup> However, these strategies have proved to be inefficient and have not managed to eliminate or reduce ASM activities.<sup>545</sup>

Although Hentschel *et al* argue that 'legalization should help ensure that the negative social and environmental effects of the sector are better managed and will enable governments to capture more revenue from the sector,' they do acknowledge that legalisation would simply mean that the informal mining sector would be exposed to the 'personal interests' of government.<sup>546</sup> Corruption and money laundering are factors that influence government's enthusiasm with respect to creating a legal framework for ASM.<sup>547</sup>

As I have mentioned above, some governments in particular countries have formally recognised the ASM sector and have attempted to provide environments that are meant to ease the burdens of ASM miners.<sup>548</sup> However, 'the implementation of legislation at a local level remains problematic and many miners do not have faith in the ability or the commitment of their governments to provide assistance.'<sup>549</sup> This

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<sup>540</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 24.

<sup>541</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 24.

<sup>542</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 24.

<sup>543</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 59.

<sup>544</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 59.

<sup>545</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 59.

<sup>546</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 41.

<sup>547</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 41.

<sup>548</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 13.

<sup>549</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 13.

supports the notion that legal reform and recognition is not necessarily the solution to improving the lives of ASM miners or improving the ASM sector. The SAHRC is also of the opinion that even if ASM were to be regulated or legalised, it would still be problematic because it is unclear as to who would monitor or enforce the regulations and the law.<sup>550</sup>

Therefore, in order to address all the challenges associated with ASM, the best way to approach ASM is through using a holistic approach that takes into account policy frameworks, as well as all of the tensions and challenges that I outlined in Chapter Two.<sup>551</sup> This dissertation argues that ASM needs to be understood as an a-legal activity because ASM cannot be addressed holistically by looking inwardly to our current laws. Once one understands ASM as an a-legal activity, one can then apply the relational theory and Nedelsky's ASC to find solutions to (or at least propose solutions to) the problems that ASM miners are exposed to.

### 3. Lindahl, A-Legality, and ASM

#### 3.1 Introduction

As can be seen from the above discussion on the formalisation fix, it is a common argument that bringing informal miners into compliance with the law would allow miners to access technical knowledge, and that co-operation could assist miners with access to markets without the intervention of a middleman.<sup>552</sup> However, it is argued that formalisation is not a solution to the problems faced by artisanal miners. Through looking at other countries where ASM has been legalised and formalised, it can be concluded that even if ASM were to be brought into the realm of the formal sector in South Africa, ASM miners would still be exposed to deeper negative social structures as a result of poverty, and they would still be faced with the same challenges and tensions as outlined in Chapter Two. Financial challenges would still pose a significant barrier to the inclusion of ASM into the formal sector. These challenges could include, for example, having to pay for transport to the DMR's Offices to procure a mining permit.<sup>553</sup> There are indeed further costs that also have to be paid in order to actually procure a mining permit—for example, the costs to perform an environmental impact assessment, as well as the costs to rehabilitate the environment.<sup>554</sup> Therefore, even if

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<sup>550</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 37.

<sup>551</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>552</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>553</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>554</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

ASM were to be formalised, these problems would still persist. It is clear that there are immense barriers with regard to the formalisation of ASM. Therefore, I will show that through addressing ASM as an a-legal activity, and by adopting a relational approach, more inclusive and specific solutions may be generated instead of simply trying to formalise ASM.

It is also interesting to note that Hilson opines that the ASM gold mining sector is actually an intentional construct on the part of policymakers and donors.<sup>555</sup> This is but another reason as to why formalisation is not an adequate solution to the problems associated with ASM.

Hilson states:

A shortage of land for registered operators, in combination with the industry being “bedevilled with too many regulations that are mostly designed to constrain it and too few inspectors to ensure that they do,” has discouraged individuals from securing the requisite permits, in effect “creating” the conditions conducive to the growth of the region’s informal gold mining.<sup>556</sup>

The quote serves to illustrate the exclusionary nature of mining regulations and laws, and it shows how law is capable of structuring relations towards activities such as ASM. According to Hilson, policy-makers ignored the initial comments made by experts about the informal mining sector. He explains that when ASM miners are not given reasonable opportunities to mine, they may feel pressured to ignore the law and any rights that anyone else may have over mines or land so that they may secure their own livelihoods. This even happens in countries where ASM has been legalised. Once again, this shows support for the idea that governments must be willing to ‘move beyond the establishment of legal frameworks’ in order to address the problems associated with ASM, and thereby ‘identify deposits and areas amendable to small-scale development.’<sup>557</sup>

Hilson’s work aims to refocus a debate that has largely highlighted the negative aspects of unlicensed activities—i.e. significant environmental impacts, health and safety concerns, and numerous social ills.<sup>558</sup> His paper does not challenge the severity of these impacts, but it rather contests that a more productive exercise would be to act on the source of these problems—specifically, bureaucratic regulations and policies.<sup>559</sup> Hilson’s focus is on how the law has played a role in excluding ASM miners from the legal system because he focuses on the bureaucracy of the laws and regulations. I agree that there should be a focus on the source of the problems, and my project aims to address Hilson’s call for a focus on the way in which policies and

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<sup>555</sup> G Hilson “‘Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa’ (2013) 33 *SAIS Review* 56.

<sup>556</sup> G Hilson “‘Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa’ (2013) 33 *SAIS Review* 58.

<sup>557</sup> G Hilson “‘Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa’ (2013) 33 *SAIS Review* 58.

<sup>558</sup> G Hilson “‘Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa’ (2013) 33 *SAIS Review* 61.

<sup>559</sup> G Hilson “‘Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa’ (2013) 33 *SAIS Review* 61.

regulations play a more than significant role in structuring the challenges that ASM miners contend with.

I have investigated an approach that suggests a way in which one can address ASM in a way that promotes it as a poverty alleviation activity, as well as a sustainable livelihood activity. This approach protects ASM's integrity, while also addressing the many negative challenges and tensions that have resulted from ASM activities. This approach is a step away from relying on the law, increased regulations, and formalisation. I use Lindahl's work on a-legality as a starting point to address the unique challenges associated with ASM.

Up to this point, I have shown how the way that the law currently regulates ASM is exclusionary in nature because of the boundaries the law is perceived to create. By discussing these boundaries and the perceived exclusionary nature of South African mining laws, I have shown what the result of boundaries has been through outlining the tensions and challenges associated with ASM. Because of the current exclusionary nature of the law, ASM has resulted in a number of negative tensions and challenges—i.e. the environmental damage, the social problems, the health and safety problems.<sup>560</sup> However, I now shift my focus to how the current boundaries can be transcended by addressing ASM through using an a-legal and relational perspective so that law can be fostered in a way that could create positive relations towards ASM activities, and thereby become inclusionary as opposed to exclusionary. I begin this investigation by delving into Lindahl's work.

### 3.2 Lindahl – An Overview

I have mentioned a-legal behaviour throughout this dissertation and offered the perspective of a-legality as a way in which one can understand ASM in order to create a more inclusionary approach towards ASM. A-legal behaviour constitutes an act that opposes any of the four ways that a legal order makes a distinction between the legal and the illegal as explained by Lindahl.<sup>561</sup> It is imperative to understand that any legal order that society can possibly comprehend has *boundaries*.<sup>562</sup> Boundaries manifest themselves in the law because 'the law determines who ought to do what, where, and when within the concrete unity of an order'.<sup>563</sup> This means that the law regulates or orders behaviour by 'setting its subjective, material, spatial, and temporal boundaries'.<sup>564</sup> Therefore, boundaries determine which types of behaviour are deemed to be (il)legal.

When the MPRDA is examined, a number of boundaries can be identified. The MPRDA determines who ought to mine, and who ought not to mine in a specific area

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<sup>560</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham vii.

<sup>561</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 142.

<sup>562</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

<sup>563</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

<sup>564</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

at, and within, a specific period of time. In this way, the MPRDA creates a number of boundaries. Section 3(1), which explains that the mineral and petroleum resources of South Africa belong to all the people of South Africa, points to an inclusiveness—i.e. we as South Africans own South Africa’s minerals. However, this section is also exclusionary because it excludes anyone who is not South African. Boundaries work to include and exclude and, therefore, a legal order can only include by excluding, and exclude by including.<sup>565</sup>

Section 3(2) sets another boundary—put simply, it explains that the Minister may decide who receives a mining permit or mining right. By creating a mining permit or right, *who* can mine then becomes restricted. The permit allows some people to mine, and anyone who is not in possession of a permit may not mine—i.e. a mining permit includes some and excludes others.

Section 5A sets out which acts are deemed to be illegal in terms of mining. Therefore, this restricts the types of behaviour that may be engaged in with respect to mining. This has the effect of excluding certain persons from mining—i.e. those who do not have proof of an environmental authorisation, and a mining permit. However, those who do have access to these requirements are then included into the ambit of who may take part in mining activities. Section 27 sets out the requirements that must be met in order to receive a mining permit. These requirements are boundaries in themselves because any person who cannot meet the requirements is automatically excluded from the scope of people who may mine.

Limits are the next important concept to understand. Boundaries become *limits* when limits make a distinction between a legal order and the ‘domain of what remains legally unordered,’ and limits become visible when *strange behaviour* occurs.<sup>566</sup> Strange behaviour ‘irrupt[s] into a legal order from the domain of the unordered’ and ‘transgresses the spatial, temporal, subjective, and material boundaries that establish whether behaviour is legal or illegal’.<sup>567</sup> ‘Strange behaviour’ is that which is known as ‘a-legality’.<sup>568</sup> Therefore, a-legality evokes ‘another realm of practical possibilities’.<sup>569</sup> At this point, it is important to note that boundaries become limits when they are challenged by a-legality (or a-legal behaviour) or situations that question the boundaries of (il)legality.<sup>570</sup> Therefore, the boundaries of the MPRDA become limits when they are challenged by ASM because ASM calls into question the boundaries of (il)legality in terms of mining and, therefore, ASM can be described as an a-legal act.

Boundaries of a legal order mark the limit between legal order, legal disorder, and the unordered,<sup>571</sup> but boundaries of a legal order are also capable of appearing as normative *fault lines*.<sup>572</sup> A fault line occurs when a-legal behaviour exposes normative claims that fall outside the scope of a legal collective’s practical possibilities that the

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<sup>565</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 5.  
<sup>566</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.  
<sup>567</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.  
<sup>568</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.  
<sup>569</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.  
<sup>570</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.  
<sup>571</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 6.  
<sup>572</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

legal collective could conceive of as its own practical possibilities if it were to reconstruct the existing boundaries about who ought to do what, where, and when.<sup>573</sup> Therefore, a specific legal collective sees a fault line as a normative claim which is not only unordered but also ‘unorderable’.<sup>574</sup> Lindahl explains that the domain of the unordered encompasses both the orderable and the unorderable.<sup>575</sup> It is important to take cognisance of boundaries, limits, and fault lines because they show that ‘*the problem of inclusion and exclusion lies at the heart of modern interpretations of practical rationality*’.<sup>576</sup> In terms of ASM, a fault line occurs because ASM is capable of exposing normative claims that fall outside the scope of the collective’s practical possibilities in terms of the MPRDA—i.e. the legal collective is unable to see ASM as a poverty alleviation activity because the MPRDA defines illegal mining as mining that takes place without a mining permit. Therefore ASM is often treated as an illegal activity even though it has not been specifically defined as such by the MPRDA.

When one regards law as a type of joint action, one can approach legal orders in a way that accommodates a vast range of legal orders while also being flexible enough to accommodate their differences.<sup>577</sup> Lindahl’s findings suggest that ‘a wide range of contemporary legal and political theories, together with many contributions to the sociology of globalization, inadvertently entrench state-centred thinking about legal order when congratulating themselves for overcoming it’.<sup>578</sup> This is a particularly interesting point for my purposes because I also rely on Nedelsky’s work to address my investigation. Nedelsky also encourages a move away from state-centred thinking. I argue that a move away from state-centred thinking would allow for a move away from the temptation to indulge a formalisation fix.

Where legal orders are necessarily limited, setting boundaries has the power to shift these limits and, in so doing, setting boundaries therefore has the power to include what has been excluded, and to exclude what has already been included.<sup>579</sup> Legal boundaries are set by decisions, and acts that set legal boundaries are always responsive—i.e. decisions (or an act that sets legal boundaries) respond to human behaviour because human behaviour questions legal boundaries.<sup>580</sup> Therefore, it can be said that the legal qualification of human behaviour sets boundaries.<sup>581</sup> When an illegal or legal act occurs, the decisions made about that specific act, in effect, enforce the boundaries of the legal order.<sup>582</sup>

When boundaries are enforced, the distinctions between legality and illegality are taken for granted, and reconfirmed as already positioned in existing legal

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<sup>573</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 4.

<sup>574</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 4.

<sup>575</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 6.

<sup>576</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 7.

<sup>577</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 5.

<sup>578</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 5.

<sup>579</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 5.

<sup>580</sup> H Lindahl ‘Law’s “Uncanniness”: A Phenomenology of Legal Decisions’ (2008) 2 *Netherlands Journal of Legal Philosophy* 144.

<sup>581</sup> H Lindahl ‘Law’s “Uncanniness”: A Phenomenology of Legal Decisions’ (2008) 2 *Netherlands Journal of Legal Philosophy* 144.

<sup>582</sup> H Lindahl ‘Law’s “Uncanniness”: A Phenomenology of Legal Decisions’ (2008) 2 *Netherlands Journal of Legal Philosophy* 145.



boundaries.<sup>583</sup> Therefore, boundary enforcement is incapable of questioning the existing legal boundaries.<sup>584</sup> When a decision is made about ASM, the boundaries of the MPRDA are enforced, the distinctions between legality and illegality are simply reconfirmed, and the existing boundaries are not questioned. Therefore, when decisions are made in response to a-legal acts, the decisions are capable of actually constituting the boundaries of a legal order.<sup>585</sup>

Human behaviour that demands legal qualification actually precedes the law because 'human behaviour never entirely fits legal expectations'.<sup>586</sup> According to Lindahl, human behaviour, at its core, is always minimally a-legal.<sup>587</sup> This is because 'it in some way upsets the anticipation of legality/illegality encoded in legal norms'.<sup>588</sup> From this, it can be deduced that human behaviour always comes first, and law always comes second. Therefore, human behaviour is incapable of ever simply being a legal construct because human behaviour precedes the law.<sup>589</sup> Human behaviour only becomes legal or illegal when legislation enforces boundaries.<sup>590</sup> However, human behaviour becomes a-legal when 'legislation constitutes boundaries,' as is the case with regard to ASM and the MPRDA.<sup>591</sup> Legal decisions can never precede human behaviour because they are only capable of responding to the normative claims that are made known by a-legality.<sup>592</sup> In Lindahl's words, '...an act of collective self-legislation—a decision—can only come first by coming second, that is, as a reaction to what calls into question who ought to do what, where, and when.'<sup>593</sup>

When a-legality challenges legal boundaries, one of two things can happen. Firstly, a-legality may expose a legal boundary to be a limit. If this is the case, the limit may be shifted in order to include what has been excluded or to exclude what has been included.<sup>594</sup> However, there is a second scenario, sometimes a-legality challenges a legal boundary and actually exposes the boundary to be a fault line.<sup>595</sup> When this happens, the legal boundary cannot simply be shifted to include what has been

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583 H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 145.

584 H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 145.

585 H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 145.

586 H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 145.

587 H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 145.

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589 H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 145.

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592 H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 146.

593 H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 147.

594 H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 7.

595 H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 7.

excluded and vice versa.<sup>596</sup> This is known as a ‘normative blind spot’, which is something that every legal collective has.<sup>597</sup> Where a normative blind spot exists, the legal collective cannot simply suspend it or even simply justify it.<sup>598</sup> As I have mentioned, with respect to ASM, a fault line occurs because the normative claims made about ASM fall outside the scope of the collective’s practical possibilities in terms of the MPRDA. ASM challenges the boundaries of the MPRDA and, therefore, exposes these boundaries as fault lines. What this means in terms of ASM is that the legal boundaries that have been created by the MPRDA cannot simply be shifted to, in this case, include ASM as a legal activity. This is the normative blind spot that the legal collective has in terms of ASM.

(II) legal behaviour makes the boundaries of a legal order visible, but a-legal behaviour makes it clear that boundaries are the limit between legal order and disorder. It does this by indicating the strange places, times, subjectivities, and act-contents which affect the legal order they transgress.<sup>599</sup> Therefore, legal and illegal behaviour reveal boundaries, but a-legal behaviour reveals the boundaries as the limits of legal (dis)order.<sup>600</sup>

### 3.3 Lindahl’s Legality and Illegality

In order to understand a-legality, one first needs to have a proper grasp of what constitutes legality and illegality. To illustrate this, Lindahl defines a legal act—he describes a group of friends who intend on throwing a party. The friends stop at the grocery store to buy a few items for the party, they fill their baskets with food, they queue up at the checkout points in the store, and then they pay for the food.<sup>601</sup> When one goes to the supermarket, one is positioned by legal norms in terms of space and time, and with respect to who ought to do what, when, and to what end.<sup>602</sup> One must act in accordance with these boundaries which include some forms of behaviour and exclude other forms.<sup>603</sup> Therefore, these boundaries determine what constitutes a legal or an illegal act.<sup>604</sup> Once an act has been determined as either legal or illegal, the boundaries then set limits on what kinds of behaviour and forms of reasoning are

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<sup>596</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 7.

<sup>597</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 7.

<sup>598</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 7.

<sup>599</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 13.

<sup>600</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 13.

<sup>601</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 18.

<sup>602</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 411.

<sup>603</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 411.

<sup>604</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 411.

appropriate within the context—i.e. one can pay for goods with cash at the till, but one cannot leave without paying.<sup>605</sup>

The legal act shows that law orders space.<sup>606</sup> The shop is an ‘ought-place’ because it is the type of place where certain forms of behaviour are expected (or ‘commanded, authorized, or permitted’).<sup>607</sup> The grocery store is a space where people ‘ought to buy and sell food’.<sup>608</sup> Legal orders split up a space into a number of ought-places, and they also regulate the conditions for the entry and exit of these places.<sup>609</sup> The law determines that one ought to enter and leave certain places in certain ways, and the law also assigns certain behaviour to certain places.<sup>610</sup> Lindahl concludes that ‘the law orders space (a) by differentiating and interconnecting a manifold of ought-places, such that (b) it makes and limits room for behaviour’.<sup>611</sup> Therefore, the MPRDA orders space by requiring miners to have permits in order to mine a certain area. The mine is an ‘ought-place’ because it is the type of place where miners are expected to mine while in possession of mining permits, and only those miners who have mining permits will be allowed to mine.

Lindahl explains that law orders time because it determines that behaviour should happen at the ‘proper time within a certain normative articulation of the past, present, and future’.<sup>612</sup> Lindahl concludes that ‘the law orders time by (a) differentiating and interconnecting a manifold of ought-times such that (b) it makes and limits time for behaviour’.<sup>613</sup> A legal order also enables and limits when and where certain behaviour ought to take place through interconnecting and differentiating the content of behaviour and by enabling and limiting what ought to be done.<sup>614</sup> The law makes and limits time for mining to take place. Therefore, miners should only enter operational mines, and these mines should only be entered at certain times of the day, and under the supervision of their employers. Unauthorised access to the mines would constitute an illegal act.

Further, the law differentiates and interconnects subjectivities.<sup>615</sup> Legal subjectivities are also normative because the law attaches certain conditions to the way they are exercised and interconnected.<sup>616</sup> In the case of a grocery store, where a person does not have any money to purchase food from that particular store, that person cannot take on the role of the buyer.<sup>617</sup> The normative point is to ‘establish *who* ought to engage in certain legal behaviour,’ and this means that it is necessary to create legal

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<sup>605</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 411.

<sup>606</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 19.

<sup>607</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 18.

<sup>608</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 19.

<sup>609</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 19.

<sup>610</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 19.

<sup>611</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 20.

<sup>612</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 20.

<sup>613</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 21.

<sup>614</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 21.

<sup>615</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 22.

<sup>616</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 22.

<sup>617</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 22.

subjectivities, and to restrict who may become a legal subject.<sup>618</sup> In this way, a legal order limits the ‘who of behaviour’.<sup>619</sup> From this, Lindahl makes the point that ‘legally ordered behaviour requires a specific form of *subjective orientation*’. This means that one is able to understand *who* is allowed to take part in certain types of behaviour, and one is also able to know when to either take on the role of the subject, or to drop the role of the subject depending on the circumstances.<sup>620</sup> In the case of a mine, where a person does not have a mining permit and right to gain access to the mine, that person cannot take on the role of a miner. In terms of a mine, one understands that only legally authorised miners are allowed to take part in mining activities because they hold mining permits. In this way, the MPRDA limits the ‘who of behaviour’.

What frames all of this legal activity is Lindahl’s concept of ‘the first-person plural perspective’.<sup>621</sup> The first-person plural perspective is simple enough to understand—legal actors do not simply act in an absolutely abstract legal order rather, legal actors live in a legal order that the collective accepts as its own order and the order that the collective lives by.<sup>622</sup> Therefore, when someone commits an illegal act, it is deemed to be illegal behaviour because it is not the way that a specific legal collective carries out an act.<sup>623</sup> The first-person singular perspective ‘involves orientation about how one ought to enter and leave certain places, and what one ought to do in those places’.<sup>624</sup>

Law also relies on the distinction between calendar time and subject-relative time.<sup>625</sup> Put simply, this means that there are correct times and places for the appropriate legal subjects to engage in an appropriate kind of behaviour.<sup>626</sup> This is also the case with mining—there are certain times when the mine is in operation and, therefore, only specific persons (permitted miners) may enter the mine in order to mine at certain times of the day. Lindahl further explains that if the law is capable of ordering behaviour by indicating its spatial and temporal boundaries, it is then also capable of ordering behaviour by indicating its material boundaries.<sup>627</sup>

In addition to ordering behaviour temporally, materially (or contextually), and spatially, law also orders the subjective dimension of behaviour by showing who can take on the role of a legal subject who is able to take part in certain legally relevant behaviour.<sup>628</sup> In terms of mining, the legal subject who may take part in the legally

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<sup>618</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 22.

<sup>619</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 22.

<sup>620</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 22.

<sup>621</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 411.

<sup>622</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 411.

<sup>623</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 411.

<sup>624</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 23.

<sup>625</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 24.

<sup>626</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 24.

<sup>627</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 24.

<sup>628</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 24.

relevant behaviour (i.e. mining) is a miner who possesses a mining permit and who has complied with all of the relevant requirements and sections of the MPRDA.

According to Lindahl, legal orders are concrete because space, time, subjectivity, and content (which are the four spheres of validity) belong together and make up a single order.<sup>629</sup> Law is also only concrete if the four spheres of validity are accepted by the perspective of those whose behaviour is regulated by the law.<sup>630</sup> Therefore, when one accepts the four spheres of validity, the law appears as a four-dimensional order in which one finds oneself in a place, as a prospective subject, in the course of time, for example, busying oneself with something (content).<sup>631</sup> In terms of mining legally, the MPRDA appears as a four-dimensional order when a miner finds him/herself in a mine, as a miner, at a certain time, mining. Legal orders are also concrete because they 'assign the appropriate places and times for the appropriate subjects to do the appropriate things'.<sup>632</sup> 'Law ... provides normative markers for what to do, when and where to do it, and by whom it should be done, such that I can orient myself in each of these dimensions, and all of them together'.<sup>633</sup> Boundaries join and separate places, times, subjects and act-contents within the concrete unity of a legal order, but limits distinguish a legal order from the domain of what remains legally unordered for it.<sup>634</sup> Legal orders then establish the different acceptable ways of acting, which then certainly include some modes of acting while excluding other ways of acting.<sup>635</sup>

It can therefore be said that illegality has the effect of making a legal order and its boundaries visible.<sup>636</sup> When an illegal act breaches legal order, the fact that it is qualified as illegal indicates that illegality is the 'privative manifestation of legal order'.<sup>637</sup> In other words, illegality reaffirms legality.<sup>638</sup> Therefore, when ASM is classified as illegal mining, it reaffirms the legality of LSM, and it reaffirms the ways in which mining may be conducted—i.e. with a mining permit and by meeting the other requirements of the MPRDA.

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<sup>629</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 24.  
<sup>630</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 24.  
<sup>631</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 24.  
<sup>632</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 25.  
<sup>633</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 25.  
<sup>634</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.  
<sup>635</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 411.  
<sup>636</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 85.  
<sup>637</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 85 – 86.  
<sup>638</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 85 – 86.

### 3.4 Lindahl's A-Legality

A-legality is not the opposite of illegality.<sup>639</sup> A-legality indicates an act that is a-legal, which, therefore, transgresses the boundaries of a certain legal order, and in this way, exposes another possible legality.<sup>640</sup> That is, a-legal acts show 'other possibilities of drawing the distinction between legality and illegality in the legal order they contest'.<sup>641</sup> This is important because it is argued that ASM, as an a-legal activity, exposes the possibility of drawing the distinction between legal and illegal mining differently.

Lindahl breaks down the meaning of the actual word, 'a-legality'.<sup>642</sup> 'Legality' refers to the fact that a-legality constitutes behaviour that 'registers in a legal order in terms of how [the legal order] concretely draws the distinction between legality and illegality'.<sup>643</sup> A-legality must be understood in the context of the distinction between legality and illegality, otherwise a-legality would not be able to oppose the legal order that makes the distinction.<sup>644</sup> ASM needs to be understood in the context of legal and illegal mining in order to be able to oppose the South African mining laws. Therefore, ASM falls outside of the legal order because it cannot simply be defined as either legal or illegal, but ASM also falls inside the legal order because it is understood in the context of the distinction between legality and illegality. I say this because ASM cannot be defined as being legal mining as it takes place without a mining permit. However, by the same token, it cannot be defined as illegal mining because of the context in which it takes place, because the MPRDA does not define ASM, and because it is an excellent poverty alleviation tool. Therefore, a-legal behaviour does not only fall outside a legal order, but it also falls inside it.<sup>645</sup> ASM is certainly behaviour that does not fully conform to normative expectations. Normative expectations are clear cut—something is either legal or it is illegal. This speaks to Lindahl's idea that 'concrete behaviour never fully conforms to normative expectations,' therefore, 'behaviour is never only inside a legal order: it is also always to a lesser or greater extent outside it'.<sup>646</sup>

Viewing ASM as a-legal means that it cannot be defined as being either legal or illegal—it is a strange behaviour that is not clear cut. There is no obvious trespassing that takes place, and there is no obvious theft. ASM is therefore left largely up to the

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<sup>639</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 143.

<sup>640</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 143.

<sup>641</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 143.

<sup>642</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 92.

<sup>643</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 92.

<sup>644</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 92.

<sup>645</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 92.

<sup>646</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 92.

different interpretations of the MPRDA. Because the MPRDA does not define ASM, it is impossible to determine whether or not ASM should be included as a legal activity or excluded as an illegal activity. However, it is possible to understand that ASM falls somewhere between the legal and the illegal.

The 'a' of 'a-legality' points to the fact that a-legality is always relational.<sup>647</sup> This means that 'a-legal behaviour contests the distinction between legal and illegal as concretely drawn in a given legal order'.<sup>648</sup> This is why one cannot really ask the question, 'What is a-legal behaviour?' A-legality refers to the way behaviour appears to a group of people (the first-person plural perspective) who fall under a certain legal order.<sup>649</sup> Therefore, a-legality is behaviour that raises its own normative claim, which resists being qualified as legal or illegal under a certain order.<sup>650</sup> In terms of ASM, the normative claim that is being raised is the idea that ASM could be promoted as a poverty alleviation activity because of all the positive benefits that ASM can offer to communities.

The difference between illegality and a-legality can be put simply; illegality 'still moves within the orbit of the normative possibilities that a legal order opens up by differentiating and interconnecting,' but a-legality 'exposes an order as foreclosing normative possibilities'.<sup>651</sup> A-legality is strange behaviour that is incapable of fitting within the 'distribution of places, times, contents and subjectivities made available by a legal order'.<sup>652</sup> Therefore, ASM can be described as an a-legal activity because it exposes the MPRDA as foreclosing certain normative possibilities such as viewing ASM as a poverty alleviation activity and sustainable development tool.

In order to illustrate how a-legality operates, Lindahl continues with the supermarket scenario. He describes a group of people known as the 'French chomeurs'—a group that represents the unemployed and vulnerable in French society.<sup>653</sup> The incident involving the chomeurs took place just before Christmas.<sup>654</sup> The chomeurs entered an upmarket supermarket with the aim of appropriating food, not paying for it, and then giving it to the poor—i.e. the vulnerable and needy.<sup>655</sup> The chomeurs filled their trolleys

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<sup>647</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 92.

<sup>648</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 92.

<sup>649</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 92.

<sup>650</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 92.

<sup>651</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 92.

<sup>652</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 94.

<sup>653</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>654</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>655</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

with food, and when the time came to pay, they asked the store manager to allow them to leave without paying, and publicly explained that they wished to give the food to the vulnerable and needy.<sup>656</sup> The chomeurs did not threaten any of the staff members at the store; however, because of the strange behaviour, shopping ceased to take place.<sup>657</sup> Initially, the manager refused to negotiate; however, the fact that the shopping had ceased concerned him and so he eventually allowed the chomeurs to leave the store with 10 trolleys full of food which the chomeurs then gave to the vulnerable and needy.<sup>658</sup> These actions of the chomeurs show what ‘an interruption of legal order’ would look like.<sup>659</sup> Their behaviour is unique because it questions the distinction between (il)legality.<sup>660</sup> The acts of the chomeurs—i.e. filling their trolleys with food and refusing to pay—transgresses all the boundaries of legal order—i.e. who ought to do what, where, and when.<sup>661</sup> However, their acts are not obviously illegal.<sup>662</sup>

The chomeurs’ intentional transgression of the legal/illegal boundary showed that even shopping entails legal ordering of a concrete kind of subjectivity and way of acting, and a concrete way of including and excluding acts and people, and therefore includes and excludes both acts and people.<sup>663</sup> The criterion for the distribution of goods is not to cater to the needy, but rather to cater to those with the financial means to buy goods.<sup>664</sup> Therefore, all people who are part of a certain principle under a legal order are included in that principle, but some people are excluded by being included.<sup>665</sup> For example, those who are unemployed and in need are included in the principle that says ‘each according to their means,’ but by being included in this principle, they are

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<sup>656</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>657</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>658</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>659</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>660</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>661</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>662</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>663</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>664</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 34.

<sup>665</sup> S Veitch ‘A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*’ (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.



also excluded from being able to be a client in an upmarket store.<sup>666</sup> Mining also entails legal ordering and, similarly, some people are included and some are excluded by being included. As ASM miners, these people are included into the legislation as miners, but they are also excluded as miners because they do not have mining permits. They are excluded as being miners under the specific legislation.

By transgressing the legal boundaries, the chomeurs acted in a way that could be regarded as 'strange' or 'other,' and it is in this sense that a-legality comes into play.<sup>667</sup> In the same way, ASM miners also act in a way that could be regarded as 'strange' or 'other'. Illegal behaviour re-affirms the ideas that boundaries come first, and behaviour is secondary but that legal boundaries are dependent on behaviour. However, a-legality shows one that boundaries can be drawn differently because it raises 'a normative claim that resists both terms of the disjunction [i.e. legal/illegal] as defined by extant law'.<sup>668</sup>

The chomeurs' actions show how those in need are 'subject to material inclusion and exclusion by the legal order'.<sup>669</sup> Therefore, the needy are included in the legal order as being unemployed, and they are also excluded from certain rights which are available to those who are employed.<sup>670</sup> Like illegality, a-legality also interrupts the boundaries of a legal order, and the boundaries also become conspicuous as boundaries.<sup>671</sup> However, illegality reaffirms the boundaries that are responsible for determining whether an act is appropriate or inappropriate, but a-legality actually calls the boundaries into question.<sup>672</sup> In other words, a-legality 'challenges how a certain legal order determines who ought to do what, where, and when'.<sup>673</sup> Therefore, a-legality creates 'a situation of indeterminability within the order as it stands'.<sup>674</sup> Like illegality, a-legality also causes a legal order to become obtrusive, but a-legality is unique in the sense that 'it becomes obtrusive in a way that reveals that the possibilities for behaviour opened up by legal differentiation and interconnection go hand in hand with the foreclosure of other possibilities, possibilities which claim a

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<sup>666</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>667</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>668</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 37 - 38.

<sup>669</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 90.

<sup>670</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 90.

<sup>671</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 91.

<sup>672</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 91.

<sup>673</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 91.

<sup>674</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 91.

normative force of their own'.<sup>675</sup> A-legality therefore aims to 'deplete the normativity a legal order claims for itself'.<sup>676</sup>

A-legal behaviour shows that there are other ways of ordering behaviour even when behaviour has been levelled down to the unimportant and irrelevant for the particular legal collective.<sup>677</sup> A-legal behaviour can be described as behaviour that ruptures the boundaries and limits of legal order because it manages to fall within both the legal and the illegal spheres of order, but it also falls outside the legal/illegal spheres of order because it is not accessible with regard to that behaviour's specific normative point.<sup>678</sup> This indicates that one cannot use the current legal system to address a-legality. A-legality is a complicated form of behaviour because it manages to combine what is practically possible and impossible for a legal collective.<sup>679</sup> A-legality therefore exposes a legal order's normative blind spot.<sup>680</sup>

A-legality disrupts legal order because it questions the meaning of boundaries and how they are placed.<sup>681</sup> That being said, it also establishes that legal order is 'fundamentally vulnerable to something other than that which it can order or account for'.<sup>682</sup> This makes it clear that although legality is different from a-legality, it actually relies on a-legality.<sup>683</sup> It can be said that order is built on the unordered.<sup>684</sup>

Lindahl distinguishes between the weak form and the strong form of a-legality.<sup>685</sup> The weak form invokes the idea that a legal order is able to address behaviour that poses a threat to it as long as the threat falls within the legal order's own terms.<sup>686</sup> In order to address the behaviour, the legal order will shift and re-set its boundaries and its

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<sup>675</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 91.

<sup>676</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 91.

<sup>677</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 160.

<sup>678</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 161.

<sup>679</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 163.

<sup>680</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 413.

<sup>681</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 413.

<sup>682</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 414.

<sup>683</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 414.

<sup>684</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 414.

<sup>685</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 414.

<sup>686</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 414.

limits.<sup>687</sup> However, the strong form of a-legality requires a more radical shift on the part of the legal order.<sup>688</sup> The strong form of a-legality refers to a 'normative claim that resists apportionment under both terms of the legality/illegality disjunction ... [It] concerns a normative challenge that a legal collective cannot accommodate either as legal or as illegal by reformulating the terms of joint action under law'.<sup>689</sup> Strong a-legality can then be said to expose the 'fault lines' of a legal order.<sup>690</sup> According to Lindahl, fault lines 'cannot be shifted; they must be overstepped, and in being overstepped lead over from one legal collective into another'.<sup>691</sup>

Lindahl's discussion on inclusion is also incredibly important for this project. Lindahl explains that most contemporary normative theories of law promote securing a greater sense of inclusiveness.<sup>692</sup> Therefore, securing a greater inclusiveness has been the main aim of legal orders thus far, as can be seen from the promotion of formalisation and legalisation of ASM—the legal order tries to include ASM into the existing legal system by formalising or legalising ASM. Lindahl believes that these theories aim to deal with problems that are created by the weak form of a-legality, which means that the theories take the fact that legal boundaries function as limits for granted.<sup>693</sup> However, Lindahl argues that '*inclusion is the problem signalled by a-legality, not its solution*'.<sup>694</sup> In other words, a-legality exposes the idea of inclusion as being the problem, and not as being the solution to the problem.<sup>695</sup> This is an important point because by simply including an a-legal activity into the legal or illegal realm of a legal order would result in that activity losing its integrity—it would certainly take away from the essence of the activity. I discuss this in more detail in Chapter Four.

Modern society has managed to produce conditions that it is unable to control, and these collapse the boundary potential of modern legal orders.<sup>696</sup> A-legality is significant and important because unlike illegality, which indicates that boundaries hold power over behaviour, a-legality shows that these boundaries are not concrete, and that they can actually be shifted by behaviour.<sup>697</sup> In other words, a-legal behaviour opposes

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<sup>687</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 414.

<sup>688</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 414.

<sup>689</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 414.

<sup>690</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 414.

<sup>691</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 175.

<sup>692</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 181.

<sup>693</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 181.

<sup>694</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 181.

<sup>695</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 181.

<sup>696</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 417.

<sup>697</sup> F Menga 'A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl' (2014) 2 *Ethics & Politics* 922.

legal boundaries by making it known that it is possible that an illegal act can be regarded as legal, and a legal act can be regarded as illegal.<sup>698</sup> A-legal acts draw attention to the split between what the actual law is, and what the law could be—i.e. the actual law versus the possible law.<sup>699</sup>

### 3.5 What Makes ASM A-legal?

ASM is a-legal because it cannot fall within the (il)legal distinction as it is, arguably, neither legal nor illegal. The problem lies in the fact that the MPRDA has not defined ASM. Lindahl defines an a-legal act as an act that transgresses the boundaries of a certain legal order.<sup>700</sup> Therefore, ASM can be defined as an a-legal act because it transgresses the boundaries of South Africa's legal order by showing that there are instances where informal mining can be considered to be a legal activity if the appropriate context is taken into account. For example, there is a group of women who have been traditionally mining semiprecious tiger's eye quartz as a community for many years.<sup>701</sup> Although this mining takes place without a mining permit, it cannot truly be deemed to be an illegal activity because not only has the MPRDA not defined what constitutes ASM, but the MPRDA was also only drafted with LSM in mind.<sup>702</sup> However, this activity cannot be defined as being legal because it still takes place without a mining permit. In terms of the way the MPRDA defines illegal mining as any mining that takes place without a mining permit, it can be interpreted to mean that ASM is illegal. However, my project promotes thinking beyond the current restrictive boundaries which have been drawn by a narrow interpretation of the MPRDA, and by only working within the given framework. ASM is not obviously illegal, and neither is it obviously legal because it has not been specifically defined in the MPRDA as being either.

Linked to this is the fact that a-legal behaviour resists falling under either legal behaviour or illegal behaviour in terms of a certain legal order.<sup>703</sup> From the in-depth analysis of ASM in Chapter Two, it is easy to see that ASM cannot possibly be regarded as illegal simply because it takes place without a permit. This would be an impossibly simplistic approach towards ASM, based on a simplistic understanding of

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<sup>698</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 143.

<sup>699</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 142.

<sup>700</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 143.

<sup>701</sup> K Nhlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>702</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6

<sup>703</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 92.

ASM. As Nghlengetwa argues, it should not be possible to deem traditional ASM activities that have been taking place for years as illegal.<sup>704</sup>

A-legality is defined by Lindahl as that which is strange.<sup>705</sup> What makes behaviour strange is that the behaviour is not able to fit into the distribution of places, times, contents, and subjectivities that are made available by a certain legal order.<sup>706</sup> ASM can be understood as strange behaviour because it often takes place at abandoned or closed mines (place), at a time when the mines have been abandoned or closed by persons who do not hold mining permits (subjects). ASM disrupts 'content' in terms of what should be done at the mines—ASM is not defined by the MPRDA; therefore, 'normal' behaviour would constitute LSM in most cases, as well as permitted small-scale mining and, in essence, ASM would constitute strange behaviour.

In order to explain a-legality, I rely on Lindahl's descriptions of the chomeurs. The chomeurs' acts were intentional transgressions of the legal order with the aim of showing how the poor and needy are both excluded and included by the legal order that they are subjects of.<sup>707</sup> ASM miners do not intentionally transgress legal orders in order to illustrate how the legal order orders certain behaviour or acts. Similarly, ASM activities take place without the intention of exposing boundaries and fault lines; however, in effect, ASM still unintentionally exposes the legal order's boundaries. The fact that there are tensions and challenges that exist as a result of ASM activities shows that there are boundaries that the legal order creates. The tensions are indicative of the fact that the MPRDA and its amendments have not given ASM adequate consideration.

A-legality challenges how a certain legal order determines who ought to do what, where, and when.<sup>708</sup> ASM generates a living for many miners and their families. Therefore, ASM presents an opportunity to alleviate poverty.<sup>709</sup> If ASM is understood as an a-legal activity, the context in which the ASM activities take place could be considered.<sup>710</sup> For example, in some cases, an LSM company acquires a mining right and permit to develop their activities on a certain piece of land. Sometimes this land is a place where traditional mining communities have mined for a certain mineral for

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<sup>704</sup> K Nghlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

<sup>705</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 94.

<sup>706</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 94.

<sup>707</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 412.

<sup>708</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 91.

<sup>709</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africanminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africanminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>710</sup> K Nghlengetwa 'Why it doesn't make sense that all informal mining is deemed illegal' (2016) [Online] Available at: <http://theconversation.com/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal-57237> [Accessed: 3 May 2016].

many years.<sup>711</sup> By not taking context into account, in effect, the LSM company is given protection by the law when a traditional mining community mines without a permit on the same land.

As has been explained, a-legality is truly unique because it is able to fall within both the legal and the illegal spheres of legal order.<sup>712</sup> ASM holds this unique characteristic because it is not defined by the MPRDA. The MPRDA's failure to define ASM means that ASM can be interpreted as being illegal, but because it is not defined, it cannot only be interpreted as being illegal.

In Chapter Two, I explain that ASM has not been defined by the MPRDA. I also explain that the SAHRC interprets the fact that ASM has not been defined as a problem because it leaves scope for ASM to be labelled as being 'illegal'.<sup>713</sup> Therefore, lawmakers and the judiciary only have the definition of illegal mining and the current legal order to work with. Because ASM takes place without a mining permit, lawmakers tend to stick to a narrow interpretation of the definition. Therefore, in most cases, ASM is interpreted to be illegal even though it has not actually been defined as such. I have explained that the MPRDA was drawn up with LSM in mind. Therefore, ASM had not been considered by the lawmakers who drafted the MPRDA, and therefore, the MPRDA cannot and should not be applied narrowly to ASM. This is why it is argued that ASM can, and must, be interpreted as an a-legal activity. Treating ASM as an a-legal activity would allow lawmakers to think of solutions that go beyond state-centred thinking, and this would allow context to be considered. By acknowledging context—i.e. the challenges and tensions as outlined in Chapter Two—ASM can be recognised as a sustainable alternative livelihood activity. I argue that a-legality cannot be addressed within the current legal order or system and, therefore, the judiciary should not necessarily make decisions about a-legal behaviour.

Furthermore, ASM constitutes a strong form of a-legality because it cannot simply be defined as legal or illegal—Lindah! explains that a-legal acts resist apportionment in terms of the legality and illegality disjunction.<sup>714</sup> When this is the case, boundaries cannot simply be shifted because they have become fault lines.<sup>715</sup> Fault lines can only be overstepped which means that they 'lead over from one legal collective into another.'<sup>716</sup> ASM exposes a fault line in the South African legal order because, as I show from my discussion on the formalisation fix, simply formalising and legalising ASM, or simply making ASM an illegal activity will not pose any appropriate solutions to the problems associated with ASM. The fault line that ASM exposes should be overstepped and, instead of relying on solutions such as the formalisation fix, an effort

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<sup>711</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009) 10.

<sup>712</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 161

<sup>713</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 11.

<sup>714</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 414.

<sup>715</sup> S Veitch 'A Comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*' (2016) 7 *Jurisprudence: An International Journal of Legal and Political Thought* 414.

<sup>716</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 175.

should be made to move away from state-centred thinking, and to move towards an approach that promotes a relational perspective in order to transcend boundaries and fault lines so that positive relations towards ASM activities may be fostered.

If it is accepted that ASM may be regarded as an a-legal activity, it then becomes possible to see that there are other ways of ordering behaviour even when behaviour has been levelled down to the unimportant and irrelevant for the legal collective.<sup>717</sup> It is argued that the drafters of the MPRDA did, in fact, level ASM down to the unimportant and irrelevant because the MPRDA was not drafted with ASM in mind. This is not necessarily negative as such because, as can be seen from my work and my discussion on the formalisation fix, simply including ASM into the LSM legislation would not necessarily have resulted in positive results for ASM and ASM miners. Since the drafting of the MPRDA, there has been no subsequent legislation that has been drafted in order to address ASM, and this is indicative of the fact that ASM is regarded as being of lesser importance. However, when an activity like ASM is treated as an a-legal activity, it indeed becomes possible to see how it could be treated differently as an important and significant activity, especially in the context of poverty alleviation.

#### 4. Conclusion

The aim of this dissertation is to draw attention to the fact that, although ASM is often regarded as an illegal activity in South Africa, it still has the potential to be an excellent poverty alleviation tool. In this chapter, the fact that the South African mining laws have played a significant role in the way that ASM is perceived is emphasised. This is mainly because the lack of a definition of ASM in the MPRDA allows for many misinterpretations about what ASM constitutes. I point out how the lack of a definition of informal mining has played a role in the way in which ASM is perceived by both lawmakers and society, and that the lack of a definition allows ASM activities to be interpreted as illegal activities even though they are not described specifically as such in the MPRDA. ASM is simply regarded as an illegal activity because it is a form of mining that takes place without a mining permit. I also identify the fact that, through a narrow interpretation of the mining laws in South Africa, the context in which ASM activities take place is often largely ignored. This is problematic because it means that the law is, as it stands, incapable of taking the fact that ASM is often used as a poverty alleviation activity by women in ASM communities into account. I rely on Hilson's work<sup>718</sup> in order to set out the barriers that prevent context from being taken into account.

I rely on Hentschel *et al* to show that ASM has the potential to become a poverty alleviation activity, and that it could act as an 'economic cornerstone' in ASM communities.<sup>719</sup> I then went on to explain that some authors and researchers are of

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<sup>717</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 160.

<sup>718</sup> G Hilson "'Creating" Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review*.

<sup>719</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham.

the opinion that the solution to the problems associated with ASM is to simply formalise ASM activities and to bring these activities into the legal realm. I call this the 'formalisation fix'. I discuss why relying on the current mining laws in South Africa would not foster ASM as a poverty alleviation activity by explaining the 'formalisation fix' phenomenon. I look at the views of Hoadley and Limpitlaw,<sup>720</sup> as well as the views of de Soto,<sup>721</sup> who all support the notion of the formalisation fix. The argument in support of the formalisation fix is that by formalising ASM, there would be potential for opportunities to be opened up so that informal miners could gain access to technical knowledge and markets. In order to discuss the formalisation fix, I rely on the works of Olalde,<sup>722</sup> Hoadley and Limpitlaw,<sup>723</sup> and I specifically focus on de Soto's work.<sup>724</sup> I conclude that, although de Soto's work provided insight into the sphere of the 'extra-legal,' and that his idea that law has the ability to actually keep people from acting inside the scope of the law, his notion of merely bringing the extra-legal into the legal sphere is certainly too simplistic.

I then discuss how the African Mining Vision discredits the idea of formalising and legalising ASM because of the evidence that it has collected from all over sub-Saharan Africa which illustrates that attempts to legalise and formalise ASM have failed.<sup>725</sup> I also rely on Hentschel *et al's* work<sup>726</sup> to illustrate the fact that legalising ASM would simply expose it to the personal interests of government. I explain that legalisation would not be able to address the deeper negative social structures that ASM miners are exposed to, and that ASM miners would still be victims of the tensions and challenges associated with ASM. I conclude that formalisation and legalisation would not prove to be appropriate solutions to the problems associated with ASM.

I then put forward the work of Lindahl and his notion of a-legality as an alternative to the formalisation fix.<sup>727</sup> In this chapter, I suggest that the notion of a-legality can be used in a way that promotes ASM as a poverty alleviation activity through protecting its integrity, and by addressing the tensions and challenges that have resulted from ASM activities. I began my discussion on Lindahl's work by first explaining the notion of boundaries, and I explain that boundaries determine whether behaviour is legal or illegal. I also identify the boundaries that the MPRDA has created by looking at a few specific sections from the MPRDA. I show how boundaries can be perceived to be both inclusionary and exclusionary. I then to explain the difference between

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<sup>720</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004).

<sup>721</sup> H de Soto 'The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else' (2003).

<sup>722</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>723</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004).

<sup>724</sup> H de Soto 'The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else' (2003).

<sup>725</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africanminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africanminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>726</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham.

<sup>727</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013).



boundaries and limits. It is only possible to identify limits when strange behaviour, known as a-legal behaviour, exposes them. I explain that, although boundaries can be exposed as limits, they can also be exposed as fault lines. Fault lines are exposed when a-legal behaviour reveals other practical possibilities that could be available to a legal collective in respect of a normative claim if the legal collective shifted its existing boundaries about who ought to do what, when, and where.<sup>728</sup> A fault line is a normative claim that the legal collective views as unordered, as well as unorderable.<sup>729</sup> In respect of this, I explain that a fault line occurs in the context of ASM because ASM is able to expose normative claims that fall outside the scope of a collective's practical possibilities in relation to the MPRDA.

I rely on Lindahl's work to explain the distinction between legality and illegality so that a-legality can be understood. I conclude that illegal behaviour has the ability to expose a legal order as well as its boundaries, and that illegality reaffirms legality.<sup>730</sup> In the context of ASM, this is significant because when ASM is determined to be illegal mining, the legality of LSM is reaffirmed and the ways in which mining is allowed to be conducted are also confirmed. I then explain that there is a third type of behaviour—that of the a-legal. This type of act is capable of transgressing the boundaries of a legal order and, in so doing, it exposes another possible legality.<sup>731</sup>

A-legality, as a behaviour, is an important concept for this project because it shows that there are other ways of drawing the distinction between legality and illegality within a legal order. I argue that ASM is a type of a-legal behaviour that, in fact, does this because it is capable of showing how the distinction between illegal and legal mining can be drawn differently. Throughout the section on Lindahl's a-legality, I have drawn links between Lindahl's work and ASM to illustrate how ASM can be considered to be an a-legal activity. I briefly discuss Lindahl's illustration of the French chomeurs in the up-market supermarket, and I compare their actions with those of ASM miners. The actions of both the French chomeurs and the ASM miners are a-legal acts which are capable of calling into question the boundaries of a legal order. A-legal behaviour is important because it challenges the ways in which a legal order determines who ought to do what, when, and where.<sup>732</sup> The point of viewing ASM as an a-legal activity is to show that there are different ways of ordering ASM (behaviour) even though ASM has been levelled down to the unimportant by the legal collective.<sup>733</sup>

I then focus on Lindahl's discussion on inclusion which is important because there is a notion that ASM should be included into the legal order through legalisation and formalisation. Lindahl identifies inclusion as being the problem that a-legality exposes and that it is not the solution that a-legality is seeking.<sup>734</sup> In the same vein, I argue that

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<sup>728</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 4.

<sup>729</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 4.

<sup>730</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 85 – 86.

<sup>731</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 143.

<sup>732</sup> H Lindahl 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence: An International Journal of Legal and Political Thought* 91.

<sup>733</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 160.

<sup>734</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 181.

simply including ASM into the current legal order would not pose an appropriate solution to the problems associated with ASM—ASM would simply lose its integrity if it were to be included into the current legal order.

I end the chapter with a discussion on what makes ASM an a-legal activity. I explain that ASM is not able to be understood as an activity which is either legal or illegal because the MPRDA has not defined it. I have proposed that ASM transgresses the boundaries of South Africa's mining laws because it is an activity that, in some contexts, is able to be regarded as a poverty alleviation activity even when the required mining permit by the MPRDA is absent.

I argue that ASM is not obviously legal, and neither is it obviously illegal—it therefore resists being included as either legal or illegal behaviour under a certain legal order (i.e. the South African mining legislation). My project promotes a move away from the simplistic understanding of ASM as an illegal activity, and a move away from state-centred thinking. Through understanding ASM as an a-legal activity, another realm of practical possibilities is evoked.<sup>735</sup> One such practical possibility is the ability to understand ASM as a poverty alleviation activity instead of simply understanding it as an illegal activity. This is important because in a country where poverty is rife, there should be a collective effort to alleviate poverty. When dealing with ASM, it is important for lawmakers to take context into account so that activities that could present themselves as alternative livelihood activities, such as ASM, can be recognised as such, and can promote the alleviation of poverty for the disadvantaged members in society.

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<sup>735</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

# **CHAPTER FOUR: NEDELSKY, RELATIONALITY, AND THE ALTERNATIVE SOCIAL CHARTER**

## **1. Introduction**

The aim of this project is to promote the fact that ASM has the potential to become a poverty alleviation activity in South Africa; however, the way ASM is currently being interpreted by lawmakers and judges has the effect of levelling ASM down to an illegal activity, instead of focusing on the positive contributions that it could and, in many cases, does make in society.

In Chapter Three, I emphasise the fact that the lack of a definition with respect to ASM in the MPRDA has played a role in the way that ASM is perceived. ASM is often misinterpreted as being an illegal activity even though the MPRDA has not specifically defined ASM as being such. I also mention that a narrow interpretation of the mining laws in South Africa prevents context from being taken into account when decisions about ASM are made.

I then make a study of the formalisation fix, and explain why simply formalising and legalising ASM activities would not present any useful solutions to the problems associated with ASM. I turn my attention to the work of Lindahl, and his notion of a-legality, in an attempt to move away from falling prey to the formalisation fix. I focus on the notion of a-legality in the context of ASM, and suggest that through using the theory of a-legality, a realm of other practical possibilities might be opened up that could promote ASM as a poverty alleviation activity. I rely on Lindahl's discussion on boundaries, and the way in which boundaries determine whether or not an activity is deemed to be legal or illegal, and I examine the boundaries that the MPRDA has created in terms of ASM. I also explain the notion of limits which only a-legal behaviour is capable of exposing. More importantly, I explain Lindahl's notion of fault lines which are also exposed by a-legal behaviour, but they are different from limits because fault lines have the ability to reveal other practical possibilities that could be available to a legal collective in respect of a normative claim if the legal collective were to shift its existing boundaries about who ought to do what, when, and where.<sup>736</sup> I explain that, in the context of ASM, a fault line occurs because ASM is able to expose normative claims that fall outside the scope of a collective's practical possibilities in respect of the MPRDA.

I emphasise the importance of a-legal behaviour for my project by explaining that a-legality shows that there are different ways of drawing the distinction between the legal and the illegal even when some behaviour, such as ASM, has been levelled down to the unimportant or insignificant by a certain legal order.<sup>737</sup> I conclude the previous chapter by outlining why ASM can (and should) be regarded as an a-legal activity.

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<sup>736</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 4.

<sup>737</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 160.

In this chapter I, once again, emphasise the importance of the role that law plays in the way human behaviour (more specifically, ASM) is perceived by society. I explain that although the notion of a-legality is extremely useful in showing the law's fault lines, and in showing that there are other practical possibilities that could be available to a legal collective in respect of a normative claim if the legal collective were to shift its existing boundaries about who ought to do what, where, and when, the notion of a-legality does not provide insight into the kinds of relations that have been structured by the current law, and neither does it, or will it, provide insight into the relations that could be structured towards a-legal behaviour if the existing boundaries were to be shifted.

I rely on Nedelsky's work to explain the importance of underlying relationships that are created by the law, and I promote addressing ASM through using the relational approach so that the types of relations that are structured by the law can come to the fore. I look at how the relational theory could help with the interpretation and lack of definition of ASM. I also refer back to my insight that the context in which ASM takes place is often ignored. Relationships that are structured by the current law, as well as the relationships that could be structured if human behaviour—such as ASM—were to be interpreted differently, form part of the notion of context. Therefore, I discuss the importance of relationships in terms of Nedelsky's relational theory.

I then provide a discussion on Lindahl and a-legality in the context of relationality, and I discuss Nedelsky's approach to boundaries. I also discuss the notion of the legal collective that appears throughout Nedelsky's work as an important concept and note that it is only briefly mentioned in Lindahl's work. I explain that a-legal behaviour transgresses the boundaries of a legal order and it exposes other possible legalities by doing so. However, what it does not do is show the relationships that could be fostered by these other possible legalities. I then discuss the fact that Nedelsky, like Lindahl, promotes a move away from a court-centred approach and that a move towards a relational approach is a move away from state-centred thinking. What is important to realise from the outset is that I do not intend to promote one author's work over another's—this is not a project that pits Nedelsky up against Lindahl. Rather, it is a project that aims to show how a-legality and relationality can work together to promote ASM as a poverty alleviation activity, and to show that other types of human behaviour that are similar to ASM could also benefit from interpretations of a-legality and relationality.

I provide a detailed explanation of what the relational theory entails. I explain that the relational approach promotes a separation between the state and the law.<sup>738</sup> The relational approach is beneficial because it is capable of questioning the way that law functions as law in different societies.<sup>739</sup> I explain that a-legality and relationality are linked because a-legality is able to illustrate the fact that there are different practical

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<sup>738</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>739</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.

possibilities that lie outside the scope of a legal collective's order and the relational approach examines how these potential practical possibilities would foster relations.

The focus of the relational approach is on relationships, and the idea that human beings are shaped by the interconnected relationships that they are a part of.<sup>740</sup> It allows one to examine the kinds of relationships that contribute to a certain problem and what moulds those relationships.<sup>741</sup> I illustrate the relationship (or lack thereof) between ASM miners and activities, and society's indifference, and I explain that the MPRDA has played a role in this relationship.

The relational approach in a legal context is examined, and I explain that when the law comes into question, it should be analysed in terms of the way that it structures relations.<sup>742</sup> The relational approach allows one to understand the issues that are at stake in a certain legal predicament, and one is also able to understand that law structures relations which then allows one to determine how law structures relations in order to either undermine or promote core values.<sup>743</sup> I show how the current law fosters relations of subordination and disrespect towards ASM miners, and I show how a different understanding and interpretation of ASM miners and their activities could foster more positive relations. I explain how the relational approach promotes debates about competing values which allows an opportunity for an analysis of the debates to take place.<sup>744</sup>

A relational approach to law allows for meaningful participation in decision making and debates about law become more accessible.<sup>745</sup> I explain how law can be used as a vehicle for democratic participation instead of a barrier with regard to a-legal activities.<sup>746</sup> The relational approach has the ability to show how the law could be shifted in order to promote rather than undermine relations in terms of values at stake.<sup>747</sup> The relational approach is able to keep state power in check by establishing different ways that state power can be exercised.<sup>748</sup> By relying on the relational approach, the relational source of problems can be more easily identified and, therefore, the role of the state in creating the problems is also identified.<sup>749</sup> The relational approach is particularly useful in determining how the state has structured relations that have undermined the core values related to ASM miners. Core values that should, in fact, be promoted.

By using the relational approach, a collective's sense of responsibility changes.<sup>750</sup> This is one of the challenges that would have to be kept in mind when relying on the relational approach. I explain that the relational approach would prevent society's wilful

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<sup>740</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 19.

<sup>741</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>742</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 65.

<sup>743</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>744</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 67.

<sup>745</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>746</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>747</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 71.

<sup>748</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>749</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>750</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

blindness and indifference towards challenges, and that a new sense of collective responsibility would be fostered.<sup>751</sup>

I turn my discussion to rights talk in terms of ASM because rights are universally used as powerful tools for justice.<sup>752</sup> A discussion on rights is imperative because I promote a move away from a court-centred approach in terms of ASM. However, whenever a dialogue of rights is invoked, the debates about rights take place in the context of a court-based system which Nedelsky has dubbed as one of the least ‘accessible forms of public deliberation.’<sup>753</sup> A move away from a court-centred approach is necessary because it is a move away from implementation and enforcement which is capable of hiding the meaning of rights.<sup>754</sup> I examine the MPRDA and explain that there is a lack of rights in terms of ASM. I suggest that, in future, if the meaning of the rights of ASM miners are debated, these debates should be focused on the way in which rights structure relationships.<sup>755</sup>

Finally, I present Nedelsky’s ASC as an alternative to court-based judgment, and as an approach which is not state-centred. I propose Nedelsky’s ASC as a way to promote ASM as a poverty alleviation activity—i.e. to give effect to social and economic rights—and as a way to move away from the popular court-centred approach because the ASC, unlike the court system, is able to promote democratic deliberation and debate about the meaning of rights.<sup>756</sup> The ASC may be used as a way to guide lawmakers and judges in their decisions about ASM because the ASC focuses on structuring relationships. The ASC invites a relational analysis of rights and it promotes a ‘dialogue of democratic accountability.’<sup>757</sup> The ASC places emphasis on vulnerability and disadvantage which makes it an excellent model to be used in terms of ASM.<sup>758</sup>

I briefly outline the structure of the ASC and explain that it is made up of two non-judicial institutions (a third of which consists of nongovernmental organisations)—the Social Rights Council (hereafter, the SRC) and the Social Rights Tribunal (hereafter, the SRT)—that could implement rights. I explain the ASC’s concept of a statement of ‘Social and Economic Rights’ which I liken to South Africa’s Constitution’s Bill of Rights. I argue that a model like the ASC could entrench the concept that democratic core values be given adequate consideration in all decisions about a-legal behaviour. I also outline how the ASC could be used to address the specific challenges and tensions surrounding ASM by focusing on the conflict between LSM companies and ASM miners, and the conflict between traditional leaders and ASM miners (and mining affected communities). It is argued that the ASC would be beneficial in terms of ASM because ASM’s contributions to the South African economy could be duly considered, and more appropriate solutions to the issues relating to ASM could be created and

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<sup>751</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>752</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 231.

<sup>753</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 231.

<sup>754</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 233.

<sup>755</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 233.

<sup>756</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 232.

<sup>757</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>758</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

implemented. Through the use of the ASC, ASM could be promoted as a poverty alleviation activity.

## 2. Points of Connection between Lindahl and Nedelsky

### 2.1 Boundaries

Nedelsky acknowledges that there is an important argument that rights are alienating and distancing and that they ‘express and create barriers between people’.<sup>759</sup> This argument links to Lindahl’s point that law creates boundaries, or barriers, that function to include or exclude. Nedelsky explains that rights are able to create barriers or boundaries because of the way that they function in our current discourse.<sup>760</sup> Currently, rights have created boundaries in order to shield people from being aware of some of the relationships that society is a part of (for example, Nedelsky’s example of homelessness which I will discuss below).<sup>761</sup>

In Chapter Three, I focus on Lindahl’s work, and his explanation of boundaries. Lindahl’s theory is that any legal order that society can possibly imagine consists of boundaries.<sup>762</sup> This is because the law controls who ought to do what, where, and when within the legal order, and law orders behaviour by setting the subjective, material, spatial, and temporal boundaries.<sup>763</sup> I determined that boundaries are an important concept to understand because they dictate which behaviour should be deemed legal or illegal to a legal collective. Using Lindahl’s theory, I identified the boundaries that the MPRDA has created in terms of ASM. Limits are the next important concept in Lindahl’s work, and he determines that boundaries are transformed into limits when they make a distinction between the legally ordered and the legally unordered; however, limits only become visible when a-legal behaviour irrupts into the legal order from the domain of the unordered, and it transgresses all the boundaries drawn by a particular legal order.<sup>764</sup> A-legal behaviour is, of course, an important concept because it ‘evokes another realm of practical possibilities’.<sup>765</sup> Although a-legality is important because it is able to show that there are other ways of drawing the distinction between legality and illegality, it is unable to emphasise the importance of what kinds of relationships these other ways of drawing the distinction between illegality and legality foster, and this is why it is important to consider the relational theory. I argue that, when examining ASM, one can identify it as an a-legal activity because it calls into question the boundaries created by the mining laws and, therefore, one can inevitably see that there are different ways of dealing with ASM. However, it is only through the relational approach that one can grasp an

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<sup>759</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 251.

<sup>760</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 251.

<sup>761</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 251.

<sup>762</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

<sup>763</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

<sup>764</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

<sup>765</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

understanding of what the best approach to ASM would be because it looks at the types of relationships that could be fostered and it examines the interconnection between people. Lindahl agrees that boundary enforcement is incapable of questioning the existing legal boundaries.<sup>766</sup>

According to Nedelsky, boundaries are unable to 'capture the complex, fertile, and tension-laden interconnection between the self and others that a transformed constitutionalism must respond to.'<sup>767</sup> This point can, in fact, be seen from Lindahl's work because his work does not focus on the connection between the self and others; it focuses on human behaviour and how it is capable of exposing boundaries. Lindahl's work examines the connection between human behaviour and the law, as well as how human behaviour can shape law and vice versa. However, it does not examine the relationships between people and one another, or how boundaries (or law) affect(s) the relationships between people. The interconnection between people is an important concept to understand because it is able to show the types of relations that the law fosters between people. By understanding the types of relations that are fostered by the law between people, one can then further understand how and why certain legal boundaries are created.

Although a-legal behaviour is able to expose a legal order's boundaries, and in so doing, it exposes another realm of practical possibilities, the relational theory is able to examine the relations that have been brought about through the creation of the boundaries, as well as the relations that have been created by the current boundaries. It also has the ability to determine the types of relations that could be created through shifting boundaries or creating new boundaries.

The relational approach examines the way in which law structures relations, and by doing this, the relational approach determines whether or not certain laws undermine or promote core values. Because the law structures boundaries, the relational approach, in essence, also examines whether certain boundaries promote or undermine certain core values. In South Africa, the core values that should be promoted are those democratic values outlined in the Bill of Rights (as contained in the Constitution) namely, human dignity, equality, and freedom.

However, Nedelsky does not make the claim that boundary is a useless metaphor in terms of the self or for legal practices that have been designed to protect and promote core values.<sup>768</sup> She does, however, claim that 'boundary distorts understanding and reinforces weaknesses in the culture's capacity to recognize and reflect on the importance of relationship'.<sup>769</sup> Nedelsky's focus is on relationship, whereas Lindahl's focus is on a metaphor of boundary. However, it is argued that these two approaches can be used together to address issues associated with a-legal behaviour in a better way. Through using a relational approach, one creates new metaphors for understanding law.<sup>770</sup> When this happens, one also has to find new ways of

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<sup>766</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 145.

<sup>767</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 115.

<sup>768</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 117.

<sup>769</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 117.

<sup>770</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 117.



understanding and responding to the new responsibilities that are created by the new metaphors.<sup>771</sup> This means that people will need to find new ways to decide whether or not the state should take responsibility for some of the new responsibilities.<sup>772</sup>

Metaphors inevitably direct our attention to some things and obscure others, and some metaphors direct our attention more fruitfully than others.<sup>773</sup> Language is linked to how rights are understood, and it is also linked to the kinds of social context that are attended to in debates about rights and values.<sup>774</sup> It is important to understand the impact that dominant frameworks have on people's lives because 'dominant frameworks of thought have real consequences for people's lives'.<sup>775</sup> In order to make the relational nature of human beings central rather than peripheral, Nedelsky proposes the promotion of autonomy as one way to create the best language to deal with rights.<sup>776</sup> A metaphor of relationships has the ability to direct our attention more fruitfully than the metaphor of boundary; however, it is argued that the metaphor of boundary is essential for identifying a-legal behaviour.

## 2.2 The Legal Collective/Community

The concept of a legal collective is an important concept in terms of my project because it is argued that there should be a collective effort to alleviate poverty in South Africa. I argue that the way the law currently deals with ASM does not promote the idea of community or collectiveness.

In section 3 of this chapter, I explain that the relational approach is a move away from the idea of the individual, the state, and regulation, and I also explain that different kinds of social contexts call for different kinds of legal order.<sup>777</sup> Lindahl refers to the notion of a legal collective. He mentions a legal collective as having certain practical possibilities within their legal order which they can rely on to determine whether or not an act is legal or illegal.<sup>778</sup> He also mentions a-legality, and the possibility of a legal collective being exposed to different practical possibilities that could come about if the legal collective were to shift its existing legal boundaries about who ought to do what, where, and when.<sup>779</sup> However, I argue that Lindahl's focus is on human behaviour and how the law affects it (and vice versa)<sup>780</sup> and not on the types of relationships that are fostered between humans, humans and the state, and humans and the law through the making of these decisions. For example, Lindahl explains that human behaviour

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<sup>771</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 117.

<sup>772</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 117.

<sup>773</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 159.

<sup>774</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 159.

<sup>775</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 159.

<sup>776</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 159.

<sup>777</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 567.

<sup>778</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 4.

<sup>779</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 4.

<sup>780</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 144.

only becomes legal or illegal when legislation enforces boundaries.<sup>781</sup> Lindahl also states that law should be regarded as a type of joint action in order to accommodate a vast range of legal orders and their differences.<sup>782</sup> This idea of 'joint action' also points to the idea of a legal collective/community in terms of Lindahl's work.

In the previous chapter, I mentioned that a-legal behaviour has the ability to show a legal collective that there are different ways to order human behaviour even if that particular behaviour has been levelled down to the unimportant and irrelevant for the legal collective.<sup>783</sup> It is argued that ASM has been levelled down to the unimportant and irrelevant because the MPRDA makes no provision for it. It is argued further that Nedelsky's suggested ASC would be able to address this issue and bring ASM into a realm of importance which would direct the collective's attention to it and to the issues related to ASM through productive discussion and debate.<sup>784</sup>

A-legality is an important concept because it paves the way for relational habits of thought—a-legal behaviour leads one to question existing legal boundaries and to start to think about other ways of ordering behaviour. The aim of a-legality is to expose other practical possibilities that fall outside a legal order to a legal collective.<sup>785</sup> As previously mentioned, the current legal system cannot be used to address a-legality because a-legal behaviour cannot be described as either legal or illegal.<sup>786</sup> It is argued that Lindahl's theory of a-legality has not placed enough emphasis on the importance of relationships, and this is why the relational approach needs to be used in addition to the theory of a-legality. The relational theory is capable of examining the relations that might be structured if another possible legality (or practical possibility) were to be used in response to a-legal behaviour.

The idea of a legal collective/community is an important concept in terms of the relational theory. This is so because 'juridical norms are found in agreements, arrangements, and other patterns of interaction between parties.'<sup>787</sup> A legal collective/community is made up of many relationships between people, and the relational theory suggests that all human beings are moulded by the various relationships that they are a part of.<sup>788</sup> In the context of law, the relational theory helps one to focus on analysing the law in terms of how it structures relationships, and this is useful because people are then able to understand the issues at stake, and the kinds of judgments that are exercised.<sup>789</sup> People are also able to see how the law shapes important relationships so that the way in which the law shapes the relationships can be analysed.<sup>790</sup> It is important for the relational approach to be adopted in all decisions made about the law so that law can be promoted as a 'vehicle

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<sup>781</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 145.

<sup>782</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 5.

<sup>783</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 160.

<sup>784</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 78.

<sup>785</sup> H Lindahl 'Law's "Uncanniness": A Phenomenology of Legal Decisions' (2008) 2 *Netherlands Journal of Legal Philosophy* 143.

<sup>786</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 161.

<sup>787</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>788</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 19.

<sup>789</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 65.

<sup>790</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 72.

for, rather than a barrier to, democratic participation in norm creation,' specifically with regard to a-legal activities.<sup>791</sup>

### 2.3 A Move Away from a Court-centred Approach

In Chapter Three, it was explained that Lindahl suggests that many of the contemporary legal and political theories actually have the inadvertent effect of entrenching state-centred thinking about legal order.<sup>792</sup> The effect of promoting state-centred thinking is that legal orders are not approached in a collective way.<sup>793</sup> State-centred thinking also encourages reliance on the mind-set that a formalisation fix would benefit activities that fall outside the legal/illegal realm. Nedelsky promotes a move away from a court-centred approach, and the relational approach is one way to move away from state-centred thinking. In the previous chapter, I argue that the fault line that ASM exposes should be overstepped, and an effort should be made to move away from state-centred thinking. It is further argued that a move towards a relational approach is necessary in order to transcend the boundaries that have been created around ASM. This is another way that the notion of a-legality and the relational theory are compatible.

In terms of the relational approach, a concerted effort must be made to move away from state-centred thinking and a court-centred approach because relationality promotes a separation between the law and the state.<sup>794</sup> The relational theory looks to patterns of behaviour and relationships between humans in order to identify juridical norms.<sup>795</sup>

Therefore, at the end of this chapter, I outline Nedelsky's ASC as a move away from state-centred thinking and a court-based approach in an attempt to adopt a more relational approach towards a-legal activities. This is because a legal approach that solely relies on the state is unable to examine the relationships that structure certain forms of behaviour, and it is unable to take cognisance of the fact that law is capable of structuring relations between people.

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<sup>791</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.  
<sup>792</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 5.  
<sup>793</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 5.  
<sup>794</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.  
<sup>795</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.

### 3. The Relational Theory explained

Theories of law that emphasise the importance of law courts and enforceable remedies focus mainly on the individual, the state, and regulations.<sup>796</sup> In accordance with Nedelsky's views, as well as those of Gidon Gottlieb's,<sup>797</sup> I argue that this is an incomplete way to understand the law. The way in which ASM is currently dealt with does not promote the idea of community or collective.

According to Gottlieb, 'The idea that a single all-encompassing concept of law accounts for all juridical phenomena in modern societies in a wide range of complex settings cannot be sustained. Different kinds of social contexts generate different forms of legal order.'<sup>798</sup> This same idea is conveyed in Lindahl's theory of a-legality because he argues that a-legal behaviour is able to expose different practical possibilities that could be available to a legal collective in respect of a normative claim if the legal collective were to shift its existing boundaries about who ought to do what, where, and when (i.e. context).<sup>799</sup> The idea of social context refers back to the idea that the way in which the law currently regulates ASM is incapable of taking context into account. By not taking context into account, lawmakers and judges ignore the current relations that exist and they then further foster relations that are not ideal in terms of ASM. By making use of a relational approach, the context in which an act takes place can be brought to the fore because the relational approach examines underlying relations, and it examines prospective relations.

Another important point that Gottlieb makes is that 'the idea that law is necessarily derived from the State through its legislative and judicial organs and that it depends upon the State for its efficacy is warranted neither by a historical perspective nor by the experience of relational societies'.<sup>800</sup> Therefore, according to Gottlieb, and in accordance with Nedelsky's theory, 'the separation between law and State is a feature of relational societies'.<sup>801</sup>

Juridical norms are found in agreements, arrangements, and other patterns of interaction between parties (i.e. relationships).<sup>802</sup> This indicates that the decisions of courts and laws of government are not necessarily sources of law in relationships between the state and a relational order.<sup>803</sup> Relational societies result in juridical

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<sup>796</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 567.

<sup>797</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983).

<sup>798</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>799</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 4.

<sup>800</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>801</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>802</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>803</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568

activities that are not litigious in character.<sup>804</sup> Instead, relational societies focus on the practices of actors, and their ‘usages, customs, and interpretations that *mediate* between actors’ actual patterns of conduct and the formal juridical instruments that are deemed to govern them’.<sup>805</sup> The relational theory examines the acceptance of juridical instruments as binding and, therefore, it is capable of questioning the way in which law functions as law in different societies.<sup>806</sup> This is where the link between a-legality and relationality lies. A-legality purports that there are other practical possibilities that lie beyond the scope of a legal collective’s order, and relationality examines how different laws function in different societies—therefore, relationality makes a study of the other practical possibilities, and specifically focuses on the relationships that are fostered by the other practical possibilities.

Importantly, ‘the concept of a legal system centred on the State and its officials cannot account for the juridical system of relational societies’.<sup>807</sup> Throughout my dissertation, I have advocated for a move away from state-centred thinking and a move towards a relational perspective. I share this goal with both Lindahl and Nedelsky, and at the end of this chapter, I will explain Nedelsky’s ASC as a move away from state-centred thinking (particularly in the context of ASM).

Nedelsky’s relational approach to human life is that it is best not to think of human subjects of law and government as freestanding individuals who need protection from one another.<sup>808</sup> The relational theory purports that each human being is shaped by the networks of relationships that they are a part of.<sup>809</sup> The networks can include intimate relations with parents, friends, and lovers. But they can also include relations between students and teachers, citizens and states, and even being a participant in the global economy.<sup>810</sup> According to Nedelsky, humans are composed of relationships, and humans do not simply exist with one another.<sup>811</sup>

When people begin to adopt a relational way of thinking, they begin to see how personal relationships and choices are actually made from, or shaped by, wider relationships, and then they can begin to see how their personal relationships are connected to their wider relationships with institutions (such as family law, or the market economy).<sup>812</sup> They also become aware of the fact that individual behaviour is capable of reinforcing or disrupting patterns of relationships.<sup>813</sup>

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<sup>804</sup> G Gottlieb ‘Relationism: Legal Theory for a Relational Society’ *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>805</sup> G Gottlieb ‘Relationism: Legal Theory for a Relational Society’ *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>806</sup> G Gottlieb ‘Relationism: Legal Theory for a Relational Society’ *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>807</sup> G Gottlieb ‘Relationism: Legal Theory for a Relational Society’ *University of Chicago Law School: Chicago Unbound* (1983) 569.

<sup>808</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 19.

<sup>809</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 19.

<sup>810</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 19.

<sup>811</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 19.

<sup>812</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 21.

<sup>813</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

In order to explain the relational theory, and how individual behaviour can shift patterns of relationships, Nedelsky relies on an example of a family.<sup>814</sup> She explains that all families that are shaped by cultural and legal norms are capable of shifting the norms.<sup>815</sup> For example, when families are organised around an equal division of caretaking labour, the children of the family, the children's friends, the neighbours, and the colleagues of the family are given a concrete example of an alternative to the 'traditional', albeit tacit, notion that it is normal for women to take on the majority of the care work at the household even if she has a job outside the home.<sup>816</sup> Nedelsky explains that when communities support an equal division of labour they, in effect, support the particular families that try to live by that specific model, and at the same time, they provide further challenges to the prevailing norms.<sup>817</sup>

Every human being is shaped by the relationships that he or she is a part of, and he or she is also capable of contributing to changing or reinforcing these relationships.<sup>818</sup> The relational approach draws attention to the kinds of relationships that generate a certain problem, and what shapes those relationships.<sup>819</sup> Nedelsky explains that human institutions and norms are then further shaped by the availability of natural resources and how humans have constructed control over the natural resources, as well as the way in which humans understand their entitlement to them.<sup>820</sup>

Nedelsky explains that human beings are fundamentally interconnected, and uses the term 'relational selves' to explain this phenomenon.<sup>821</sup> When one focuses on the harms and benefits that are available to all humans, one is able to see how humans are interconnected—'people are free to do what affects only them, but their liberty will be constrained by harm to others.'<sup>822</sup> However, Nedelsky explains that this understanding of harm is based on the presumption of individualism.<sup>823</sup> In order to make this point on interconnectedness more clear, Nedelsky relies on the example of homelessness.<sup>824</sup>

According to Nedelsky, homelessness is a form of suffering and violence that most people have become accustomed to.<sup>825</sup> As human beings living in society, we are compelled to accept the fact that some people live in luxury and others are left out in the cold to beg.<sup>826</sup> As Nedelsky states, 'We live with a knowledge of vulnerability to disaster and of callousness, of indifference to suffering that characterizes the community we live in. Or perhaps there is a knowledge that, for some, there is no community, only an indifferent collectivity'.<sup>827</sup> In the case of homelessness, there is a

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<sup>814</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>815</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>816</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>817</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>818</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>819</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>820</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>821</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>822</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>823</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>824</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 23.

<sup>825</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 23.

<sup>826</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 23.

<sup>827</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 24.

direct link (or relationship) between one person's legally protected right to exclude another person, who may be cold and hungry, from their home, and that homeless person being on the street.<sup>828</sup> It creates an assumption of one's own right to exclude.<sup>829</sup> Nedelsky explains that the right to exclude creates a relation of power that is asymmetrical—it creates a relation of responsibility.<sup>830</sup> In the case of homelessness, it creates 'an absence of (legal) responsibility' on one's part for the homeless person's immediate well-being.<sup>831</sup> It also enables one to justify one's actions by convincing oneself that one had not violated any right of the homeless person, which then allows one to further 'remain under the illusion that [one's] entitlements are in no way responsible' for the homeless person's predicament.<sup>832</sup>

A similar phenomenon happens in the case of ASM. In the case of ASM we, too, live with the knowledge that ASM miners are vulnerable to disaster. There are constant reports that illegal miners have died in a mine collapse, as was the case with the Bontekoe mining incident that I discussed in Chapter Two. However, because ASM is regarded as an illegal activity, society feels 'an absence of (legal) responsibility' in relation to the well-being of informal miners—in this sense, it is easy to see how law has fostered relations of responsibility (or a lack thereof) in terms of ASM. One feels that one is not responsible for the plight of ASM miners because, under the current mining legislation, it is deemed to be illegal and, therefore, one does not need to be concerned with their plight because it is not an activity that should be taking place in our legal community in terms of our law.

#### 4. The Relational Approach in a Legal Context

In terms of law, the relational approach is a two-pronged approach; firstly, when rights and law are questioned, they should be analysed in terms of how they structure relations.<sup>833</sup> The benefit of analysing law in terms of how it structures relations is that people can begin to understand the issues that are at stake, and the types of judgments that are exercised.<sup>834</sup> Secondly, one needs to understand that what rights and law actually do is structure relations.<sup>835</sup> The relations that they structure either promote or undermine core values (for example, autonomy).<sup>836</sup> Importantly, because law currently structures relations, a relational approach can be used in all current legal systems.<sup>837</sup>

In order to explain how rights and law structure relations, and in order to show how the relations enhance or undermine core values, I will rely on Nedelsky's example of a

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<sup>828</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 24.  
<sup>829</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 24.  
<sup>830</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 24.  
<sup>831</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 24.  
<sup>832</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 24.  
<sup>833</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 65.  
<sup>834</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 65.  
<sup>835</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 65.  
<sup>836</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 65.  
<sup>837</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 65.

single mother on social assistance.<sup>838</sup> According to Nedelsky, many welfare systems create relations of domination and subordination between the recipients of welfare and the case workers.<sup>839</sup> An example of this would be where policies are put into place that encourage neighbours to report any welfare system abuses. This may result in a creation of relations of disrespect and suspicion towards people who rely on welfare.<sup>840</sup> These relations then have a further effect of undermining equality and destroying self-esteem for the people relying on welfare (these are both values that are important in the creation of autonomy).<sup>841</sup> Nedelsky also suggests that when laws do not limit the power of welfare officials to conduct surprise home visits, relations of subordination and insecurity can be created.<sup>842</sup>

However, positive relations towards people relying on welfare systems may also be created through a different interpretation of, or understanding towards, people relying on social assistance.<sup>843</sup> Nedelsky explains that if one were to interpret welfare recipients' rights to privacy, liberty, and security as needing strict limitations during home visits, relations would be shifted between recipients and welfare officials, as well as between the recipients and society at large.<sup>844</sup> This shows that when recipients of welfare are given the same rights as everyone else, they are also given more equal standing in society.<sup>845</sup> In this case, the value of privacy is magnified through an interpretation of rights that does not promote disrespect or suspicion from the case workers and, therefore, the value of equality is then also enhanced.<sup>846</sup> Through this kind of interpretation, the autonomy of the welfare recipients is enhanced. Nedelsky also suggests that welfare recipients should be given a right to take part in a hearing before a recipient's benefits are extinguished in order to promote autonomy for the welfare recipients.<sup>847</sup> By doing this, the relations between the welfare organisation and the welfare recipient will be positively shifted. The welfare recipient would no longer be a 'powerless supplicant,' but rather, a 'co-participant in shaping the meaning of the relevant rules'.<sup>848</sup>

Similarly, in terms of ASM, law fosters relations of subordination between ASM miners and the state, and ASM miners and society in general. This is because the MPRDA has not included ASM and therefore, by not being included, ASM has been relegated to the sphere of the unimportant and irrelevant. The current focus on implementation and enforcement in terms of ASM is proof of this. Because of the way that the MPRDA has been interpreted, ASM has been deemed to be an illegal activity, and this has the result of creating relations of mistrust, disrespect, and a lack of concern for the welfare of ASM miners. These relations undermine equality, dignity, and freedom, which are core democratic values in terms of the South African Constitution. They also

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<sup>838</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>839</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>840</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>841</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>842</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>843</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>844</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>845</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>846</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>847</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>848</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 67.



undermine the core value of alleviating and eliminating social and economic disadvantage in South Africa.

However, if a different interpretation or understanding of ASM miners and activities were to take place, positive relations towards ASM could be fostered. For example, if one were to interpret ASM to be a poverty alleviation activity, relations could be shifted between ASM miners and the state, and ASM and society in general. ASM miners would be given an equal standing in society, and they would be treated with more dignity, while the value of freedom would also be promoted. In this case, the value of poverty alleviation would be enhanced through an interpretation of the law that relies on treating ASM as an a-legal activity and one that relies on a relational approach. I also suggest that, like the welfare recipient mentioned by Nedelsky, ASM miners should be given the right to take part in a hearing about their activities before any decisions about their activities are made so that the democratic core values of autonomy, dignity, and equality can be promoted. Like Nedelsky's welfare recipient, ASM miners would also no longer be a 'powerless supplicant,' but rather, they would be co-participants in shaping the rules about ASM.

Nedelsky explains that through applying the relational approach, debates often ensue.<sup>849</sup> In the case of the welfare system, debates about competing values would take place—for example, there may be concerns about the state's interests because the state would want to avoid being exploited by the welfare system.<sup>850</sup> Through using the relational approach, the debates would then be analysed by looking at how well the disputed law and the relations of insecurity and inequality that it causes achieve that end, and then the analyses would look at how significantly the relations undermine the core values (like privacy, equality, and autonomy).<sup>851</sup> Nedelsky suggests that the most helpful suggestions would be about 'how to structure relations (of dependence) between recipients and welfare bureaucracy in ways that both address legitimate state objectives and enhance the autonomy and well-being that is supposed to be the objective of the welfare system.'<sup>852</sup>

In terms of ASM, debates about competing values would also ensue—for example, the competing interests between LSM companies and ASM miners that I mention in Chapter Two. However, the relational approach would allow the debates to be analysed in a way that would promote core values rather than undermine them, and that helpful suggestions could be put forward about how to deal with these kinds of disputes. In Chapter Two, incredibly useful suggestions made by women involved in ASM are discussed. One such suggestion is that positive relationships between LSM companies and ASM miners should be promoted through LSM companies allowing female ASM miners access to the land that the company is no longer using.<sup>853</sup> Another suggestion made by the women is that it should be made easier for women to apply

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<sup>849</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 67.

<sup>850</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 67.

<sup>851</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 67.

<sup>852</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 67.

<sup>853</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

for concessions, and that governments could provide training support.<sup>854</sup> One of the women suggested that financial institutions be educated about the nature of ASM,<sup>855</sup> and it is argued that the use of the relational approach would allow this to happen naturally as more positive relations towards ASM are fostered with time.

## 5. The Relational Approach to Law

Nedelsky advocates for meaningful participation in decision-making as well as 'greater accessibility of debates about law.'<sup>856</sup> These are two very important points that could beneficially serve the ASM sector, as well as the decisions made about the ASM sector. This is because, as Nedelsky suggests, law should be promoted as a 'vehicle for, rather than a barrier to, democratic participation in norm creation,' specifically with regard to a-legal activities.<sup>857</sup>

Using the law to address issues pertaining to greater freedom or achieving a more effective distribution of power is a controversial approach.<sup>858</sup> This is because the law is associated with being closely linked to the state and, therefore, by relying on the law, one is often criticised as following a liberal approach.<sup>859</sup> Because the law is closely linked to the state, it is frequently argued that because the state is controlled by the powerful, it is unlikely that the state would even be able to act in the best interests of redistributing power, goods, and advantages in an equal way.<sup>860</sup> It is argued that by using the law, one reinforces 'the significance and legitimacy of the dominant framework.'<sup>861</sup>

However, through using the work of Nedelsky one can, in fact, use the law and the relational theory together. As Nedelsky states, it is 'simplistic to envision the law as simply the tool of the powerful: it could not be as effective in sustaining the legitimacy of existing structures of power if it advanced only the interests of the powerful.'<sup>862</sup>

Nedelsky does, however, argue that 'equality seekers have turned too habitually to the state to solve their problems'.<sup>863</sup> She identifies the fact that law is still able to make an important contribution because it is able to 'restructure relations of power and responsibility *without* necessarily giving the state power to implement the practice in

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<sup>854</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>855</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>856</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>857</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>858</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 69.

<sup>859</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 69.

<sup>860</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 69.

<sup>861</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 69.

<sup>862</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 70

<sup>863</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 70.

question.<sup>864</sup> Therefore, the call is not for an increased role of the law of the state but rather, a different role.<sup>865</sup>

As I have mentioned, the relational approach is sometimes perceived to be a risky approach because whenever the law is used as a tool for transformation, there is a risk that “the master’s tools” are being used.<sup>866</sup> Law is, in general, controlled by those who have power and, therefore, by relying on the law, there is a risk that one’s transformative project will be shaped by the dominant frameworks, priorities, and preoccupations.<sup>867</sup> Although this may be true, Nedelsky argues that engaging with the law is a necessary risk because ‘it shapes so many dimensions of people’s lives’.<sup>868</sup> It is therefore essential for the law to be used in a way that would shift the dominant conceptual framework so that the law can foster important societal values.<sup>869</sup> This is known as the relational use of law.<sup>870</sup> Law alone does not have the capacity to change internalised or entrenched patterns of behaviour; however, patterns cannot be changed without the support of the law.<sup>871</sup>

The relational approach is important because it is able to show how existing law contributes to a problem, and how the law could be shifted to promote relations that are conducive to a value at stake rather than undermine relations.<sup>872</sup> Through using a relational approach, people are able to see the various ways that law is able to shape important relationships, and then these ‘ways’ can be analysed.<sup>873</sup>

Through using a relational approach, one is able to assess the nature of state action because the relational theory draws attention to how law plays a part in the creation of the problem, it identifies ways of shifting the problem by changing the way law currently structures relations, and it also makes it clear when a solution requires more or less state action.<sup>874</sup> It is important to understand when a solution requires state intervention because often, the law structures relations that hide the power and role of the state. Through using a relational approach, the role that the law and the state play in structuring relations of power becomes far clearer.<sup>875</sup>

The relational approach is theoretical, legal, and political.<sup>876</sup> This project engages with the legal aspect of the relational approach. It is important to examine the law because law is the main way in which values are enforced.<sup>877</sup> Because engaging with the law in a transformative project is risky, I have further relied on Nedelsky’s work and suggestions to mitigate the risks of working with the law. Nedelsky’s first way of mitigating the risks of working with the law is to democratise the law itself.<sup>878</sup>

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<sup>864</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 70.  
<sup>865</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 70.  
<sup>866</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.  
<sup>867</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.  
<sup>868</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.  
<sup>869</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.  
<sup>870</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.  
<sup>871</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.  
<sup>872</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 71.  
<sup>873</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 72.  
<sup>874</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 72.  
<sup>875</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 72.  
<sup>876</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 363.  
<sup>877</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.  
<sup>878</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.

In an attempt to democratise law, Nedelsky suggests that ‘law should become more open to public deliberation’ so that the public can determine which values are important, and how those values should be implemented.<sup>879</sup> If a relational approach is used, law would become “a site of discursive engagement” by making it more widely accessible to public deliberation.<sup>880</sup> In order to make the law easier to understand, the values at stake could be explained through using a relational approach.<sup>881</sup> Nedelsky is also of the opinion that constitutionalism should be approached in a way that ‘invites popular deliberation about the meaning of rights’.<sup>882</sup> Throughout Nedelsky’s work, there has been a focus on the relations of freedom and autonomy.<sup>883</sup> This is because ‘the relations of freedom and autonomy (or their absence) shape who gets to have a say in the formation of the norms that govern people’s lives’.<sup>884</sup> In terms of South African law and decisions made about ASM, the relations of freedom and autonomy are also important values to keep in mind.

Although law is an important tool that can, and is, used to bring life to conceptual underpinnings, it is not the only tool that can be used, and in some cases, relations should be structured in ways that do not directly rely on, or involve, the state.<sup>885</sup> This is the unique characteristic of the relational approach—it can extend beyond the state. Therefore, it is essential to understand that when rights or values are at stake, it does not mean that the state should be the only relevant actor.<sup>886</sup> The beauty of the relational approach is that it does not promote an increase in the scope of the state, and it therefore stays true to transformative projects.<sup>887</sup>

The main aim of using the relational approach is to use it as a tool to clarify how the existing exercise of state power shapes relationships that are destructive to values, such as autonomy or freedom, and to help envision and establish different (rather than additional) ways that the state can exercise its power.<sup>888</sup> In terms of ASM, the important values to keep in mind are those democratic core values that are enshrined in the Bill of Rights in the Constitution—i.e. human dignity, equality, and freedom. One of the core values that is promoted in South African society is to alleviate and eliminate social and economic disadvantage and, therefore, through promoting ASM as a poverty alleviation activity, this core value could be upheld.

The relational approach is also used to identify and understand the relational source of problems.<sup>889</sup> The relational approach is able to identify the role of the state in creating certain problems by not making the presumption that the current way that the state exercises its power is optimal.<sup>890</sup> As Nedelsky points out, sometimes there is a need for an increase in state power where it is deficient. When this is the case, it is

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<sup>879</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.

<sup>880</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.

<sup>881</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.

<sup>882</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.

<sup>883</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.

<sup>884</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>885</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>886</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>887</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>888</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>889</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>890</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

not important to determine whether the state is actually structuring relations but rather, it is important to examine how the state structures relations that either undermine or enhance core values, and this is when the relational approach is particularly useful.<sup>891</sup> In terms of ASM, the fact that more state intervention is not necessarily the solution to the issues associated with ASM has been established. However, the relational approach could help to identify how the state has structured relations that have undermined the core values that should be promoted in terms of ASM miners.

## 6. The Challenge of the Collective's Responsibility as a result of the Relational Approach

Inevitably, using the relational approach shapes collective norms which, as Nedelsky explains, results in changes in people's sense of responsibility.<sup>892</sup> A shift in people's framework of thinking results in a shift in people's sense of responsibilities.<sup>893</sup>

In order to explain this phenomenon, Nedelsky, once again, relies on the example of the homeless person on the street which has been discussed earlier in this chapter. If one were to adopt a relational way of thinking, one could not talk oneself out of being responsible for causing the homeless person's situation in order to shield oneself from responsibility.<sup>894</sup> Relational thought would result in one understanding that one's right to exclude is immediately linked to the plight of the homeless person.<sup>895</sup> As Nedelsky puts it, the relational way of thinking would 'make wilful blindness to the problem much harder.'<sup>896</sup> However, although one might be able to make and understand this link, one would still not know what to do, or what the rights policies would be, in this situation.<sup>897</sup> Figuring out what kind of compassion is needed and turning one's attention to the issues of poverty would demand more of one's time and, therefore, relational habits of thought would result in a call for new judgment skills.<sup>898</sup> Put simply, relational habits of thought would result in a change in people's sense of the content of 'responsible freedom'.<sup>899</sup>

A similar phenomenon would occur in the case of ASM—one could also not talk oneself out of being responsible for causing, at least in part, the plight of ASM miners. I say this because, as a legal community in South Africa, we have chosen to be a part of the legal order (even if it has been tacit consent), and we have accepted the MPRDA as our mining legislation. By not challenging the law as undermining our core democratic values in terms of ASM, we continue to accept the status quo, which in turn makes our legal community responsible for the plight of ASM miners. Our legal community has adopted a 'wilful blindness' to the problems and challenges associated with ASM, and it is therefore argued that adopting a relational approach would prevent

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<sup>891</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>892</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>893</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>894</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>895</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>896</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>897</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>898</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>899</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

this indifference from occurring, and it would also result in the collective feeling a sense of responsibility for those involved in, and affected by, ASM.

Nedelsky acknowledges that ‘learning to exercise individual and collective judgment about the moral responsibilities that flow from full awareness of human interconnection will be a bigger challenge than learning to see those interconnections.’<sup>900</sup> She also notes that the relational approach may be rejected because of the desire to avoid the challenge.<sup>901</sup> However, as Nedelsky argues, this would not be a responsible or well-justified reason to reject the relational approach.<sup>902</sup> Nedelsky admits that relational norms would have their own normalizing and, therefore, exclusionary effect.<sup>903</sup> She also acknowledges that although there is a downside to collective norms and collective norms can have costs, the relational way of thinking (or relational habits of thought) is capable of lessening the scope of harm that is done by indifference and blindness.<sup>904</sup>

Therefore, I agree with Nedelsky when she says, ‘this is the kind of harm [referring to blindness and indifference] that I think must be balanced against the loss of scope of personal freedom for irresponsibility that a relational framework would involve.’<sup>905</sup> The type of responsibility that is created by the relational approach would foster even more relational thought because people would begin to question the reasons for a given norm, which would then have the effect of further fostering values of freedom and autonomy because of their new-found training in good judgment.<sup>906</sup>

Nedelsky explains that shifting the norms of individual responsibility, and focusing on interconnection would also have the ability to shape the norms of collective responsibility.<sup>907</sup> Eventually, the stronger norms of collective responsibility would have an impact on state policy.<sup>908</sup> Nedelsky uses global warming as an example—global warming has made people more familiar with public policy arguments that are guided by attention, interconnection, and interdependence.<sup>909</sup> She explains that the shifts in habits that will be required to contain global warming ‘can be seen not just as a loss but also part of a deep rethinking about, say, the role of food in our lives and the many kinds of values connected to it.’<sup>910</sup>

According to Nedelsky, the relational approach refocuses society’s attention on how relationships are central to people’s lives and this has compensatory benefits for the so-called loss of freedom (which is nevertheless irresponsible freedom).<sup>911</sup>

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<sup>900</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>901</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366-367.

<sup>902</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 367.

<sup>903</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 367.

<sup>904</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 367.

<sup>905</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 367.

<sup>906</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 368.

<sup>907</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 368.

<sup>908</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 368.

<sup>909</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 368.

<sup>910</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 368.

<sup>911</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 368.

## 7. Rights Talk in terms of ASM

It is undeniable that rights are used as a powerful tool all over the world in struggles for justice and, therefore, constitutional rights are often used to limit the state's power because rights articulate a society's core values.<sup>912</sup> In most Western based legal systems, the courts are the institutions that are responsible for defining and enforcing rights, which means that debates about rights and their definitions take place in 'the least popularly accessible forms of public deliberation.'<sup>913</sup> The use of rights to limit state power is known as rights discourse, and it is subject to a fair amount of criticism.<sup>914</sup>

Although judicial review is the most popular form of enforcing rights, and although it is a universal mechanism, I, like Nedelsky and Lindahl, argue for a move away from a court-centred approach throughout this project.<sup>915</sup> It is argued that the relational approach is such a move away from a court-centred approach and, as Nedelsky explains, it can, and should, be used 'in all contexts where rights are invoked, defined, debated, or defended.'<sup>916</sup> Of course, in terms of ASM, a number of human rights are abused and overlooked (rights such as human dignity, security, equality, and rights to health care, employment opportunities, childcare support, and education—to name a few), and therefore, it is argued that the relational theory is an appropriate way to address these rights abuses. In order to implement the relational theory, Nedelsky proposes the ASC from Canada as an 'alternative institutional' forum which can address rights abuses. This project supports the notion that alternatives to judicial review need to be implemented, especially in the case of a-legal activities such as ASM, in order for the focus to be shifted to the relationships that are being structured by rights, legislation, and legal decisions.

I have explained that, in terms of ASM, the focus is generally on the implementation and enforcement of the MPRDA, and that this frequently has negative consequences for ASM miners because they are not protected by the MPRDA. The focus on implementation and enforcement also turns lawmakers' attention away from the violations that ASM miners are exposed to, and the everyday struggles that they are faced with. Therefore, the MPRDA is enforced without an understanding of the types of relationships that will be structured as a result thereof. It also means that there is no opportunity for ASM to be treated and encouraged as a poverty alleviation activity. Nedelsky explains that the focus on implementation and enforcement 'buries the highly contested nature of the meaning of the rights themselves'.<sup>917</sup> This quote can be extended to the implementation and enforcement of legislation because legislation has the ability to structure, and have an impact on, rights.

From the MPRDA, one can see that there is clearly a lack of rights in terms of ASM—the rights of ASM miners are not mentioned and not defined which is problematic. It is

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<sup>912</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 231.

<sup>913</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 231

<sup>914</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 231.

<sup>915</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 232.

<sup>916</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 232.

<sup>917</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 233.

important to mention the issue of rights in this project because there is a true possibility that rights discourse will be relied on in terms of ASM in the future. There may be a move to define the rights of ASM miners which is important; however, it is argued that when any decisions are made about the rights of ASM miners in the future, these decisions should be made by focusing on the way in which rights structure relationships.<sup>918</sup>

## 8. The Alternative Social Charter and ASM

The ASC was proposed in Canada in the early 1990s as a way to give effect to social and economic rights, and it was intended to serve as a supplement to the already existing structure of judicial review.<sup>919</sup> The ASC is a system that is not centred around the courts, and it promotes democratic deliberation about the meaning of rights.<sup>920</sup> It is, therefore, able to protect rights and to promote deliberation and debate about the meaning of rights. These debates are able to open people's imaginations to different constitutional possibilities.<sup>921</sup> The ASC is a model that could be used in order to address a-legal activities which pose many difficult questions and issues that can be challenging to address. It is argued that something similar to the ASC could be used in the context of ASM in order to guide lawmakers and the judiciary in their decisions about ASM because of its focus on relationships. The ASC is a model for institutionalising a 'dialogue of democratic accountability,' and it is a structure that invites a relational analysis of rights.<sup>922</sup>

Interestingly, the original ASC was proposed by anti-poverty groups.<sup>923</sup> This links to this project because the aim of this project is to promote ASM as a poverty alleviation activity. Initially, the ASC was a project that aimed to illustrate exactly what it would take for all the members in Canadian society to be regarded as full and equal participants in society, and what it would take for all the members of society to be truly treated with equal respect and dignity.<sup>924</sup> The ASC used language that made disadvantage central which had the effect of tacitly emphasising a relational approach to rights because it did not deflect the focus away from vulnerability and disadvantage.<sup>925</sup> The ASC uses the language of rights, but it tacitly recognises the fact that traditional, individualistic rights can obscure the impact of disadvantage.<sup>926</sup>

The most unique and, arguably, the most relevant aspect of the ASC for Nedelsky, and for this project, is the fact that the ASC's structure avoided 'treating courts as the central means for institutionalizing rights'.<sup>927</sup> As has been mentioned, the ASC was

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<sup>918</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 233.

<sup>919</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 232.

<sup>920</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 265.

<sup>921</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 252.

<sup>922</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>923</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>924</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>925</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>926</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>927</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.



able to act as an alternative to a court-based system of rights.<sup>928</sup> The ASC formed two non-judicial institutions that were used to implement rights namely, the Social Rights Council (hereafter, the SRC), and the Social Rights Tribunal (hereafter, the SRT).<sup>929</sup> These two institutions aimed to promote public debate and deliberation about rights.<sup>930</sup> The institutions fostered the idea that ‘rights are not just claims against a government, but an occasion of ongoing dialogue about the meaning and implementation of these rights’.<sup>931</sup> The institutions also made sure that those to whom the rights actually mattered were made part of the deliberations about the rights.<sup>932</sup> These bodies were to be appointed by the Senate (which is equivalent to the legislature in South Africa) in Canada, and were to be made up of at least a third of nongovernmental organisations which represented vulnerable and disadvantaged groups.<sup>933</sup> Nedelsky concedes that the question of exactly how the appointments of adjudicators would work is an area that needs more consideration and detail, and that it would be a challenge to find optimal adjudicators and policymakers.<sup>934</sup>

The ASC opens with a statement of ‘Social and Economic Rights’ which I outline briefly. The ASC begins with the idea that everyone has an equal right to well-being which encompasses the right to a standard of living that ensures adequate food, clothing, housing, child care support services, and any other requirements for security and dignity to be upheld.<sup>935</sup> The right to wellbeing also encompasses a right to comprehensive health care, public primary and secondary schooling, access to employment opportunities, as well as just and favourable conditions of work.<sup>936</sup> It is argued that the right to well-being, as outlined in the statement of ‘Social and Economic Rights’ in the ASC, is incredibly similar to the rights contained in the Bill of Rights (as contained in South Africa’s Constitution). The Bill of Rights contains the democratic values of human dignity, equality, and freedom which are considered to be core values in terms of Nedelsky’s relational theory. The Bill of Rights adequately covers all of the rights that the right to well-being in terms of the ASC encompasses and, it is argued that, the Bill of Rights is perhaps even more comprehensive. If a model similar to the ASC were to be adopted, the right to well-being would be covered by the Bill of Rights. However, it is argued that a model such as the ASC would further entrench the idea that these democratic core values must be given due consideration in all decisions made about a-legal behaviour by placing emphasis on the core values.

The ASC also asserts that it, and all other statutes, regulations, policies, practices, and the common law, should be applied and interpreted in a manner that is consistent with the rights that are outlined in the statement of ‘Social and Economic Rights,’ as well as with ‘the fundamental value of alleviating and eliminating social and economic disadvantage’ (i.e. poverty alleviation).<sup>937</sup> This emphasis on eliminating social and

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928 J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

929 J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

930 J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

931 J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

932 J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

933 J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

934 J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 270.

935 J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

936 J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

937 J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

economic disadvantage is of paramount importance, especially in the context of a-legal activities such as ASM. The ASC also reinforces the importance of governments having an obligation to ‘take positive measures to ameliorate the historical and social disadvantage of groups facing discrimination’.<sup>938</sup> Through making use of its two tribunals, and by relying on the statement of ‘Social and Economic Rights,’ the ASC promotes a relational analysis.<sup>939</sup>

The SRC would be responsible for encouraging governments to ‘engage in active and meaningful consultations with non-governmental organizations which are representative of vulnerable and disadvantaged members of society’ and it could hold inquiries, compel governments to provide documents, and report on relevant matters.<sup>940</sup> Through the SRC, a reporting process that usually receives minimal public attention could actually become a focus of public conversation.<sup>941</sup> This would be beneficial in situations where conflict between LSM and ASM arise—particularly in cases where LSM companies are given rights and protection and, therefore, priority in terms of the MPRDA, at the expense of ASM miners as a result of their lack of rights.

In Chapter Two, it is explained that mining communities are often forced to deal with consultants and traditional leaders, and that traditional leaders usually have different interests from the interests of ASM miners, as well as the mining affected communities.<sup>942</sup> Through the use of the ASC and the SRC, it is argued that the concerns of ASM miners, as well as mining affected communities (and women), could be given due consideration, and ASM miners and communities would not have to rely on consultants and traditional leaders to represent their concerns as was the case in terms of Petmin that I mentioned in Chapter Two. The use of the ASC would provide some relief to the tensions experienced by ASM miners and mining affected communities.

It was also pointed out that there is often a lack of communication between ASM miners and LSM companies which causes conflict<sup>943</sup> and, in rare cases, when there is communication, promises are often made by LSM companies which are rarely kept.<sup>944</sup> The fact that the SRC encourages government to engage in consultations with nongovernmental organisations that could represent ASM miners could help in this regard. The ASC could enforce the promises made by LSM companies and the concerns of the mining affected communities (and specifically the concerns of women) could be given due consideration.

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<sup>938</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

<sup>939</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>940</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>941</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>942</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 70.

<sup>943</sup> R Pelon & G Walser for CASM *Mining together: Large-Scale Mining meets Artisanal Mining* (2009) 10.

<sup>944</sup> Y Groenewald ‘Mining’s Ugly Underbelly’ (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

The SRT was proposed as an alternative institution to the courts as a mechanism for hearing claims about rights.<sup>945</sup> The tribunal was able to hear complaints about alleged systemic infringements or infringements that would have a systemic impact on vulnerable or disadvantaged groups.<sup>946</sup> This meant that rights would be analysed in a way that would provide redress and that would analyse the underlying sources of the rights deprivation.<sup>947</sup> In the context of ASM, this would mean that the tribunal could hear about the infringements that ASM miners are exposed to, or the infringements that mining affected communities and women are affected by. For example, the concerns of mining affected communities could be heard, especially in cases where mining has affected the drinking water, as was the case in Limpopo which is discussed in Chapter Two.<sup>948</sup>

A practical example of the benefit of using the ASC would be when one refers to the statement of 'Social and Economic Rights' which refers to the 'requirements for security and dignity of the person for full social and economic participation in their communities'.<sup>949</sup> Therefore, in order to understand what the rights and their violations would be in terms of the statement of 'Social and Economic Rights,' one would have to ask what would make security, dignity, and full participation possible.<sup>950</sup> From this line of questioning, one can see that there is a constant focus on the idea on disadvantage.<sup>951</sup> This illustrates the fact that security, dignity, and full participation will not be possible for everyone unless the relations of inequality are changed.<sup>952</sup> To use Nedelsky's example, in the case of a single mother on social welfare, she would not be able to break away from her role as a dependent, marginalised citizen if she was not given some form of training or education to do so.<sup>953</sup> In this case, the ASC would allow one to understand that the system fails in terms of the ASC.<sup>954</sup> The ASC promotes the recognition that rights structure relations of equality and respect; therefore, adjudicators would focus on the relations that are established or maintained by the system of social entitlements.<sup>955</sup> They would also be able to focus on whether the system of social entitlements would allow all people to be full participants in society.<sup>956</sup>

Similarly in terms of ASM, if one were to ask what would make security, dignity, and full participation possible, thereby making disadvantage central, one would also conclude that ASM miners will not be able to participate fully in society unless the current relations of inequality are changed.<sup>957</sup> I argue that ASM miners are

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<sup>945</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>946</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>947</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>948</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>949</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>950</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>951</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>952</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>953</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.

<sup>954</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.

<sup>955</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.

<sup>956</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.

<sup>957</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

marginalised citizens because, under the current mining legislation, they do not hold any rights. In this way, disadvantage becomes central because one can see that the mining legislation fails in terms of the ASC.

In order to ensure the ongoing dialogue about rights, the institutions make use of a fairly simple system.<sup>958</sup> Firstly, the tribunal has a hearing in order to determine whether or not there has been a violation of a right that has a negative impact on a vulnerable or disadvantaged group of society.<sup>959</sup> A second hearing then takes place that revolves around an appropriate remedy to the problem.<sup>960</sup> This phase involves hearing opinions from both petitioners and governments.<sup>961</sup> Based on the opinions and arguments, the tribunal then makes an order that certain measures be taken, and the order then goes through the policy-making and legislative process.<sup>962</sup> Alternatively, the tribunal is also allowed to permit government to take initiative, and it may order that the appropriate government report back on the measures that it has taken or that it proposes to take.<sup>963</sup> The tribunal can then endorse the government's proposal, it can send it back to the government for more consideration, or it can even issue its own order.<sup>964</sup> Once the tribunal issues an order, it will send the order to the relevant legislature so that it may be considered.<sup>965</sup> The tribunal was set up in such a way so as to maximise democratic deliberation.<sup>966</sup> The biggest advantage of making use of the tribunal is that it would have the power to command the attention of the legislature because it would be able to issue its own remedy, which would mean that the default rule would be that the tribunal's order would come into effect if the legislature did not act.<sup>967</sup>

The democratic characteristic of the public deliberations that would take place under the tribunal would be protected because the role of the courts in overseeing the tribunal would be restricted.<sup>968</sup> Only the Supreme Court of Canada was able to review the decisions and the orders of the tribunal, and even the powers of the Supreme Court were restricted because it could only use its power to review the tribunal's decision if it had grounds to suggest that there had been 'a *"manifest"* excess of jurisdiction'.<sup>969</sup> In terms of South African law, I argue that if a model based on the ASC were to be adopted, the Supreme Court of Appeal or the Constitutional Court would be able to review the decisions of the tribunal in the case of 'a *"manifest"* excess of jurisdiction'.<sup>970</sup> It is argued that the ASC would allow law-makers to reach beyond the narrow scope of a particular society's law in order to seek solutions to a problem.

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<sup>958</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.  
<sup>959</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.  
<sup>960</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.  
<sup>961</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.  
<sup>962</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.  
<sup>963</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.  
<sup>964</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.  
<sup>965</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.  
<sup>966</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.  
<sup>967</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 269.  
<sup>968</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 270.  
<sup>969</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 270.  
<sup>970</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 270.

Like Lindahl, Nedelsky also argues that ‘it is important to imagine and experiment with alternatives to judicial review’.<sup>971</sup> Nedelsky explains that when rights are understood as relationships, and when constitutionalism is understood as a dialogue of democratic accountability, one can move beyond long-standing problems, and new conceptual and institutional structures can be created that will facilitate inquiry into new problems. Although Nedelsky recognises that there are still unresolved questions about how a system like the ASC could replace judicial review by courts, she still argues that the ASC is an important model of rights adjudication, which centres on public deliberation about the content of rights.<sup>972</sup> The relational approach suggests that judicial review by courts should not only be focused on the implementation of law and rights, it should also pay equal attention to the question of who defined the laws and rights in question, thereby taking context into account which has been an important concept throughout my project.<sup>973</sup>

In Chapter Three, it was argued that ASM should be regarded as an a-legal activity. When one acknowledges an activity such as ASM as being a-legal, one accepts that the activity falls outside the scope of the law. It also allows one to accept that there may be another realm of practical possibilities in terms of that activity that falls outside the current legal system.<sup>974</sup> When one accepts that there are other practical possibilities that fall outside the scope of one’s own law, one begins the process of relational thought. I have argued for a relational approach towards ASM activities which entails thinking about the way the law structures or could structure relations towards ASM activities. I then introduce Nedelsky’s ASC as a practical example of how the relational theory could be adopted into practice.

In terms of ASM, the ASC would be beneficial because through the ASC, the fact that ASM plays a significant role in the South African economy could be given adequate attention and, therefore, more appropriate solutions to the issues relating to ASM could be created and implemented.<sup>975</sup> It would also mean that ASM could be promoted as a positive poverty alleviation activity instead of it being viewed as an unfavourable illegal activity. It is argued that the ASC should be used to address a-legal behaviour because those involved in a-legal behaviour, like ASM miners (and particularly female ASM miners), are part of a vulnerable group in society.

I have argued that the relational approach is important because it shows how existing law contributes to a problem, and it also shows how the existing law could be shifted in order to promote relations that are conducive to a value at stake.<sup>976</sup> Through the use of the ASC, it is shown that the MPRDA could be interpreted in such a manner so as to allow relationships created by the law to be given significant attention. It is also argued that lawmakers and the judiciary would be able to gain a deeper understanding into how the MPRDA currently structures relations towards ASM miners. One of the

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<sup>971</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 270.

<sup>972</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 270.

<sup>973</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 271.

<sup>974</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

<sup>975</sup> African Minerals Development Centre ‘Special Report: African Women in Artisanal and Small-scale Mining’ (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>976</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 71.

main problems that has been identified in this project, is that the MPRDA does not define ASM. The issue with this is that ASM is open to many misinterpretations about exactly what it entails. This has led to negative relations being structured because ASM has been interpreted to be an illegal mining activity as it takes place without a mining permit. However, if the ASC were to be used, debates about the definition of ASM could take place and, therefore, adequate attention to context could be given. The ASC ‘provides an institutional structure that recognises rights as entailing an ongoing process of definition.’<sup>977</sup> This links to Lindahl and shifting boundaries, and how human behaviour is, at least initially, comprised of a-legal behaviour.<sup>978</sup> Because ASM has not been defined, the rights of ASM miners have also not been defined. This is problematic because decisions about rights can only take place if rights are defined. As Nedelsky states, ‘Rights must be defined before they can be protected.’<sup>979</sup> However, if the ASC were to be used in the context of ASM, the rights of ASM miners could be defined by relying on public debate and deliberation which would entail taking context into account, and the rights of the ASM miners could be defined, but their nature as being dynamic and not static would also be promoted.<sup>980</sup> The ASC ‘provides an important model for rights adjudication where public deliberation about the content of rights is an integral part of the process.’<sup>981</sup> The ASC is an institutional structure that is able to recognise rights as necessitating a process of definition that is ongoing.<sup>982</sup> Through using the ASC, any decisions made about rights would be made based on an analysis of the way in which the proposed rights would structure relationships.<sup>983</sup>

Throughout my project, I have emphasised the need for lawmakers and the judiciary to take context into account, especially with regard to a-legal activities, like ASM. As has been explained through using Nedelsky’s work, boundaries encourage society to focus on the separative self and, therefore, new modes of inquiry are prevented from being established.<sup>984</sup> It also means that society is prevented from understanding reality.<sup>985</sup> The ASC is a move away from the current focus that is on the separative self, and a move towards understanding the interconnectedness of human beings.<sup>986</sup> The move away from the separative self can already be seen in the context of female ASM miners and the role that they play in their communities.<sup>987</sup> From the women’s stories that are outlined in Chapter Two, it is evident that women use ASM to reduce poverty in their communities, and that some of the women use their money to contribute to poverty alleviation in their communities.<sup>988</sup> Many female ASM miners are

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<sup>977</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 270.

<sup>978</sup> H Lindahl ‘Law’s “Uncanniness”: A Phenomenology of Legal Decisions’ (2008) 2 *Netherlands Journal of Legal Philosophy* 145.

<sup>979</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 233.

<sup>980</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 270.

<sup>981</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 270.

<sup>982</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 270.

<sup>983</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 233.

<sup>984</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 107.

<sup>985</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 107.

<sup>986</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>987</sup> African Minerals Development Centre ‘Special Report: African Women in Artisanal and Small-scale Mining’ (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>988</sup> African Minerals Development Centre ‘Special Report: African Women in Artisanal and Small-scale Mining’ (2015) *NewAfricanWomen February/March 2015 Edition*.

involved in the development of their communities, and a system like the ASC could foster these positive kinds of relations, and it could foster the importance of the value of poverty alleviation in ASM activities. If a system like the ASC were to be used to address activities such as ASM, better conclusions could be made about solutions to the problems associated with ASM because context would be taken into account. Adjudicators would be able to consider the way in which the law has helped to foster the current relations surrounding ASM, and they would be able to see that the MPRDA has not been drafted with ASM in mind, as Hoadley and Limpitlaw suggest.<sup>989</sup> Adjudicators would be able to study the mining legislation in a way that would allow them to see that there are different ways for the MPRDA to be interpreted, and investigations could be made into the relations that the mining laws have created towards ASM activities. Through a relational investigation, adjudicators would become aware of the fact that the requirements of the MPRDA are often out of reach for ASM miners, and that this is the reason as to why so many ASM miners are without mining permits. The ASC could ensure that the objectives of the mining legislation are carried out properly, and it could focus on sections such as section 2(d) of the MPRDA which aims to drastically expand opportunities for historically disadvantaged persons such as women and certain communities. More focus could be given to sections like section 12 of the MPRDA so that historically disadvantaged persons could be assisted.

As I have discussed in Chapter Two, in order to apply for a mining permit, a prospective miner must meet the requirements of section 27, which involves applying for environmental authorisations and paying a non-refundable fee. Through using a system like the ASC, adjudicators could take context into account, and understand that these conditions place a heavy burden on ASM miners. Through focusing on disadvantage, the ASC could find more appropriate systems and conditions that would be more feasible for ASM miners. Through a relational examination, adjudicators would become aware of the fact that these provisions are restrictive, and that stringent requirements put acquiring a mining permit out of reach of most ASM miners.<sup>990</sup>

Because the MPRDA makes no provision for ASM, it is argued that ASM has been levelled down to the unimportant and insignificant. The mining legislation in South Africa was drafted with LSM in mind and, therefore, many of the provisions in the legislation are not applicable to (or appropriate for) ASM activities.<sup>991</sup> This is another factor that the ASC could take into account when dealing with ASM. By treating ASM as an a-legal activity, and by dealing with it through using a system that is not based on judicial review, the ASC could bring issues, like ASM, that have been levelled down to the unimportant and insignificant to the foreground. The ASC could also ensure that relationships with respect to mining and mining rights are given due consideration and that positive relations are fostered. As Nedelsky explains, simply recognising rights as being relational makes the discussion surrounding rights open to reflection and

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<sup>989</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

<sup>990</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

<sup>991</sup> M Hoadley and D Limpitlaw 'The Artisanal and Small Scale Mining Sector & Sustainable Livelihoods' (2004) 6.

debate.<sup>992</sup> Productive discussion about ASM is something that is certainly needed in order to create awareness about what it entails, and how it can be utilised as a poverty alleviation activity.<sup>993</sup>

In Chapter Two, an in-depth discussion on the tensions and challenges associated with ASM is provided. Tensions and challenges form part of the context in which ASM takes place and it is, therefore, argued that due consideration needs to be given to the challenges and tensions associated with ASM. Unfortunately, the MPRDA is unable to take context into account, and this has the effect of preventing lawmakers from making appropriate decisions about, and fostering positive relations towards, ASM. The ASC would allow adjudicators to focus on context, and specifically on the tensions and challenges associated with ASM, and that the adjudicators that would be appointed in terms of the ASC would be better equipped to make decisions about ASM because they would be exposed to the context in which ASM takes place through public participation and deliberation. Adjudicators would be afforded an opportunity to hear the stories of ASM miners which would have the effect of opening their eyes to the challenges that ASM miners face on a daily basis. In this sense, the women's stories that have been outlined in this project would be particularly useful. In developing countries (and particularly in rural communities) women's voices are, to a great extent, absent from political decision-making.<sup>994</sup> This results in 'women's perspectives, needs, knowledge and proposed solutions' being largely ignored.<sup>995</sup> When women are excluded from the decision-making process, they become increasingly marginalized because the policies do not take women's concerns into account.<sup>996</sup> Women's views need to be incorporated into the decision-making process in order for gender-sensitive policies to be promoted, and for programmes to be implemented that target ASM and women in ASM.<sup>997</sup> The women's stories that have been outlined expose the challenges that ASM miners are faced with, but they also expose some solutions to the problems that are associated with ASM because women are able to express their needs and concerns. Through the use of the ASC, women's concerns could be voiced, and women could play a main role in the promotion of ASM as a poverty alleviation activity because the ASC would allow for meaningful participation in decision making, and greater accessibility of debates about law.<sup>998</sup> It is also argued that the ASC would prevent 'gender-blindness' from taking place because its focus is on those who are disadvantaged which, in the case of ASM, are mainly

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<sup>992</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 252.

<sup>993</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 78.

<sup>994</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 17.

<sup>995</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 17.

<sup>996</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 17.

<sup>997</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 17.

<sup>998</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.



women involved in, or affected by, ASM. As has been mentioned, the ASC would allow for meaningful participation in decision making, and greater accessibility to debates about the law which would be particularly advantageous for women.<sup>999</sup>

This project has illustrated that decisions made about mining are often made without consulting the people that the decisions are going to affect—for example, women who rely on the environment to provide for their families or traditional mining communities that have been mining on the land for generations. The ASC presents a solution to this because the SRC and SRT would ensure that those to whom the rights actually mattered would indeed be made part of the deliberations about mining rights.<sup>1000</sup> This would also mean that women’s voices would finally be heard with regard to ASM activities.

Nedelsky’s work is feminist at its core.<sup>1001</sup> However, it is unique in the sense that it goes beyond feminism so that it becomes available to anyone even when their stance is not particularly feminist in nature.<sup>1002</sup> Therefore, although her work is grounded in feminism, she believes that ‘all matters of justice will benefit from relational analysis,’ and ASM is most certainly a matter of justice.<sup>1003</sup> Nedelsky emphasises the importance of care in her work, which is a value that is promoted by feminist theory time and time again. By placing emphasis on care as a core value, Nedelsky explains that ‘societies should be organized so that those who provide care are not disadvantaged and that they are not relegated to the bottom of hierarchies of relationships’.<sup>1004</sup> A relational analysis entails assessing how existing laws and rights have contributed to the construction of the problem that one is dealing with by looking at the patterns and structures of relations that have shaped the problem.<sup>1005</sup>

Lindahl’s work shows that modern society has managed to produce conditions that it is unable to control. A-legality shows that boundaries are not concrete and that behaviour can shift boundaries.<sup>1006</sup> One then needs to assess the values that are at stake in the problem, and then one needs to examine the kind of relations that would promote the values that are at stake.<sup>1007</sup> In terms of ASM, the values at stake include women’s roles in mining communities, the health and safety problems that ASM miners have to contend with each day, and the protection of the environment, equality, human dignity, freedom, and poverty alleviation. In this examination, one would also need to determine what type of shift in the law would promote the values at stake.<sup>1008</sup> This could include a different interpretation of the law. The relational approach compliments Lindahl’s work on a-legality because Lindahl also seeks to enhance rather than undermine the values that are at stake. By promoting the fact that solutions

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<sup>999</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>1000</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>1001</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 84.

<sup>1002</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 84.

<sup>1003</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 85.

<sup>1004</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 83.

<sup>1005</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 74.

<sup>1006</sup> F Menga ‘A-Legality: Journey to the Borders of Law. In Dialogue with Hans Lindahl’ (2014) 2 *Ethics & Politics* 922.

<sup>1007</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 74.

<sup>1008</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 74.

can be found beyond the scope of one's own law, Lindahl promotes enhancing values instead of undermining them.<sup>1009</sup> A relational approach does not promote maintaining existing relationships, rather, it promotes the examination of relationships in order to determine whether they support or undermine core values.<sup>1010</sup> This links to Lindahl's theory that a-legality cannot necessarily be addressed through using existing legal structures.<sup>1011</sup>

## 9. Conclusion

Throughout my project, the aim has been to show that ASM has the potential to be promoted as a poverty alleviation activity in South Africa. I have shown that the way that ASM is currently understood by lawmakers and judges has had the effect of diminishing ASM as an illegal activity that needs more regulation and enforcement, instead of acknowledging the fact that it has the potential to play an important role in poverty alleviation.

In this Chapter, I look at the points of connection between Lindahl's theory of a-legality and Nedelsky's relational approach in order to illustrate the fact that these two approaches can be used together in a way that would foster positive relations towards ASM, and which could have the result of promoting ASM as a poverty alleviation activity. I explain that a-legality is an important concept to understand because it illustrates the fact that there are other practical possibilities that are available to a legal collective when drawing the distinctions between illegality and legality.<sup>1012</sup> In addition to this, I also explain that the relational approach could be beneficial because it is able to emphasise the relationships that would be created by these 'other practical possibilities,' and it is able to show what the current relations in a legal order are. Through examining the way in which law structures relations, the relational approach is able to determine whether a certain law undermines or promotes core values.

Both Nedelsky and Lindahl deal with the notion of a legal collective. In terms of my own project, the notion of a legal collective is important because 'juridical norms are found in agreements, arrangements, and other patterns of interaction between parties.'<sup>1013</sup> This means that the legal collective has the ability to shape relations and, more specifically, to shape relations towards ASM activities. Nedelsky and Lindahl also promote a move away from a court-centred approach because state-centred thinking impairs legal orders from being approached in a collective way.<sup>1014</sup> A move away from a court-based system of law would allow the boundaries surrounding ASM to be transcended.

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<sup>1009</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 60.

<sup>1010</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 87.

<sup>1011</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 160.

<sup>1012</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 3.

<sup>1013</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>1014</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 5.

In this Chapter, I discuss the details of the relational theory, and I emphasise the importance of relationships and a move away from a court-centred approach. I explain that law is not necessarily derived from the state, but rather, it is derived from agreements, arrangements, and other interaction between parties.<sup>1015</sup> The relational theory focuses on the fundamental interconnection between human beings which is significant in terms of ASM because it becomes clear how law has fostered relations of a lack of responsibility for the plight of ASM miners. I also show, through using Nedelsky's work, how the relational theory can be applied to a legal context. I argued that when law is questioned, it should be done so in a way that emphasises the importance of how law structures relations because the relations that law structures are capable of promoting or undermining democratic core values.<sup>1016</sup> I show how the relations of law have fostered relations of subordination towards ASM miners through the current focus on implementation and enforcement, and I also show how, through using the relational approach, relations of dignity, freedom, and equality could be fostered towards ASM through an interpretation of ASM that promotes core values, and in so doing, ASM could be promoted as a poverty alleviation activity.

I outline the benefits of using the relational approach in terms of law so that more meaningful participation in decision making about ASM can take place.<sup>1017</sup> I show how law could be used as a 'vehicle for, rather than a barrier to, democratic participation in norm creation,' specifically with regard to a-legal activities.<sup>1018</sup> It is important to use the relational approach in terms of the law because the law is capable of shaping many dimensions of people's lives which means that it is imperative for law to foster the values that are important to society (like poverty alleviation).<sup>1019</sup>

I explain that through using the relational approach, new norms for a legal collective could be shaped, which would result in a change in people's sense of responsibility.<sup>1020</sup> I explain that this would be a challenge that would need to be addressed in terms of the relational theory because once one begins to have relational thoughts, the next challenge is to be able to determine what to do in a given situation, like ASM.<sup>1021</sup> This would create a greater burden of responsibility for the legal collective, and 'wilful blindness' to a-legal activities such as ASM would no longer take place.<sup>1022</sup>

I then shift my attention to rights talk, and more specifically, rights talk in terms of ASM. I find it necessary to discuss rights in terms of ASM because rights are used as powerful tools for justice all over the world, and in order to limit the power of the state.<sup>1023</sup> My main focus is on judicial review and the fact that it forms part of a court-centred approach, which I aim to move away from.<sup>1024</sup> I point out that, in the future, there will be a move to define the rights of ASM miners. However, I argue that this

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<sup>1015</sup> G Gottlieb 'Relationism: Legal Theory for a Relational Society' *University of Chicago Law School: Chicago Unbound* (1983) 568.

<sup>1016</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 65.

<sup>1017</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>1018</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>1019</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.

<sup>1020</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>1021</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>1022</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 366.

<sup>1023</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 231.

<sup>1024</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 232.

needs to be done in a way that would allow the relations that may be structured by the definition of rights to be given due consideration.<sup>1025</sup> The aim to move away from a court-centred approach led me to investigate Nedelsky's ASC as an 'alternative institutional' forum that could address a-legal behaviour like ASM.

I explain that the ASC was created in order to promote social and economic rights (i.e. poverty alleviation) in Canada.<sup>1026</sup> I promote the ASC in the context of ASM because I argue that a model similar to the ASC, which invites a relational analysis of rights, could guide lawmakers and judges to make decisions that consider relationships.<sup>1027</sup> The ASC promotes a move away from 'treating courts as the central means for institutionalizing rights,'<sup>1028</sup> and it relies on two non-judicial institutions (the SRT and the SRC) to implement rights.<sup>1029</sup> Through using these institutions, the ASC could ensure that public debate about rights could be promoted, and it could ensure that those to whom rights actually mattered were made part of the deliberations about rights.<sup>1030</sup> I argue that the ASC would also be able to ensure that the Bill of Rights, as contained in the South African Constitution, would be promoted and enforced in all decisions relating to democratic core values.

I explained that the ASC could be used in matters where conflicting interests between ASM miners and LSM companies (or between ASM miners plus mining affected communities and traditional leaders) take place so that these issues could receive public attention and be subjected to debates and public deliberation. Under the ASC, the infringements that ASM miners, or mining affected communities, are exposed to could be heard in order to make security, dignity, and full participation possible.<sup>1031</sup> The ASC ensures that disadvantage is central, and in terms of ASM, this means that one would be able to understand that ASM miners would only be able to fully participate in society if the relations of inequality were changed.<sup>1032</sup>

I argue that a shift in perspective, and a focus on disadvantage, would certainly be advantageous to ASM miners. As Nedelsky explains, the language of the ASC makes disadvantage central which, I argue, would be particularly useful in terms of ASM because it shifts the focus on to vulnerability and disadvantage, instead of focusing on enforcement and implementation.<sup>1033</sup> Many of the challenges that ASM miners face result in ASM miners being kept under the poverty line.<sup>1034</sup> Through utilising the ASC, the rights that are contained in the MPRDA could be better analysed in terms of the ways rights structure relationships.<sup>1035</sup> The ASC would allow lawmakers to make better decisions about ASM because it would allow them to shift their focus to the kinds of

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<sup>1025</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 233.

<sup>1026</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 232.

<sup>1027</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>1028</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>1029</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

<sup>1030</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 267.

<sup>1031</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>1032</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 268.

<sup>1033</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>1034</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013) 23.

<sup>1035</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 236.

relationships that they would like to foster,<sup>1036</sup> instead of simply implementing and enforcing laws that are clearly unable to address ASM activities and the problems associated with ASM.<sup>1037</sup>

The relational approach is important in terms of ASM because it is capable of showing how existing law, like the MPRDA, contributes to a problem, and how the law could be interpreted in a way that would promote relations that are conducive to a value at stake (for example equality, dignity, and security), instead of undermining relations. Through the ASC, the law could become more open to public deliberation and, therefore, the public would be allowed to determine which values are important to society, and how they believe that the values could be implemented in order to foster positive relations between one another, and between society and the law.<sup>1038</sup> Through using a model like the ASC, it is argued that relations towards ASM would be shifted so that it would no longer be regarded as an undesirable, illegal activity, and that it would rather be regarded as a beneficial, poverty alleviation and sustainable livelihood activity. I also argue that 'wilful blindness' in terms of ASM would no longer take place because people would be forced to accept and understand that ASM exists as a result of the system that we are a part of. Therefore, a culture of collective responsibility would be fostered which would, in turn, foster further positive relations.

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<sup>1036</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 238.

<sup>1037</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham 48.

<sup>1038</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 364.

## CHAPTER FIVE: CONCLUSION

### 5.1 Chapter Summaries

The aim of this project has been to promote ASM as a poverty alleviation activity in South Africa. As ASM currently stands within South African law, it is regarded as an illegal activity by lawmakers and society. However, the extensive research on ASM activities has shown that ASM creates considerable employment opportunities for people living in poverty. In fact, ASM creates a living for many more miners and their families than LSM.<sup>1039</sup> This is why I argue that ASM should not be treated as an illegal activity. Approaching ASM as an illegal activity is an ineffective way to address ASM activities because this approach forces ASM to take on the role of a clandestine activity which has significant negative impacts on the lives of ASM miners and their families, particularly because ASM miners do not have legal recourse when their rights are infringed upon.

In Chapter Two, I investigate ASM by examining the MPRDA and through discussing the MPRDA's significance in terms of ASM by identifying the sections that are applicable to ASM. I then link the challenges and tensions that are associated with ASM to the applicable sections of the MPRDA. Through this investigation, I conclude that the MPRDA is incapable of adequately addressing ASM, and that applying the current law to issues relating to ASM will not result in appropriate solutions.

I continue to focus on ASM's significance in Chapter Two by relying on a report written by Love for the SAHRC,<sup>1040</sup> and on the work of Pelon and Walser.<sup>1041</sup> I also focus on the tensions and challenges that are associated with ASM by studying the work of Hentschel *et al*,<sup>1042</sup> the African Mining Vision,<sup>1043</sup> Love,<sup>1044</sup> Groenewald,<sup>1045</sup> Mabasa,<sup>1046</sup> and Hinton *et al*.<sup>1047</sup> The challenges and tensions that I identify from the

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<sup>1039</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>1040</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013).

<sup>1041</sup> R Pelon & G Walser 'Mining Together – When Large-Scale Mining Meets Artisanal Mining: A Guide for Action' (2009).

<sup>1042</sup> T Hentschel, F Hruschka & M Priester *Artisanal & Small-Scale Mining: Challenges and Opportunities* (2003) UK: Russel Press Ltd, Nottingham.

<sup>1043</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

<sup>1044</sup> J Love *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2013).

<sup>1045</sup> Y Groenewald 'Mining's Ugly Underbelly' (2016) Available at: <https://www.fin24.com/Companies/Mining/minings-ugly-underbelly-20160918-3> [Accessed: 20 September 2016].

<sup>1046</sup> L Mabasa for the Legal Resources Centre 'Zama zamas: Trying to make ends meet in the face of the apocalypse' (2016) Available at: <https://realisingrights.wordpress.com/2016/10/24/zama-zamas-trying-to-make-ends-meet-in-the-face-of-the-apocalypse/> [Accessed: 21 December 2016].

<sup>1047</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

work of these authors include tensions and challenges created by law, between traditional leaders and communities, between LSM and ASM, and between ASM and the environment. I give attention to women involved in, or affected by, ASM in Chapter Two because I argue that, in order to promote ASM as a poverty alleviation activity, women must be encouraged to play a fundamental role in effecting positive change, and in changing the perceptions that surround ASM. In this section, I examine the role of women in ASM;<sup>1048</sup> the relationship between women, farming, and ASM;<sup>1049</sup> the relationship between women, patriarchy, and LSM;<sup>1050</sup> the relationship between women, cyclical time, and ASM;<sup>1051</sup> the relationship between women, ASM, and gender specific illness<sup>1052</sup> and; women and specific gender challenges.<sup>1053</sup> In order to give life to the section on women, I also rely on the stories of women involved in ASM from the 'Special Report' written by the African Minerals Development Centre.<sup>1054</sup> Through illustrating the tensions and challenges, I show the effect that the MPRDA has had on creating perceptions about ASM. I conclude this chapter by explaining that reliance on the MPRDA would not promote ASM as a poverty alleviation activity.

This conclusion brings me to Chapter Three, in which I discuss a way that ASM could be interpreted as a poverty alleviation activity. Firstly, I discuss the fact that many researchers and experts believe that ASM should be included into the legal system through a process of formalisation.<sup>1055</sup> This call for formalisation results from the idea that the rectification of regulatory imperfections could encourage artisanal miners to enter the formal economy.<sup>1056</sup> I argue that formalising ASM is not the solution to the complex problems associated with ASM, and that formalisation would not have the effect of promoting ASM as a poverty alleviation activity. My rejection of the formalisation fix led me to the idea of understanding ASM as an a-legal activity in terms of Lindahl's work.

Lindahl focuses on boundaries and how boundaries determine whether human behaviour is legal or illegal. I use Lindahl's explanation of boundaries in order to

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<sup>1048</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

<sup>1049</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

<sup>1050</sup> S Valiani 'The Africa Mining Vision: A Long Overdue Ecofeminist Critique' (2015).

<sup>1051</sup> K van Marle 'Refusal, Transition and Post-apartheid Law' (2009) 15 – 22; and A Cavarero 'In Spite of Plato: A Feminist Rewriting of Ancient Philosophy' (1995).

<sup>1052</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

<sup>1053</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003).

<sup>1054</sup> African Minerals Development Centre 'Special Report: African Women in Artisanal and Small-scale Mining' (2015) *NewAfricanWomen February/March 2015 Edition*.

<sup>1055</sup> M Olalde 'Bringing South Africa's Small-Scale Miners Out of the Shadows' 2016 Available at: <http://www.ipsnews.net/2016/12/bringing-south-africas-small-scale-miners-out-of-the-shadows/> [Accessed on: 31 October 2017].

<sup>1056</sup> G Hilson '“Creating” Rural Informality: The Case of Artisanal Gold Mining in Sub-Saharan Africa' (2013) 33 *SAIS Review* 55.

identify the boundaries that the MPRDA has created. I explain how a-legality comes into play when boundaries act as limits—i.e. a-legal behaviour exposes limits. However, I also explain that a-legal behaviour is capable of exposing fault lines, and that it does this by revealing other practical possibilities that could be available to a legal collective in respect of a normative claim if the legal collective were to shift its boundaries about who ought to do what, where, and when.<sup>1057</sup> I point out how ASM exposes a fault line in terms of the boundaries that are drawn by the MPRDA because it is able to show the normative claims that fall outside the scope of a legal collective's practical possibilities in terms of the MPRDA. In short, a-legal behaviour exposes the fact that the distinction between legality and illegality may be drawn differently by a legal order. Through understanding ASM as an a-legal activity, different ways of ordering ASM are opened up, and one can order ASM in such a way so as to promote it as a poverty alleviation activity. In so doing, we can move away from the common misconception that ASM should be interpreted as an illegal activity.

My aim to understand ASM as a poverty alleviation activity led me to Nedelsky's relational approach. Nedelsky's approach allowed me to investigate the important role that the law plays in society's perception of human behaviour. In Chapter Four, I highlight the fact that a-legality is of paramount importance when investigating the law's fault lines. A-legality is also incredibly important in showing other practical possibilities that may be available to a legal collective should its existing boundaries about who ought to do what, when, and where be shifted. However, I also argue that the concept of a-legality is unable to shed light on the kinds of relations that have been structured by the way the law currently regulates human behaviour. It is also incapable of providing insight into the potential relations that could be structured towards a-legal behaviour in the event that the existing boundaries were to be shifted.

I argue that the way the law structures human behaviour has an impact on the way that society perceives behaviour; therefore, ASM, when addressed through the use of the relational approach, exposes the relations that are structured by the MPRDA. I argue that the relational theory could assist in defining and interpreting ASM, and I suggest that the relational theory would allow lawmakers and judges to consider the context surrounding a-legal behaviour. Further, I argue that the relations that are structured by the law form part of the context that surrounds human behaviour. This is why it is imperative to discuss relationships in terms of the relational theory.

In Chapter Four, I provide a comparison of Nedelsky's work and Lindahl's work in order to show how these theories can be used together in order to address a-legal behaviour. In the context of ASM, the notion of a-legality, and the theory of relationality are able to promote ASM as a poverty alleviation activity. I argue that a-legality has the ability to demonstrate the fact that there are alternative practical possibilities that lie outside the scope of a legal collective's order, and that the relational theory is able to investigate how the potential practical possibilities (as identified by a-legality) could foster new relations.

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<sup>1057</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 4.



The relational theory focuses on the kinds of relationships that contribute to a certain problem, and one can also see what has shaped those relationships.<sup>1058</sup> In terms of this, I consider the relationship between ASM miners and society's indifference towards ASM, and I also explain how the MPRDA has played a role in this relationship. In terms of the relational theory, the law should be examined in light of the way that law structures relations.<sup>1059</sup> Through using the relational theory, one is able to understand the issues that are at stake in a legal predicament.<sup>1060</sup> The relational approach then also allows one to understand that law structures relations and that these relations can be used to either undermine or promote the core values of society.<sup>1061</sup> In terms of ASM, the law currently fosters relations of subordination and disrespect. Certainly, one of the main benefits of using the relational approach is that it promotes serious discussion and debate about the law in a way that is more accessible to those it affects.<sup>1062</sup> This is particularly significant in terms of ASM because, through debates and discussion, the law can be transformed into a vehicle for democratic participation.<sup>1063</sup>

I also discuss rights talk in terms of ASM in Chapter Four because it relates to a move away from a court-centred approach. It is important to consider rights in terms of ASM, because rights are often used in struggles for justice.<sup>1064</sup> A court-based approach is usually used to address debates about rights; however, this type of approach is inadequate in exposing the meaning of rights.<sup>1065</sup> The discussion that I conduct about rights paves the way for the introduction of Nedelsky's ASC, which is able to provide a forum for ASM to be promoted as a poverty alleviation activity because the main objective of the ASC is to give effect to social and economic rights.<sup>1066</sup> I conclude that a model based on the ASC should be used by lawmakers and judges in the context of a-legal behaviour because the ASC focuses on the way in which law has structured, and could potentially structure, relationships. The ASC also focuses on vulnerability and disadvantage which, I argue, is a way of considering the context in which a-legal behaviour takes place.<sup>1067</sup>

I therefore conclude that the notion of a-legality and the relational theory should be used together in order to address behaviour that does not fall within the illegal and legal distinction such as ASM. I conclude that the theory of a-legality should be used in order to reveal other practical possibilities that could be available to a legal collective in respect of a normative claim if the legal collective were to shift its boundaries about who ought to do what, where, and when.<sup>1068</sup> In addition to using the theory of a-legality, I also conclude that the relational approach should be used in matters dealing with a-legal behaviour. I conclude this because the theory of a-legality, although an excellent tool to use in order to expose other practical possibilities to a legal collective, is unable to illustrate what the impact of these other practical possibilities would be on society.

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<sup>1058</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 22.

<sup>1059</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 65.

<sup>1060</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>1061</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 66.

<sup>1062</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>1063</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 365.

<sup>1064</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 231.

<sup>1065</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 233.

<sup>1066</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 232.

<sup>1067</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012) 266.

<sup>1068</sup> H Lindahl *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 4.

The relational approach, however, is able to examine the relationships that would be fostered and structured if the other practical possibilities were to be implemented because of its focus on the importance of relationships and how relationships impact upon society. I conclude that using the theory of a-legality and the relational theory would allow ASM to be promoted as an important poverty alleviation activity in South Africa, and a move away from ASM being considered as an illegal activity would be fostered.

## 5.2 Findings and Recommendations

I have found that ASM is a topic about which very little is known, and I argue that my research problem has managed to shed some light on this elusive topic. ASM is mistakenly known as illegal mining in South Africa because it has not received the attention that it deserves. However, through my project, I have made it clear that there certainly is a difference between ASM and illegal mining, and I have explained that ASM is simply regarded as illegal mining because it takes place without the mining permits that are required by the MPRDA. I have shed light on the fact that ASM activities generate a living for many miners and their families.<sup>1069</sup>

My project provides an in-depth discussion on ASM activities, and what exactly ASM entails. One of the most important contributions of this project is my attempt to promote a change in the way ASM is perceived, particularly by relying on women's stories. There is certainly scope for further studies on women in ASM in South Africa because this is a topic that has very limited research, and it is my hope that my project will lead to further investigations of women in ASM in South Africa.

I present a unique way of examining 'illegal' mining through understanding ASM as an a-legal activity. Through using the theory of a-legality, I show that it is not necessary to define ASM as legal or illegal in order to find a solution to the problems associated with ASM. In fact, through using the theory of a-legality, other practical possibilities about who ought to do what, where, and when in terms of ASM are possible. I combine a-legality and the relational theory in order to create a unique way of examining ASM, and to cultivate positive relations towards ASM activities. It is my hope that through my contributions, my project will foster a new understanding about ASM activities and that a path to treating ASM as a potential poverty alleviation activity will begin to take shape.

In order to address ASM as a poverty alleviation activity in South Africa, I recommend that lawmakers, judges, and society adopt a relational approach or an approach that is in line with the ASC that I describe in Chapter Four. I recommend using an a-legal approach to address activities that fall outside the legality/illegality distinction, and I recommend using a relational approach in all decisions made about a-legal behaviour.

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<sup>1069</sup> The African Mining Vision 'Boosting Artisanal and Small-scale Mining' [Online] Available at: [http://www.africaminingvision.org/amv\\_resources/ISGbulletin4.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin4.pdf) [Accessed: 15 April 2016].

In terms of ASM, specifically in South Africa, I recommend that further research and study be conducted about women involved in ASM because I argue that the only way ASM can be adequately addressed is through using the insight of women.<sup>1070</sup>

### 5.3 Future Work

In Chapter Two, I mention the proposed Mineral and Petroleum Resources Development Amendment Bill of 2013 in a footnote. The Amendment Bill amends section 2(d) of the MPRDAA so that it no longer places emphasis on women and communities. I argue that this would shift the focus away from women in ASM and the particular challenges that women face. Future work on the topic of ASM should certainly investigate the effect that this would have on women and communities involved in, or affected by, ASM activities. Such an investigation could begin with using the relational theory to identify the types of relations that would be structured by such an amendment.

Any future research that investigates ASM in South Africa would benefit from a more in-depth study of women in ASM. Fieldwork and interviews would be particularly useful in this sense. Conducting research about women in ASM would be a particularly interesting and useful study for anyone who is interested in ASM, and it would provide further beneficial insight into the world of ASM. Through conducting research about South African women in ASM, one would open up an entire new field of research because it is a topic that very little is known about, and one would shed even more light on ASM as an a-legal activity. One would be able to understand the role of South African women more fully, and this research would have potential to have a significant impact on the mining legislation in South Africa. As I have stated in my project, ASM activities in South Africa can only be adequately addressed by including women in any proposed solutions.

There is also scope for further research into how the ASC could replace judicial review in terms of a-legal behaviour and it would be incredibly interesting to conduct research into what it would take to implement a system like the ASC in South Africa. Further research could also indicate whether or not a system like this could positively impact upon the lives of those involved in a-legal activities like ASM. The appointment of adjudicators in terms of the ASC, and who would qualify to be an adjudicator—i.e. who would be the ideal adjudicator—also requires further research. It would be interesting to conduct more research into the SRT because, in terms of the ASC, it is proposed as a mechanism for hearing complaints about rights. A tribunal like the SRT could be implemented in a practical sense in terms of ASM in South Africa.

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<sup>1070</sup> J Hinton, M Veiga, and C Beinhoff 'Women and Artisanal Mining: Gender Roles and the Road Ahead' in 'The Socio-Economic Impacts of Artisanal and Small-scale Mining in Developing Countries' (Chapter 11) (2003) 12.

In the final stages of this project, the 'Right2SayNo' case became a topic of conversation on social media.<sup>1071</sup> The issues that have been raised in the 'Right2SayNo' case, which is a case centred on land rights versus mining rights, is very important but beyond the scope of the current project.<sup>1072</sup> The case is focused on mining in communal areas, and the Legal Resources Centre represents the Xolobeni community in challenging the Minister of Mineral Resources. The Minister granted a mining right to an Australian mining (LSM) company known as Transworld Energy and Minerals (hereafter, 'TEM') to mine the sand dunes of Xolobeni, and it is believed that mining in the community would 'result in the removal of more than seventy households from the farming community'.<sup>1073</sup> This would result in disrupting the people who live in the area, and it would have incredibly negative impacts on the environment.<sup>1074</sup> Although this case does not deal with ASM as such, it does deal with mining affected communities and the disadvantages that LSM bestows upon them. The community is seeking a declaration from the court that states that the Minister should not be able to grant a mining right unless the community has consented to it. It would be interesting to conduct a study on the implications of this and how consent from a mining affected community could be achieved. The ASC could be particularly useful in a case like this, and it would be interesting to conduct a study into how the ASC could work to emphasise the importance of the core value of consent. Further, an important study may be made in terms of space in communal and customary spaces in South Africa especially with regard to mining (or development) and space.

The topic of ASM in South Africa is incredibly vast, and it is a challenge to narrow down one's research. Therefore, there is plenty of scope for further studies into ASM, and there is even more scope for studies to be made into mining in general, and mining affected communities.

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<sup>1071</sup> F Moosa 'The Xolobeni Community is Fighting For A Voice In Mining Decisions' [Online] Available at: <http://www.thedailyvox.co.za/the-xolobeni-community-is-fighting-for-a-voice-in-mining-decisions-fatima-moosa/> [Accessed 25 April 2018].

<sup>1072</sup> F Moosa 'The Xolobeni Community is Fighting For A Voice In Mining Decisions' [Online] Available at: <http://www.thedailyvox.co.za/the-xolobeni-community-is-fighting-for-a-voice-in-mining-decisions-fatima-moosa/> [Accessed 25 April 2018].

<sup>1073</sup> F Moosa 'The Xolobeni Community is Fighting For A Voice In Mining Decisions' [Online] Available at: <http://www.thedailyvox.co.za/the-xolobeni-community-is-fighting-for-a-voice-in-mining-decisions-fatima-moosa/> [Accessed 25 April 2018].

<sup>1074</sup> F Moosa 'The Xolobeni Community is Fighting For A Voice In Mining Decisions' [Online] Available at: <http://www.thedailyvox.co.za/the-xolobeni-community-is-fighting-for-a-voice-in-mining-decisions-fatima-moosa/> [Accessed 25 April 2018].

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## **Legislation**

1. Constitution of the Republic of South Africa, 1996.
2. Mineral and Petroleum Resources Development Act 28 of 2002.
3. Minerals and Petroleum Resources Development Amendment Act 49 of 2008.
4. Mineral and Petroleum Resources Development Amendment Bill of 2013.