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THE NDP AND AFRICAN COMMISSION JURISPRUDENCE

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ABSTRACT

The National Development Plan formulated by the National Planning Commission encapsulates the Government's plan for economic development and growth for the next fifteen years. The plan, in nature and in form, seems to prioritise economic development over other areas of development with the view that economic development comes first sequentially, ultimately creating the conditions under which cultural growth and social cohesion are fostered. The African Commission takes a different approach. Through its jurisprudence on the rights of indigenous peoples, development and development rights are defined in the light of empowerment, participation and consent. Overall the NDP does not take adequate cognisance of the nuances of rural life, and does not adequately incorporate the broader African Union and African Commission human rights perspectives necessary to effect meaningful development.

I INTRODUCTION

In November 2011, the National Planning Commission released their 'vision for 2030,'¹ the National Development Plan ("NDP" or "Plan"), in order to make recommendations about how South Africa ought to combat poverty, land inequity, and an underperforming economy. The NDP hopes to promote 'an integrated and inclusive rural economy,'² providing 'specific proposals to raise agricultural production and effect land reform in a way that focuses on the capabilities of farmers and communities to earn an income, rather than just redistributing land.'³ It also makes specific recommendations about land tenure in communal areas that, for example,

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¹ National Planning Commission (2011) *National Development Plan; Vision for 2030*.

² Ibid. at 195.

³ Ibid. at 419.

‘balance traditional authority with greater certainty for female-headed households to invest in farming.’⁴ Though the NDP claims to be comprehensive, this paper will argue that the primarily economic focus of the Plan limits the potential for its development recommendations to be democratic and locally generated, or for the right to social and cultural development to be given full weight. The approach of the National Planning Commission in crafting the plan purports to be holistic and yet consistently focuses on developing economic opportunities for the ‘capabilities’ of persons understood as individualized units of ‘human capital’⁵, leaving little room for the self-determining person or the member of a self-determining community.

By placing the NDP and related documents such as the 2011 Green Paper on Land Reform,⁶ and the recent Recapitalization and Development Programme⁷ in the context of international development, focusing strongly on the jurisprudence of the African Commission, a critique can be generated with a broader human rights perspective than can be gained from simply evaluating the NDP on Constitutional grounds. The development jurisprudence of the African Commission has mostly been derived from land claim cases made necessary by past abuse. The National Development Plan is essentially forward looking. And yet African Commission, and in some cases the broader international jurisprudence upon which it relies, is both relevant and useful in judging contemporary development policy, not least because it keeps open questions that the National Development Plan closes about what just and democratic development policy looks like. In so doing, it also acts as a constant reminder that South Africa has failed before to ensure the implementation of such policy. This paper will go on to explore the possibility, rooted in language and policy proposals of the Plan itself that a more aggressive and less democratic approach to implementation will be necessary to achieve the goals of the Plan than it would like to admit. This claim is bolstered by the strongly economic understanding of development used in the Plan, which comes into conflict with standards for successful development laid out in African Commission and broader international jurisprudence, on both a procedural and a substantial level.

⁴ Ibid.

⁵ Ibid. at 5.

⁶ The *Green Paper on Land Reform* (GN 639 in GG 34607 of 16 September 2011)

⁷ The *Recapitalization and Development Programme of the Department of Rural Development and Land Reform* (23 July 2013) available at http://www.dla.gov.za/phocadownload/Policies/rdp_23july2013.pdf

II THE CONCEPT OF DEVELOPMENT IN THE NDP AND IN AFRICAN COMMISSION JURISPRUDENCE

In its vision statement the NDP ‘tells a story’ not just for South Africa but for ‘the region as a whole,’⁸ and indeed does briefly report on and draw lessons from the economic experiences of Africa more broadly, writing for example that, ‘Minerals underpin the economic strength of many countries. Africa holds 95 percent of the world’s platinum group metals reserves’⁹ to reinforce the importance of the mining industry for South Africa. It also considers continent-wide trends, such as the surging, youthful workforce — ‘in less than 15 years Africa will be home to one-quarter of the world’s population under 25 years of age’¹⁰ — and the correlative challenges posed to the continent as a whole. However, development itself as a concept, as a challenge and a necessity, for Africa as a whole is not fleshed out in the NDP, and as such, a valuable perspective is missing. This is particularly true because under-development and abuses of the African Charter’s Right to Development (Article 22)¹¹ are often the result of colonial and post-colonial struggles endemic to the continent as a whole, though of course specific to each country. The African Charter does not make up part of the domestic law of South Africa, and yet the African Commission has made it perfectly clear that the Charter is binding and imposes a mandate towards development on its signatories of which South African is one.¹² The creation of the NDP is generally in line with this mandate, and is an active attempt to lay out a plan for South Africa over the next fifteen years, but to fulfill the mandate of Article 22 is to take on the understanding of development laid out in the jurisprudence of the African Commission — its case law, guidelines, and writings.

The jurisprudence of development of the African Commission is itself well-developed, and will be reviewed briefly below. For the purposes of this paper, the most important principle

⁸ NDP op. cit. note 1 at 225.

⁹ Ibid. at 61.

¹⁰ Ibid. at 62.

¹¹ ‘1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.’ (OAU ‘The African Charter on Human and People’s Rights’ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982))

¹² See the UNGA ‘Declaration on the Right to Development’ A/RES/41/128 (4 December 1986), Article 3, as cited in *Centre for Minority Rights Development & Others v Kenya* 2009 AHRLR 75 (ACHPR 2009) (*Endorois v. Kenya*) para. 298

to emerge from this jurisprudence is that a primarily economic focus on development is inadequate. It threatens the development and, in a related and in fact inextricable way, self-determination of culture particularly in rural communities. It must necessarily bypass democratic processes that are not simply a means to an end of successful development but are in fact, as the Commission makes clear, ends in and of themselves, falling under the mandate of the right to development in the Charter, in pursuit of its economic goals.

In the African Union's 'Framework and Guidelines on Land Policy in Africa', it is asserted that: 'The administration of land resources has an important bearing on the democratic process. Structures governing access, control and management of land are as much about the consolidation of democracy as they are about asset stewardship.'¹³ This is especially true in the case of indigenous peoples and their development because, according to the African Commission's Working Group on Indigenous Populations, subsequently cited in the African Commission's 2010 land claim case *Endorois v. Kenya*¹⁴ where they decided in favour of the land rights of the indigenous peoples in question, 'Indigenous communities have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and to large scale development initiatives that tend to destroy their lives and cultures rather than improve their situation.'¹⁵

The Commission has struggled, most noticeably in *Endorois v. Kenya* to generate an understanding of the right to development for groups living under customary law without simply conflating them with indigenous populations on the one hand (relying on international jurisprudence that usurps to a significant extent the Commission's mandate to 'to give content to a uniquely African document'¹⁶) or else framing their rights in the spirit and form of common law principles like private property. As Wicomb and Smith¹⁷ ask, who then constitutes a "people"? They argue that the Endorois decision, 'conflates the notion of "peoples" with "indigenous peoples" throughout the decision, moving seamlessly from speaking about "peoples" to speaking about "indigenous communities", thereby intimating that peoples' rights

¹³ Land Policy In Africa: A Framework To Strengthen Land Rights, Enhance Productivity And Secure Livelihoods. Framework And Guidelines On Land Policy In Africa, Revised Version March 2009, 3.1.2.

¹⁴ Supra note 12.

¹⁵ Report of the African Commission's Working Group on Indigenous Populations/Committees (2005) at 20.

¹⁶ Wilmien Wicomb and Henk Smith 'Customary communities as 'peoples' and their customary tenure as 'culture': what we can do with the *Endorois* decision' (2012) 11 AHRLJ 422 at 14.

¹⁷ Ibid.

(in the context of communal tenure at least) belong to indigenous peoples only.’¹⁸ However, the Charter itself, they go on to assert, particularly when bolstered by the *Ogoni* case (where a section of the population was recognized as a ‘people,’ lending credence to a flexible reading of the Charter) allows for a reading of customary groups as “peoples” whose rights are then protected under the African Charter.

In a similar spirit, ‘It could well be argued that the marginalisation of customary law systems and the inability of domestic African courts to protect customary forms of tenure – as recognised elsewhere in the *Endorois* decision – constitute present-day injustices and inequalities. This would extend the protection to all customary communities.’ Reading the jurisprudence of the African Commission in this way, democratic processes, the right of people and peoples, broadly understood, to participate in the development initiatives that affect them, are understood as a good in and of themselves, not only because they lead to a positive end in the case of successful development. The body of this paper will take up this inclusive reading of the kind of group that falls under the protection of the Charter, even as it cites and uses jurisprudence that retains the perplexity that Wicomb and Smith highlight. Where the word ‘indigenous’ exists in the cited case law, it is used here carrying the productive weight of that confusion. In other words, it is no contradiction to use it so, just as long as one argues as Wicomb and Smith do that the jurisprudence on peoples and indigenous populations actually ‘can be depicted as a search for the current and future legal implications’¹⁹ of the practices, rights, and place under the protection of the Charter of groups that have not been able to assert legal rights in the past, such as those living under customary law.

Although the National Development Plan and other development initiatives do not focus exclusively on the development of “peoples”, the jurisprudence of the African Commission is rooted in a highly relevant historical context, especially given that underdevelopment in South Africa is so closely intertwined with pre-Apartheid and Apartheid era injustices against such populations. Because the history of indigenous peoples and those living under customary systems is one of development deterred, the Economic, Social, and Cultural Guidelines to the African Charter go on to remind the Commission that such peoples, are often ‘regarded as less developed and less advanced than other more dominant sectors of society, which often prevents

¹⁸ Ibid. at 15.

¹⁹ Ibid. at 22.

them from being able to genuinely participate in deciding their own future and forms of development.²⁰ As a remedy, the Commission notes the Complainants arguments in its decision that, ‘recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.’²¹ Additionally, in *Endorois*, the Commission writes that they are,

‘of the view that the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development.’²²

Consistent with this means-end test, the Guidelines state that ‘the African Charter on Human and Peoples Rights (the African Charter) reflects that all human rights are indivisible, interdependent and interrelated, and cannot be enjoyed in isolation from each other.’²³ It is therefore not justifiable to impose economic development initiatives, for example, claiming some eventual benefit relating to cultural development as a justification.

III PARTICIPATION AND CONSENT

Crucially, the jurisprudence relating to development is highly concerned with what genuine participation in one’s own development might look like. In the Inter-American Court of Human Rights case *Mary and Carrie Dann v. USA*, subsequently cited in *Endorois*, the court

²⁰ ‘Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities’ Adopted by The African Commission on Human and Peoples’ Rights at its 28th ordinary session, as referred to in ACHPR ‘Principles and Guidelines on the Implementation of Economic, Social, and Cultural Rights in the African Charter on Human and Peoples’ Rights’ at para 1.1.ii.

²¹ *Endorois v. Kenya* supra note 12 at para 277, the Commission cites Arjun Sengupta ‘Development Cooperation and the Right to Development’ and Francois-Xavier Bagnoud Centre Working Paper No. 12 (2003) available at www.hsph.harvard.edu/fxbcenter/working_papers.htm. See also U.N. ‘Declaration on the Right to Development’ U.N. GAOR, 41st Sess., Doc. A/RES/41/128 (1986) Article 2.3, which refers to ‘active, free and meaningful participation in development.’

²² *Endorois v. Kenya* supra note 12 at para 277.

²³ ACHPR op. cit. note 20 at p.6, “Preamble”.

states that to have a process of consent that is fully informed ‘requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.’²⁴ In the “Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples”, subsequently cited by the Commission in *Endorois*, Antoanella-Iulia Motoc writes that, ‘The principle of free, prior informed consent is acknowledged in several documents in the field of international human rights law [...] ensuring that every effort is made by States to fully consult with indigenous peoples in the context of development, land and resources.’²⁵ This principle is also found in the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169 refers to the principle of free and informed consent in the context of relocation of indigenous peoples from their land), in the UN Declaration on the Rights of Indigenous People, draft 1994, and in the American Declaration on the Rights of Indigenous People of the Organization of American States.²⁶ Motoc goes on to argue that the principle is essential so that, ‘Indigenous peoples are not coerced, pressured or intimidated in their choices [...] That their consent is sought and freely given prior to the start of development; That indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being; That their choice to give or withhold consent over developments affecting them is respected and upheld.’²⁷

Consent must be obtained, according to the African Commission in *Endorois*, according to the customs and traditions of the people.²⁸ Cultural differences must be addressed, especially differences in the understanding of key concepts like ownership and property. Illiteracy must be taken into account and accommodated.²⁹ The Commission determined that this was not the case in *Endorois*, the result being that ‘community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game

²⁴ *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002) para 140.

²⁵ ECOSOC ‘Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources’ that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept submitted by Antoanella-Iulia Motoc (herein after referred to as ‘Motoc’) and the Tebtebba Foundation – the ‘Legal Commentary on the Concept of Free Prior and Informed Consent’ U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004).

²⁶ *Ibid.* at para 3.

²⁷ *Ibid.* at para 57.

²⁸ *Endorois v. Kenya* supra note 12 at para 291.

²⁹ *Ibid.* at para 292.

Reserve.’³⁰ If this is not to be the case, substantial and appropriate consultation must precede all development initiatives, and ‘[t]hese consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.’³¹ This duty of active consultation ‘requires the State to both accept and disseminate information, and entails constant communication between the parties.’³²

IV EMPOWERMENT

Although the ‘the result of development ought to be the empowerment of the [people],’³³ cases like *Yakye Axa*³⁴ demonstrate what it might look like when this test is failed — grave difficulty in obtaining food, and lack of appropriate housing with clean water and basic sanitation services, among other problems. The specific lack of a communal property right in the case of *Yakye Axa* exacerbated the struggles of the community, making it still more difficult for them to access clean water and medicinal natural resources. As *Endorois* points out, indigenous populations are often moved to lands unknown to them in service of development initiatives that ultimately are not to their benefit. It is this (living) history that leads the Commission to write in *Endorois* that, ‘the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available.’³⁵ It is imperative that ‘benefit-sharing’³⁶ and just compensation are two results of any development process, and indeed they, ‘[serve] as an important indicator of compliance for property rights.’³⁷ Ultimately, then, this jurisprudence is aligned with the the African Charter on Popular Participation in Development and Transformation, which says

‘We, therefore, have no doubt that at the heart of Africa’s development objectives must lie the ultimate and overriding goal of human-centered development that ensures the overall well-being of the people through sustained improvement in their

³⁰ Ibid. at para 281.

³¹ Ibid. at para 289.

³² *Saramaka People v. Suriname* (20 November 2007) IACHR 172 at para 133 as quoted in *Endorois v. Kenya* supra note 12 at para 289.

³³ *Endorois v. Kenya* supra note 12 at para 283.

³⁴ *Yakya Axa Indigenous Community v. Paraguay* (17 June 2005) IACHR.

³⁵ *Endorois v. Kenya* supra note 12 at para 278.

³⁶ Ibid. at para 294.

³⁷ Ibid.

living standards and the full and effective participation of the people in charting their development policies, programmes and processes and contributing to their realization.’³⁸

Furthermore, according to the Commission in *Endorois*, citing the UN Declaration on the Right to Development, it is the state that ‘bears the burden for creating conditions favourable to a people’s development.’³⁹

V DEVELOPMENT RIGHTS AND THE NDP

The primary focus of the National Development Plan is economic development. This focus is the “primary” one in a double sense. First, it is the main focus, and most of the Plan concerns itself with economic goals and mechanisms for their achievement. Second, the understanding of the Plan seems often to be that economic development comes first sequentially, as a means towards other kinds of development, creating the conditions under which eventually cultural growth and social cohesion are fostered. This logic draws upon the moment in the Green Paper where the Department of Rural Development and Land Reform argues that the economic structure of South Africa ‘undermine[s] the creation of conditions which are conducive to fostering social cohesion.’⁴⁰ However, because the African Commission employs a “two-pronged test,” and because it insists that Charter rights must be enjoyed simultaneously, it is not sufficient to argue that planned economic development, the means, will eventually lead to cultural development, one of many ends since, ‘[a] violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development.’⁴¹ The NDP is very clear that opportunities ought to be provided for people to live the lives they are capable of — ‘*At the core of this plan is a focus on capabilities*’⁴² — which correlates strongly within the Plan, and is perhaps even used interchangeably with the lives they desire since the understanding of development at play

³⁸ ECA ‘African Charter on Popular Participation in Development and Transformation’ (Arusha, 1990) at para 8.

³⁹ *Endorois v. Kenya* supra note 12 at para 298.

⁴⁰ The *Green Paper on Land Reform* op. cit. note 6 at para. 2.3.

⁴¹ *Endorois v. Kenya* para supra note 12 at 277.

⁴² NDP op. cit. note 1 at “Foreward”.

‘draw[s] strongly from definitions of development that focus on creating the conditions, opportunities and capabilities that enable people to lead the lives that they desire.’⁴³ Even so, the constant focus on capabilities forecloses on the question of rights, and ultimately the voice of the individual. The understanding of the person laid out is highly individualized, a unit of ‘human capital’ who pursues the ends that any other reasonable and competitive individual would also inevitably choose in the same situation, and who follows a predictable and maximally efficient model of self-development. He is, in other words, an entrepreneur of the self. No matter what understanding of “peoples” we employ, it’s difficult to conceptualize him as a community member. He rejects the old ‘paradigm of entitlement’⁴⁴ (language that is certainly not accidental, given the context of the reopening of the land claims process through the 2013 Restitution of Land Rights Amendment Bill) in favour of a model based around opportunity. But does he have rights? In Chapter 6, the NPC states almost regretfully that,

‘Unrealistic expectations have been created by promises of rights. Natural resources are limited and probably already fully exploited or even over-exploited. Small-scale fisheries cannot be regarded as a way to boost employment. Industrial capital-intensive fisheries offer better salaries and better conditions of employment, and are more transformed than small-scale low-capital fisheries. Reducing the rights allocated to industrial fisheries to award them small-scale operations simply cuts jobs. There is a serious need for research to determine the relative values of different sectors in terms of employment, salaries and conditions of service, and contributions to tax.’⁴⁵

Despite the fact that at the recent Parliamentary workshop on Land Reform, Professor Nick Vink, a member of National Planning Commissioner Mohammed Karaanun’s subcommittee, argued for a rights based approach, arguing that farmers ought to have both land rights and ‘rights to markets,’⁴⁶ rights are relegated to something desirable but impractical within the NDP.

⁴³ Ibid. at 5.

⁴⁴ Ibid.

⁴⁵ Ibid. at 209.

⁴⁶ Nick Vink ‘Land reform and agrarian policy in South Africa: the NPC’ (2013) available at <http://db3sqepoi5n3s.cloudfront.net/files/130607vink.ppt>.

This must be partially explained by the way in which the economic model employed relies on rapid growth under ‘ideal conditions.’⁴⁷ As is written in Chapter Six, ‘[t]he longer-term solution to skewed ownership and control is to grow the economy rapidly enough and focus on spreading opportunities for black people as it grows.’⁴⁸ The sense of urgency continues:

‘South Africa needs to adjust its focus in light of the changing global economic landscape. This is particularly urgent in trade and industrial policy. South Africa needs to redirect its attention to pursuing export opportunities in the economic power-houses of the future, many of them emerging economies. These opportunities can only be exploited if industrial policy supports sectors and industries that can best produce the goods and services to meet the needs of the new markets South Africa wishes to serve.’⁴⁹

The most efficient policies having been identified, the NDP argues, aggressive restructuring of the economy is called for. In *Endorois*, though, the African Commission wrote that the State’s consultation procedures were inadequate, among other reasons, because, ‘community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve.’⁵⁰ Although in theory local communities participated in the Planning Commission’s research through forums like NPC Jam, a vast online conversation between the Department of Rural Development and anyone who wanted to participate, such conversations hinged on internet access, and besides recorded deeply conflicting accounts of what different communities and individuals wanted.

VI ANALYSIS OF THE NDP

In order to more fully consider the role of community and culture in the NDP, it is necessary to look at the spatial model being employed within it, with regards to land and to the arrangement of bodies into situations where they live with each other on it. In the NDP, plans are laid for a systematic reorganization of the South African economy to make space for various

⁴⁷ NDP op. cit. note 1 at 203.

⁴⁸ Ibid. at 102.

⁴⁹ Ibid. at 68.

⁵⁰ *Endorois v. Kenya* supra note 12 at para 281.

markets. The NDP makes normative, albeit empirically founded claims about the industries that should be implemented in different areas, or more accurately about where governance should open spaces for markets to enter. In this, they work under the assumption that people will be open to whatever jobs become available to them, and more specifically, whichever jobs the NDP generates in their area. The NDP argues that, ‘spatial patterns exclude the poor from the fruits of development,’⁵¹ inhibiting the rural poor from successfully generating and sustaining industry on their own land or from accessing job markets in more productive, often urban areas. They offer several remedies. First, by way of local job creation, ‘rural economies will be supported by agriculture, and where possible by mining, tourism, agro-processing and fisheries.’⁵²

Agriculture is an important part of local economies and the economy more broadly, but on they write on the topic of untapped agricultural potential: ‘Attention is needed to address the following: highly fragmented production – 85 percent of Africa’s farms occupy less than two hectares (in Brazil, Germany and the United States, only 11 percent or less work on this scale).’⁵³ Thus, the plan ‘[o]ffers white commercial farmers and organised industry bodies the opportunity to significantly contribute to the success of black farmers through mentorships, chain integration, preferential procurement and meaningful skills transfer.’⁵⁴ This is a similar strategy to the one promoted by the recent Recapitalization and Development Programme (Recap Policy) through their ‘strategic partnerships.’⁵⁵ However, the NDP, like the Recap Policy makes aggressive assumptions about the desires of local communities when it comes to job creation—that because they want jobs, they want whatever jobs fit most neatly into a larger plan for the South African economy. But surely this is a prime example of what the *Endorois* Commission was worried about when they wrote that development initiatives are often presented to indigenous and struggling populations as a *fait accompli* such that their input is rendered meaningless. Such a system is undemocratic and unacceptable in the jurisprudence of the African Commission. For example, jobs in the fishing industry may be important to those living under customary systems not simply because of the economic profit but because fishing is a deeply rooted part of some indigenous cultures in a sense that is incompatible with a commercialized and large-sector

⁵¹ NDP op. cit. note 1 at 3.

⁵² Ibid. at 196.

⁵³ Ibid. at 66.

⁵⁴ Ibid. at 67.

⁵⁵ The *Recapitalization and Development* Programme op. cit. note 7 at section 7.1.

approach to the industry. This perspective may become buried within a purely economic calculus.

When the Planning Commission writes, '[i]t is estimated that roughly 80 000 jobs could be created in these smaller, labour intensive industries under ideal conditions,'⁵⁶ it raises the question of which criteria are used to judge what ideal conditions look like, and surely answers to this question are neither uniform or individually uncontroversial. If the answer is simply an economic one⁵⁷, then such an initiative is not sufficiently democratic to satisfy the African Commission's assertion in *Endorois* that development 'must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.'⁵⁸

Beyond how decisions are made with regards to job creation, the question of implementation arises. The plan acknowledges that local input should be 'given careful consideration,'⁵⁹ but does not expand adequately upon how such input will be sought and, most importantly, incorporated. There are many moments in the plan where the success of job creation initiatives is presented as inevitable simply because people in the given area want jobs, as though all jobs were equally desirable within all communities. When the plan goes on to admit that, 'The majority of new employment will arise in activities that are domestically-oriented, where global competition is less intense and there is high labour component [...] Examples include: housing construction, retail, personal services such as hairdressing or cleaning, business services such as office cleaning or repair'⁶⁰ or queries whether 'South Africa can mobilise unemployed people into production for export markets,'⁶¹ it becomes clear that implementing these initiatives leaves very little room for self-determination.

Rural land use within the NDP is problematic for many of the same reasons. The Planning Commission write in the Plan that, 'a difficult but important issue is the challenge of

⁵⁶ NDP op. cit. note 1 at 203.

⁵⁷ And of course, even a purely economic answer cannot itself be simple. For example, according to the NDP, the creation of jobs in the mining industry is a necessary and crucial part of development since, 'If mining output does not increase, and if the associated rents are not extracted sensibly and used wisely, it will represent a tragic failure for the people of the continent.' They write within the same document, however that, 'the environmental impact of developments is a concern, particularly the destructive nature of extractive industries, fuelled by cheap and dirty energy sources.'

⁵⁸ *Endorois v. Kenya* supra note 12 at para 277.

⁵⁹ NDP op. cit. note 1 at 253.

⁶⁰ Ibid. at 108.

⁶¹ Ibid. at 12.

land tenure and governance in former homeland areas, where large areas of high-potential agricultural land remain grossly underutilized,⁶² picking up on rhetoric also used in the new Restitution of Land Rights Amendment Bill, that rights to the land are linked to capabilities and the ability to use the land productively. One question in this case is whether “productivity” implies maximum productivity given how much of the NDP is concerned with land itself being underdeveloped, especially within the agricultural sector. The NDP rebuffs those who treat land access in communal areas,

‘as though land rights and the use of different forms of land are undifferentiated. In practice, land rights for agricultural purposes differ depending on how people use the land. Securing tenure for investment is important when land is used to grow crops. The focus should be on cooperating with traditional leaders in securing tenured irrigable land that will lead to fully defined property rights, which allows for development and gives prospective financiers the security they require.’⁶³

If the right to tenure security is based on what the land is used for, it is also difficult to imagine how such a system could accommodate communities living under land tenure systems that are not themselves based on a model of private ownership. The NDP promises to ‘[i]nvestigate the possibility of flexible systems of land use for different kinds of farming on communal lands’⁶⁴ but seems suspicious of locating such an investigation itself locally. When it writes that, ‘creating jobs in agriculture will not be easy [...] The effectiveness of extension officers depends on performance, capacity and level of priority given by provincial agricultural departments. Whether this service is correctly located should also be considered’⁶⁵ it seems to imply that it would be more effective, even easier, to take decisions out of the hands of local authorities. To the extent that this means questioning the powers of undemocratic or corrupt traditional leaders, this could be a means of making development policy more democratic, but to the extent that it means removing power and mechanisms of accountability even further from the

⁶² Ibid. at 241.

⁶³ Ibid. at 200.

⁶⁴ Ibid. at 205.

⁶⁵ Ibid. at 198.

hands of those living in rural areas under customary systems, delocalizing the ‘leadership needed to drive implementation,’⁶⁶ it is a rhetoric to be wary of.⁶⁷

The plan does show some awareness of the differentiated nature of rural development, arguing that, ‘some places justif[y] high investment because of social need and development potential.’⁶⁸ Indeed, the Green Paper, which preceded the NDP, does say that, ‘In pursuit of agrarian transformation, the link between the land question and agriculture is acknowledged as the basis of the search for an economic rationale and a vision of a post-reform agrarian structure. Yet, demand for land may be for other productive but non-agricultural uses.’⁶⁹ However, it is difficult to imagine where such an understanding fits into the substance of NDP proposals, particularly as this idea of productivity evolves into legislation like the Restitution of Land Rights Amendment Bill, unless to mean that rural land is ripe for other kinds of exploitation, like mining or extraction of other resources. The call for ‘mutual sacrifice’⁷⁰ for longer term benefits also seems to mask the possibility that it is the rural poor who will bear the brunt, perhaps without consent as the African Commission understands it at least, of difficulties caused by the restructuring of their local economies, even to the point, albeit in ‘extreme cases,’ of measures like ‘promot[ing] out-migration.’⁷¹ Though this may be for their own good, or at least for the good of their economies, South Africa has a powerful colonial and post-colonial legacy lending weight to suspicion about such a claim, especially since the African Union’s Framework And Guidelines On Land Policy In Africa reminds us, ‘Structures governing access, control and management of land are as much about the consolidation of democracy as they are about asset stewardship.’⁷²

Of course rural development makes up only one part of the spatialised development policies proposed in the NDP. Urban space and the development of urban economies is also a crucial component of the vision proposed. This requires not only the restructuring of existing

⁶⁶ Ibid. at 10.

⁶⁷ See NDP op. cit. note 1 at 44: ‘*Institutional capacity* is integral to success, especially in the reforms required to resolve contested relationships between indigenous and constitutional institutions.’; and Ibid. at 275: ‘Additional difficulties for the planning system include: ambiguity and contest around the developmental role of traditional authorities’.

⁶⁸ Ibid. at 257.

⁶⁹ *Green Paper* op. cit. note 6 at para. 7.2.

⁷⁰ NDP op. cit. note 1 at 413.

⁷¹ Ibid. at 250.

⁷² AU, ECA, AfDB ‘Framework And Guidelines On Land Policy In Africa; Land Policy In Africa: A Framework To Strengthen Land Rights, Enhance Productivity And Secure Livelihoods’, Revised Version March 2009 at 3.1.2.

cities and towns but also the urbanization of rural areas and increased strategic infrastructure in rural areas so that those living there may share in the living standards theoretically possible in the city. In other words, ‘Settlement patterns should meet the needs and preferences of citizens, taking into account broader social, environmental and economic interests.’⁷³ However, the Plan seems to assume at moments that those living in rural areas desire the life of the city. Perhaps more to the point, when it comes down to it, the Plan imagines that workers from rural areas will want to travel into the city to work, writing that ‘travel distances need to be shorter. This means ensuring that a larger proportion of workers live closer to their places of work, and that public transport is safe, reliable, affordable and energy efficient [...] In rural areas, settlement patterns must balance the social, cultural and agricultural needs of families with the need to provide cost-effective services to households.’⁷⁴ In actual fact, they quote three separate contributors who capture the complexity of the lure of the city: 1) most people want to go to the city because rural areas are underdeveloped, 2) cities can be empowering economically, and yet 3) ‘Urban migration is caused by a sense that the grass is greener on the other side and the wish to have a better standard of living, not necessarily that people want to live in the big cities. This, in most cases, ends up being a disappointment.’⁷⁵ The NDP also acknowledges the strain that urbanization places on societies in diverse ways, not only throughout Chapter 8, but also when they write in the context of concerns over climate change that ‘many scientists believe that population pressures, urbanisation and rising consumption and waste are pushing planetary boundaries to breaking point with uncertain, but potentially catastrophic, consequences.’⁷⁶ And yet this is a plan in large part about urbanization.

Even the rural strategy ‘aims to enable the poor to escape from rural poverty by relocating to cities with easier access to services and secure employment. To achieve this, specific attention should be paid to improving the human capital of residents in these areas’⁷⁷ continuing to conceptualize individuals as units of human capital who must inevitably want only that which is most economically efficient. On several occasions, the NDP frames remittances, the chance to leave home, work in a city, and send money back to the family that has stayed behind,

⁷³ NDP op. cit. note 1 at 16.

⁷⁴ Ibid.

⁷⁵ Ibid. at 253.

⁷⁶ Ibid. at 52.

⁷⁷ Ibid. at 209.

optimistically. Development policy, the authors write, should ‘enable people to develop the capabilities they need to take advantage of economic opportunities throughout the country and so contribute to the development of their communities through remittances and the transfer of skills [to the local economy].’⁷⁸ Of course, asking working-age community members to leave (even implicitly, by their purported own choice, after investing in housing closer to the train tracks into town, etc.) could have a devastating effect on local culture, supplementary cultural development initiatives notwithstanding. This focus is symptomatic of the inability to think through cultural development or what they call ‘social cohesion’ as anything other than a function of a specific conception of a successful economy.

VII CONCLUSION

The reopening of the post-apartheid land claims process has directed intense focus towards land reform in South Africa, and the NDP is only one perspective. Yet there is no doubt that it has been taken up in policy discussion since its unveiling and has played a significant role in shaping further debate. The NDP captures something important and seemingly widespread, namely a desire to look forward when it comes to land reform, rather than placing emphasis exclusively on righting the wrongs of the past. In service of that goal, however, the Plan adopts a primarily economic approach that tends to foreclose on not just the difficult questions surrounding the uneasy relationship between economic development and cultural development that is self- and community-determined, but more importantly, on the voices of those who will be affected by development initiatives. The NDP declares that, ‘a balance needs to be found between healing the divisions of the past, broadening economic opportunities (particularly to black people) and building a sense of inclusion and common purpose among all South Africans. The aim is not to create a melting pot where individual, religious, cultural and other differences disappear, but rather a society with a shared South African identity, without detracting from our diverse multiple identities.’⁷⁹

Yet, despite broad claims about the importance of culture and self-determination, when it comes to implementation, the NDP does (and must, given its limited perspective) take an

⁷⁸ Ibid. at 16.

⁷⁹ Ibid. at 413.

aggressive approach that assumes that all voices will be in accordance with the most economically efficient model of development. As the African Union Frameworks and Guidelines on Land Policy in Africa, effective and equitable land policy, though a pre-requisite for economic growth, ought not necessarily pursue economic growth single-mindedly, but must also consider the political, cultural, social, and environmental effects of development.⁸⁰ Ultimately, as the African Commission reminds us in *Endorois*, ‘the result of development ought to be the empowerment of the [people],’⁸¹ and so too must the substance and implementation of development meet this same criteria.

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